

SOUTH AFRICA / JUDGMENT

Transnet Port Terminals v Sonqishe and Others (D765/2022) [2024] ZALCD 27 (20 August 2024) [2024] ZALCD 27

COURT
Labour Court Durban

BEFORE
Allen-Yaman

CASE / FILE NUMBER
D765/2022

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Source record

IN
THE LABOUR COURT OF SOUTH AFRICA, DURBAN
Case
No: D765/2022
Not
Reportable
In

the matter between:

TRANSNET
PORT TERMINALS
(A
DIVISION OF TRANSNET SOC LTD)
Applicant
And
YONELA
SONQISHE
First
Respondent
TRANSNET
BARGAINING COUNCIL
Second
Respondent
BESS
PILLEMER N.O.
Third
Respondent

Heard: 21 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 20 August 2024.

JUDGMENT

ALLEN-YAMAN J

Introduction

- [1] The first respondent's dismissal by the applicant having been found to have been substantively and procedurally unfair the third respondent awarded her reinstatement retrospective to the date of her dismissal. The applicant applied to review and set aside the award. In the event of such an order being granted, it sought further orders, in the alternative, that the award be substituted with an order that her dismissal be found to have been substantively and procedurally fair, or that the dispute be remitted to the second respondent to be determined de novo before a commissioner other than the third respondent.
- [2] The application was opposed by the first respondent.

Background

- [3] In 2020 the first respondent was called to attend a disciplinary hearing to determine the veracity of the applicant's allegations that she had committed gross misconduct,
- '1. Gross dishonesty in that in November and December 2019 you made a false submission to the company by submitting fraudulent sick notes.
2. Fraud in that on November and December 2019 you submitted a false sick note with the intent to defraud the business, which resulted in you being paid sick leave.'
- [4] The charges emanated from three medical certificates which the first respondent had submitted to the applicant, ostensibly in substantiation of her prior absences from the workplace. These absences were alleged by her to have been occasioned, firstly, by her need for family responsibility leave and, thereafter, by her inability to perform her duties on account of illness. The medical certificates in question were dated 4 November, and 17 and 23 December 2019 ('the medical certificates'), and each, on the face thereof, had been authored by one Doctor M T Umar. The first recorded that the first respondent's minor child had been examined on 4 November 2019 at 09:40. Where space was allocated for the provision of additional information concerning the cause of the incapacity, the author thereof indicated, 'Family Responsibility: Yonela Sonqishe.' The second and third both indicated that the first respondent had been examined at 09.30 and that she had been

declared unfit to perform any duties on the day of each, her inability to have done so having been attributed to her then having suffered from bronchitis

- [5] Suspicions concerning the authenticity of the medical certificates led the applicant to cause an investigation to be conducted,

initially by Mr Kwenza Radebe and thereafter by Ms Sithembile Khaba.

- [6] Mr Radebe, the applicant's National Employer Relations Manager testified that one of the applicant's payroll officers had drawn his attention to another medical certificate attributed to Dr Umar which had been submitted by another employee, but which appeared to have been tampered with. As Mr Radebe was familiar with the address attributed to Dr Umar on the medical certificate he attended those premises where he established that Dr Umar had not practiced from those premises for some four years. Through enquiries directed to the Health Professions Council of South Africa he established that Dr Umar was then employed at King Edward Hospital. Upon contacting the person whom he understood to be Dr Umar (telephonically and by email) he was informed that the first respondent was unknown to him and nor had he authored any of the medical certificates.

- [7] Ms Khaba, an investigator employed by ICAS Southern Africa, contracted to the applicant, conducted a similar investigation and arrived at a similar conclusion. Her findings were reflected in the report prepared by her,

'The medical certificates submitted for verification were deemed invalid, based on current available information obtained through the verification process.

It has been confirmed by Dr M.T. Umar that all 3x medical certificates submitted for Miss Yonela Sonqishe are invalid. The details on the sick certificates have incorrect contact details including the email address which also proves that the medical certificates are fraudulent, therefore this matter has been taken to HPCSA for investigation by Dr M.T. Umar.'

- [8] When she was initially called upon to respond to the conclusion which had been reached that the medical certificates were fraudulent, the first respondent indicated that she had been ill, had obtained sick notes, and had no knowledge of whether the doctor in question had issued fraudulent or genuine sick notes.
- [9] The first respondent was duly charged as aforesaid, found guilty of both acts of misconduct alleged, and was dismissed on 3 June 2020. The award issued by the third respondent pursuant to her having challenged the fairness of her dismissal by way of referral to the second respondent is that which forms the subject matter of the present review application.

Analysis

- [10] The applicant's first challenge to the award pertains to the manner in which the third respondent dealt with certain hearsay evidence which had been placed before her, being the statements attributed by the applicant to Dr Umar. In regard to this aspect it was the

applicant's case, firstly, that the third respondent failed to apply correctly the factors which she was enjoined to apply in terms of s3 of the Law of Evidence Amendment Act, 1988 when determining whether such evidence was to be admitted. Secondly, the applicant took issue with the timing of her decision to refuse its admission, such decision having been reflected in the award, rendering the applicant unable to deal with the consequences thereof and thereby depriving it of a fair hearing.

- [11] As was correctly identified by the third respondent, s3 of the LEAA provides for the circumstances in which a trier of fact may admit hearsay evidence, such circumstances constituting exceptions to the ordinary prohibition against such admission. Having done so, and by consideration of the evidence presented, she assessed each of the factors she was enjoined to consider. In the result she concluded that,

‘There was no good reason for not calling Dr Umar and the fact that he was not called renders his evidence inadmissible as it is not in the interests of justice that the Applicant be denied the opportunity of challenging his evidence by cross-examination.’

- [12] Nothing stated by the applicant in its founding affidavit in support of its contention that the third respondent ought to have found other than she did constitutes anything more than an expression of its disagreement with the third respondent's conclusions. In consideration of the basis upon which the findings and decisions of decision makers in the position of the third respondent may be subjected to review, in particular those findings and decisions which involve the exercise of a wide discretion, this court cannot find that the applicant made out a case for the substitution of her decision to exclude the hearsay evidence.

- [13] The further issue raised by the applicant, was premised on the principle established by the Labour Appeal Court in *Exxaro Coal (Pty) Ltd v Chipana and Others* (2019) 40 ILJ 2485 (LAC),

‘The timing of the ruling and the Commissioner's relative passivity during the arbitration when the hearsay evidence was being adduced is not consonant with a commissioner's duty to determine a dispute between parties fairly, or quickly. If the issue of admissibility of the evidence had been addressed promptly when it was sought to be adduced or adduced, the ruling in respect thereof would not only have assisted both sides to know what the ambit of the cases were they had to meet respectively, but could possibly have led to a quicker and cheaper resolution of the dispute.’

- [14] The exclusion of the hearsay evidence which had been attributed to Dr Umar occurred within the award, at a time when neither the applicant nor the first respondent had an opportunity to deal with the matter. This does not however, in the circumstances of the present case, render the award reviewable. This is so for the reason that, even if the third respondent had admitted the hearsay in terms of s3 of the LEEA, or had timeously excluded it and the applicant had subsequently unequivocally established that the medical certificates were not authentic through the direct evidence of Dr Umar, this would not have affected her ultimate conclusion that the dismissal of the first respondent had been substantively unfair.

[15] The reason for this lies in the nature of the misconduct in respect of which the first respondent had been alleged to have perpetrated, an issue which the third respondent had correctly identified. The first respondent was not alleged to have failed to have provided a valid medical certificate; she was alleged to have perpetuated a fraud on her employer. To render herself guilty of the commission of fraud entailed an intention on her part to deceive the applicant.

[16] The applicant's assertions that upon it having been established that the medical certificates were false the 'natural

inference' which followed was that the first respondent had acted with fraudulent intent, and that her explanation to the

contrary was 'obviously contrived and implausible.'

[17] The first respondent's version remained consistent since the issue was first raised, to which she then responded,

'At all relevant times, I was under the impression that the medical practitioner was legitimate and was authorized to practice in the field of medicine and I had no suspicions that he is not a medical practitioner nor did he give out fraudulent sick notes.

At no stage was I given a reason by the medical practitioner to doubt his skills, expertise and or abilities as a medical practitioner, thus I had no knowledge that the medical practitioner was giving out fraudulent sick notes.

I humbly request that the company should not discipline me as I could not have foreseen that the sick notes were fraudulent as I have been treated by the said medical practitioner more than once. When I was treated by the medical practitioner, I had no reason to doubt that the medical practitioner is in fact not a medical practitioner.'

[18] Not only did the applicant introduce no evidence to gainsay the first respondent's stated belief that she had consulted with a bona fide medical practitioner, but its own witness Mr Radebe accepted that she may have been duped,

'Ms Ciya: Judging by the high crime rate in this country all crime irrespective of which you have it do you think it is impossible for a person to be a victim of a bogus doctor?

...

Mr Radebe: Madam Chairperson I am going to respond to this question with the greatest utmost honesty. Madam Chairperson it is highly possible and when I looked at the sick note for the applicant let me speak about the applicant. I had that suspicion that this poor lady is a victim of some con artist out there.'

[19] As her version was neither gainsaid and nor was it inherently improbable, it was not unreasonable for the third respondent to have concluded that,

‘The other evidence measured against her evidence does not go far enough to establish the alleged fraud.’

[20] Her reasoning accords with that of the LAC in *Woolworths (Pty) Ltd v CCMA and Others* [2024] 8 BLLR 881 (LAC),

‘... The idea that an employee who happens to go to a doctor who is not trusted by an employer must be subjected to a disciplinary process

for using that doctor is troubling. At the very least, the employer should investigate their suspicions about the contraventions of standard operating procedures by that doctor and if the suspicions are well founded, the employees should be warned about using that particular doctor once some valid grounds have been established. ... It is even concerning that an employee who may unknowingly go to what appears to be a doctor’s normal medical practice and is booked off sick could be dismissed if it turns out that that doctor was either not qualified or unregistered. Ordinary people including workers surely cannot be expected to conduct an investigation into which doctor is qualified, which one is one suspension, and which one is for some or other reason not entitled to practice as a doctor.’[1] [2]

[21] In view of the fact that the third respondent’s finding that the applicant had failed to establish any fraudulent intent on the part of the first respondent, an essential element of the offenses for which she was dismissed, neither admission of the hearsay, or subsequent direct evidence in relation thereto could, in any event, have served to establish the first respondent’s guilt. The timing of the decision did not, accordingly, affect the outcome.

[22] In the result, the third respondent’s finding that the applicant had failed to prove that the first respondent had been guilty of the infractions alleged was within the bounds of that which a reasonable decision maker could have arrived at. The award accordingly does not fall to be interfered with and the application will be dismissed.

Costs

[23] Both parties asked for costs. Notwithstanding that the first respondent is to be reinstated and the employment relationship

between the parties to be revived, the first respondent is an individual litigant who has been both deprived of the opportunity to have earned an income as a result of her dismissal and contemporaneously been obliged to bear the costs of the present litigation. In these circumstances this court is of the opinion that fairness necessitates she be awarded her costs. Albeit that a request was issued that her costs include that of two counsel, this court does not find that the application was of sufficient complexity to have necessitated the utilisation of more than one advocate.

Order

1. The application is dismissed.

2. The applicant is ordered to pay the first respondent's costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Ms Ngcobo, instructed by Goldberg & De Villiers Inc.

First Respondent:

Mr W Kuboni with Mr N Cele, instructed by Malwane Attorneys

[1] At paragraphs 30 and 31

[2] This decision was delivered pursuant to the matter having been argued, however nothing contained therein necessitated that the

matter be re-enrolled for further argument

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