

SOUTH AFRICA / JUDGMENT

SAMWU v Commissioner for Conciliation, Mediation and Arbitration and Others (JR 2355/2019) [2021] ZALCJHB 212 (26 July 2021)

[2021] ZALCJHB 212

COURT

Labour Court Johannesburg

BEFORE

Cassim

CASE / FILE NUMBER

JR 2355/2019

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 2355/2019

In

the matter between:

SAMWU
OBO MAKOE
GERMAN Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND
ARBITRATION First
Respondent
DAN
PRETORIUS
N.O. Second
Respondent
RAND
WATER Third
Respondent
Heard: 01
July 2021
Delivered: Delivered:(In
view of the measures implemented as a result of the Covid-19

outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 26 July 2021)

JUDGMENT

CASSIM, AJ

- [1] This is a review which very unfortunately and sadly reflects the state of affairs in the employment and legal environments. The applicant, a former employee of Rand Water, Makoe German (German), was charged in an internal disciplinary hearing on a number of charges, which his then employer contended amounted to misconduct. All of the charges, other than that of failing to carry out the instruction of the previous day, arose from a single event which took place on 23 March 2018 in the offices of Mr Dibate (Dibate) at the workplace. In my view, there was an unnecessary splitting of charges and, viewed in context, all the relevant facts surrounding the conduct of German amounted to German behaving dismally bad. In the internal disciplinary hearing, the chairperson, Lucas Shabangu (Shabangu), also concluded that charge 4 is linked with charge 3. On 8 November 2018, Shabangu considered that the employer had proven charge 1 which was failing to carry out or obey a lawful instruction. Charges 2, 3 and 4 related to the conduct of the employee in relation to Dibate on 23 March 2018. In essence, he failed to carry out a lawful instruction and in response thereto, unlawfully infringed the dignity of Dibate.
- [2] Shabangu's findings are dated 8 November 2018, German was on suspension since 26 March 2018 on full pay. On 14 January 2019, A Harripurshad considered an appeal lodged by German and found that Shabangu's decision was reasonable and the appropriate sanction was that of dismissal. This then resulted in the hearing before the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [3] On 3 September 2019, the arbitrator concluded that the dismissal of German by Rand Water was substantially and procedurally fair. It boggles the mind that at no stage did German take it upon himself to own up to his improper conduct and apologise to Dibate and his employer for his conduct. Had he done so, the position may well have been very different. At Rand Water he commanded a lucrative salary and other benefits. This I read in the papers as one of the mitigating factors German put up in explaining that he has not been fortunate to find employment in a comparative capacity. All this must have made him realise what he must do right in order to not lose his job. What is so alarming to me is that at no stage did his union, his union officials or the attorneys assisting the union nudge German to do what is right and show some remorse for his bad behaviour. That he conducted himself badly cannot be disputed. Advocate Phahane is correct in her submissions. German is unable to overcome the facts as deposed to by Dibate as to the events of 23 March 2018. Pretorius and Ms Mashego supported the version of Dibate. That was also the view of Harripurshad and

Msweli, who although called by the applicant supported the version of Rand Water that the applicant has conducted

himself badly. German entered Dibate's office on 23 March 2018. He was aggressive and refused to leave Dibate's office. He harassed and intimidated Dibate. He invaded Dibate's personality rights and impugned on Dibate's dignity. Dibate was the operations manager and his instruction to German to obtain the corrective action report and to work thereupon was a lawful and reasonable instruction.

- [4] In the review hearing before me, Mr Jabu Gwebu put up a sterling case on behalf of German. He argued that the commissioner got it wrong. German had visited the offices of Dibate at 07h00 to enquire to what extent he had failed to carry out corrective action on the report referred to him the previous day. Dibate, instead of engaging him, reacted in a high-handed manner and this caused the subsequent animosity, aptly termed by Gwebu as robustness. I used the phrase "aptly termed", because this reflected the line of reasoning of the case presented by Gwebu. Counsel for Rand Water demonstrated in argument, correctly so, that the conduct of German in entering the office of Dibate and the subsequent events as found by the commissioner reflected an individual who was not interested in adhering to the instruction, but instead confrontational, aggressive and intent on provoking Dibate. It is in this context that I find that there is no basis to interfere in the comprehensive, cogent and well-motivated findings of the commissioner. Even if I were to disagree, that would not suffice in a review.
- [5] The commissioner painstakingly allowed evidence and cross-examination on which, on the probabilities, there was no issue. He did this, I assume, in the interest of justice and fairness. But all this is a very costly exercise and resources are wasted. These resources include wasted money which could have been used to advance other opportunities and create job opportunities. The hearing, in my view, signifies a failure in a system which is meant to be equitable and yet to enhance job opportunities and not to destroy or diminish organs of state which rely on the public purse to survive. Other than my criticism that there was a splitting of charges, I can find no fault in the reasoning of the commissioner. In my view, there is nothing to suggest that, holistically speaking, he arrived at a decision which is not rational and justifiable. On the contrary, he showed enormous patience and professionalism in the manner in which he conducted himself and his award speaks for itself.
- [6] German must take responsibility for his actions. Rand Water, like any other employer, cannot be expected to put up with conduct of the nature which German displayed on 23 March 2018. After 23 March 2018, he had ample opportunity to demonstrate that his conduct, in the heat of the moment, was not justifiable. Instead, he resisted the internal disciplinary hearing. The matter should have died at that stage, by him simply acknowledging wrongfulness, showing remorse and indicating a path of reform. Instead, he denied wrongful conduct and the rest is history.

[7] It is worth mentioning that on 26 November 2018 the internal chairperson, Shabangu, pointed out that "Mr Makoe does not see anything wrong with his bad behaviour and disrespect, and there is a high possibility that this kind of bad behaviour shown my Makoe and continue in future to his manager, Dibate, which can be very catastrophic if appropriate action is judgment of the panel in appointing the fourth respondent in these proceedings must be respected. The commissioner adopted the correct process and properly determined the issues in dispute.

[10] In the result, the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

N. Cassim

Acting Judge of the Labour Court of South Africa

Representatives:

For the applicant: Adv. AJ Gerber

Instructed by: SAPU

For the respondent: Ms MM Ntsoane

Instructed by: MM

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Prepared on 12 October 2026 · Esheria