

SOUTH AFRICA / JUDGMENT

SAMWU obo Hlongwane v Sedibeng District Municipality and Others (JR1616/12) [2016] ZALCJHB 469 (31 May 2016)

[2016] ZALCJHB 469

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR1616/12

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JR 1616/12

In the matter between SAMWU obo HLONGWANE Applicant And SEDIBENG DISTRICT MUNICIPALITY First Respondent SA LOCAL GOVERNMENT BARGAINING COUNCIL Second Respondent

TLHOTLHALEMAJE E N.O.

Third Respondent

Heard: 16 March 2016

Delivered: 31 May 2016

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 8 May 2012.
- [2] The award under review relates to a dispute between the applicant and the first respondent, characterised as a dispute concerning the interpretation and/or application of a collective agreement. The agreement concerned is the main collective agreement concluded under the auspices of the second respondent, the bargaining council, and in particular, that part of it concerning disciplinary procedures. Clause 6.3 of the collective agreement reads as follows:

The employer shall proceed forthwith or as soon as reasonably possible with a Disciplinary Hearing but in any event not later than three (3) months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for combination to the relevant Division of the SALGBC.

- [3] Also in issue was Annexure B to the collective agreement. That Annexure sets out the process to be followed from the point at which an employer first becomes aware of an allegation of misconduct against an employee, to the conclusion of a disciplinary hearing and appeal. In regard to disciplinary hearings, a note to the annexure, inserted after paragraph 7, reads as follows:

The process set out in paragraphs 1 to 7 above shall take place within a reasonable time but not exceeding six months calculated from the first day that the Employer became aware of the alleged misconduct up to an (sic) including the first day of the Disciplinary Hearing – clauses 6 and 7 read in its proper context.

- [4] Paragraph 14.6 of the agreement deals with suspension pending a disciplinary hearing. The paragraph reads as follows:

The suspension or utilisation in another capacity of the employee shall be for a fixed and pre-determined period and shall not exceed a period of three (3) months.

- [5] The arbitration hearing concerned, amongst other things, disciplinary action against the applicant's member Hlongwane. She had been suspended on 31 August 2011 and charged with various acts of misconduct. She was notified that she should appear before

disciplinary enquiry on 12 December 2011. At the time of the arbitration hearing, the disciplinary enquiry had yet to be finalised. The applicant's contention was that by suspending Hlongwane to a period of suspension exceeding three months and subjecting her to discipline outside of the three month period from the date on which the first respondent became aware of the allegations of misconduct against her, the respondent had failed to adhere to the terms of the agreement. The first respondent conceded that three months had expired prior to Hlongwane being formally charged, but that it was a reasonable explanation in this regard. Further, it was submitted that the disciplinary enquiry was ongoing. In regard to clause 6.3, the respondent submitted that the charges could only be laid against an employee once the employer became aware of the allegations and to this end, and to the extent that the employees were suspended in August 2011 and since the enquiries were initiated in December 2011, it had acted within six months as envisaged by annexure B of the collective agreement. In regard to the suspension issue, the respondent submitted that it could not utilise the employee in an alternative position on account of the nature of the allegations against her.

- [6] The arbitrator saw his task as one to give effect to the words used by the parties in the collective agreement in their plain, ordinary and popular meaning. He went on to hold the following:

It is my view that by virtue of the Alnwick share having been signed by the parties to the collective agreement, it can only imply that the party is also intended to be bound by its provisions as part of the collective agreement, and more particularly the disciplinary steps envisaged in it. To this end, the provisions of clauses 6.3 to 6.11 cannot be read in isolation. In my view, what is envisaged and rightly so, is a process whereby an investigation would be initially conducted into allegations of misconduct as contemplated in step 2 of Annexure B. Depending on the nature of the investigations, clause 6.3 contemplates that these would be completed within three months from the time that the employer becomes aware of the allegations of misconduct. If however the investigation is not completed within three months for whatever reason, the employer is still entitled to institute disciplinary proceedings as long as steps in that regard within the six months contemplated in Annexure B

[7] The arbitrator went on to conclude that the plain, popular and ordinary meaning to be imputed in to 6.3 is that it be read together

with Annexure B and to the effect that the entire process from the time that the employer becomes aware of any allegations of misconduct, to the investigations and the commencement of the actual disciplinary proceedings, must fall within the six-month period

contemplated by Annexure B. Further, insofar as the limit on suspension to a period of three months was concerned, the arbitrator

observed that the employees had been suspended with full pay in August and issued with notices to attend a disciplinary hearing in December 2011. This was some two weeks outside the prescribed period. However, the employees had not shown what prejudice they had suffered as a result of the non-compliance (they were suspended on full pay) and in any event, the delay was not so unreasonable that it could be concluded that the first respondent had acted in flagrant disregard of the provisions of the agreement.

[8] In regard to Hlongwane, the arbitrator observed that the disciplinary process had commenced and that there was a dispute as to what caused the process to store. The reality, he remarked, was that the only remedy available to her in view of the factual disputes surrounding the reason the process of not being expedited was to order the respondent to complete it within a reasonable time. In the result, the first respondent was ordered to reconvene and finalise a disciplinary process in regard to Hlongwane within 30 days from the date on which the parties received the award.

[9] The applicant seeks to have the award reviewed and set aside on the basis that the plain grammatical meaning of paragraph 6.3 is that an employer is required institute proceedings within three months of becoming aware of the alleged misconduct. The applicant contends that the arbitrator came to a conclusion to which no reasonable decision-maker could have come by finding that it was open to an employer to conclude the investigation within six months.

[10] Further, the applicant contends that in view of the contradiction between paragraph 6.3 and Annexure B of the code, the arbitrator

ought to have taken steps to secure the leading of evidence from the parties who negotiated the agreement. Finally, and to the extent that the arbitrator held that the bargaining council had no jurisdiction to bar the first respondent from continuing with its disciplinary process, the applicant contends that this renders a dispute about the application an interpretation of collective agreements meaningless. In other words, a finding that the bargaining council had no powers to redress the situation that arose from the incorrect interpretation of the collective agreement would render any conclusions reached by the arbitrator academic.

[11] The dispute was referred to the second respondent (the bargaining council) on 8 February 2012. In its summary of the facts, the applicant stated that “Sedibeng D.M. not complying with clause 14.6 and clause 6.3 of the disciplinary procedures in the case of Tilly Hlongwane. The date on which the dispute arose is recorded as 13 December 2011. The outcome sought is ‘Upliftment of the suspension which has been overdue since 30 November 2011’; and ‘Disqualification of the disciplinary case against Tilly Hlongwane’.

[12] The nature of the dispute is captured in the arbitrator’s summary of the parties’ respective positions. Paragraph

[4] of the award reads:

The Union’s main contention was that in suspending and subsequently subjecting the two employees to a disciplinary enquiry, the respondent failed to adhere to the provisions of clause 6.3 and 14.6 of the agreement in that firstly, the employees were placed on suspension for a period of more than three months, contrary to the period of suspension contemplated in this clause 14.6, and secondly that the employees were subjected to discipline outside of the three months from the date upon which the employer became aware of the allegations of misconduct against them, and in further doing so, had not applied for condonation as contemplated in clause 6.3.

[13] It is clear from this formulation (and from the terms of the referral) that what the applicant sought was for Hlongwane’s

suspension to be uplifted, and for the disciplinary proceedings against her to be nullified. In other words, what the applicant

sought was the enforcement of the collective agreement.

[14] The dangers of conflating disputes about the interpretation and application of collective agreements and disputes about the rights that derive from a collective agreement were recently highlighted by the Labour Appeal Court. In *Hospersa obo TS Tshambi v Dept of Health KZN* (DA 1/2015, unreported, 24 March 2016) the court dealt at some length with this issue and held that the phrase ‘interpretation or application’ in s 24 is not to be read disjunctively and that the ‘enforcement’ of a collective agreement is not a facet of

‘application’. The court held that ‘the idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by section 24 is wrong. Section 23, which provides for the enforceability of collective agreements and section 24 need to be read together.

Together they create a legal edifice for the legal effect of collective agreements and certain disputes which take place about

them...’ (at paragraph [19] of the judgment).

[15] I am bound by the Hospersa judgment. To the extent that the applicant sought to have what on its own version amounted to a substantive unfair labour practice dispute determined by way of s 24, it was not entitled to do so. The award under review is effectively one in which the arbitrator refused to intervene in the matter of Hlongwane’s suspension (because she had been suspended on full pay and the disciplinary hearing was underway) and simply ordered that the disciplinary process be finalised within 30 days. Ideally, as I have indicated, the arbitrator ought to have determined that properly characterised, the dispute before him was one that concerned with an attempt to enforce the collective agreement and dismissed the claim on the basis that the substantive dispute between the parties was one that concerned Hlongwane’s suspension and disciplinary hearing. That being so, her remedies lay elsewhere. Be that as it may, the outcome of the arbitration hearing (which had the effect of dismissing the applicant’s referral) is not one that falls outside of a band of decisions to which reasonable decision-makers could come, and the review application therefore stands to be dismissed.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr R Daniels, Cheadle Thompson and Haysom Inc.

For the first respondent: No appearance

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Prepared on 13 October 2026 · Esheria