

SOUTH AFRICA / JUDGMENT

SAMWU obo Cheemee v City of Cape Town (C586/2020) [2024] ZALCCT 36 (16 August 2024)

[2024] ZALCCT 36

COURT

Labour Court Cape Town

BEFORE

Ford

CASE / FILE NUMBER

C586/2020

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FLYNOTES:

LABOUR – Dismissal –
Dishonesty and negligence
– Employee did not dispute
that there was deviation from tender provisions under his watch –
Meritless contention regarding
use of discretion under exceptional
circumstances – Created an ongoing risk for City –
Acted contrary to rules
for an extended period – Acted
without permission from superiors – Decision falls within
band of reasonableness
– Found guilty of serious misconduct
which warranted dismissal – Application dismissed.
THE LABOUR COURT OF
SOUTH AFRICA, CAPE TOWN
Not reportable
Case Number: C586/2020
In

the matter between:

SAMWU
obo R. CHEEMEE
Applicant
and
CITY
OF CAPE TOWN
First
Respondent
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL
Second
Respondent
URSULA
BULBRING
Third
Respondent

Heard: 14 August 2024

Delivered: 16 August 2024
(This judgment was
handed down electronically by circulation to the parties' legal
representatives, by email, publication
on the Labour Court's
website and released to SAFLII. The date on which the judgment is
delivered is deemed to be 17 August
2024.)

JUDGMENT

FORD, AJ

Introduction

[1] This is an application to set aside the arbitration award of the third respondent, whom I refer to as “the commissioner”, dated 10 November 2020. For ease of reference I refer to the first respondent as “the City” and to the applicant as “Cheemee”.

The facts

[2] Cheemee commenced employment with the City of Cape Town (“the City”) in

1998. At the time of his dismissal, he was a Senior Superintendent at the Solid Waste Disposal Facility at the Kraaifontein Waste Management Facility (landfill site) (“Kraaifontein”) and earned an annual salary of R469,119.00. Cheemee worked for the City for 30 years with a clean disciplinary record.

- [3] The City concluded a service agreement with Reliance Compost (“Reliance”) pursuant to a chipping tender. The tender has been in operation since 2012, with Reliance being the chipping contractor at Kraaifontein. Cheemee was responsible for managing Reliance. The tender specifies, inter alia hours of operation, and that payment was to be done by the City to the contractor on volume (cubic meter) load mass.
- [4] The City instituted a forensic investigation pursuant to a complaint received from a member of the public, a certain Mr. Coetzee, in September 2016. Various allegations were levelled against the officials at the drop-off and landfill sites, and in particular as it relates to their dealings with Reliance. In respect of Kraaifontein, it was alleged that:
- 4.1. Reliance trucks were allowed early access to landfill facilities to load green waste chipping which is then taken to the Klapmuts landfill site;
 - 4.2. Loading of the Reliance trucks was done without supervision;
 - 4.3. Reliance trucks would enter the site with sand already loaded onto the truck and would enter the landfill and load chippings onto the sand to enhance the load mass;
 - 4.4. Cheemee received a Nissan Nirvana bakkie from Reliance, in return Cheemee overlooked irregularities and allowed early access.
- [5] The City mandated Joseph Louis (“Louis”), on 4 January 2017, to conduct the forensic investigation. The investigation’s scope spanned the period January 2012 to November 2018.
- [6] When Louis interviewed, the Head of the Disposal Unit, Riyaz Nakhwa (“Nakhwa”) he informed Louis that he was not aware that Reliance was given early access to the site. He was also concerned about the high volumes of chippings taken out by Reliance, especially at the Kraaifontein site.
- [7] Louis received an email reflecting the amount of clippings removed from each of the City sites. The email noted that notoriously high tons were recorded by the weighbridge at Kraaifontein.
- [8]v When Louis advised Nakhwa about the allegations levelled against city officials by Coetzee, Nakhwa told him that he received emails from two city officials Nomazizi Mathabela (“Mathabela”) and Patrick Jaca (“Jaca”) who both reported to Cheemee. In the email Mathabela expressed his concerns to Cheemee, about the fact that trucks are allowed to go over the weighbridge without a weighbridge operator being present, and that they (the officials) were required to sign the delivery notes as if they were present. The following is stated in the email: “We are not in a position to change tender agreements (working hours) only the Director of SCM (supply chain management)”.

[9]v In the aforesaid email, the official requested Cheemee to secure approval for these arrangements from higher authority. In his reply, Cheemee stated that the arrangement is not only with Reliance and that he agreed to it because the accumulation of waste material posed a fire hazard. Further that he is not changing the tender agreement, but that he is acting in the best interests of the City.

[10] In Jaca's email dated 21 March 2017, also addressed to Cheemee, he stated that Reliance truck loads have not been verified and that these trucks are permitted to come onto the site as early as 06h00am, and after hours. He also questioned the deviation from the tender stipulations and noted unverified weighbridge loads and half-full loads. The email highlights Jaca's concerns. He says:

From what I read in the emails there is definitely a breach of contract agreement, especially for the chipping. The tender says that chips can only be removed during operating hours.

There is also a huge financial risk that the City of Cape Town has been put under by allowing vendors to work unsupervised after hours ... the risk is that they can write their own dockets ... the same dockets that we are invoiced against and pay the vendor.

What are the "precautionary procedures" you refer to?

Any signing of documents by any staff that it (sic) done after the event i.e. not in their presence can be construed as fraudulent, as they cannot verify that the docket they are made to sign is actually what transpired ...

Such decisions deviate from the tender conditions require approval of the BAC (bid adjudication committee) only they can approve such a request.

[11] The email ends, by suggesting that Cheemee stops the practice with immediate effect and that he follows the approval process for the correct authority to be granted. Cheemee responded, he will do so with immediate effect.

[12] Louis also interviewed the Head of Security at Kraaifontein, Claude Amon ("Amon") who advised him that Cheemee instructed them to allow the Reliance trucks to load early. He confirmed to Louis that security did not really verify the loads on the trucks. Amon informed him, that on occasion the Reliance trucks would come onto the site two to three times, before the site becomes operational.

[13] When interviewing former Reliance employees, they informed Louis that on occasion the Reliance trucks would come onto the site with sand already loaded on the truck and then load the clippings on top. At times they would wait on the N1 and return to the site and a delivery note would be issued as if the truck was full or as if it was a new load.

- [14] Mathabela told Louis that when the site opens, and the capturers would capture the information, Cheemee would override the system and the capturers would capture the information, as if it was done during operational hours. When Louis interviewed the capturers they informed him that they were not happy to capture the loads after the fact, and that loads were not verified but they followed the instructions of Cheemee.
- [15] The City was billed by Reliance, for the early delivery notes for period December 2016 to February 2017 an amount to the tune of R2.25million.
- [16] When Reliance sought permission to do the early delivery, Cheemee advised that he didn't have a problem with it, provided Reliance followed the rules.
- [17] Louis met with Cheemee who acknowledged that Reliance was given access to the site before it became operational, and that it was permitted to prevent stockpiling and environmental issues. This, so Cheemee contended constitutes exceptionally circumstances. When showed the tender documents and specifications, Cheemee replied that he was not so au fait with tender documents, but that he was glad it was shown to him. He acknowledged that he made the early access decision on his own and that he was sorry as he was not supposed to have done so.
- [18] On account of the information from the forensic investigation, The City preferred disciplinary charges against Cheemee, and he was found guilty of gross negligence and dishonesty.
- [19] Unhappy with that decision, he referred an unfair dismissal dispute to the Bargaining Council.
- [20] At the arbitration, the City persisted with the charges levelled against Cheemee. The commissioner found that the dismissal of Cheemee was both procedurally and substantively fair.
- [21] In analysing the evidence, the commissioner found that Cheemee did not dispute that there was a deviation from the tender provisions under his watch. In so far as Cheemee asserted that he didn't read the tender provisions, the commissioner found that whether he read the tender provisions or not is irrelevant. He knew the operating hours, but still allowed Reliance to enter and exit the site outside the normal operational hours. The commissioner noted further that there were no special measures put in place to ensure control and risk mitigation. She pointed out that Cheemee allowed trucks to enter and exit the site outside the normal operational hours, and failed to ensure that the weight was accurately captured by a City Official over the weighbridge.
- [22] To the extent that Cheemee relied on a defence that he used his discretion in granting Reliance access, owing to exceptional circumstances, the commissioner held that allowing early loads for a period of three months can hardly be regarded as exceptional circumstances, it was effectively changing the way the City worked. She noted adversely that, not once during those three months did Cheemee report to his seniors what he was

doing. Had he asked, so the commissioner held, he would not have been given the go-ahead to use his discretion and deviate from the tender conditions for that length of time.

[23] The commissioner noted that even in exceptional circumstances the system would be maintained, somebody would still be required on the weighbridge so as to ensure that the City did not incur risk.

[24] The commissioner found that Cheemee created an ongoing risk for the City and acted contrary to the rules for an extended period of time. Further that his version that he believed he had authority to act in the manner he did, cannot be reasonably plausible or true.

[25] The Commissioner concluded that Cheemee acted in a grossly negligent manner, especially by him allowing the early loads to continue for the length of time it did. He acted without permission from his superiors and this, the commissioner found, alarming.

[26] She also found that there was an element of dishonesty in Cheemee's conduct in that he shared his password (which he should not have done) and allowed data to be entered into the system after the fact.

[27] In so far as an appropriate sanction is concerned the commissioner stated:

As to the appropriate sanction, there is no real evidence that Cheemee cannot be trusted anymore. He continued to work for a period of more than two years without incident until the final forensics (sic) report. This indicates that dismissal was not the appropriate sanction at the time. Also, I note that he has 30 years' unblemished service and that he did show some insight and remorse. On the other hand, his inability to act in a responsible way in a senior position (his juniors did) means that he cannot return to this position. A demotion would have been appropriate at the time of the enquiry and were I empowered with that discretion it would be my finding. I understand that Malgas offered the union and Cheemee a demotion and that it was rejected before the sanction of dismissal was handed down. I am not empowered to make such a finding and, in the circumstances, I must confirm the dismissal. The dismissal was substantively fair.

AWARD

I find in favour of the City. The dismissal was substantively and procedurally fair.

Grounds of review and

analysis

[28] The applicant does not take issue with the commissioner's survey and analysis of the evidence.

[29] At the hearing of the review application, Mr. Geldenhuys acting for the applicant, advised that the only ground of review that the applicant persists with, is the first ground of review.

[30] That ground of review is phrased as follows:

A reasonable Arbitrator would have replaced the sanction of dismissal with a lesser sanction. This much was within her powers.

[31] In the applicant's heads of argument, this ground was embellished ever so slightly but still in keeping with the substance of the ground of review. It is phrased therein, as follows:

On the question of appropriate sanction, the Arbitrator found as follows:

there is no real evidence that Cheemee cannot be trusted anymore. He continued to work for a period of more than two years without incident until the final forensics (sic) report. This indicates that dismissal was not the appropriate sanction at the time. Also, I note that he has 30 years' unblemished service and that he did show some insight and remorse.... A demotion would have been appropriate at the time of the enquiry and were I empowered with that discretion it would be my finding.

[32] According to Mr. Geldenhuys, and in light of the fact that there is no cross-review, the above finding by the commissioner on the appropriateness of the sanction stands. Further that, to the extent that the commissioner believed she did not have the discretion to award a demotion, as opposed to a dismissal, she made a reviewable finding, as the commissioner was required to determine whether the applicant was guilty of the allegations levelled against him and what an appropriate sanction ought to be.

[33] In support of this argument, he relies on a decision of the Supreme Court of Appeal in Rustenburg Platinum Mines Limited (Rustenburg Section) v CCMA and others

(2006) 27 ILJ 2076, where the SCA held that a CCMA commissioner is entitled to interfere with the sanction imposed by the employer, and that the arbitrator's sense of fairness must prevail over that of the employer. respect to Mr. The SCA decision he relied upon was set aside on appeal by the Constitutional Court, becoming the famous decision in Sidumo.

[34] Ms. Ngqata, appearing for the City argued that the reasoning accorded to the finding of the commissioner, must be seen within the context that the commissioner could not order a demotion, as the applicant had previously refused a demotion. Further that the commissioner is not permitted to interfere with the employer's sanction.

[35] The position in Sidumo[1], in so far as the commissioner's role in relation to determining a sanction is concerned, has now been clarified. The court said:

It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing "discretions". Employer and

commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.

[36] And at paragraph 79, the court said:

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.

[37] In his assenting judgment in *Sidumo*, Ngcobo CJ, said, with reference to whether the commissioner can interfere with the employer's sanction:

What this means is that the commissioner... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair[2].

[38] The commissioner does not have the authority to consider a sanction afresh and was accordingly correct in her assessment and recordal of the legal position. Since that is the only basis on which interference with her decision is sought, I conclude that her decision falls within the band of decisions a reasonable decision-maker could reach, especially when considering the fact that Cheemee was found guilty of various counts of serious misconduct which warranted his dismissal.

[39] In the result, I make the following order:

Order

[40] The application is dismissed.

[41] I make no order as to costs.

Bart Ford

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. E. Geldenhuys Instructed by: Macgregor Erasmus Attorneys
For the Respondents: Adv. K. Ngqata Instructed by: Yvette Cloete & Associates

[1] *Sidumo and another v Rustenburg Platinum Mines Ltd and others*

[2007] ZACC 22; 2008

(2) BCLR 158 (CC), at para 79.

[2] Ibid para 178

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