

SOUTH AFRICA / JUDGMENT

Overberg District Municipality v Lambrechts and Another (C763-2021) [2024] ZALCCT 12 (19 February 2024) [2024] ZALCCT 12

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C763-2021

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THE LABOUR COURT OF
SOUTH AFRICA
AT CAPE TOWN
Not
Reportable
case no: c
763/2021

In the matter between:

OVERBERG DISTRICT
MUNICIPALITY
Applicant
and
IMATU obo DANIE
LAMBRECHTS
First Respondent
SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING COUNCIL
Respondent
COMMISSIONER
ORLANDO MOSES
Respondent

Heard:

14 February
2024

Delivered:

(This judgment was handed down electronically by emailing a copy to the parties. The 19th February 2024 is deemed to be the date of delivery of this judgment).

Summary: (Review – unfair dismissal – Arbitrator misconstruing charges and hence not assessing case before him – arbitrator reaching findings no reasonable arbitrator could have come to on the evidence)

JUDGMENT

LAGRANGE J

Introduction

- [1] On 1 August 2018, the first respondent, Mr S Lambrechts ('Lambrechts') was dismissed on grounds of sexual harassment and non-compliance with conditions of his suspension. The case went to arbitration and the arbitrator dismissed the sexual harassment charges but agreed he had been guilty of breaching the conditions of his suspension, which principally related to him contacting the complainant on at least five occasions. The arbitrator decided this misconduct did not warrant dismissal and reinstated him retrospectively, but without backpay, on 1 August 2019.
- [2] Shortly after his reinstatement, Lambrechts was charged with various acts of misconduct relating to certain allegations about what said on two separate occasions to two different individuals on 17 and 20 August respectively.
- [3] The first incident took place on 17 August 2019. Lambrechts was in the company of an acquaintance, Mr Wessels ('Wessels'), watching a rugby match in a restaurant. He told Wessels he had been unfairly dismissed by the municipality, and that a female friend of Wessels had played a big role in him being dismissed. Lambrechts identified Wessels's friend as the complainant in the harassment case. He told Wessels that he was now back at work and that he was going to 'fuck her and the whole town there up good'. Wessels testified that he mulled this over for a while and then decided to tell his friend and her husband what Lambrechts had told him. The complainant reported this to the municipality and the municipality asked Wessels to make a statement about what Lambrechts said to him, which he did in the form of an affidavit.
- [4] The municipality said this amounted to a statement of intent to harm the complainant and others involved in the case. Arising from this incident, the municipality charged Lambrechts with three forms of misconduct arising from the incident under clause 1.29 of Annexure A to the South African Local Government Disciplinary procedure, which obligates municipal employees to "Refrain from any rude, abusive, insolent, provocative, intimidatory or aggressive behaviour to a fellow Employee or member of the public."

- [5] The second incident, which took place a few days later, on 20 August 2019, involved Lambrechts allegedly telling a colleague, Mr Johnson ('Johnson') that the sexual harassment case, which had been brought against him was the result of a conspiracy amongst fellow employees. He went further and told Johnson that the complainant had admitted under cross-examination during the arbitration hearing that there was such a conspiracy and her admission was the reason he was acquitted by the arbitrator. The municipality alleged that this untrue statement obviously reflected badly on it. Arising from this incident, the municipality charged Lambrechts with three forms of misconduct under clause 1.25 of the disciplinary procedure, which obligates municipal employees to "conduct themselves with honesty and integrity."
- [6] At the time of his dismissal Lambrechts was a senior operating official, of 30 years' service, performing the job of the manager of Local Economic Development: tourism, eat PWP and resorts.
- [7] The arbitrator concluded that the municipality did not prove that Lambrechts had made any of the alleged utterances on the occasions in question, any of the charges and ordered Lambrechts's reinstatement with backpay to the date of his second dismissal on 20 August 2020. It is this award that is the subject of the review application.

In limine objection – authority to litigate

66 Lambrechts had objected to the authority of Mr R Geldenhuys, the municipality's Acting Director of Corporate Services at the time, to depose to the founding and supplementary affidavits on behalf of the municipality, but this objection was withdrawn before the hearing.

The review

[8] The municipality seeks to review and set aside the award on the basis that:

8.1 The arbitrator was biased in favour of the Lambrechts and this led him to draw inferences for which there was no rational basis in the evidence before him.

8.1.1 One instance of this was when he indirectly cast doubt on the credibility of Johnson's testimony on the second incident because he believed that Johnson hoped to replace Lambrechts if the latter was not reinstated, in circumstances where Lambrechts was already reinstated. Whatever, the arbitrator surmised about Johnson's motive, there was no evidentiary basis for inferring that Johnson had any interest in assuming Lambrechts' position and therefore wanting him dismissed. There was nothing to gainsay Johnson's evidence that he had no interest in working for the municipality when his employment contract ended after Lambrechts's return to work and that he had reached the age where he no longer wished to work. The arbitrator also took the view that Lambrechts was entitled to hold the opinion that there was a conspiracy to dismiss him, but failed to appreciate that there is a difference between harbouring such a belief and concocting an allegation that the conspiracy was proven and led to his acquittal. He declined to deal with the sting of the charge, by focussing purely on Lambrechts's expression of an opinion and falsely representing that he was acquitted because the main witness against him admitted

that there was a conspiracy
against him.

8.1.2 In another instance, the arbitrator equated Johnson's recounting of the incident to his superior as rumour mongering, which adversely affected his credibility, when it occurred in the course of reporting to his superior on the trip he undertook with Lambrechts, as he normally did. Moreover, because it was a matter which reflected on the integrity of the municipality in the conduct of disciplinary proceedings, it was something the employer ought to be aware of.

8.1.3 A third example was when the arbitrator persevered in trying to extract a concession from Lambrechts's line manager that the threat made in Wessel's presence did not necessarily imply a violent intent, even though Lambrechts's own defence was simply that he never uttered such a threat, and even though the complainant against whom the threat was partly aimed, perceived that it could include a physical threat, and in any event was troubled by it. The arbitrator sought to place the most benign interpretation on the threat, without any evidentiary basis for suggesting it was a hollow one and had no violent connotation, except that Lambrechts had no prior history of behaving violently towards the complainant.

8.2 In relation to both incidents, the arbitrator failed to weigh up the credibility of the municipality's two witnesses relative to that of Lambrechts, but chose to accept the latter's version for reasons which applied equally to the other two witnesses. For example, he was inclined to disbelieve both Wessels and Johnson because their versions were uncorroborated, whereas the same could be said of Lambrechts's version. Similarly, he found that Lambrechts maintained his version during his testimony, which was also true of Johnson and Wessels. Moreover, the arbitrator accepted Lambrechts's version, despite Lambrechts failing to lead witnesses whom he had claimed he would call to corroborate his conversation with Wessels. He did not even weigh up the relative inherent probabilities of the contrary versions, in deciding to accept Lambrechts's version. Lambrechts did not contend that either Wessels or Johnson had a reason to falsely implicate him in misconduct. Insofar the arbitrator decided, nonetheless, that Johnson might have had a motive to do so, he did not consider that Johnson made no effort to exaggerate the gravity of what he reported to his manager. He did not even consider that Lambrechts had a strong motive to deny what happened.

8.3 The arbitrator distorted the nature of the charges against Lambrechts and then proceeded to evaluate the evidence not against the correct charges but against the contrived version of the charges he had developed. Clearly misconstruing the real import of the evidence through this distorted lens, this led him to take account of irrelevant issues, while ignoring evidence directly relevant to the real charges.

8.3.1 Thus, the arbitrator misleadingly characterised the charges relating to the first incident with Wessels in the pub as amounting to charging Lambrechts with misconduct merely for discussing his previous dismissal case, which was an act not forbidden by any workplace rule and was something he was entitled to do. This gloss erased the gravamen of the charge which concerned what he actually conveyed to Wessels. Far from simply giving voice to his disgruntlement over his

first dismissal, he identified the complainant as a major cause of his dismissal and announced this intention to cause harm of some kind to the complainant and others who might have been complicit in the first enquiry. As mentioned above, the real charge concerned intimidatory or aggressive behaviour directed at a fellow employee.

8.3.2 In relation to the second incident the arbitrator characterized the charges as one of 'deceitful conduct'. The municipality argues that this misses the essential character of the misconduct that his misrepresentation was aimed at imputing mala fides to the municipality, portraying his employer as untrustworthy. The municipality contends that this breach of his duty to conduct himself honestly and with integrity amounted to a serious breach of his duty act with good faith towards his employer.

8.4 The arbitrator found that even if Lambrechts had conveyed to Wessels his threat to cause the complainant and other employees, it was not serious enough to warrant dismissal, because he never followed through on the threat with any act of violence. The municipality

pointed out that even in the more adversarial terrain of collective bargaining the making of threats is taken seriously by this court, even if the threat is not carried out[1].

[9] Lambrechts's primary grounds of opposition to the review, were that:

1.1 Firstly, he contends that Wessels's testimony showed that he did not regard the alleged threat as seriously conveying a real prospect of violent action by Lambrechts, because he took a couple of days before deciding that he should report to the complainant and her husband what Lambrechts had said to him. Moreover, Lambrechts argues that meaning of the alleged utterance he made to Wessels, reported by Wessels as "hy het toe gesê hy is nou weer terug by die werk, en dat hy nou vir Marietjie en sommer die hele dorp daar goed gaan op fok", is ambiguous.

1.2 Secondly, it is unclear what workplace rule he had allegedly transgressed.

1.3 Thirdly, even if the arbitrator wrongly found Lambrechts was not guilty as charged, the sanction of dismissal was not the only appropriate

sanction in the circumstances?

1.4 Finally, irrespective of any flaws in the arbitrator's reasoning, was his decision one no other arbitrator could have made?

Evaluation

[10] In relation to the complaint that the arbitrator was biased, I am satisfied that it was manifest from the award itself and from some of his interactions with the parties during the arbitration. Examples of this are summarized in the municipality's grounds of review above. The municipality clearly did not get a fair consideration of its case as a result. Nonetheless, the primary impact of his bias was in the award itself, so there is no reason to remit the matter for a fresh hearing as there is nothing to suggest that the municipality was actually prevented from leading any evidence it wished to, or from cross-examining Lambrechts, so

there is no need to allow it another opportunity to lead evidence.

- [11] The arbitrator did weigh up the evidence of both parties' witnesses, but illogically found that the factors he considered

favoured Lambrechts. I agree with the applicant that he considered the absence of corroboration of its evidence and the extent to which Lambrechts stuck to his version as factors favouring the veracity of his testimony when in fact those considerations applied equally to the municipality. He also manifestly failed to consider the inherent probabilities of two separate incidents occurring, a few days apart, in which Lambrechts opened up to third parties about his antipathy towards the complainant and unspecified others at the municipality over his previous dismissal, shortly after his return to work. Further, he did not consider the absence of evidence to support why either Wessels or Johnson would want to implicate him and why, if Johnson wanted to implicate him, he confined his version of their interaction to a very narrow issue. Had he not adopted such a skewed approach, he could not have found that the municipality failed to prove Lambrechts made the statements in question.

- [12] The arbitrator also manifestly reformulated the charges to make them appear as charges relating to relatively innocuous statements by Lambrechts of his personal. In opposing the review Lambrechts also argues that the charges did not fit the alleged misconduct.

Viewed through the arbitrator's formulation of the charges, that is understandable, but on any plain interpretation of the

disciplinary procedure provisions under which he was charged, it is clear enough that the complaint concerning the second incident is that he misrepresented the reason he had been acquitted in the previous arbitration and maliciously portrayed it originating in a conspiracy by other employees against him, which to the mind of any listener, could only have placed the integrity of the municipality in relation to its motives for taking disciplinary action in a very bad light. In respect of the first incident, it plainly concerned his utterance of a threat to take some form of revenge against those who had been responsible for his dismissal, and in particular, the complainant. He referred to her as a friend of Wessels, and it seems most improbable he did not expect that Wessels would not relay it to the complainant, given that he knew she was a friend of Wessels. What would have been conveyed was a threat to do her harm in some form or other. He did not ask Wessels not to repeat what he said.

- [13] This raises the question posed by Lambrechts about the seriousness of the threat. The first problem for Lambrechts is that because he denied ever making it, he never offered a reason why he made it or what he meant by it. He attempts to argue it should not have been taken seriously because Wessels was not sure how to deal with what he had been told. Within a few days of being told, he did report it to the complainant and her husband. If he felt it was all just hot air, why did he then bother? Moreover, the complainant herself testified that she felt threatened. She and her husband even consulted an attorney. She did not know what Lambrechts might do to 'get her back' for his dismissal. It was accepted by the arbitrator in Lambrechts's previous dismissal case that the complainant had been 'a nervous wreck' as a

result of the alleged sexual harassment, even though Lambrechts was ultimately found not guilty of such misconduct. The arbitrator in this instance, simply disregarded the impact on the complainant, of Lambrechts relating his intentions to Wessels because it was not clear if violence was intended and there was no follow by Lambrechts, if he had intended that kind of action.

[14] Unlike in the case of *Solidarity on behalf of Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority & Others*[2] , where the threat made was not dissimilar to that made by Lambrechts, in the sense that the employee threatened he would go after the managers he saw as responsible for his dismissal, the employee acknowledged he had made the threat, the evidence showed the managers did not take it seriously, and the court found his exasperation at being dismissed in the circumstances was understandable. He also gave an explanation why he said what he did. In this instance, Lambrechts provided no explanation to the municipality why he was trying to bad mouth it concerning its motives for his dismissal and what prompted him to say what he did to Wessels, because he simply denied saying anything about his previous dismissal.

[15] In these circumstances, would no reasonable arbitrator have decided, even if Lambrechts was guilty of the misconduct, that dismissal was not an appropriate sanction? To reach such a conclusion, the arbitrator would have to be satisfied that it would be appropriate that a superior who believes a subordinate engineered his dismissal and who states his intention to “fuck up” that subordinate now that he was back at work, but who does not attempt to explain what he meant by his threat nor even admit making it, should be allowed to return to work. I do not believe a reasonable arbitrator could find that such conduct was not destructive of the trust between it and the employee, and did not warrant dismissal.

[16] In light of the above, the award should be reviewed and set aside.

Order

1. The arbitration award issued by the Third Respondent on 19 November 2021 under case number WCP082014 is reviewed and set aside.
2. Paragraph 51 of the said award is deleted and replaced with the following:
“The dismissal of the Applicant, Mr Danie Lambrecht, was substantively fair.”
3. No order is made as to costs.

R G Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Keagan Barkhuizen from Bradley Conradie Halton Cheadle

For the Respondent: Philip Fouché from IMATU

[1] See e.g. National Union of Metalworkers of SA on behalf of Motloba v Johnson Controls Automotive SA (Pty) Ltd & others (2017) 38 ILJ 1626 (LAC)

[2]

(2021) 42 ILJ 852 (LAC)

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Prepared on 11 October 2026 · Esheria