

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: PAS/2017

In the matter between:

NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY

Appellant

and

INDEPENDENT MUNICIPAL & ALLIED
TRADE UNION (IMATU) obo
JOHANNES TSHABALALA

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL

Second Respondent

NTOMBEKHAYA SESANI N.O.

Third respondent

Heard: 28 August 2018

Delivered: 03 December 2018

Summary: The employee was dismissed for having been involved in a physical altercation with a fellow employee - the Bargaining Council - finding that the employee was provoked and acted in self-defence - consequently holding that the dismissal was substantively unfair.

On review - the Labour Court finding - that the arbitration award was of the kind that a reasonable decision-maker could have made and consequently dismissing the review application filed by the employer.

On appeal- The LAC finding - employee's account, of how the altercation

unfolded, vacillated. The employee also gave conflicting instructions to his representative which brought his credibility and reliability into sharp focus.

The Court finding- that the employer established that the two employees engaged in a fight in the presence of their subordinates, the intensity of which went far beyond mere "horse play". Having had regard to the facts- finding that the employee was the aggressor and could not have been provoked - further finding - that it was clear-that the two employees were equally to blame.

The Court held - that in our law every person is expected to control his/her temper. In addition, there is no obligation on an individual to accept a challenge. Either employee could have walked away from the scene. Not only to defuse the situation but also to report the event to the employer.

The Court finding - that the misconduct committed by the employee was sufficiently serious to warrant a sanction of dismissal regardless of his length of service and clean disciplinary record.

The Court concluding that the commissioner's award could not be said to be one that a reasonable decision-maker could have reached.

The appeal upheld - the order of the Court a *quo* set aside and substituted with an order, *inter alia*, that the dismissal of the employee was substantively and procedurally fair.

Coram: Phatshoane ADJP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

PHATSHOANE ADJP

[1] This is an appeal with leave of this Court against the whole of the Judgment and order of the Labour Court (*per* Lallie AJ) delivered on 17 June 2016, dismissing the application to review and set aside the arbitration award dated 09 July 2012 issued under Case No: ECD031225 by Commissioner Ntombekhaya Sesani ("the commissioner"), the third respondent, under the auspices of the South African Local

Government Bargaining Council ("SALGBC"), the second respondent.

[2] Mr Johannes Tshabalala, the first respondent ("the employee"), entered into employment with Nelson Mandela Bay Metropolitan Municipality ("the Municipality"), the appellant, on 10 November 1988. He and Mr Thomas Ndleleni were assistant superintendents at managerial level supervising a large number of employees. The employee was engaged in the Roads Section whereas Mr Ndleleni was employed in the Drain and Storm Water Section. The operations of the two sections were complementary and required these employees to work together on occasion which they refused to do.

[3] The employee and Mr Ndleleni had constantly been at loggerheads. Their longstanding conflictual relationship polarised workers in their respective sections into factions. According to Mr Tetry Holmes, the superintendent in the Drain and Storm Water Section and the two employees' immediate supervisor, the feud had a negative impact on service delivery. The Municipality unsuccessfully attempted to resolve their ongoing hostility to no avail. Mr Jeffrey Sawuli, an operation officer attached to the Roads, Storm Water, Infrastructure and Engineering Department, directed a letter to the two antagonists on 28 June 2011 cautioning them to desist from their unbecoming conduct and were further warned not to make contact with each other but only through their supervisor.

[4] On 02 August 2011 the employee and Mr Ndleleni were involved in a violent physical altercation which lasted approximately 15 minutes. They were separated with difficulty by their subordinates, Messrs Monde Meteza, Mkhululi Ziyokwana and Vuyisile Ngoza. Mr Ziyokwana explained that he, and indeed the others, found their two supervisors wrestling but not trading any blows. He told them that they were not supposed to fight at the workplace.

[5] The employee was notified around 04 November 2011 to attend a disciplinary hearing scheduled to take place on 18 November 2011 to answer to a charge that on 02 August 2011 he became involved in a physical altercation with a fellow employee, Mr Ndleleni, in contravention of Annexure "A" to the SALGBC Disciplinary Code which encapsulates the standard of conduct expected of the employees, in particular, Clause 1.2.9, which provide that the employees should:

"Refrain from any rude, abusive, insolent, provocative, intimidating or aggressive behaviour toward a fellow employee or member of the public."

[6] During the employee's disciplinary hearing he sought to enter into a plea bargain with the Municipality, by pleading guilty to the charge in exchange for a sanction of a final written warning valid for a period of six months, which was rejected. In the ensuing disciplinary enquiry he was found guilty • charged and dismissed on 17 January 2012. Mr Ndleleni was also dismissed on the same basis as the employee.

[6] Dissatisfied with the outcome of his disciplinary hearing the employee, assisted by his trade union, Independent Municipal and Allied Trade Union (IMATU), referred his alleged unfair dismissal dispute to the SALGBC for resolution through conciliation and arbitration.

[7] The employee explained, during the arbitration, that on that eventful day he instructed his team to remove some steel pipes from the storage room that was utilised by Mr Ndleleni. Ndleleni prohibited the team from carrying out the employee's orders and locked the storage room with a padlock. The employee says he reported the incident to Mr Holmes who failed to direct Mr Ndleleni to open the storage facility. He then took it upon himself to break open the lock to enable his full access. In the interim Mr Ndleleni accosted him, challenging him openly, while uttering offensive epithets. Mr Ndleleni bumped him on his shoulder causing his spectacles to fall. As he picked them up Mr Ndleleni struck him with a fist. He grabbed him to defend himself. He denied retaliating. He further disputed that the Municipality made sufficient attempts to resolve their unending feud.

[8] The commissioner found, in her assessment of the evidence, that *"there was no evidence from [the Municipality] of the [employee] physically assaulting or being in physical altercation with Mr Ndleleni."* She further found that the employee was simply reacting to an act of excessive provocation on the part of Mr Ndleleni. She opined, with reference to the purported provocation and the nature of the relationship between the duo, that *"any reasonable person would have reacted in the same manner [as the employee] did"*. She found the employee's version, that as a man it was not easy to walk away from a fight, to be reasonable. She was of the view that the employee was defending himself and therefore it would be hard to accept, under those

circumstances, that the altercation breached the relationship of trust.

[9] The commissioner found the Municipality's efforts, which were aimed at resolving the ongoing conflict, to have been insufficient. In her view, the employee's suggestion, that he be transferred to another section or department, was reasonable and had been rebuffed by the Municipality without any proper justification.

[10] Remarkably, the commissioner found that there was no altercation between the antagonists in the prelude to her assessment of the evidence, however, at the end of her analysis she stated: *"(f)t is evident from the evidence above that the {employee} was involved in an altercation however, the circumstances that led to such do not justify his dismissal."* Having regard to the employee's clean disciplinary record and thirty years of service she was of the view that the sanction of dismissal was too harsh and reinstated him into the Municipality's employ.

[11] The Municipality launched an application to review and set aside the arbitration award with the Labour Court on the grounds, *inter alia*, that the commissioner misconstrued the important aspects of the evidence; she failed to apply her mind to the Municipality's version and thereby perpetrating a gross irregularity in the conduct of the arbitration proceedings. It was contended that, had the commissioner adopted an appropriate and balanced approach to the evidence, she would have been compelled to conclude that the Municipality had discharged its onus of establishing that the dismissal was fair.

[12] The Court *a quo* was unpersuaded that the commissioner erred in finding that the employee had been provoked by Mr Ndleleni. It found the altercation of 02 August 2011 to have been preceded by Mr Ndleleni's conduct of locking up the storage room thereby making it impossible for the employee's team to comply with his instructions.

[13] The Court further found that the commissioner's error in finding that the employee did not retaliate was of no moment because the employee was not charged with assault but with having been involved in an altercation with Mr Ndleleni. The Court was of the view that *"an employee does not necessarily commit misconduct by being involved in an altercation because a victim of assault may also be involved in an altercation."* The Court held that the commissioner's finding, that the Municipality did

not adequately resolve the long standing conflict between the two employees, was beyond reproach.

[14] The Court concluded that the arbitration award was of the kind that a reasonable decision-maker could have made and consequently dismissed the review.

[15] Before us, the Municipality contended that the Court *a quo* erred by not finding that:

15.1 The employee and Mr Ndleleni had engaged in a physical altercation in which the employee enthusiastically participated and both had been fairly dismissed;

15.2 The brawl occurred after simmering tensions between the two which disrupted the operations of their departments after which they were warned to avoid further confrontation. It was argued that the brawl amounted to a fight which constituted a breach of the applicable disciplinary code and carried the potential sanction of dismissal;

15.3 The commissioner wrongly concluded that the employee's culpability was diminished because Mr Ndleleni provoked him and that the employee was acting in self-defence. These findings, it was contended, were contradicted by the employee's own evidence and was predicated on a misapprehension of the circumstances in which these defences may be raised in the workplace context.

15.4 The commissioner misconstrued the evidence in the following respects:

15.4.1 when she held that there was no evidence that the employee assaulted or was in a physical altercation with Mr Ndleleni.

15.4.2 when she found that the provocation had been excessive. She also erred in finding that the evidence by the employee, that he was provoked, was unchallenged and in making the observation that any reasonable person would have reacted as the employee did and that "as a man he could not walk away from the fight."

15.4.3 when she found that the employee was "a modest and honest

employee" whom the Municipality could trust and rely upon. In this regard, 'it was argued that the commissioner failed to make any credibility findings or assess the probabilities of the employee's version. he also ignored the deleterious and intolerable effect the feud had on the employer-employee relationship.

15.5.4 when she took the Municipality to task for not sufficiently intervening in the dispute between the two senior employees and failing to consider the practicability of an award of reinstatement.

[16] Mr Le Roux, for the employee, argued that Mr Ndleleni was the aggressor whose actions gave rise to the sustained attack on the employee which legally entitled him to defend himself. He further argued that there was insufficient evidence before the commissioner suggesting that the employee ought to have been found guilty of intimidation or assault. The fact that the employee may have hit Mr Ndleleni, in the course of defending himself, does not change the character of the incident, the argument went.

Analysis

[17] The review largely turned on whether the commissioner had correctly concluded that the employee was not involved in a physical altercation with his co-worker. It should therefore be determined whether the commissioner misdirect herself or not.

[18] The employee's account, of how the altercation unfolded vacillated. He also gave conflicting instructions to his representatives, which brings his credibility and reliability into sharp focus. To demonstrate this:

18.1 He pleaded guilty to having been involved in a physical altercation with Mr Ndleleni at the internal disciplinary hearing.

18.2 At arbitration, in his opening address, the employee's trade union representative submitted: *"but my instructions are that especially Mr Tshabalala's plea was that he doesn't deny that he was involved in a fight, but what he pleaded guilty to- what he thought he pleaded guilty to, [was] that he defended himself and in that process, by defending himself, that he also hit the other employee.....he thought he*

is being attacked and while forming that intension to defend himself, he thought to defend himself. is to hit Mr Ndleleni back and that's what happened."

18.3 In a sworn statement the employee made on 02 September 2011, approximately a month following the altercation, he said: *"..Mr Ndleleni was walking up and down carrying equipment while I was only standing and observing what was going on. The next moment Mr Ndleleni hit me with his left shoulder and I asked him what he was doing. He said that I could see what happened. Without saying anything I moved a little backwards and he hit me with his fist in my face to such an extent that my glasses fell on the ground but I immediately hit back. We kept on hitting each other until Messrs Mateza, Ziyokwana and Ngoza intervened and separated us."*

[19] Despite his guilty plea, his sworn statement, and opening remarks by his representative, when presenting his evidence at arbitration, the employee tried very hard to deny that he traded any blows with Mr Ndleleni. They merely *"clinched together"* because *"each one did not want to be hit by the other one."* He did not disavow what is set out in his sworn statement that he *"immediately hit back."* Instead he said what is contained in his statement was consistent with his evidence- in-chief. Under cross-examination he made a complete about-turn *by* recanting what he said in his sworn statement. He claimed that the security department that took his statement recorded it incorrectly: *"I didn't say we hit each other..."*

[20] As already alluded to, the Court *a quo* reasoned that it was unimportant that the commissioner erred insofar as she found that the employee did not hit Mr Ndleleni because, in any event, the employee was not charged with assault but with having been involved in an altercation.

[21] In an internal disciplinary enquiry a charge need not be meticulously drawn up as in a criminal court. As Le Roux & Van Niekerk say in their work *The South African Law of Unfair Dismissal* ¹:

'Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate w the offence found to have been committed

¹ PAK le Roux & Andre van Niekerk *The SA Law of Unfair Dismissal* (Juta & Co 1994) at 102.

may be imposed.' (My emphasis)

[22] it was sufficient for the employer to establish that the employee and Mr Ndleleni had engaged in a fight in the presence of their subordinates, the intensity of which went far beyond mere "horse play." This it did. Regardless of how one labels it, the evidence overwhelmingly shows that there was a fight or an intense physical altercation between the employee and Mr Ndleleni. What then remains to be considered is whether the employee was provoked which may ameliorate the sanction and/or acted in self-defence to which if established would exonerate him.

[23] It was not in dispute that, as a consequence of the animosity towards each other, the employee and Mr Ndleleni used separate storage rooms. They had been warned to communicate with each other only through their supervisor. Clearly acting contrary to the authority of his immediate supervisor, the employee had the audacity to break open the padlock on the door of Mr Ndleleni's storage room to give his team access to the facility and remove some steel pipes. According to Mr Holmes the pipes were ordinary scrap material and it was not urgent or essent that they be removed. To my mind, the employee's belligerent attitude described above must have ignited the furore of 02 August 2011 and the events that subsequently followed. He knew that, because of their intense animosity, Mr Ndleleni would not take kindly to his action. He was therefore the aggressor and could not have been provoked.

[24] The commissioner was plainly wrong in finding that the employee's involvement in the fight was excused by provocation. Even more inexplicable is her finding that the provocation had been excessive whereas it is clear that the two employees were equally to blame. It bears reminding that the employee did not raise provocation as a defence. That defence was an *ex post facto* attempt at justification for his misdemeanour.

[25] On the basis of the foregoing analysis the Court *a quo* erred in finding that the altercation had been precipitated by Mr Ndleleni's conduct in locking up the storage room and thereby making it impossible for the employee's team to comply with the employee's instruction.

[26] The **employees** further argument that he acted in self-defence cannot avail him. The commissioner's conclusion that: "*Any reasonable person would have*

reacted in the manner [the employee] did and that "as a man he could not walk away from the "fight", goes against the grain of conduct expected of an employee. In our law every person is expected to control his/her temper. In addition, there is no obligation on an individual to accept a challenge. Either employee could have walked away from the scene. Not only to defuse the situation but also to report the event to Mr Holmes.

[27] By questioning the adequacy of the Municipality's efforts at resolving or mediating the enduring conflict between the employee and Mr Ndleleni, as a further excuse for what transpired on 02 August 2011, it is clear that the commissioner did not bring her mind to bear on the following aspects of the evidence:

27.1 First, Holmes explained that, at the behest of the Municipality, there were several unsuccessful conciliatory meetings between the two employees over the years in respect of their feud.

27.2 Second, the two employees were referred to the Employee Assistant Practitioner (EAP) to assist them in reconciling their differences.

27.3 Third, Mr Sawuli testified that the two employees had been counselled on several occasions by the superintendent, Human Resources, and by himself.

27.4 Fourth, apparent from the employer's letter dated 28 June 2011 the employee was informed, *inter alia*, that the conflictual relationship could no longer be tolerated.

27.5 Fifth, he was warned and was thus acutely aware that a further incident would lead to a formal disciplinary action being taken against him.

[28] Mr Sawuli also explained, albeit tersely, that the two employees could not be moved to other sections because the operations of their sections were very technical in nature. What further conceivable action could the Municipality possibly take to accommodate the two employees. I am persuaded that in holding that the employee ought to have been moved to an entirely new section or department of the Municipality the commissioner imposed an unreasonable obligation on the employer.

[29] Although the Municipality submitted that the review was not directed at the sanction due to its subjective nature, it contended that the commissioner erred by not considering whether the employment relationship had not been rendered intolerable at the time of the dismissal and whether an award of reinstatement was practicable.

[30] The employee had been in the service of the Municipality for over 30 years with a clean disciplinary record. In *Toyota SA Motors (Pty) Ltd v Radebe & others*,² this Court made a point that, although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal.

[31] Clause 2.7 of Annexure "A" of the SALGBC Disciplinary Procedure and Code Collective Agreement provides: '*As a guideline, an employee may be dismissed on the first occasion for, inter alia, intimidation, fighting and/or assault.*

[32] The commissioner's finding that the employee was "*a modest and honest employee, whom the [Municipality] could trust*" is not borne out by the evidence. This finding ignores that the fray was in full view of the two employees' subordinates whom they were supposed to lead by being exemplary. The finding does not take into account the longstanding feud between the two and the disruptive effect that their conduct had on the operations of the Municipality through the years. In my view, the misconduct committed by the employee was sufficiently serious to warrant a sanction of dismissal. His length of service and clean disciplinary record cannot, in the premises, save him from dismissal.

[33] On this analysis, the commissioner's award cannot be said to be one that a reasonable decision-maker could have reached. The Court *a quo* erred in finding to the contrary. The corollary of this is that its order falls to be set aside.

[34] Regard being had to the requirements of law and fairness I am not swayed that the cost should follow the result of the proceedings in the Court *a quo* and in this appeal. The arbitration award and the judgment of the Court *a quo* may have motivated the employee to resist the review and the appeal. In the result, I make the

² (2000) 21 /U 340 (LAC) at 344 paras 15-16

following order.

Order

1. The appeal is upheld with no order as to costs.
2. The order of the Court *a quo* is set aside and substituted with the following:

"1. The review application filed by Nelson Mandela Bay Metropolitan Municipality, the applicant, is hereby granted;

2. The arbitration award dated 09 July 2012 issued under Case No: ECD031225 by Commissioner Ntombekhaya. Sesani the second respondent, under the auspices of the South African Local Government Bargaining Council ("SALGBC"), the first respondent, is reviewed and set aside;

3. The dismissal of Mr Johannes Tshabalala, the third respondent, by Nelson Mandela Bay Metropolitan Municipality was substantively and procedurally fair;

4. Mr Johannes Tshabalala's unfair dismissal claim is dismissed;

5. No order is made as to costs."

MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Surtherland and Kathree Setiloane JJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT: Adv Pattington

Instructed by Gray Moodlier Attorneys

FOR THE FIRST

AND SECOND RESPONDENT: Adv FE Le Roux

Instructed by Kaplan Blumberg Attorneys