

SOUTH AFRICA / JUDGMENT

SAMWU obo Seanego v SALGBC and Others (JR 436/15) [2016] ZALCJHB 364 (27 September 2016)

[2016] ZALCJHB 364

COURT

Labour Court Johannesburg

BEFORE

A Steenkamp

CASE / FILE NUMBER

JR 436/15

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO : JR 436/15

DATE: 27 SEPTEMBER 2016

NOT REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

SAMWU obo Lesiba SEANEGO.....Applicant

And

SALGBC.....First Respondent

Diale NTSOANE N.O.....Second Respondent

MODIMOLLE LOCAL MUNICIPALITY.....Third Respondent

Heard: 24 August 2016

Delivered: 27 September 2016

Summary: Review – misconduct – fraud and dishonesty – employee alleged to have been complicit in changing wording of settlement agreement – not proven that employee had changed wording although he may have been aware of it – reviewed and remitted.

STEENKAMP J

Introduction

- [1] The applicant, Mr Lesiba Seanego (represented by his trade union, SAMWU), was an asset clerk employed by the third respondent, Modimolle Local Municipality. He was also the SAMWU branch chairperson. He was dismissed because of alleged misconduct in the form of fraud and gross dishonesty. He referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the first respondent). The arbitrator, Diale Ntsoane (the second respondent) found that his dismissal was fair. The applicant seeks to have that award reviewed and set aside in terms of s 145 of the LRA.

Background

facts

- [2] The employee occupied a position on post level 7. One of his colleagues was promoted to post level 6. (Level 6 is a higher post level than level 7). Together with five of his colleagues, he referred an unfair labour practice Dispute to the Bargaining Council. The parties reached a settlement agreement. Clause 2 of the agreement read as follows:

“That the respondent [the Municipality] will upgrade the above six applicants from their respective grades to grade 7 with effect from 1 July 2012. The implementation of this agreement shall take place on 1 February 2013.”

- [3] It is common cause that all six applicants were employed at grade 7. They understood the settlement agreement to have been that they would be upgraded to grade 6. But that is not how the settlement agreement read. Neither party asked for the agreement to be varied or rectified.
- [4] The provincial organiser of SAMWU, Mr Sam Ramphele, signed the settlement agreement on behalf of the employees. He gave it to the municipality’s labour relations officer, Mr Oupa Kwadi Moloto, to take it to the acting municipal manager to sign. He signed it. Moloto gave the applicant, Mr Seanego, a copy.
- [5] The applicant took the signed agreement to Polokwane to give it to SAMWU’s Ramphele. A few days later Ramphele returned to Modimolle. He testified that he could not get hold of Moloto. He gave the settlement agreement back to the applicant and told him to “submit it to the authorities”, i.e. Moloto. Instead, the applicant took it to the human resources department to be implemented.

- [6] At the arbitration, the applicant testified that he started hearing rumours about fraud in relation to the settlement agreement. The municipality did not implement it. Ramphele wrote to the municipality in these terms:

“Re: Settlement agreement: case number LPD 1010215

1. It has come to our attention that you have some doubts regarding the implementation of the agreement cited above.
 2. You are also victimising members, shop stewards regarding the same agreement.
 3. You know as much as we do that local shop stewards are not allowed to sign for any settlement and anything that has to do with the above settlement should be directed to the signatory.
 4. After the signing of the agreement I personally realised there was a fault i.e. that instead of upgrading from level 7 to level 6, the latter was cited as 7. This was just but a reasonable error that can be corrected as it is also supported by the referral to the Council hence I acted promptly.
 5. It has also come to our attention that you intent [sic] to discipline one of our shop stewards regarding same agreement.
 6. We therefore would like to inform you that we see this action as the declaration of war against the union as you already have stated in one of your meetings with workers that, I quote ‘SAMWU is nothing and they have never won a case and they will never win one’. We note here in that you were uttering the statements in the presence of IMATU which is our rival union in the sector.
 7. We therefore demand that your intentions against the union should be clear so that we know what we are dealing with. Please be informed that the suspicion you have against shop stewards regarding the settlement agreement in question is like you are barking at the wrong tree [sic].”
- [7] It is common cause that, when the applicant returned the settlement agreement to the human resources manager, Ms Phala, it had been altered to reflect “grade 6” instead of “grade 7”.
- [8] The Municipality alleged that the applicant, Mr Seanego, had a hand in changing the wording of the settlement agreement. It called him to a disciplinary hearing on the following allegations of misconduct:

“Charge 1

Fraud.

On or about the 21 January 2013 at Modimolle Local Municipality, whilst in the course and scope of your employment of Modimolle Local Municipality, you disobeyed Council and/or the Municipality and its collective agreement disciplinary procedure and code by unlawfully and intentionally making a misrepresentation to Human Resources Division and/or Manager Human Resource that there is a settlement between SAMWU obo Simon Makwana and others and the Municipality (LPD 101215), in which parties agreed to move clerks from Finance from post level 7 to post level 6, knowing that the settlement presented was false and caused prejudice to the Municipality in the amount estimated at R 121 000, 00. Your conduct violates clause 2.7.9 and 2.7.10 respectively of Annexure A of the disciplinary code. Your conduct constitutes gross fraud.

Charge 2

Gross dishonesty.

On or about the 21 January 2013 at Modimolle Local Municipality, whilst in the course and scope of your employment of Modimolle Local Municipality, you acted with gross dishonesty and without integrity by violating clause 2.7.5 of Annexure A of the disciplinary code, when you individually and/or collectively changed or amended the content of the original signed settlement agreement, by changing the number 7 to the number 6 in paragraph 2 of the settlement agreement. You made such changes without informing the Modimolle Local Municipality, a party in this matter. Your conduct was dishonest, disrespectful and therefore undermining the Municipality. Your conduct constitutes gross dishonesty.”

[9] At the internal disciplinary hearing the chairperson found that the employee had committed the misconduct. He was dismissed.

The award

[10] At the arbitration hearing, Ramphele testified that it was he – and not the applicant – who changed the wording of the settlement agreement.

[11] The arbitrator nevertheless found that the applicant had committed misconduct, i.e. misrepresentation and “individually and/or collectively” changing the agreement, amounting to gross dishonesty.

[12] The arbitrator accepted that there was no direct evidence to prove the allegation that the applicant had changed the settlement agreement. He considered, though, that the applicant would have committed fraud and would have been grossly dishonest if the evidence showed that he was aware that the agreement had been changed when he presented it to the municipality.

[13] Concluding on a balance of probabilities that the employee did know that the document had been altered, the arbitrator took the following into account:

13.1 Ramphele told the applicant to give the agreement back to Moloto; but Moloto already had a signed copy. Instead of returning it to Moloto, the applicant gave it to the human resources manager, Ms Phala, who was not a party to the agreement. The arbitrator concluded that he did so because Moloto – who was a party to the agreement – would have noticed the alteration, whereas Phala would not have been aware of it. That led to the inference that the applicant knew that it had been changed.

13.2 The applicant subsequently went to the Chief Financial Officer, together with other clerks, to make sure that the agreement would be implemented by the end of February 2013. The reason for mobilising the other clerks, the arbitrator found, was to exclude pressure on the CFO to have the agreement implemented before the alteration was noticed.

13.3 The applicant heard rumours about the fraudulent settlement agreement but he did not raise it with the people he was interacting with, i.e. Ms Phala, the CFO and Moloto. Instead, he called Ramphele in Polokwane, 100 km away. The inference is that he did not raise it with Phala because he knew that it had been altered.

[14] Taking these factors into account, the arbitrator found on a balance of probabilities that the applicant had submitted the altered settlement agreement knowing that it had been altered. His actions fell within the definition of fraud and dishonesty; and his dismissal was fair.

Review grounds

[15] Mr Venter, for the applicant, argued, in short, that the Municipality had not proven the misconduct on a balance of probabilities; and that the arbitrator's conclusion to the contrary was unreasonable and reviewable.

Evaluation / Analysis

[16] In considering the arbitrator's findings on the evidence before him, it is convenient to deal with the two allegations separately.

Charge 1: Fraud

[17] The allegation is, in short, that the employee made a misrepresentation to the Human Resources Department when he submitted the altered settlement agreement to Ms Phala.

[18] In order to prove that allegation, the municipality had to prove that the applicant knew that the agreement had been altered. The arbitrator drew that inference based on the evidence before him. I do not think that that conclusion was so unreasonable that no other reasonable arbitrator could have come to the same conclusion.

[19] Even if Ramphele had made alteration, as he confessed at the arbitration, the question is whether the applicant knew about it. The arbitrator's conclusion on a balance of probabilities that it did, is not unreasonable. It is improbable that he would have submitted the agreement to the human resources division without having read it; and the arbitrator reasonably raised the question why he did not submit it to Moloto.

[20] This aspect of the award is not open to review.

Charge 2: gross dishonesty

[21] The allegation that the applicant had to face at his disciplinary enquiry is vaguely worded. The municipality alleged that he “individually and/or collectively changed or amended the content of the original signed settlement agreement”.

[22] Given the evidence of Ramphele at the arbitration – that was accepted by the arbitrator – it cannot be said that the applicant individually changed the agreement. Ramphele changed it. Can it be said that the applicant was complicit in “collectively” changing the agreement?

[23] Ramphele’s evidence was unequivocal. He changed the agreement on his own. The arbitrator accepted that “no evidence was led to prove the allegation that the applicant changed or altered the settlement agreement”.

[24] In those circumstances, the arbitrator’s conclusion that dismissal was a fair sanction is not a reasonable one. In coming to that conclusion, he did not take into account that the municipality had not proven the misconduct complained of in charge 2.

Procedural fairness

[25] Procedural fairness was also in dispute. Neither the employee nor his trade union representative was present on the last day of the disciplinary hearing. But they were there on the previous occasion when the hearing was postponed; they submitted evidence in mitigation; and they did not query it at the time. The finding that the hearing was procedurally fair is not, in my view, reviewable.

Conclusion

[26] The arbitrator should have considered whether, in circumstances where the employee knew that the agreement had been altered, but he had not done so himself, dismissal was a fair sanction. He did not do so. That aspect has to be remitted to the Bargaining Council for a fresh consideration before a different arbitrator.

[27] With regard to costs, I take into account that there is an ongoing relationship between SAMWU and the Municipality. And the dispute is not finalised. I do not, in law and fairness, consider a costs order to be appropriate.

Order

[28] I make the following order:

28.1 The arbitration award under case number LPD 071402 dated 12 February 2015 is reviewed and set aside insofar as the arbitrator found that the municipality had proven the misconduct of the employee on charge two; and that dismissal was a fair sanction.

28.2 The finding on the misconduct complained of in charge one is not reviewable.

28.3 The dispute is remitted to the first respondent (the SALGBC) for an arbitrator other than the second respondent to consider afresh whether the employee had committed the misconduct complained of in charge two; and whether dismissal was a fair sanction.

28.4 There is no order as to costs.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R Venter

Instructed by Maenetja attorneys.

THIRD RESPONDENT: N C Malumbete of Malumbete & Makhubele attorneys.

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