



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA12/19

In the matter between:

SOL PLAATJE MUNICIPALITY

Appellant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER MOLOI N.O.

Second Respondent

BOTHA COLLIN BERESFORD

Third Respondent

FRITZ LIONEL

Fourth Respondent

Heard: 27 May 2021

Delivered: Deemed to be 05 August 2021

CORAM: Davis JA, Coppin JA et Savage AJA

JUDGMENT

COPPIN JA

- [1] Following their dismissal by the appellant (“the municipality”) for misconduct relating to an air-conditioner owned by the municipality, the third and fourth respondents (referred to respectively as, “Mr Botha” and “Mr Fritz”) were successful in arbitration proceedings before the first respondent (“the

SALGBC”) where the second respondent (“the arbitrator”), in an award, ordered their reinstatement with full back-pay.

- [2] An application brought by the municipality to review the award was dismissed by the Labour Court (Mahosi J). This is an appeal against that order of the Labour Court (“the court *a quo*”). Leave to appeal having been granted on petition.
- [3] The arbitrator decided the matter on the version of the municipality, after, effectively, rejecting the version proffered by Messrs Botha and Fritz, through the testimony of Mr Botha. The ultimate issue before the court *a quo* was whether the arbitrator’s award, in which the arbitrator found, in essence, that certain of the charges of misconduct had not been proved against them, respectively, and their dismissal was not appropriate, fell within the limits of reasonableness.
- [4] We were informed from the bar that since the lodging of the appeal, Mr Fritz had sadly passed away. Though no notice of substitution was delivered and nobody officially represented his estate at the hearing before us, Mr Botha’s legal representative, attorney, made submissions that were broad and also covered Mr Fritz.

The facts

- [5] The municipality is situated in Kimberley, Northern Cape. Until their dismissal, Messrs Botha and Fritz were employed as carpenters in a department or section of the municipality styled “the Directorate of Economic Development”.
- [6] On Wednesday, 6 May 2015, Mr Calvert, to whom Mr Botha reported, instructed Mr Botha, who was the supervisor of a crew which included Mr Fritz and about three others, to repair the roof, ceilings and eaves at the Floors Community Hall in Kimberley (“the hall”).
- [7] When Mr Calvert revisited the site the same day he found Mr Botha and his crew dismantling an air-conditioner fixed to the roof of the hall. He stopped

and admonished them and told them that their conduct could result in disciplinary action being taken against them.

- [8] Later on that same day Mr Bitterbos, a security official of the municipality, found Mr Botha and his crew with the municipal vehicle, on which the parts of the air-conditioner had been loaded, outside and close to the premises of MM Scrapyard. When he confronted Mr Botha, the latter informed him, *inter alia*, that Mr Calvert had given them permission to dismantle the air-conditioner, and explained that they were busy with “a spin” (a slang term, implying that they were in the process of making a deal in respect of ill gotten things).
- [9] Mr Bitterbos reported this to Mr Calvert, who came to the scene. The vehicle together with the parts were then taken to the premises of the municipality where it was to be secured. Although Mr Calvert denied authorising Mr Botha and his crew to dismantle the air-conditioner, he took pity on them and decided not to lay criminal charges.
- [10] On Saturday, 9 May 2015, Mr Botha, accompanied by some of his crew, went to the municipal premises where the vehicle was kept and tried to first bribe and then, through threats and personal insults, coerce the security guard on duty, Mr Segwagwa, to give him access to the vehicle and the parts. Mr Segwagwa reported this to Mr Bitterbos. Although nothing had been taken on this occasion, about a week later Mr Calvert informed Mr Bitterbos that the parts had been stolen from where they had been kept and as a result a case was opened with the police.
- [11] The events of 8 and 9 May resulted in disciplinary action being taken against Mr Botha and his crew. They were charged with three counts of misconduct, which read as follows:

'Charge 1

It is alleged that you contravened clauses 1.2.3 and 1.2.5 of Annexure A of the South African Local Government Bargaining Council Disciplinary Procedure collective agreement. In that on or about Friday, 8 May 2015 you sold metal, copper pipes, pieces of the motor of the air-conditioner at Floors Community Hall to a scrap metal dealer in Kimberley. The estimated damage

to the cooling and heating system of the air-conditioner from the Floors Community Hall, which is the property of Sol Plaatje Municipality, is in the vicinity of R 200,000.

Charge 2

It is alleged that you contravened clause 1.2.4 of Annexure A of the South African Local Government Bargaining Council Disciplinary Procedure collective agreement. In that on or about Friday, 8 May 2015, you disobeyed a reasonable instruction from your supervisor, Mr F Calvert, who is the superintendent of the Maintenance Section by not fixing the roof and gutters of the Floors Community Hall, but rather opted to grind off pieces of the motor of the air-conditioner of the Floors Community Hall which is the property of Sol Plaatje municipality.

Charge 3

It is alleged that you contravened clauses 1.2.3 and 1.2.5 of Annexure A of the South African Local Government Bargaining Council Disciplinary Procedure collective agreement. In that on or about Saturday, 9 May 2015 you entered the premises of the employer, Sol Plaatje municipality workshop complex in Ashburnham with the intention to gain entry into the maintenance section building in order to get hold of the pieces of metal from the air-conditioner that was grinded off from the air-conditioner of the Floors Community Hall. The pieces of metal were conserved as proof by the employer in the Maintenance Complex and you therefore unlawfully intended to retrieve the pieces of metal out of the Maintenance Section Building in order to sell the pieces to a scrap metal dealer.'

[12] The disciplinary hearing was set down for 18 November 2015. On that day, the matter proceeded in the absence of Mr Botha and his crew, after they left the hearing with their union representative, without participating and despite being warned not to do so. After pleas of not guilty to all the charges were entered in respect of all of them, the presiding officer proceeded to hear the evidence adduced by the municipality. At the conclusion, the presiding officer found that Mr Botha and his crew (including Mr Fritz) were guilty as charged and that dismissal was the only appropriate sanction.

- [13] Mr Fritz and Mr Botha were respectively informed on 25 and 26 November of the outcome of the hearing; that they were dismissed with immediate effect; and that the last date for their remuneration was 25 November 2015. They were also informed of their right of appeal and that the disciplinary hearing had determined the extent to which they, respectively, were to be held accountable for the damage caused to the air-conditioner - Mr Botha for 45% and Mr Fritz for 15% of the damage.
- [14] Their union referred an unfair dismissal dispute on their behalf to the SALGBC. A certificate of outcome of the conciliation was issued on 12 January 2016, and at the request of their union the matter proceeded to arbitration before the arbitrator. This took place on 29 February 2016. Since Mr Botha and Mr Fritz had opted to be represented by a private attorney and elected no longer to be represented by their union and union representative, their hearing was separated from that of the other crew members. Their hearing proceeded and that of the other crew was postponed.
- [15] At the hearing, Messrs Calvert, Bitterbos and Segwagwa gave evidence on behalf of the municipality. Mr Fritz did not testify and it is recorded in the award that it had been agreed between Messrs Botha and Fritz that Mr Botha was to testify on behalf of both of them. In his evidence, Mr Botha denied any wrongdoing, and alleged that he had been given permission by Mr Calvert to dismantle the air-conditioner. He denied that they sold or intended to sell the parts to a scrap dealer, and ascribed their presence in the vicinity of the scrap dealer to coincidence, as they were there to drop-off one of the crew who had to get a taxi. Mr Botha also denied trying to bribe and then, coercing or threatening Mr Segwagwa in order to get access to the parts that were kept in the Maintenance section on 9 May, and ascribed his presence at the maintenance section to something rather innocuous. According to him, he had forgotten his lunch box and keys in the municipal vehicle and was there merely to retrieve those items.

The Award

- [16] In his award, the arbitrator found Mr Botha to have been an evasive and unreliable witness who did not hesitate to make up and adapt his testimony and version as circumstances suited him. The arbitrator, effectively, rejected Mr Botha's version and decided the matter on the version of the municipality adduced through Messrs Calvert, Bitterbos and Segwagwa. Notwithstanding, having analysed the evidence and the charges, the arbitrator concluded that Messrs Botha and Fritz were not guilty on charge 1, because it had not been proved that they sold the parts as alleged in the charge. According to the arbitrator, the finding of the chairperson of the disciplinary hearing that the respondents had attempted to sell the parts did not justify finding them guilty on charge 1, because that charge alleges an actual sale and not an attempted one.
- [17] According to the arbitrator, what Mr Botha had told Mr Bitterbos, namely that they were "busy with a spin" did not amount to the offence of selling the parts in question. The arbitrator found that in any event, a mere intent to sell did not amount to an attempt to sell, implying that the respondents could not even have been found guilty of an attempt to sell the parts.
- [18] In respect of charge 2, the arbitrator found that whatever instruction had been given by Mr Calvert, had been given to Mr Botha and not to Mr Fritz and that it is only Mr Botha who could have instructed Mr Fritz. Thus, according to the arbitrator, it could not be found that Mr Fritz had disobeyed the instruction given by Mr Calvert and that Mr Fritz's dismissal for that reason was "baseless and unfair". The arbitrator also seems to have made something of the fact that Mr Calvert had admonished Mr Botha about dismantling the air-conditioner, but had not instructed them to stop, although he concluded, ultimately, that Mr Botha had been rightly found guilty of this charge of misconduct.
- [19] Regarding charge 3, the arbitrator found that there was no basis in the evidence for finding Mr Fritz guilty of this misconduct. Once again the arbitrator found, in effect, that while it may have been proven that Mr Botha (and those accompanying him) intended "to get hold of the parts to sell to a scrap", the fact that there was no evidence that they actually got hold of the

parts and sold them to the scrap yard did not mean that misconduct on the part of Mr Botha had been proved. According to the arbitrator, proof of “bare intent” on its own did not justify the dismissal of Mr Botha.

- [20] The arbitrator rejected the argument made on behalf of the municipality that Mr Fritz and the other crew members were guilty of “derivative” or “team” misconduct in respect of charge 1. According to the arbitrator, because that charge (as worded) had not been proved, i.e. it had not been proved that they sold the parts to the scrap yard, neither Mr Botha, nor any of his crew could be found guilty of the misconduct alleged in that charge, let alone of derivative or team misconduct.
- [21] Consequently, the arbitrator found that Mr Fritz was not guilty of any misconduct and that Mr Botha was similarly not guilty of the misconduct described in charges 1 and 3, but guilty of the misconduct described in charge 2. The arbitrator further reasoned that the latter misconduct did not justify a sanction of dismissal and that there was no evidence suggesting the contrary.
- [22] The arbitrator, accordingly, concluded that the dismissals of Mr Botha and Mr Fritz, even though procedurally fair, were substantively unfair, and made the following award:

29.1 I find that the dismissal of Colin Botha and Lionel Fritz by Sol Plaatje Local Municipality on 30 November 2015 was procedurally fair but substantively unfair;

29.2 I order Sol Plaatje Local Municipality to reinstate Colin Botha and Lionel Fritz with effect from 30 November 2015 and to pay arrear salaries (with the necessary increments/adjustments as they may be entitled to) Colin Botha in the amount of R114 683-31 and Lionel Fritz in the amount of R62 150-83 by no later than 31 July 2016.

29.3 Colin Botha and Lionel Fritz must report for duty on 1 July 2016.

29.4 I make no order as to costs.”

The Review

- [23] The appellant brought an application in terms of section 145 of the LRA¹ to review and set aside the award. The grounds for review, *inter alia* and in brief, are the following: that the arbitrator had failed to appreciate that even though charge 1 alleged that the parts had been sold to the scrap yard and the evidence led by the municipality did not establish an actual sale, it did indeed prove an attempt to sell, or dishonest conduct on the part of Mr Botha and his crew in that regard; that the charges were wide enough to encompass such dishonest conduct; that the arbitrator had generally failed to consider the principal issues before him and had “evaluated the wrong facts and evidence”, while ignoring “pertinent facts and evidence”; as a result, the arbitrator came to a conclusion that a reasonable arbitrator would not have come to; and finally that, in any event, reinstatement was not appropriate because the municipality could not reasonably be expected to trust Mr Botha and his crew after what they did.
- [24] The application was opposed by both, Messrs Botha and Fritz. Mr Botha deposed to the opposing affidavit on behalf of both of them, while Mr Fritz deposed to a simple confirmatory affidavit. In his affidavit, Mr Botha defended the award, but also repeated his version of the events that had already been rejected by the arbitrator, and even though he did not seek to counter-review the award.

The Court a quo

- [25] The court *a quo* found that there was no merit in the municipality’s challenge of the award regarding the separation of the hearings, and nothing more needs to be said about that ground because the municipality did not persist with it on appeal. The court *a quo* further held that the arbitrator did not misconceive the nature of the dispute before him. According to the court *a quo*, the issue before the arbitrator “was whether, on the balance of probabilities, the employees committed the misconduct they were charged with.” The court found that the allegation, that the arbitrator misconceived the nature of the dispute, constituted an attack upon the arbitrator and that it was “unwarranted and uncalled for”; that the arbitrator had “considered the

¹ The Labour Relations Act 66 of 1995.

appropriateness of the sanction and had been reasonable in his assessment of the evidence before him and had reached a conclusion that any reasonable decision-maker would have reached on the issue of the probability of the versions placed before him". The court *a quo* also found that the municipality "has not established any basis upon which the court could find that the arbitrator's award was reviewable". Consequently, it dismissed the review application, but made no order in respect of the costs.

Summary of the argument on appeal

[26] The appellant argued, in essence, that it never set out to prove that the sale of stolen property had taken place; that its case was about the stripping of the air conditioner and the three charges of misconduct flowed from there. It contended that the arbitrator misconceived the law and the evidence on the point and that the arbitrator "incorporated irrelevant considerations and failed to appreciate the nature of the dishonest acts of the employees". According to the appellant, the probabilities point towards a reasonable inference that Mr Botha and his crew had the intention of misappropriating the parts of the air conditioner that they had stripped for their own gain. Reference was made to this Court's decision in *Aquarius Platinum (SA) (Pty) Ltd v Commission for Conciliation Mediation & Arbitration & others*² regarding what the arbitrator ought to have focused on, and also to this Court's decision in *Head Department of Education v Mofokeng & others*³ and others for the principle that an arbitrator ought to consider all relevant facts.

[27] The argument on behalf of Mr Botha (and by extension, on behalf of Mr Fritz) advanced by the attorney, went beyond merely defending the reasonableness of the award and extended toward defending the credibility of Mr Botha and the acceptability of his version, notwithstanding that the arbitrator had made adverse credibility findings against Mr Botha and had, effectively, rejected his version, and no counter-review had been brought in that regard.

Evaluation

² (2020) 41 ILJ 2059 (LAC).

³ *Head Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC).

- [28] The only grounds left for consideration are whether, it could be found reasonably that on the evidence led in respect of the charges, misconduct was proved on the part of Mr Botha and Mr Fritz in respect of the charges (in the case of Mr Botha charges 1 and 3; and in respect of Mr Fritz charges 1, 2 and 3); and whether that misconduct could reasonably have been found to have involved dishonesty, and whether the sanction of dismissal was the appropriate remedy in respect of the charges they could reasonably have been found guilty on.
- [29] It is trite that an arbitrator, or commissioner, must apply his mind to all the evidence, and that a failure to do so may constitute an irregularity if it shows a misconception of the true enquiry, or results in an unreasonable outcome.⁴
- [30] It has also been repeatedly held by this Court that there is a major difference between the wording of charges in criminal matters and that of charges in disciplinary proceedings, and that an unduly technical approach to the framing and consideration of the latter should be avoided.⁵ There is also authority in this Court that if the main charge of misconduct is not proved, but an attempt to commit such misconduct is proved, the employee may be found guilty of such an attempt on that same charge.
- [31] The arbitrator reasonably (if not correctly), rejected Mr Botha and Mr Fritz's version and decided the matter on the version proffered by the municipality. However, the arbitrator erred in his interpretation of the charges and seems to have adopted an overly technical approach in that regard and to have overlooked crucial facts/evidence that led him to unreasonable conclude that charges 1 and 2 had not been proven against Messrs Botha and Fritz.
- [32] It is clear on the accepted version that Mr Botha and his crew were not authorised to work on, let alone dismantle the municipality's air conditioner and strip its parts. They disregarded the instruction that they had been given.

⁴ See, *inter alia*, *Mofokeng* (above) para 30; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* [2014] 1 BLLR 20 (LAC); *Cusa v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC) paras 76 and 134; *Sidumo and another v Rustenberg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

⁵ See, eg. in *Pailprint (Pty) Ltd v Lyster NO and others* (2019 40 ILJ 2047 (LAC) para 18; *First National Bank Ltd v Language* (2013) 34 ILJ 3103 (LAC).

Their dismantling of the air conditioner was wrongful and unlawful having not been authorised. They brazenly did as they pleased. Having removed the parts, they transported them to where they were found, close to, or outside, the scrapyard.

- [33] When they were confronted by Mr Bitterbos, Mr Botha, either brazenly, or naively, hoping to entice Mr Bitterbos to partake in their scheme, informed him that they were there to make a deal to sell the parts. That was enough to establish an unlawful attempt to sell those parts. It was much more than mere intent. Mr Botha and his crew not only intended to strip and sell the parts but acted on that intention. Mr Bitterbos', and subsequently Mr Calvert's intervention, stopped them from fully executing their dishonest scheme.
- [34] The parts were confiscated and taken back to the municipal premises for safekeeping as evidence. Mr Botha tried to remove those parts from the municipal premises through dishonest means and by coercion and threats (which included swearing and personal insults).
- [35] Taking all the evidence into account the only reasonable inference to be drawn is that Mr Botha and his crew intended (unlawfully) to sell those parts for their own gain at the scrapyard after having removed them. They were caught in the process of attempting to do so. They acted in concert and their acts were not only without the authority of the municipality but were dishonest. Mr Botha's false versions about what they did, actually compounded matters. Mr Fritz's confirmation of those false versions also compounded his dishonesty.
- [36] In respect of charge 1, even though Mr Botha and his crew could not be found guilty of actually selling the parts they could have been found guilty of attempting to steal and sell the parts for their own gain. But more so, they could have been found guilty of contravening clauses 1.2.3 and 1.2.5 of the disciplinary code (as alleged in the charge), because clause 1.2.3 required all employees to perform their tasks and job diligently, carefully and to the best of their ability, and clause 1.2.5 required all employees to conduct themselves with honesty and integrity.

- [37] In respect of charge 2, Mr Botha was rightly found guilty of misconduct alleged there, but Mr Fritz could not escape liability on the basis that Mr Calvert had instructed Mr Botha, and had not instructed him directly. He was present when Mr Calvert gave the instruction and admonished them. Mr Fritz was or must have been aware that Mr Botha was bound to follow Mr Calvert's instruction and could not give his crew a contrary instruction. Finding Mr Fritz guilty of charge 2 was thus not "baseless and unfair". Clause 1.2.4 of the disciplinary code provides that "all employees should obey all lawful and reasonable instructions given by a person having the authority to do so."
- [38] Regarding charge 3, it is not clear from the evidence whether Mr Fritz was with Mr Botha when the latter went to the municipality's premises on 9 May. It could reasonably have been found that it was not proved that he had accompanied Mr Botha. On the other hand, Mr Botha's conduct there was nefarious and despicable. There is no reason to not accept Mr Segwagwa's version of what transpired there. His conduct was most certainly in breach of clauses 1,2,3 and 1.2.5. of the disciplinary code. That is what a reasonable arbitrator would have found.
- [39] Even though being found guilty of charge 2, on its own, did not warrant dismissal, the other charges were much more serious. The extensive damage caused to the municipality's property, the cost of replacing the air conditioner, the dishonesty, which was compounded by the false testimony of Mr Botha (and with which Mr Fritz agreed), was sufficiently serious to warrant dismissal. And that is what a reasonable arbitrator would have found in light of all the relevant facts.
- [40] The failure of the arbitrator to find accordingly is indeed a reviewable irregularity. The findings of the court *a quo* to the contrary are not correct.
- [41] It follows that the appeal must succeed. Taking the facts, the law and fairness into account, a costs order is not appropriate. There shall therefore be no costs order.
- [42] In the result, the following order is made:

42.1 The appeal is upheld;

42.2 The order of the Labour Court is set aside and substituted with the following order:

“1. The award of the second respondent, acting under the auspices of the first respondent, under case no. NCD12150 is reviewed and set aside and is substituted with the following:’1. The dismissal of Mr Collen Botha and Mr Lionel Fritz by the Sol Plaatje Local Municipality was both, procedurally and substantively fair. 2. There is no costs order.’”

P Coppin

Judge of the Labour Appeal Court

Davis JA and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Adv F Venter

Instructed by Van de Wall Inc.

FOR THE THIRD RESPONDENT: Ms Mkabayi

of Nobahle Mkabayi Attorneys