

SOUTH AFRICA / JUDGMENT

Rupee v Commission for Conciliation, Mediation and Arbitration and Others (D83/17) [2020] ZALCD 19 (14 December 2020)

[2020] ZALCD 19

COURT
Labour Court Durban

BEFORE
Cele

CASE / FILE NUMBER
D83/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN
THE LABOUR COURT OF SOUTH AFRICA HELD AT DURBAN
Not
Reportable
CASE
NO: 083/17
In

the matter between:	ROSHEN RUPEE Applicant and COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent BESS PILLEMER N.O Second Respondent DURBAN AND COAST SPCA Third Respondent
Heard:	08 October 2020
Delivered:	14 December 2020

Summary: Review - incapacity - employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation - employee not accommodated - principal issue not considered - award reviewable.

JUDGMENT

Cele J

Introduction

[1] This is an application in terms of s145 of the Labour Relations Act[1] to review and set aside the arbitration award of the second respondent dated 18 December 2016 and for an order that, inter alia,

the applicant was unfairly dismissed and that the applicant be reinstated with retrospective effect to the date of his dismissal.

The third respondent opposed this application on the simple basis that the applicant has meandered down the incorrect path and

attempted to appeal the arbitration award findings as opposed to reviewing it.

Factual Overview

[2] The dispute between the parties emanates from facts that are largely common cause. The applicant was employed by the Society for the Prevention of Cruelty to Animals (SPCA) as an inspector since 1995. His core function was to prevent cruelty to animals by investigating cruelty cases and prosecuting offenders. As an inspector, the applicant possessed magisterial authorisation in terms of section 8 of the Animals Protection Act[2] for the purpose of carrying out his duties. This authorisation was valid from 23 July 1995 and remained valid for all times material to this matter.

[3] In terms of section 8 (1) (d) of the APA, the applicant was empowered to destroy an animal in the circumstances set out in section 5 (1) of the APA which provides that:

"Whenever a police officer is of the opinion that any animal is so diseased or severely injured or in such a physical condition that it ought to be destroyed, he shall, if the owner be absent or refuses to consent to the destruction of the animal, at once summon a veterinarian or, if there is no veterinarian within a reasonable distance, two adult persons whom he considers to be reliable and of sound judgment, and if such veterinarian or adult persons after having duly examined such an animal certify that the animal is so diseased or so severely injured or in such physical condition that it would be cruel to keep it alive, such police officer may without the consent of the owner destroy the animal or cause it to be destroyed with such instruments or appliances and with such precautions and in such manner as to inflict as little suffering as practicable."

- [4] In accordance with section 8 (1) (d) of the APA, the applicant performed euthanasia in the field only in emergency situations and had done so on approximately 15 occasions in the 22 years of his employment. He learnt how to euthanise animals through observation. In 2003 the applicant became a senior inspector after passing an examination. He did a refresher course in 2008 and
2013. This included a written examination. He attended at the abattoir and volunteered to stun an animal. There was no certification issued regarding euthanasia. He did not obtain any Animal Welfare Assistant (AWA) authorisation to perform euthanasia from the South African Veterinary Council (SAVC) from the inception of his employment. He was not required to do any euthanasia training at the refresher courses in 2008 and 2013.
- [5] The third respondent had six inspectors, a HOD, a controller, and one driver. There were three vets who worked full time and a number of AWAs who worked in the clinic. AWA's do treatments and evaluate animals, assist vets and do euthanasia. As an inspector dealing with animal welfare the applicant could be described as an AWA. There was no system of registration of AWAs. The applicant worked on standby for the period from 1999 to 2004 - 6 years. He was the only inspector performing this duty. He ceased standby duty in 2004 as it was taking a strain on him, but he had no health issues at the time.
- [6] The applicant suffered a heart attack in March 2009 whilst on duty. He was taken to Entabeni Hospital where Dr Deenadayalu, a Cardiologist, attended to him. At that time he had a stent inserted and a second stent was done in 2010. The third respondent, through the evidence of Ms Caroline Smith, its General Manager, contended that the applicant was given lighter duties after his heart attack. The applicant disputed such evidence. In 2013 the third respondent's manager at the time, Mr Chris Matheson, required all inspectors to perform standby duties. At that time, the applicant produced a letter from Dr Deenadayalu, dated 28 February 2013, which was submitted to Mr Matheson. Reference was made in that letter to the applicant's coronary artery disease and the two stents. Dr Deenadayalu stated that the applicant could continue with his normal duties but should avoid excessive physical and mental stress at work. He further stated that the applicant was unable to do a 24-hour call or after hours calls in view of his underlying cardiac condition. Mr Matheson accepted the letter on behalf of the third respondent, and no issues were raised concerning the same.
- [7] During June/July 2015 the applicant was made aware that assessment as an AWA was required for the purposes of obtaining authorisation in terms of section 23 (1) (c) of the Veterinary and Para-veterinary Professions Act[3]. Prior to this period the applicant had not undertaken any assessments whatsoever. The assessment was required to be conducted by a vet accredited by the South African Veterinary Council (SAVC) to assess AWAs who apply for authorisation under section 23 of the VPVPA. The guidelines for the assessments are set out in the guideline documents. Notwithstanding the statutory requirement for such authorisation from the SAVC, the applicant prior to 2015 was never assessed by an accredited vet and did not make application for such authorisation. In the guideline under the introduction, it is indicated that the assessor should be cognisant of the role of the AWA

in the Animal Welfare Organisation (AWO) and that the aim is to balance a need for some sort of veterinary intervention in those areas where no professionals are available with the requirements of the Act. The AWA's functions include those set out in the guidelines.

- [8] In the applicant's case, the assessment applied to his role as an AWA for euthanasia only. Assessors are not required to pass or fail candidates but determine whether they were competent or not competent. According to the third respondent the following extracts are important:

"18.1 paragraph 11 of a training policy dated 10 February 2007 which states that: "before an inspector may authorise, an AWA certification must be obtained for euthanasia"

18.2 paragraph 2.26 of a training policy dated October 2015, which states that "before an inspector may obtain magisterial authorisation, an AWA certification must be obtained for euthanasia"

18.3 paragraph 2.27 which states that 'an inspector must successfully complete their application for AWAs and forward relevant documentation to NSPCA within six months of attending a training course. This can be done prior to attending the inspector's course."

- [9] The third respondent made application for euthanasia authorisation for the applicant to the SAVC by letter dated 27 July 2015. In this letter the General Manager, Ms Smith, states that:

"The inspector would be required to euthanise small animals in emergencies, after hours, weekends , and when our veterinarian is not available at the Durban and Coast SPCA."

[10] The SAVC granted the authorisation as recorded in its letter dated 24 November 2015 addressed to Dr Muchopa. The controlling vet, Dr Muchopa, requested the third respondent to implement a regular assessment of inspectors. The request is contained in an email dated 20 August 2015 from Dr Muchopa to Ms Smith. Dr Muchopa stated that based on Dr Eduardo's recent assessments he felt it was imperative not only for inspectors but for himself as the supervising vet that they be required to spend time in clinic on a monthly basis, euthanasing animals, as this is an essential part of their duties. He stated further that he understood that inspectors spent a large part of their day in the field, so they will exercise discretion based on their capabilities with regard to the amount of time needed in the clinic. Ms Smith also confirmed that Dr Muchopa referred to exercising a discretion. He further stated that one of the inspectors, Mr Ramsamy , spent about two hours in the clinic in the week and due to his level of competency, fulfilled his monthly training requirement. He noted further that he believed that this proves their willingness to be flexible and use their judgment with regard to each inspector's level of skill by not insisting on lengthy periods of time spent in clinic. Ms Smith responded by email dated 20 August 2015 wherein she states the following:

"I am fully in agreement with the basis for this request. I appreciate the application of judgment based on individual level of skill, rather than onerous set times, which may affect productivity in both departments. I expect the inspectors' full cooperation in this regard."

- [11] In August 2015, a roster was established. The third respondent stipulated a period of two hours per month for inspectors to euthanise animals in its clinic. In August and September 2015, the applicant did not engage in the "training". During early October 2015, Ms Smith met with the applicant regarding the issue of "training" in the clinic. In an email dated 07 October 2015, she addressed the applicant, referring to their meetings on the previous week regarding the applicant's "non-compliance" with the requisite training in the clinic as instructed by their supervising vet Dr Muchopa. She stated further that the applicant had assured her that he would comply, that she required confirmation that the requisite AWA training has been undertaken with clinic, and if this was not done, that she required confirmation by close of business of the dates booked for such. Ms Smith confirmed an approach by the applicant on one day in that period to be exempted from the practice. She explained to him that she could not exempt him because if she exempted him, she would have to exempt every one of the other inspectors.
- [12] The applicant did not comply with the set training. He did not see the need to do so considering himself qualified and because he had difficulty euthanasing healthy animals. He informed Dr Muchopa about this, his medical condition, and sought exemption. Dr Muchopa informed him that the two-hour "training" was not negotiable. The applicant also discussed the issue with his

HOD, Jay Metadad, who informed the applicant that it was an instruction from the vet that had to be followed. The applicant thereafter complied with the "training requirement" from October 2015 to January 2016. During this period, the applicant euthanised approximately 10 animals per two- hour session. There were no vets present during the time spent and he did not at any stage receive feedback from the vet or anyone else regarding the "training".

- [13] The applicant was emotionally affected and became stressed when he had to euthanise healthy animals. During his visit to his doctor for his yearly check-up in January 2016, he mentioned the euthanasia practice and how it affected him. A letter was written by Dr Deenadayalu, dated 03 February 2016, which was handed to the third respondent. Part of the letter read:

"He has extreme stress at work and is very anxious and depressed regarding his duties.

He is unable to cope with the emotional aspect of his work as well as he gets tired on physical effort.

I am concerned regarding this as this could trigger off another heart attack with dire consequences .

He has been a long standing employee of the SPCA.

I therefore recommend that he can continue with lighter duties and probably can cope with admin and more sedentary duties. "

[14] The matter was discussed with the third respondent. The applicant requested at the time that he be exempted from the time spent in the clinic practising euthanasia. The applicant says he did not want to be relieved of any duties and did not request sick leave. However, the reaction of the third respondent to the letter was to send the applicant home. On 10 February 2016 the applicant was called to a meeting with Ms Smith. He again requested exemption from the time spent in the clinic practising euthanasia. The third respondent requested certain information from the cardiologist, particularly whether the applicant could perform his duties. The response from the cardiologist dated 16 February 2016 clearly, *inter alia* stated:

"He was rather anxious about a specific duty that he has been recently involved in which involves euthanasia of animals.

He is unable to cope with the aspect of his work and this is the cause of his recent stress.

He claims that he is well able to work in the field and to continue with his normal duties and he has no problem in coping with this.

I feel he is fit enough to continue with his duties that he has been doing for many years he has been able to cope. I therefore feel after further discussion Mr Rupee that he can continue with his normal duties but should avoid the specific duty that is causing him much distress. "

[15] The third respondent did not communicate further with the applicant's cardiologist. On 19 February 2016 a meeting occurred between the third respondent and the applicant regarding his objection to training and a proposal was made to the applicant to take early retirement. Ms Smith informed the applicant that the option of being exempted from spending time in the clinic euthanasing animals was not possible. She wrote to the applicant on 26 February 2016. In the letter reference was made to the monthly AWA training. In the third and the last paragraphs she states:

"In your particular instance the concern is that you are unable to cope with various emotional and physical aspects of the job with specific reference to the euthanasia duties which need to regularly be carried out. We are also concerned with your objection to attend the AWA training as this is an important requirement in fulfilling your job obligations and keeping you up to date.

In the circumstances I would like to meet with you to discuss whether or not you wish to proceed with the offer of early retirement failing which we will have no option but to proceed with a formal hearing."

[16] The applicant made written submissions to the third respondent highlighting particularly the nature of his contracted functions, that he is capable of and wants to continue performing his duties including euthanasia when necessary, and that he only requested an exemption from euthanasing animals at the SPCA clinic as part of the "training". Ms Smith confirmed in her evidence that the applicant stated that he did not mind doing euthanasia in the field but did not want to have to do the practice. There was no substantial response to the content of the applicant's letter. The reaction of the third respondent was to convene a

hearing. At the end of that hearing, the applicant was dismissed. He referred an unfair dismissal dispute which arose, for conciliation.

When the dispute could not be resolved, he referred it to arbitration. The second respondent found that the decision of the third respondent to terminate the employment of the applicant on the grounds of incapacity was fair. The applicant initiated the present application.

Chief findings of the second respondent

[17] Various findings were made by the Commissioner in her arbitration award and these include:

" [10.2] This case has to be decided on the basis of Dr Deenadayalu's opinion that the stress the applicant would suffer by having to perform euthanasia could trigger off another ;heart attack with dire consequences'. The respondent had to bear this in mind in deciding how best to deal with the applicant's condition and the fact that he could not on medical grounds be expected to perform euthanasia. Even if the applicant was willing to take the risk, and it does not appear that he was at the time, the respondent could not be expected to do so in the light of the medical information supplied to it by the applicant. Dr Deenadayalu was not called and the inference to be drawn from that is that he could not add anything meaningful to the information he had already provided.

[10.3] So therefore if performing euthanasia is an essential requirement of the job of a senior inspector it is obvious that the applicant lacks the capacity to perform that function and termination of his employment on the grounds of incapacity is justified.

[10.4] If on the other hand, performing euthanasia is not an essential element of the job, then there is no reason why he could not continue to render all the other services and termination of his employment on grounds of incapacity in these circumstances is unfair.

[10.5] Accordingly , the only question really to be decided is whether or not the

Applicant does in fact have to be able to euthanaze and whether he therefore has to maintain the competency and skill by performing euthanasia during the two hours monthly training session.

[10.6] The respondent contends that as a matter of law the applicant cannot hold the post of senior inspector unless he is registered with the Veterinary Council as an Animal Welfare Assistant (AWA). This requirement is set out in the Operations Manual of the National

Council of Societies for the prevention of Cruelty to Animals (NSCPC). The only practical examination of the candidate who seeks to be registered as an AWA is the euthanasing of an animal, as the Veterinary Council has to observe that the person is capable of performing the task. It follows that actual ongoing competency is essential.

[10.7] In the latest policy document dated October 2015 (clause 2.26 and 2.27) the rules provide that before an inspector may obtain

magisterial authorisation, he must obtain an Animal Welfare Assistant certificate for euthanasia. The inspector must successfully complete the application for Animal Welfare Assistant within six months of attending a training course which can be done prior to attending the inspectors' course.

[10.8] The controlling veterinarian has the right to request authorisation to be withdrawn should the veterinarian find that the person in question is not competent to perform the procedures. This underlines the need for actual competency and not mere certification.

[10.9] It is therefore reasonable for the respondent to require persons who may from time to time have to perform euthanasia to keep their skill current. Two hours per month is in my assessment reasonable.

[10.10] Even though the applicant has the certificate it is clear that he cannot perform that function without serious risk to his own health because he has a weak heart and is so emotionally stressed by it. In the circumstances he cannot claim that because he has the certificate that is enough.

[10.11] I find that the rules require a senior inspector to be able to actually perform euthanasia if required. The Respondent cannot reasonably be expected to require one of its inspectors to do something that can have potentially fatal consequences. In those circumstances the Applicant's inability to carry out euthanasia results in the Applicant lacking the necessary capacity to do his job.

[10.12] There was evidence that alternatives were looked into but the only possible job available was that of a driver which also did not suite the applicant because of its physical element."

Analysis

[18] In his founding and supplementary affidavits, the applicant has outlined numerous grounds of review. In the heads of argument of his counsel, these are summarised and are numbered from 1 to 25, running from page 19 up to page 29. This, to me is akin to a process related approach to review, which is not permissible[4]. The law governing reviews has become trite. The question is whether the decision reached by the Commissioner is one that a reasonable

decision maker could not reach[5]. In *Herholdt v Nedbank Ltd*[6] it was held that for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145

(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

[19] In considering all of the submissions of the parties on grounds for review, I shall ascertain whether the Commissioner was able to consider the principal issue before her; whether she evaluated the facts presented at the hearing and finally whether she came to a conclusion which was reasonable to justify the decisions she arrived at[7]. In respect of poor work performance related to incapacity, the Court in the Goldfield Mining decision[8] had the following to say:

[23] In drawing a distinction between poor work performance and misconduct, "Professor B. Jordaan in his article "Poor Work Performance (Incapacity) vs Misconduct stated the following :

'Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer's standards. In this case the problem lies with the employee's 'aptitude': although willing to do what is required, s/he is unable to because of some factor linked to the employee that s/he has little or no control over.

[20] In the present matter, with all evidential material considered, it could never be said that the applicant persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case, which cannot be said of the applicant, the employee would potentially lack the skills, knowledge or competencies to meet the employer's standards. The source of the incapacity is premised on the medical condition of the applicant. No evidence was adduced in the arbitration hearing that, before his dismissal, the applicant had failed to euthanise any distraught animal in the field. Nor was evidence led to show that during the clinic practise of euthanasia he dismally failed to euthanise the animals within the set two hours per month. Thus, the Commissioner found herself forced to say:

" [10.2] This case has to be decided on the basis of Dr Deenadayalu's opinion that the stress the applicant would suffer by having to perform euthanasia could trigger off another heart attack with dire consequences. The respondent had to bear this in mind in deciding how best to deal with the applicant's condition and the fact that he could not on medical grounds be expected to perform euthanasia."

[21] In his letter of 16 February 2016, Dr Deenadayalu was very clear of what he perceived to be the source of distress of the applicant when he said the applicant was rather anxious about a specific duty that he has been recently involved in which involves euthanasia of animals.

Further, he said the applicant was unable to cope with the aspect of his work and this was the cause of his recent stress. This was in clear reference to euthanasing healthy animals at the clinic, as a refresher course. Nowhere in this letter or even the previous one of 3 February 2016 does Dr Deenadayalu say that the euthanasing of animals in the field caused the distress on the applicant. As if it was not enough, Dr Deenadayalu then goes on to say that he felt that the applicant was fit enough to continue his duties that he had been doing for many years, as he has been able to cope. He concluded his letter by saying that he felt that after further discussion, the applicant could continue with his normal duties but should avoid the specific duty that was causing him much distress.

[21] The Commissioner clearly, perpetrated the same mistake which the third respondent had committed, namely, that of dealing with incapacity as though it were misconduct, where all that is necessary to determine the guilt is to arraign a hearing. Incapacity determination is a process and not an event entailing the employer offering training, guidance, assistance and evaluation. The third respondent never engaged in this process. All it did was to receive Dr Deenadayalu's letter of 3 February 2016, then it held a meeting with the applicant, corresponded with Dr Deenadayalu, met the applicant, sent him home and held an incapacity hearing.

[22] Clearly therefore, to say that this case had to be decided on the basis of Dr Deenadayalu's opinion, as the Commissioner opined in her award, is far from the facts. If it were decided based on the opinion of Dr Deenadayalu, the applicant would be allowed to continue with his normal duties. Then, an attempt would be made to meet him half way on the training aspect. For instance, an

investigation could have been conducted on whether the two hours per month could be split within that month. A consideration could also be made on whether the number of healthy animals to be killed on training could not be reduced. Simply put, an attempt to meet the needs of the applicant at training should have been made. It must always be remembered that the training, though necessary, was not supposed to surpass the need thereof. In 22 years the applicant killed only 17 animals in the field. On average, this works out to be one animal killed in one year, with an interval of years totalling five years in between. It then begs the question why kill so many healthy animals during the training session. One has to bear in mind the primary objective of the third respondent, to prevent cruelty to animals. This killing on training is no longer the mercy killing enshrined in euthanasia.

[23] In my findings, the Commissioner got lost in considering the principal issue before her, by concentrating on what was presented to her as legal requirements of the job. This had a domino effect of not evaluating the facts presented at the hearing properly with the consequence of not coming to a conclusion which was reasonable to justify the decisions she arrived at. As proposed by the applicant, this arbitration award should not stand.

[24] I conclude by making the following order:

1. The arbitration award in this matter is reviewed and set aside.
2. The dismissal of the applicant by the third respondent on incapacity was unfair.
3. The third respondent is ordered to re- institute the applicant to his employment, retrospectively , with no loss of income and benefits, from the date of his dismissal.
4. The third respondent is to effect the back pay to the applicant within 14 days from the date it receives this order.
5. The applicant is to report on duty within five (5) days from the date of receipt of this order.
6. No costs order is made.

H Cele

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Jay Reddy attorneys.

For the Third Respondent: Mr G Kirby-Hirst

Instructed by: MacGregor Erasmus Attorneys.

[1] Act Number 66 of 1995, as amended.

[2] Act Number 71 of 1962 (the " APA").

[3] Act Number 19 of 1982 (the "VPVPA")

[4] See Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others) [2014] 1 BLLR 20 (LAC).

[5] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] 12 BLLR 1097 (CC) at para 110

[6] Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia) [2013] 11 BLLR 1074 (SCA)

[7] See the Goldfield decision supra.

[8] Supra.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCD/2020/19.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rupee-v-commission-for-conciliation-mediation-and-arbitration-and-others-unknown-topic-alcd-2020>

Prepared on 13 October 2026 · Esheria