

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN**

CASE NO. D717/07

Reportable

In the matter between

UTHUNGULU MUNICIPALITY

Applicant

And

NHLANHLA MATHE

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

LINDIWE PURITY MYENI

Third Respondent

Judgment

Cele J

Introduction

- [1] This is an application for the review and setting aside or correction of an arbitration award dated 10 October 2007, issued by the first respondent as an arbitrator of the second respondent. The arbitration award was issued in favour of the third respondent who then opposed this application. On an

earlier date, that is 11 August 2010 condonation for the late filing of the answering affidavit was granted in this matter.

Factual Background

- [2] The third respondent, Ms Myeni was in the employ of the applicant. Since 1 December 2000 she was appointed into the position of a Cashier. Part of her job entailed the registration of businesses as levy payers. She had to receive payments in respect of such levies for which she had to issue receipts. She utilized a cubicle as her working office. The business of the applicant did not involve the registration of close corporations. The applicant accommodated its staff by permitting it to a reasonable use of the telephone for private purposes provided such telephone calls were identified and paid for.
- [3] In January 2006 Ms Myeni went on her vacation leave. Due to the fact that her husband passed away at the time, her leave was extended until March 2006. On 6 April 2006 Ms Myeni was also on leave as was her colleague one Ms Sigwazi who did the same type of work done by Ms Myeni. A member of the South African Police Services (SAPS), according to his dress code, arrived at the cashiers' desk and requested either Ms Sigwaza or Ms Myeni but he left when he was told by Ms Padayachee and Ms Monoko, the cashiers on that day that those he sought were on leave.
- [4] About two hours later the SAPS member returned to the cashiers. He had documentation for the registration of a close corporation, known as C. K documents, a copy of his identity book and R750.00. Ms Padayachee examined the documents but told him that such registration was never done by the applicant. In the course of the exchange Ms Padayachee called Ms Du Plessis, a Supervisor of the department and reported the request that had been made to her. The matter was then reported to Mr Bhajun, the Accountant Consumer Billing of the applicant. Mr Bhajun in turn later reported the matter with an internal memorandum to the Assistant Chief Financial Officer Ms Swift. Ms Swift directed that an investigation be conducted. The cubicle of Ms Myeni was then searched for any documents which could suggest that she was registering close corporations for members of the public during office

hours and possibly using office material. A bundle of documents was retrieved from Ms Myeni's office which was then confiscated.

[5] Ms Myeni was then charged with three acts of misconduct, namely:

1. Theft of R200. It was changed to negligence for a failure to issue a receipt of R200 for Mr Musa Ntuli for the registration of his business into applicant's data base;
2. Use of the employer's property/equipment for purposes other than the employer's business, namely a telephone and a fax machine during September 2005 till 29 March 2006 for administrative services and/or registration of close corporations;
3. Conducting private business during company business time.

[6] She was found guilty of all three charges. In respect of the first count of negligence, she was given a final written warning but was dismissed for the second and third charges. On 2 February 2005 Ms Myeni had been convicted of the use of a fax machine of the applicant for her private purposes, which she had done in 2004. She was given a final written warning valid for six months. However, when the dismissal sanction was imposed, the 2005 final written warning was not taken into account as it had expired.

[7] She then referred an unfair dismissal dispute for conciliation and thereafter for arbitration. Parties entered into a pre-arbitration discussion and filed a minute thereof. The dispute concerned the second and the third counts. The first respondent found the dismissal to have been substantively and procedurally unfair and he ordered the applicant to re-instate Ms Myeni with no loss of earnings. The applicant initiated the present application.

Chief findings of the first respondent

[8] To the extent relevant for this application the first respondent made the following findings:

- It was common cause that Ms Sigwaza had not been disciplined for registering close corporations. There was no reasonable or acceptable explanation for the failure by the employer to take disciplinary action against Ms Sigwaza. Several witnesses testified that some members of the public had asked for Ms Sigwazi for purposes of asking her to register close corporations for them. A letter was extracted from the municipal computer that tendered to show that Ms Sigwazi was abusing the property of the municipality and was conducting her business during the employer's time. The failure discloses preferential treatment of Ms Sigwazi by the employer. Such failure to take disciplinary action is capricious, arbitrary and unfair ;
- Ms Swift conceded that the SAPS member who came to the cash hall was carrying the ck papers for other reasons than for Ms Myeni to register a business for him. This concession speaks to the unreliability of the evidence of the employer in relation to the policeman and the woman who are said to have called at the cash hall to register their businesses. The Bargaining Council was invited to speculate in favour of the employer that both persons had wanted to register their close corporations during working hours;
- There was no direct evidence from the people themselves that Ms Myeni had registered close corporations for them during business time. Therefore the claim that the employee registered businesses for her company during business hours was merely speculative;
- Ms Myeni admitted the documents found in her cubicle to be hers. She denied that keeping them in her office was to be construed as an indication that she registered close corporations for members of the public during the employer's business time. Under cross-examination numerous speculative questions were put to her but she remained steadfast in her claim that she had reasons

other than those suggested by the employer to keep the documents in her cubicle. Her claim was not discredited and was to be accepted. While the employer claimed that more documents such as blank ck papers and business cards of some suppliers were found, no weight could be attached to those as they were not tendered in evidence and there was no explanation for that failure;

- It was not in dispute that Ms Myeni had made the telephone calls identified with her. She paid for those amounting to R52. 54. The next two printouts were issued while she was on leave and later when she was on suspension. While the calls did not appear to be excessive, no yardstick was shown for what constituted moderate use of the telephone. There was also no comparison with any other calls made. Nor had it been brought to her attention that she was abusing the telephone. There was no evidence to support the claim that Ms Myeni used the telephone of her employer for her own private use. No evidence was produced to negate the claim by the employee that the telephone number 035 796 2575 belonged to the Department of Local Government and Traditional Affairs, Esikhawini, where she had a friend. Her telephoning that number was not in breach of any standards;
- It emerged from the printout of faxes produced by the employer that during September, October November and December 2005, as well as January 2006, several documents had been faxed to SCW using the fax number 012 362 4103. The employer also produced a letter faxed by the employee to SCW in October 2004, in which she left her contact details including her cellular telephone number. There was no direct evidence of Ms Myeni having helped members of the public to register their close corporations. The second problem was that the fax machine was communal and not limited to a use by Ms Myeni alone. Ms Sigwazi had also access to using it. In the absence of other, undisputed evidence there was no reasonable basis to accept with merits, that Ms Myeni was guilty of having sent the faxes to SCW.

- Ms Sigwazi had in the past been disciplined for the similar conduct but the employer had not considered that she might be guilty of sending the faxes. It was wrong to draw the inference that Ms Myeni was guilty;
- There was no evidence that Ms Myeni had telephoned SCW during the period relevant to dismissal whereas there was irrefutable evidence that Ms Sigwazi had made various such telephone calls. Even when Ms Myeni had gone on leave, the sending of faxes continued. It was alarming that the employer had resisted the admission of such evidence which had the effect not only of exonerating the employee but also of demonstrating inconsistency on the part of the employer. There were reasonable grounds to doubt that Ms Myeni sent the faxes complained of;
- The probabilities of the matter favoured Ms Sigwazi having sent the faxes. Therefore the inference which the employer sought to draw from the proven facts could not be drawn in the matter;
- There were several flaws that seriously tainted the disciplinary hearing and rendered the dismissal procedurally unfair. The hearing went ahead even when Ms Myeni indicated that she did not wish to go ahead in the absence of a lawyer and she was not given an opportunity to find an alternative lawyer because Mr Zwane had taken ill;
- The municipality did not accept the explanation that Mr Zwane was ill but clung to an earlier correspondence wherein Mr Zwane was withdrawing on account of unpaid fees. The chairperson preferred to rely on the past letter and ignored an explanation given by an attorney from Mr Zwane's office. Compelling her to proceed unrepresented on the guise of accommodating a witness was unfair because it ignored the inability of the employee to state her case before the tribunal. She has always deferred the presentation of her case to her attorney;
- Over and above the undue haste of the chairman the manner in which it was conducted was strange and confusing to the point of rendering the hearing unfair. Mr

Ntuli was recalled after both the employee and the prosecutor had presented closing arguments;

- Based on the evidence presented by the parties the employer failed to discharge the onus that the dismissal was fair. Therefore the dismissal of the employee was procedurally and substantively unfair.

[9] In support for the review application the applicant proffered the grounds of review as outlined below.

- The finding concerning the probabilities of Ms Sigwazi having sent the documentation or utilized the resources of the applicant during the period in question was unreasonable, given that the documentation pertaining to that business enterprise was found in Ms Myeni's cubicle and that her explanation in respect thereof was implausible and inconsistent with the common cause facts;
- A negative inference should have been drawn from the failure to call Ms Sigwazi as a witness of Ms Myeni. It was evident that she would have contradicted Ms Myeni's testimony;
- There is no explanation in the award by the first respondent as to what Ms Myeni's explanation was for having the various ck documentation in her office, whether they were for family and friends or not and why that explanation should be accepted in preference to the only logical and reasonably possible explanation, namely that Ms Myeni was in fact registering close corporations from the applicant's offices during working hours and utilizing the applicant's resources;
- Ms Myeni admitted being in possession of the ck documentation in her cubicle. That seen together with the fact that enquiries were made, on more than one occasion, with Ms Padayachee for Ms Myeni to assist them with the registration of the close corporations and that it was communicated to her that Ms Myeni was responsible for such registrations at the offices of the applicant, demonstrated that, on probabilities, Ms Myeni was guilty of the charges preferred against her;
- No ck documentations were found in Ms Sigwazi's cubicle. The only document found was on her computer which she used from the South African Revenue Services (SARS), in which they had described her as a bookkeeper. There was no suggestion that she conducted the bookkeeping function, if at all, during her business hours.

Bookkeeping was quite evidently a function which could be performed outside normal working hours;

- Given Ms Myeni's disciplinary record, it is evident that no reasonable decision maker could have determined that Ms Myeni was not guilty of the charges preferred against her, and accordingly, no reasonable decision maker could have found that the dismissal was substantively unfair;
- Ms Myeni's conduct in dishonestly denying her guilt had irretrievably affected the relationship of trust justifying her dismissal;
- In relation to procedural unfairness the story changed from the attorney having placed on record that his withdrawal due to lack of funds to one that the attorney was ill. Given the circumstances of the matter and the availability of witnesses, the applicant was entitled to proceed on the day in question. Ms Myeni was well able to defend herself. The issues in dispute were simple, factual only and she was well equipped to deal with them.

[10] Ms Myeni's brief grounds in opposition to the review application will now be outlined;

- Mr Biyela, being the deponent to the founding and the supplementary affidavits did not appear to have personal knowledge of the facts he referred to more so as he referred to common cause facts which he failed to outline;
- A reasonable and plausible explanation was offered to the first respondent for the possession of the papers found in her cubicle. The first respondent did not err in accepting that explanation;
- Ms Myeni was not guilty of the misconduct and she did not abuse the applicant's resources during the period in question as suggested by Mr Biyela;
- Ms Myeni was disciplined for the September 2004 incident and was given a final written warning which was no longer valid at the time of her unfair dismissal and therefore such a warning ought not to have been considered for purposes of sanction;
- The findings made by the first respondent concerning the probabilities of Ms Sigwazi having sent the faxes to the Shelf Company Warehouse are correct and are supported by evidence. The evidence of the applicant itself was that the faxes continued to be sent even when Ms Myeni was on leave which clearly demonstrated that the faxes could not have been sent by her. It was an inescapable conclusion that the

- person who sent the faxes while Ms Myeni was on leave was the same person who sent them while she was at work;
- The dispute pertaining to negligence was never referred to the second respondent and therefore any reference to it was misguided;
 - It was speculative to say that Ms Sigwazi, if called as a witness, would have contradicted Ms Myeni's evidence. It was always open to the applicant to call Ms Sigwazi as its witness if it intended to conduct a fair disciplinary enquiry against Ms Myeni. If any adverse inference was to be drawn from a failure to call her it should be held against the applicant;
 - Ms Myeni had the same access to the fax machine and the telephone facility as did Ms Sigwazi;
 - The first respondent's findings on procedural fairness were correct. It had been indicated to the chairperson of the disciplinary hearing that Ms Myeni would be unable to proceed with the enquiry on her own and that she wanted legal representation. The chairperson having initially allowed legal representation ought to have postponed the enquiry for the attorney to attend the hearing. The attorney, Mr Zwane sent another attorney from his office to apply for a postponement. An attorney who is not placed in funds would not send a colleague to make an application for a postponement. Instead he would have withdrawn;
 - The applicant did not lead a shred of evidence to say that Ms Myeni was registering close corporations during the employer's business hours. The applicant only required of the first respondent to speculate from unsubstantiated evidence while it evidence constantly referred to Ms Sigwazi as the possible culprit. In the enquiries that were made to Ms Padayachee Ms Sigwazi featured prominently;
 - The telephone printout reveals that, during the period in question Ms Sigwazi frequently telephoned Shelf Company Warehouse as:
 - 1-30 September 2005 she telephoned 11 times;
 - 1-30 November 2005 she telephoned 7 times;
 - 1- 31 December 2005 she telephoned 7 times;
 - 1-31 January 2006 she telephoned 4 times;
 - 1- 28 February 2006 she telephoned 1 time;
 - 1- 31 March 2006 she telephoned 4 times;
 - During the same period no telephone calls were reflected against the name of Ms Myeni. On Ms Sigwazi's telephone bill several calls were made to Status Restaurant, a company she was helping, which showed that she was engaged in private business using the company's

resources and time. No such evidence existed in Ms Myeni's case. If anyone, Ms Sigwazi was the one that should have been dismissed.

Evaluation

- [11] This application is specifically not based on the provisions of section 145 (2) of the Labour Relations Act 66 of 1995, hereafter referred to as the Act, as is often the case with most review applications in this court. The ground of review relied upon is that the arbitration award being assailed is not reasonable. Therefore, the applicant seeks to rely on the right to an administrative action which is lawful, reasonable and procedurally fair- see paragraph 110 in *Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) BCLR158 (CC) at p189*. The test for review set out in *Sidumo* is whether or not the decision reached by the commissioner is one that a reasonable decision maker could not reach. It remained common cause between the parties at arbitration that the applicant did not have direct evidence to incriminate Ms Myeni in the two charges referred for arbitration but relied on circumstantial evidence.
- [12] At the outset I need to agree with the applicant that the first respondent misconstrued the evidence about whether or not Ms Sigwazi was disciplined by the applicant for her misconduct which was similar to that of Ms Myeni and which covered the same period. Ms Sigwazi pleaded guilty to the charges and was found guilty. With her consent, she was suspended without a pay for six months. She had had no prior disciplinary record. This issue had in fact been common cause between the parties. The position taken by Ms Myeni at arbitration was to deny having committed the charged acts of misconduct. Her case was not that of admitting liability and then complaining about the inconsistent application of a sanction. The question will then be whether having misconstrued this aspect of evidence the decision he reached is the one that a reasonable decision maker could not reach.
- [13] In essence the case of the applicant was simply that Ms Myeni admitted being in possession of the ck documentation in her cubicle. That seen together with the fact that enquiries were made, on more than one occasion, with Ms

Padayachee for Ms Myeni to assist them with the registration of the close corporations and that it was communicated to her that Ms Myeni was responsible for such registrations at the offices of the applicant, demonstrated that, on probabilities, Ms Myeni was guilty of the charges preferred against her.

- [14] It was common cause between the parties that the office dealing with the registration of close corporations was the Shelf Company Warehouse, which parties referred to as the SCW. The undisputed evidence of Ms Myeni is that in all, 34 telephone calls were made by Ms Sigwazi to SCW during the period September 2005 to March 2006. None were made by Ms Myeni. Ms Sigwazi's telephone bill showed that several calls were made by her to Status Restaurant. The evidence was that the faxes continued to be sent from the applicant's offices for the registration of close corporations even when Ms Myeni was on leave which could clearly, on evidence, not have been sent by her. There is no basis for holding that the person who sent these fax messages could not continue to do so when Ms Myeni was at work. Ms Myeni and Ms Sigwazi share office space and equipment at the cash hall.

- [15] From the totality of evidence led at the arbitration it remained probable that the acts of misconduct with which Ms Myeni was charged are those which Ms Sigwazi admitted and for which she was punished by being suspended from work. This conclusion is reached, notwithstanding the very fact that Ms Myeni was found with ck documents. It was not the only probable inference to draw from that finding that she was registering close corporations during office hours and using applicant's equipment.

- [16] The first respondent considered the explanation that Ms Myeni proffered and with the benefit of having been involved in the trial, he accepted her evidence. The applicant has made a bold but unsubstantiated criticism on this aspect without laying any solid basis for the rejection of this finding by the first respondent. In these proceedings I have an obligation to keep in mind a need to observe a distinction between a review and an appeal and to guard against being overzealous in setting aside the arbitration award merely because it might not coincide with either my opinion or that of the applicant.

[17] The allegations on the irretrievable break down of relations was premised on a submission that Ms Myeni had dishonestly denied the allegations against her and that she was not fairly treated during the internal disciplinary hearing. Her denial of the allegations against her was meritorious and the applicant must accept that it make an error of judgment in finding her guilty of the two counts. In my view, it will not be necessary to pursue the issue of procedural unfairness. If it had been, I would have found in her favour. For purposes of this application, I had to avoid a consideration of those grounds of review outlined in the heads of argument which were not made in the founding and supplementary affidavits. An applicant for review stood or fell by the grounds of review outlined in the pleadings, see *Director of Hospital Services v Misty* 1979 (1) SA 626 (A) and *Northam Platinum Ltd v FGanyango NO & Others* (2010) 31 ILJ 713 (LC).

[18] I conclude that the decision reached by the first respondent in this matter fell within the range of reasonableness and accordingly it is not a decision which a reasonable decision maker could not reach. I have reflected on the costs implications in this matter and conclude that fairness dictates that the costs should follow the results notwithstanding the resumption of employment relations between the parties. The following order will then issue:

1. The review application in this matter is dismissed.
2. The applicant is ordered to pay the costs.
3. Ms Myeni is to report for duty on 24 January 2011 in the terms of the arbitration award.

Cele J.

DATE OF HEARING : 26 NOVEMBER 2010

DATE OF JUDGMENT : 14 JANUARY 2011

APPEARANCES

FOR APPLICANT : Adv CA NEL

Instructed by : Truter James de Ridder Inc
FOR 3RD RESPONDENT : Adv I PILLAY
Instructed by : Mhlanga Inc.