

SOUTH AFRICA / JUDGMENT

Shevel v CCMA and Others (C854/16)

[2017] ZALCCT 69 (15 December 2017)

[2017] ZALCCT 69**COURT**

Labour Court Cape Town

BEFORE

A J Steenkamp

CASE / FILE NUMBER

C854/16

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA****HELD****AT CAPE TOWN****CASE****NUMBER: C 854/16****Not****reportable****Of****interest to other judges****In****the matter between:**

DANIEL
SHEVEL
and
CCMA
COMMISSIONER
M. NASH N.O.
Dr
E SHEVEL INC.

Heard:

30 November 2017

Delivered:

15 December 2017
SUMMARY: Son
dismissed by father. Dismissal fair. Review dismissed.
Applicant
First respondent
Second respondent
Third respondent

JUDGMENT

STEENKAMP J:

Introduction

[1] Communio mater rixarum est,[1] the maxim has it. But in this case, it may have to be amended to conductio operis pater rixarum est. The dispute concerns a father dismissing his son, whom he employed. The son referred an unfair dismissal dispute to the CCMA.[2] The arbitrator[3] found the dismissal to be fair. The son, Mr Daniel Shevel (the applicant) seeks to have that award reviewed and set aside.

Background**facts**

[2] Dr Elliot Shevel built up a medical practice known as The Headache Clinic in Parktown, Johannesburg, from 1992. He employed his son, Daniel, for some 16 years. This would lead to untold family conflict and more than headaches on both sides.

[3] Daniel holds a Business Science degree and an MBA. He has no medical qualifications. But his real passion is surfing. So he joined his father's business (Dr E J Shevel Inc, the third respondent) around 1998, but he did not live and work in Johannesburg. He lived in Kommetjie where he could surf the big waves of Outer Kom, Crayfish Factory and other iconic surf sites. He used a web-based product that enabled him to handle the administration of the business remotely.

[4] Daniel was made a director of the business or practice of Dr E J Shevel Inc. in 2005. But he resigned as a director soon afterwards,

because, not having a medical qualification, he could not act as director. Since then Dr Elliot Shevel has been the sole director and shareholder.

[5] Daniel registered a new entity, Migraine Research Institute (Pty) Ltd [cleverly abbreviated as MRI] in 2008. He was registered as the sole director of MRI. Despite the name, MRI did not do any medical research – it was, in fact, the administrative arm of The Headache Clinic (the commercial name under which Dr E J Shevel Inc. practises).

[6] The Clinic paid Daniel a salary. It deducted Unemployment Insurance Fund contributions, tax and other statutory deductions. Daniel also acted as a notional partner in the business and shared in the profits. He enjoyed additional benefits such as a company credit card.

[7] Things started falling apart around 2014. A family feud ensued between Daniel, on the one hand, and his father, his mother, his brother Michael (also employed by Dr Shevel) and his sisters on the other hand.

[8] A number of incidents led to Daniel being suspended on 27 October

2015. He says that they arose because he was concerned about possible malpractice and about the safety of patients; Dr Shevel disputes the motivation. Be that as it may, on 19 November 2015 he was called to a disciplinary hearing to face the following allegations of misconduct:

“Charge 1: Gross insubordination in that you made death threats to Dr E Shevel, the director of The Headache Clinic.

Charge 2: Gross insubordination and misconduct in that you attempted a hostile takeover in the business.

Charge 3: Gross insubordination in that you prevented Dr Shevel from attending at the clinic and resulting in patients not being attended

to despite having scheduled appointments.

Charge 4: Gross insubordination in that you have undermined the authority and position of Dr E Shevel including but not limited to locking the office door of Dr Shevel and not allowing him access to the office.

Charge 5: Gross misconduct in that you have been involved in the incitement of staff to embark on an illegal strike and threatening of the staff and not playing any role in convincing the staff to return to work.

Charge 6: Gross misconduct in that you have removed property belonging to the clinic without authorisation and that you have failed to return same [sic] despite demand.

Charge 7: Gross misconduct in that you have attempted to use the email of certain staff members without authorisation whilst you were on suspension.”

[9] An independent chairperson, Adv Mark Meyerowitz of the Johannesburg Bar, chaired the disciplinary hearing.

[10] Meyerowitz proceeded from the uncontroversial premise that an employee owes a duty of good faith to an employer.[4] He accepted that, despite Daniel’s protestations about his role as CEO, full control of The Headache Clinic could not be wrested away from Dr Elliot Shevel as sole director and shareholder. Dr Shevel is personally liability for the actions of the company, being a personal liability company.

[11] He then dealt with Daniel’s justifications for his actions. Daniel denied attempting a “hostile takeover” but nevertheless admitted that, due Dr Shevel’s alleged malpractice, he had taken it upon himself to stop Dr Shevel from

treating patients and to deny Dr Shevel any control over the operational and financial aspects of the business. Daniel argued that

he had acted in the best interests of the patients and of the business.

[12] Meyerowitz noted that Daniel has no medical training or expertise. Accordingly, it was unlikely that he knew better than his father how to treat patients. And if he had a genuine concern about his father's abilities, he should have reported him to the Health Professions Council of South Africa (HPCSA). [Daniel did eventually report his father to the HPCSA, but at the time that the matter was heard in this Court that body had found no wrongdoing].

[13] Insofar as Daniel purported to act in the best interests of the business, the chairperson found, he had no authority to contradict

the wishes of Dr Shevel as sole director and shareholder.

[14] Meyerowitz then dealt with each of the allegations and found that Daniel had committed the alleged misconduct. He recommended summary dismissal. Dr Shevel dismissed him on 8 December 2015.

Death threats

[15] In a series of acrimonious text messages between Daniel and his brother, Michael, on 18 October 2015 – some of them while

Michael was at a strip club, Mavericks – Daniel said, amongst others, the following:

“Elliot’s license and his ability to earn will be removed fast.”

“He looses [sic] his license tomorrow if he fails to comply Michael.”

“”He’s going to die in jail Michael”.

“Your father will die in Jail”.

Michael responded, “Calm the fuck down. You are behaving like a lunatic. Stop throwing knives. Chill the fuck out man”.

Daniel’s reply was: “It’s not a knife Michael. It’s a hollow point.”

The exchange deteriorated further: “And you threw the first knife”.

“Cunt”.

“Comply or die”.

“And tell your retard of a father that fraud forgery and drug trafficking prescribe in 20 years”.

“So take your water pistol off the table before you cop a full metal jacket in the forehead”.

[16] This display of filial and fraternal affection led Meyerowitz to conclude that – whether it was meant metaphorically or literally – it constituted gross insubordination. (At arbitration, the arbitrator disagreed -- he accepted that the tone of the messages was of threatening nature but not to the extent of constituting a death threat. He found that it was used metaphorically

to describe how serious Daniel was about his threat to report Dr Shevel to the HPCSA. The arbitrator disagreed that this constituted

misconduct or that the employer had proven the misconduct).

Gross insubordination: attempting a hostile takeover

[17] Meyerowitz found that, on the evidence at the disciplinary hearing, it was not disputed that the employee attempted to take control of the business and deny Dr Shevel managerial control.

[18] His only defence was that he was entitled to take control of the company because of the allegations of medical malpractice against Dr Shevel. But he is not a medical professional and was unable to unilaterally determine whether Dr Shevel was guilty of medical malpractice. That did not entitle him to attempt to wrest control of the company away from Dr Shevel.

[19] Meyerowitz noted that, at the hearing, the employee once again argued about the terminology used in the charges. Wally admitted attempting to take control of the business he said that it was not a “hostile takeover” within his own definition of the term. Meyerowitz disagreed. He believed that the attempted takeover was “hostile” in the sense that the employee engage in aggressive tactics and language. For example, he told Dr Shevel to “comply or die” and he called Dr Shevel and Michael “a dumb arrogant bunch of cunts”.

Gross insubordination: preventing Dr Shevel from working.

[20] Daniel admitted to locking Dr Shevel’s office and preventing him from entering the clinics premises. He also admitted to threatening to report Dr Shevel to the HPCSA if he arrived at the clinic without being “authorised” by Daniel. Meyerowitz

found that, by preventing Dr Shevel from running his own company, the employee committed gross insubordination.

Gross misconduct: inciting staff to strike

[21] It is common cause that the staff embarked on an unprotected strike. On 28 October 2015 the employee sent a draft “strike letter” to Nicole Smith (one of the clinic’s employees) in anticipation of the strike. He told that she could change the letter if she wished, but that whoever agreed with the final contents should sign it. Although the letter contained various demands by staff members, it actually threatened mass resignation rather than strike action. Nevertheless, it is common cause that, a few days later, a large contingent of the staff members embarked on an unprotected strike. Daniel did nothing to stop it; instead, he told

the disciplinary hearing that he felt that the staff was doing the right thing. Meyerowitz found that that constituted a manifest breach of the duty of good faith he owes to his employer and thus gross misconduct.

Gross misconduct: theft of company property

- [22] Daniel admitted to removing certain backup computer discs from the company server and, in doing so, he actually broke the metal security housing in which the discs were kept. He said that he was entitled to do so because he wanted to send them to the HPCSA. Meyerowitz found that, whatever the reason, Daniel had no right to take the law into his own hands. Had he felt so strongly about it, he could have approached the High Court for an Anton Pillar order^[5] authorising the sheriff to preserve the evidence in anticipation of referral to the HPCSA. Absent such legal authorisation, he simply committed theft.

Gross misconduct: an authorised use of emails.

- [23] When Daniel was suspended on 27 October 2015 he was prohibited from intercepting the communications of Headache Clinic staff, whether by telephonic, electronic or other means of communication. On 16 November 2015 the company's accounts manager, Ms Martha Musararwa, noticed that someone had accessed her email account over the weekend and had tried to forward an email from her account to Daniel's personal email address. It failed because the email was too large. At the hearing, Daniel admitted to accessing this email account. He happened to know the password. He said that it needed to do so in order to access information regarding Dr Shevel's alleged medical malpractice.
- [24] Meyerowitz found that the prohibition against Daniel intercepting emails without authorisation was reasonable. If he believed that he needed information he could have requested it. He did not. He hacked into the email and intercepted communications in direct contravention of his terms of suspension, thus committing gross misconduct.

Sanction

- [25] The chairperson found that Daniel's misconduct struck at the very heart of the trust relationship between employer and employee. He abandoned the duty of good faith he owed to his employer. He took the law into his own hands. He denied the employer's authority and tried to take over control of the business. The trust relationship had broken down irretrievably. The chairperson

recommended summary dismissal. The employer accepted that recommendation.

The award

- [26] Daniel referred an unfair dismissal dispute to the CCMA. Unsurprisingly, conciliation failed. He referred the dispute to arbitration. It came before the second respondent, Commissioner Melwyn Nash. It ran over five days. The arbitrator found that the dismissal was substantively and procedurally fair.

[27] Daniel had referred two further disputes to arbitration, and they were consolidated with the unfair dismissal dispute:

27.1 whether he was entitled to a statutory leave payment; and

27.2 whether the employer had committed an unfair labour practice, as Daniel alleged that the employer unilaterally cut his remuneration in terms of employment for the period of suspension.

[28] The arbitrator did not make a finding in respect of leave pay, but initially did find that the employer had committed an unfair labour practice in terms of s 186(2)(b) of the LRA. That is because the employer did not pay him part of his remuneration during suspension, comprising bond repayments made by the employer for Daniel. That amounted to R24 061, 76. He ordered the employer to pay Daniel that amount. In a subsequent variation ruling, the arbitrator ruled that the employer had not committed an unfair labour practice. The finding that Daniel had not been paid his full remuneration while on suspension was an error. The bond repayments had in fact been made.

Grounds of review

[29] The employee, who was initially represented by attorney Justine del Monte and by counsel, chose to represent himself at the hearing of the application. He raised a number of vague and wide-ranging grounds of review. His main bone of contention was that he did not have the intention to commit misconduct; he saw himself as a “managing senior partner” rather than a “subordinate employee”. But the fact is that he was an employee. He referred an unfair dismissal dispute and an unfair labour practice dispute to the CCMA qua employee. And in his oral argument before court, he conceded that he was an employee.

[30] As an overarching review ground, the employee submitted that the Commissioner did not apply his mind to the evidence before him and that the Commissioner’s conclusion was so unreasonable that no other arbitrator could have come to the same conclusion.[6]

Evaluation / Analysis

[31] In his oral and written submissions, the employee dealt with each allegation of misconduct separately; as well as the unfair labour practice complaint and the claim for outstanding leave pay. It is as well to deal with the reasonableness or otherwise of the award under each of those rubrics.

[32] The arbitrator found that the employer had not proven this charge. There is no review or cross review on this finding.

Hostile takeover

[33] The arbitrator found on a balance of probabilities that there was sufficient evidence that Daniel was attempting a takeover of the business. He arranged the opening of a new bank account, sought advice as to how to go about a takeover, restricted Dr Shevel’s

access to the clinic, changed the locks to his office and encouraged workers to strike. It is clear that he wanted to side-line Dr Shevel completely.

[34] The employee argued that the arbitrator ignored the evidence. That is not the case. The arbitrator considered the evidence and came to a conclusion that another arbitrator could have reached on the evidence before him.

Incitement to strike

[35] The arbitrator found that Daniel did not dispute this allegation; instead he sought to justify it by saying that he was acting in interests of patients. The arbitrator noted that, if Daniel was concerned about patients, he could and should have reported Dr Shevel's alleged medical misconduct to the appropriate authorities rather than taking the law into his own hands.

[36] The arbitrator's finding is not so unreasonable that no other arbitrator could have come to the same conclusion.

Theft

[37] It was common cause that Daniel took patient files and backup discs from the clinic. Once again, he did not dispute this but try to justify it. The arbitrator found that, whether the clinic or a trust (the "Temporal Business Trust") was the owner, the probabilities show that Daniel had these items in his position and that he was not authorised to have them. That is a reasonable conclusion and not open to review.

Accessing emails

[38] It is common cause that the employer prohibited Daniel from accessing emails whilst on suspension. And it is common cause that Daniel did so. He committed the misconduct. The arbitrator's finding in this regard is not reviewable.

[39] Given the proven misconduct, the arbitrator found that the trust relationship between the parties had broken down completely. That is as clear as daylight; one need only read the email, WhatsApp and SMS exchanges between Daniel on the one hand and his father and brother on the other hand to see that that is beyond doubt. The arbitrator's finding that the sanction of dismissal was a fair one is a reasonable

conclusion.

Unfair labour practice

[40] The arbitrator initially found that the employer did commit an unfair labour practice. In a variation ruling, he ruled that it did not, as the employee had been paid his full remuneration while he was suspended. On review, the employee argues that he was entitled to profit share and a credit card facility as part of his remuneration when he was suspended.

- [41] In relation to profit share, the arbitrator found that the profit share agreement fell outside of the employment relationship; that it was discretionary, and that it did not form part of his remuneration.
- [42] This conclusion was not so unreasonable that no other arbitrator could have come to the same conclusion. It appears from the evidence that payment of the profit share was discretionary and dependent upon the profitability of the clinic from time to time. Dr Shevel's evidence at the arbitration was that, during the period of employment addressed in the unfair labour practice dispute, no bonus will profit share was declared. Daniel could not refute this evidence.
- [43] As far as the credit card is concerned, the arbitrator also found that it does not form part of remuneration. That is not an

unreasonable finding. Neither the profit share nor the credit card was included in Daniel's remuneration for tax purposes. He cannot have his proverbial cake and eat it.

Leave pay

- [44] Daniel made the rather astonishing claim that, in 16 years, he had never taken leave; this despite the common cause fact that he went on surfing holidays to Mozambique and Sri Lanka. He claims that this was not leave as he had access to his email and telephone and that he worked while he was there.
- [45] The arbitrator found this version to be improbable. However, given the manner in which Daniel performed his functions, the arbitrator noted that it was practically impossible to establish whether any leave was due to him. He found that there was insufficient evidence to make any finding on this issue; and he pointed out that, if Daniel wished to pursue this claim, he could do so through the Department of labour. That conclusion is not so unreasonable that no other arbitrator could have come to the same conclusion.

Conclusion

- [46] Applying the test in *Gold Fields*,^[7] the arbitration award is not open to review.
- [47] The arbitrator gave the parties a full opportunity to have their say in respect of the dispute – in fact, the arbitration ran over five days.
- [48] The arbitrator correctly identified the three disputes he was required to arbitrate. He understood the nature of those disputes. He dealt with the substantial merits of each of the disputes. And his ultimate decision was one that another decision-maker could reasonably have arrived at based on the evidence.
- [49] Both parties asked for costs to follow the result. The relationship between them has completely broken down. I see no reason to differ.

Order

The application for review is dismissed with costs.

Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES APPLICANT: In person. THIRD RESPONDENT: Steven Sachs of Bagraim Sachs attorneys.

- [1] Co-ownership is the mother of disputes.
- [2] The Commission for Conciliation, Mediation and Arbitration (the first respondent).
- [3] Mr Melwyn Nash (the second respondent).
- [4] Cf Volvo (Southern Africa) (Pty) Ltd v Yssel 2009
- (6) SA 531 (SCA).
- [5] Referring to Shoba v OC Temporary Police Camp Wagendrift Dam 1995 (1) SA 1 (A).
- [6] i.e. the test set out in Sidumo v Rustenburg Platinum Mines Ltd [2007] 11 BLLR 1097 (SCA) and further articulated in Herholdt v Nedbank Ltd [2013] 11 BLLR 1074 (SCA) par 25 and Gold Fields Mining SA Ltd (Kloof Gold Mine) v CCMA [2014] 1 BLLR 20 (LAC).
- [7] Above par 20.

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