

SOUTH AFRICA / JUDGMENT

Padayachee v Endumeni Municipality and Others (D 577/19) [2021] ZALCD 10 (14 July 2021)

[2021] ZALCD 10

COURT

Labour Court Durban

BEFORE

Whitcher

CASE / FILE NUMBER

D 577/19

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IN

THE LABOUR COURT OF SOUTH AFRICA

Case

no: D 577/19

Not Reportable

In the matter between:

DESIGA
PADAYACHEE
Applicant
and
ENDUMENI
MUNICIPALITY
First Respondent
SALGBC
Second Respondent
VEESLA SONI N.O.
Third Respondent
Application heard: 18
March 2021 (via Zoom)
Delivered: 14
July 2021

JUDGMENT

WHITCHER J

- [1] This opposed review is against the award of the second respondent in which the arbitrator (Veesla Soni) found that the dismissal of the applicant by the Municipality was substantively and procedurally fair.[1]
- [2] The arbitration took 11 days and the record is voluminous (6 lever arch files). Despite this there is scant reference to the record in the pleadings and heads of argument of both sides and where an effort was made in this regard, the record hardly reflect the claims.[2] This is unacceptable.
- [3] The applicant was employed by the Municipality from January 2010 until his dismissal in September 2017. At the time of his alleged offences and dismissal he held the substantive post of Senior Manager in the Office of the Municipal Manager.
- [4] Following a disciplinary enquiry, the applicant was found guilty of 10 charges of misconduct and dismissed. The arbitrator found that the Municipality had discharged its onus only in respect of the following charges:

Charge 1: Assault of a fellow employee, Mrs Shirley Bujram in her office on 31 July 2015.

Charge 2: Gross dishonesty: In that during the period 24 to 28 August 2015, you caused or allowed road construction layer works to be performed by Municipal workers on private property of your family....

Charge 8: Dereliction of duty: In that on 11 April 2017 you left work, failed to properly hand-over your duties...

Charge 9: Unauthorised removal of files and documents: in that you had in your possession and under your charge personnel files and documents constituting work in progress...but those files disappeared.

Charge 10: Intimidation: in that on 7 June 2017 you went to the house of Mr Nsibande (Senior Manager) to intimidate and threaten him and his family.

- [5] The arbitrator rejected the applicant's claim that his dismissal was procedurally unfair on account of the fact that it was held in his absence and in his view unfairly so.

- [6] I turn now to the grounds of review, addressed under the headings below.

A fair hearing at the arbitration

- [7] There is no merit in the applicant's scant contention that the arbitrator deprived him of a fair hearing. While it is correct that the arbitrator raised concerns because the case had proceeded slowly over a number of days, the admonishment was directed at both parties and the record reveals that the applicant was given a full opportunity to question the employer's witnesses (which he did at length), testify in his own defence (which he did at length on 21 and 22 February) and to lead his witness on 27 February 2019.

A fair hearing at the disciplinary enquiry

- [8] It is common cause that at the first sitting of the applicant's disciplinary enquiry on 15 August 2017 his attorney made a formal application for a postponement on the basis of a letter written on 14 August 2017 by one Dr Fourie in which it was stated that the applicant] "has been admitted to hospital due to typical chest pains. Preliminary E.C.G grossly abnormal. Arrangements are being made for an angiogram to be done by Dr Dirk Pretorius (cardiologist in Durban) this will determine when he will be able to return to work". The application was rejected and the enquiry proceeded in the absence of the applicant.
- [9] I must concur with the applicant's contention that no reasonable arbitrator could have found that the dismissal was procedurally fair. It is abundantly clear that in summarily rejecting the application for a postponement of the enquiry, the chairperson deferred to the employer representative's bald opinion that "Dr Fourie often provided letters to patients who were not ill". Notably, the material before the arbitrator included an angiogram print-out and an ECG test printout which supported Dr Fourie's certificate. So while the arbitrator accepted and acknowledged that on 14 and 16 August 2017 the applicant had undergone such tests, she nevertheless still concurred with the view of the chairperson.
- [10] Even if there was some doubt about the bona fides of the applicant's absence, no evidence was presented as to why there was an urgency in proceeding with the enquiry on 15 August given that this was its first sitting and why on the 15 August the applicant could not for instance have been placed on terms in respect of the future proceedings of the enquiry and corroborative proof of his alleged incapacity on 15 August. In essence, the Municipality provided no good reason for hastily proceeding with the applicant's disciplinary enquiry in his absence and the arbitrator failed to appreciate this.

Charge1

- [11] I am constrained to agree with the applicant that the arbitrator's findings in this regard are reviewable and fall to be set aside. While the arbitrator's misapplication of the case law[3] would not on its own have vitiated her decision given the (I must say credible) direct evidence of Mr Madlala, the evidence before the arbitrator demonstrated that this charge was formally and unconditionally withdrawn by the former (acting) municipal manager on 29 February 2016. In the notice, the municipal manager made it clear that the charge is "unconditionally withdrawn...as a matter of finality". In the absence of this decision having been reversed and/or reviewed by a relevant authority, it stood.

Charge 2

[12] I agree with the applicant that there is a complete disconnect between the evidence that was before the arbitrator and her finding. There is no evidence on record that linked the applicant to this matter at all, namely that it was his property and/or that he had ordered the work done on the said property.

The remainder of the charges: charge 8, 9 and 10.

[13] Only charges 1 and 2 are pertinently addressed in the founding and supplementary affidavits.

[14] After dealing with the above submissions, a general submission is made that the arbitrator was confronted with irreconcilable opposing versions but failed to apply Stellenbosch Farmers Winery. The opposing respondent and the court are not told which matters (or charges) this submission is directed at. The supplementary affidavit then goes on to state that argument will be presented in relation to the submission. This was not done in the heads or meaningfully taken further during oral argument.

[15] A perusal of the award reveals that the arbitrator did engage the fact that there were opposing versions, and explained why she favoured the version of the Municipality in respect of the above charges. The applicant's real complaint is that he does not agree with her reasoning. This does not constitute a valid ground to review and set aside the award.

[16] It is now trite to succeed in a review application, the applicant must demonstrate that both the reasoning and result of the arbitrator was unreasonable. Even if the reasoning of an arbitrator is materially flawed, it may be that the result is nevertheless justifiable on the evidentiary material that was before the arbitrator. In the case of *Khambule v National Union of Mine Workers and others*,^[4] the Labour Appeal Court (per Waglay JP) stated as follows:

It needs to be restated that when considering a review, the reasoning of a commissioner is no guiding light in determining whether the decision or more particularly the "order" handed down is reasonable. Put differently, a court reviewing an award need not consider the commissioner's reasoning to determine whether or not his/her reasoning justifies the award. The reviewing court, as has been repeatedly held, must consider all the evidence led at the arbitration and in the light of that evidence determine whether the award is one which any commissioner in the position of the commissioner, who determined the arbitration, could reasonably make. If the answer is in the positive, then there must be no interference with the award.

[17] In *Quest Flexible Staffing Solutions (Pty) Ltd v Lebogate*,^[5] the LAC stated:

[15] However, having identified the misdirection committed by the Commissioner, namely his failure to consider and apply his mind to the totality of the facts and circumstances of the case, the Labour Court failed to progress to the second stage of the enquiry by asking whether, despite the failure to consider and apply his mind to the totality of the facts and

circumstances of the case, the result of the award was one which a reasonable Commissioner could reach. In so doing, the Labour Court adopted a piecemeal approach to the review test which is fundamentally at odds with Sidumo as endorsed

in both Herholdt and Gold Fields.

- [16] In Gold Fields, this Court rejected the piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it “assumes the form of an appeal” and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in s 138 of the LRA in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly.[9] On this approach, therefore, the failure of a commissioner “to mention a material fact in his or her award”, or “to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute”, or “commits an error in respect of the evaluation or consideration of facts presented at the arbitration”[10] would not, in itself, render the award reviewable.[11]
- [18] Despite the shortcomings of the applicant’s approach in this review, I considered the evidence and conclude that the decision of the arbitrator (that the applicant’s dismissal was substantively fair) is sustainable even if one restricts the matter to one of the charges, namely that of intimidation.
- [19] On the evidence before the arbitrator the probabilities are overwhelming that the applicant angrily approached Mr Nsibane (a fellow employee) and told him that he was lucky the applicant had not been home when Nsibane had tried to deliver the disciplinary notice to him because Nsibane would be dead, and that the applicant’s parting words were “I will come back. I will make sure I deal with you one by one, and I will deal also with the council”. Given this, Nsibane’s testimony that he was left shaken and scared by the encounter is also probable.
- [20] The applicant’s version as to why he had to go to Nsibane’s home made no sense and strained credulity. He failed to explain why he couldn’t have just left a message or telephoned later if as he alleges Nsibane did not answer his phone when he first tried to call him. What was so urgent that he had to then rush off to Nsibane’s house?
- [21] The applicant also failed to explain why it had been necessary for his brother to accompany him just to ask Nsibane about a letter. It’s unlikely that he would have needed his brother’s company if his intention was not to intimidate Nsibane. This is the same brother who had been implicated in intimidating and threatening other municipal officers.

- [22] That the applicant was capable of such behaviour was corroborated by very detailed and plausible evidence of S P Madlala which revealed that he had directly witnessed the applicant assaulting and verbally abusing another fellow employee, Ms Burjam.
- [23] It goes without saying that the applicant's conduct towards Nsibande justified the sanction of dismissal, not only because it constituted intimidation, but because it was conduct unbecoming of a senior manager. It is common cause that at the time the applicant was the acting municipal manager and that his substantive post had been that of a senior manager in the office of the municipal manager.
- [24] Accordingly, there are no grounds to interfere with the arbitrator's award that the dismissal of the applicant was substantively fair.
- [25] The only remaining issue is what relief a reasonable arbitrator would have granted the applicant for the finding that his dismissal was procedurally unfair. It is not practical to remit the matter to the bargaining council just for this matter.
- [26] This was not a situation where the applicant was afforded no opportunity at all to defend himself against the charges. The unfairness arose from the failure to afford him a postponement of the disciplinary enquiry. In my view compensation equivalent to two months' salary would suffice as a solatium.

I therefore make the following order:

1. The award [rendered on 8 March 2019 under case number KPD101715] that the dismissal of the applicant was procedurally fair is reviewed and set aside and substituted with an order that the dismissal of the applicant was procedurally unfair.
2. In respect of the above the first respondent is ordered to compensate the applicant with two months' pay. This must be paid within 30 days of the date of this judgment.
3. There is no order as to costs.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT:

Adv P J Blomkamp SC, instructed by Mohamed Abdulla Attorneys

FIRST RESPONDENT: Adv W S Kuboni, instructed by Nompumelelo Hadebe Inc

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- [1] Dated 8 March 2019 under case number KPD101715.
- [2] Eg, the claim that pages 549 to 551 demonstrate that charge 2 was withdrawn by the municipal manager. Even the letter that is mentioned in the letter does not reflect this.
- [3] Minister of Police v M and others (2017) 38 ILJ 402 (LC).
- [4] (JA 89/17) [2019] ZALAC 61; (2019) 40 ILJ 2505 (LAC) (24 July 2019)
- [5]
- [2015] 2 BLLR 105 (LAC).
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