



THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR853/2011

In the matter between:

MTHUTHUZELI GEORGE NDWANYA

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

ABRAHAM NTHAKO N.O

Second Respondent

POLOKWANE LOCAL MUNICIPALITY

Third Respondent

Heard: 30 October 2012

Delivered: 07 January 2013

Summary: Review applications - Gross insubordination - disobey instruction by Municipal Manager to hand over laptop.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number NDC 090809, dated 24 March 2011, in terms of which the dismissals of the applicant was found to have been for a valid and fair reason.
- [2] The application was unopposed. The picture that emerges from the reading of the founding papers of the applicant is, as will also appear from his argument later, that his dismissal was motivated by ulterior motives. The converse, however, emerges on the closer reading of the transcript of the arbitration proceedings.

Background facts

- [3] The applicant who was employed as the legal officer by the third respondent was dismissed for misconduct concerning gross insubordination. The charges of insubordination arose from the refusal by the applicant to hand over a laptop to the municipal manager.
- [4] The charge against the applicant read as follows:
 - ‘1. On the 2nd of April 2008 you grossly insubordinate in that you and the intentionally refused to clearly out in law and reasonable order to hand over the laptop belonging to the municipality as instructed by the Municipal Manager, and have thereby contravened clause 1.2.4 annexure "A" to the South African local government disciplinary procedure collective agreement.
 - 2. On the 2nd of April 2008 you prejudice the administration, discipline and efficiency of the Municipality in that you conducted yourself in an improper disgraceful and acceptable manner when officials, security of the municipality and the members of the South African Police Services requested him to hand them a laptop belonging to the Municipality, and have thereby contravened clause 1.2.9 of annexure "A" to the South African local government disciplinary procedure.’

- [5] The applicant was found guilty and dismissed at the disciplinary hearing. He, thereafter, referred a dispute concerning an alleged unfair dismissal to the first respondent where the matter was arbitrated upon and the dismissal confirmed as being fair.
- [6] The third respondent in support of its case, that its reason for dismissal was for a fair reason, presented evidence from four witnesses. For the purposes of contextualising and looking at the totality of the circumstances within which the dismissal occurred, the essential aspects of the testimony of the witnesses, is summarised below.
- [7] The first witness of the third respondent, Mr Ntswana, who at the time was the operating services manager, confirmed that the applicant informed him that he had received the instruction from the municipal manager to return the laptop, and that he had difficulties in implementing the instruction because there were documents he needed to download.
- [8] Mr Ntswana did not deny that he may have said, to the applicant, that he would speak to the municipal manager, as he thought there might have been misunderstanding between the two of them. He further conceded that the applicant did file a grievance and that although he was not sure of what was expected to be the outcome, he thought it would have been dealt with in terms of the grievance procedure.
- [9] During cross examination, Mr Ntswana stated that he informed the applicant that the laptop should be handed over and the matter can be discussed at a later stage. He indicated that, from his understanding, the reason for requesting the applicant to return the laptop was because there was suspicion that the laptop was being used not for the purposes than those it was intended.
- [10] The second witness of the third respondent, Mr Ramuthele, who at the time was personal assistant to the municipal manager, testified that she delivered the letter to the applicant from the municipal manager, instructing him to return the laptop. The applicant did not give him the laptop and therefore he returned later to him to ask for the laptop.

- [11] According to Mr Ramuthele, the applicant told him when he went to him the second time that he needed to speak to the municipal manager before he could hand over the laptop. He further stated that, during that conversation, the applicant informed him that he would only hand the laptop to the municipal manager only in the presence of the police.
- [12] On receipt of the report about the attitude of the applicant, the municipal manager called the police. On arrival, the municipal manager explained to the police that he required them to open a case. One of the police officer tried to grab the laptop from the applicant's hands.
- [13] During the course of the engagement with the police officers about the laptop, the police superintendent arrived but the problem could not be resolved.
- [14] Mr Ramuthele testified further that the manner in which the applicant spoke to the municipal manager, was unacceptable as he raised his voice and shouted at him. According to him, the applicant was shouting when he arrived at the office of the secretary of the municipal manager.
- [15] The second witness of the third respondent was Ms Mwali, who at the time was the secretary to the municipal manager. She testified that, on the day in question, the applicant arrived at the reception area very angry and after entering the municipal manager's office, she heard the applicant speaking at the high voice in an angry manner.
- [16] The fourth witness Mr Tshethabo, the municipal manager, testified that he is the administrator and an accounting officer of the third respondent. He testified about the charges which were proffered against the applicant and that he had asked his personal assistant to deliver a letter to the applicant requiring him to hand over the laptop. He confirmed that Mr Ntswana informed him that the applicant said he would only return the laptop in the presence of the police. He also confirmed having instructed the security officer not to allow the respondent to leave the premises unless he handed over the laptop.

- [17] The municipal manager confirmed that the applicant was furious and aggressive when he came to his office saying that the security officer was limiting his rights by refusing him to leave the premises. The other complaint raised by the applicant was that the two police officers were abusing their powers and that their superintendent should be called. At that stage, the police indicated that they would open a case and one of them left the office to collect a file from the vehicle, which had been parked outside. According to the municipal manager, the applicant attempted to run out of the office but was grabbed by one of the police officers who remained in office while the other went to collect a docket.
- [18] The superintendent was then contacted by one of the police officers who indicated that he (the superintendent) was on his way. At that point, the applicant indicated that he was willing to hand over the laptop and requested time to download his documents from the laptop.
- [19] On his arrival, the superintendent indicated to the police that the laptop can only be returned if a case was opened. After the explanation by the superintendent as to what was to happen if the case was open, the municipal manager, testified that he told the police that he would deal with the matter internally. The applicant then left the office of the municipal manager, without handing over the laptop.
- [20] In his testimony, the municipal manager, explained that the reason for requiring the applicant to return the laptop was because he was no longer doing the municipality's secretarial work as somebody else was doing that aspect of the work.
- [21] The municipal manager denied during cross examination that he wanted to have the laptop back so that he could check whether the applicant was not responsible for a report that had been made to the specialised criminal investigating unit of the police, which was known as the "Scorpions". He indicated that the Scorpions started the investigation after the dismissal of the applicant. He explained further that the other investigation conducted by Scorpions concerned someone who was arrested concerning a tender and had been approached by Scorpions for

information regarding that investigation. He testified that he was not investigated but was simply required to provide information.

- [22] The applicant, in testifying on his own, indicated, firstly, that the relationship between him and the municipal manager was cordial until December 2007. According to him, the relationship between the two of them changed after he advised the municipality about the allocation of land to a company which was owned by a friend of the municipal manager.
- [23] The applicant further testified that he needed the laptop for purposes of typing legal opinions and communicating with stakeholders like attorneys and advocates who were doing work for the municipality. He also uses the laptop for his assignment with the University of Pretoria.
- [24] The applicant did not dispute having received the instruction from the municipal manager that he should return the laptop but says that he did not comply because Mr Ntswana, his immediate manager, had told him not to return the laptop as he would discuss the matter with the municipal manager.
- [25] The applicant testified that he told the municipal manager at his office that he was still discussing the issue of handing over the laptop, with Mr Ntswana. The municipal manager told him that Mr Ntswana would never be able to reverse his decision.
- [26] The applicant testified further that while speaking to the municipal manager the two police officers instructed him to hand a laptop to the municipal manager. According to him, the two police officers were not interested in listening to him even after he told them that he was still discussing the matter with the municipal manager. He told them that what they were doing was illegal and that he would report the matter to the superintendent.
- [27] During the exchange with the two police officers, the applicant took out this voice recorder and recorded the conversation. He threatened to submit the recording to their superiors.

- [28] The applicant says because his phone was in his office, he told the police officers that he needed to go to his office to collect his diary so that he could call the superintendent. One of the police officers grabbed him as he opened the door of the municipal manager's office and this was in the process of him exiting to go to his office. He says he was pushed back into the office.
- [29] After the police pushed him back into the office, he told the municipal manager that he was willing to hand over the laptop but needed time to download some of his documents. He sat at a table and downloaded his documents onto a memory stick, which he says because of its capacity, could not take all the documents.
- [30] The superintendent arrived while the applicant was busy downloading the documents from the laptop. After some discussion the superintendent told both the municipal manager and the applicant that they should resolve the dispute themselves. After that, the applicant left with the laptop. He returned the laptop the following day.
- [31] The case of the applicant at the arbitration hearing was that, initially, his relationship with the municipal manager was cordial but changed after he made a report during December 2007 concerning land which had been allocated to a certain company that did not apply for land allocation. The applicant testified that soon after making that report, he received a letter instructing him to return the laptop. This surprised him because he used the laptop for legal documents, correspondence and reports for the municipality. He also indicated that he uses the laptop for his studies.
- [32] On receipt of the letter instructing him to return the laptop, the applicant approached the manager corporate services about the matter. According to him the manager corporate services told him not to return the laptop and that he would speak to the municipal manager about it.
- [33] After speaking to the manager corporate services, the employee was approached by one of the employees who told him that he had been sent by the municipal manager to collect the laptop.

- [34] At some point during the course of that commotion, the applicant was stopped by the security officer when he was leaving the workplace. He was told he could not leave unless he handed over the laptop. The applicant then approached the municipal manager in his office apparently to enquire as to what the problem was. The respondent informed him that he instructed the security officer to collect the laptop. According to him, as he was speaking to the municipal manager, the police arrived and tried to use force to get the laptop from him. He told them that what they were doing was unlawful.

Grounds of review.

- [35] In his founding affidavit, the applicant complains about the fact that the arbitrator ignored his complaint that the disciplinary enquiry was nothing but a sham. In this regard, the applicant contends that his dismissal was because the municipal manager suspected him of passing information to the police which resulted in the Scorpions investigating him.
- [36] The other complaint of the applicant is that the arbitrator arrived at the conclusion as he did without having regard to the evidence of a number of witnesses who should have testified on behalf of the third respondent. He in particular says that the third respondent failed to call the security officer who stopped him from leaving the workplace and sought to take the laptop from him. His contention in this respect is that it was never the evidence of the third respondent that he wanted to leave with the laptop when he was stopped by the security officer. His contention is that he did not have the laptop with him at the time he was stopped by the security officer as he had left the laptop in his office.
- [37] It is on the basis of the above that the applicant contends "that there was no basis in law or fact for the arbitrator, to ignoring the fact that the third respondent(s) failed to call these important witnesses."
- [38] The applicant further question the finding of the arbitrator, that he forcefully entered the office of the municipal by manager. In this respect, the applicant contends that he approached the personnel assistance and

requested to see the municipal manager and was given the permission. It would appear that the ground upon which the applicant seeks to challenge the arbitration award is that the arbitrator failed to apply the rules of evidence. In this respect, the applicant states that the arbitrator accepted the evidence of a single witness, as opposed to evidence in his favour which was corroborated.

[39] Another point raised by the applicant is that the arbitrator accepted the unsubstantiated and contradictory evidence of the personnel assistant to the municipal manager who claimed in his testimony that the applicant was aggressive but could not describe his aggressive manner, except to say that his voice was high. The personal assistance contradicted himself in that he claimed that the applicant spoke loud and was shouting but could not hear what he said when he was speaking to the municipal manager.

[40] The applicant, further, complains that the arbitrator ordered costs when neither party asked for the same.

The arbitration award

[41] After a detailed summary of the evidence by the respective witnesses of the parties, the Commissioner in analysing the evidence which was before him start by noting that in terms of section 192 of the Labour Relations Act the third respondent has the onus of showing that the dismissal was for a fair reason. He then set out that for a dismissal to be fair the employer has to prove that the dismissal was for a fair reason in terms of section 188 of the LRA.

[42] Turning to the legal principles governing what constitutes an offence of insubordination, the Commissioner at paragraph 68 of the arbitration award and relying on the decision in *National Union of Metal Workers of South Africa v Schnaier Industries (Pty) Ltd*,¹ said the following:

‘68. In terms of common law and employees are obliged to show respect to want his/her employer. Rudeness, disrespect and

¹ (1992) 13 ILJ 112 (LAC).

undermining of authority of the employer are acts of misconduct and may invite disciplinary action. Insubordination is a more severe form of misconduct and displaced an element of disobedience, such as wilfully refusing to obey a lawful instruction, or a challenge to the employer's authority. It has been held by the Courts that insubordination may exist in the form of verbal defiance, degrees of disrespect or defiance and use of the reasonable and lawful instructions.'

[43] The critical aspects, as concerning the facts is that the arbitrator made the following findings:

43.1 the applicant, indicated that he would give the laptop to the municipal manager only in the presence of the police.

43.2 Inferred that had the security officer not stopped the applicant from leaving the workplace he (the applicant) would have left with the laptop. The applicant was unhappy about the security officer stopping him from leaving the workplace.

43.3 The applicant had no intention of handing over the laptop to the municipal by manager.

43.4 The municipal manager gave his laptop to the secretary, because the applicant had left with the laptop. He had been instructed to hand over.

[44] The arbitrator further found that the municipal manager is the administrator and accounting officer of the municipality and therefore he had the authority to give instructions to all those other employees including the applicant. And as concerning the instruction given to the applicant, the arbitrator found that the laptop was needed to be given to another employee so that she could do the work.

[45] As concerning the conduct of the employee in relation to the instruction given to him, the arbitrator found it to have been disrespectful and that he behaved in an unprofessional manner. The instruction was found to have been reasonably and lawful.

The legal principles governing insubordination

[46] The broad principles governing what constitutes insubordination that would justify a dismissal is set out in *Lynx Geosystem (Pty) Ltd v CCMA and Others*,² a judgment which the applicant relied on in his heads of arguments. This court in that judgment (at paragraph 28) held that as a general rule, for insubordination to constitute misconduct justifying a dismissal, it is to be shown that the employee deliberately refused to obey a reasonable instruction by the employer. The court proceeded to quote with approval what was said in *Ntsibande v Union Carriage and Wagon Co (Pty) Ltd*,³ where it was held that:

‘As a general principle it may be stated that the breach of rules laid down by an employer or the refusal to obey and employers lawful and reasonable order is to be viewed in a serious light and may even given circumstances even justify dismissal. However, the presence of certain prerequisites is required. In the first place, it should be evident that an order, which may even be in the form of the warning, must infect have been given... In the second-place, it is provided that order must be lawful; an employee is therefore not expected to be an unlawful order such as work if you go over time. Thirdly, the reasonableness of an order should be beyond reproach and will be enquired into: in cases before the court that order or request has sometimes been found to be reasonable and at other times to be unreasonable. In addition, it is required... that the refusal to obey must have been serious enough to warrant a dismissal.’

Evaluation

[47] In relying on a number of judgments referred to in his heads of argument he applicant argued that:

‘(1) a refusal to follow a direct, valid work order – The order must be clear, it must come from someone authorised to issue directives, and the employee must understand it as an order.

² (JR1935/05) [2010] ZALC 154 (22 October 2010) at para 28.

³ (1993) 14 ILJ 1566 (IC) at 1569I-1570A.

- (ii) a clear and prior warning of the consequence- The supervisor must clearly state the penalty for continued refusal to carry out the order. An employees' failure (as opposed to refusal) to carry out an order, or protest while carrying out the order, may justify a lesser charge than insubordination and, consequently, a lesser form of discipline, but would not, by itself, constitute insubordination.'

[48] In applying the reasonable decision maker test as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁴ on the facts and the circumstances of this case, I find no basis to fault the arbitrator in the decision he reached. The reasonable decision maker test as set out in *Sidumo* requires that in considering an application for review of an arbitration award, the enquiry to conduct is that of determining whether the decision reached by the arbitrator is one which a reasonable decision maker could not have reached. In applying this test, the totality of the facts and circumstances of the case has to be taken into account. This guideline was formulated as follows in the *Sidumo* matter:⁵

'[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[49] Whilst in the heads of argument, the applicant suggests that the municipal manager, was not authorised to issue the instruction; that is not the case he made during the arbitration hearing. It was also not his

⁴ (2007) 28 ILJ 2405 (CC).

⁵ Ibid at para 78.

case that the instruction given was not clear. If the instruction was not clear from the letter and from when it was communicated to him the second time by the personal assistant, it must have come abundantly clear when he went to the municipal manager's office what was exactly expected of him. He was told by the municipal manager that he was not intending to change his mind even if his immediate manager was to seek to persuade him otherwise.

[50] On the facts and the circumstances of this case, considering also the level at which the applicant operated at, there can be no doubt that the applicant ought to have appreciated that the conduct of challenging the his superior in front of not only other employees but the police, and for that matter the superintendent, was totally unacceptable and absolutely undermined the authority of his employer over him. At the disciplinary and the arbitration hearing, the applicant showed no remorse for his conduct.

[51] It is apparent from the reading of the arbitration award that the arbitrator found no merit in the complaint that the disciplinary hearing was nothing but a sham. It seems that the applicant says that the hearing was a sham because according to him the municipal manager suspected him of being responsible for allegedly leaking out information to the Scorpion about investigating the alleged irregularity by the municipal manager. The findings made by the arbitrator indicate that this allegation was rejected by the arbitrator. The record of the proceedings take the case of the applicant in this respect no further than the allegation he made. That allegation was not substantiated. The investigation it would appear from the version of the applicant arose from the alleged allocation of land to a company whose manager had a personal relationship with the municipal manager. The report which forms the subject matter of this allegation was not presented neither did the applicant lead any evidence of any of the council members who were present when he made the report, neither did he make available the minutes of the meeting where the report was made. There is therefore no causal connection between his disciplinary

hearing and the underhand motive he sought to use to support his proposition that the disciplinary hearing was nothing but a sham.

- [52] In my view, taking into account the totality of the facts and the circumstances of the case, it cannot be said that the arbitrator committed and irregularity or that his arbitration award is no which reasonable decision maker could have reached.

Award as of costs

- [53] The issue that remains for consideration is the issue of the complaint that the arbitrator made an award as to costs even though neither of the parties asked for costs. The issue of costs in Local Government disputes is governed by rule 39 of the Rules of the South African Local Government Bargaining Council (SALGBC).

- [54] It is generally accepted that arbitrators in labour disputes will not readily grant costs orders and if they are to do so they are guided by the requirements of law and fairness. The exception to this broad principle is provided for in rule 39 of SALGBC, which gives arbitrators discretion to award costs where there it found that a party has in either instituting the proceedings or defending them acted in a frivolous or vexatious manner. The exception to the general rule is introduced into the rules of the SALGBC through rule 39(1) through the incorporation of section 138(10) of the Labour Relations Act. The rule reads as follows:

‘(1) The basis on which an arbitrator may make an order as to costs in an arbitration, is regulated by section 138(10) of the Act (LRA).’

Section 138(10) of the LRA reads as follows:

‘The commissioner (the arbitrator) may not include an order for costs in the arbitration award unless a party, or the person who represented that party in the arbitration proceedings, acted in a frivolous or vexatious manner-(a) by proceeding with or defending the dispute in the arbitration proceedings; or (b) in its conduct during the arbitration proceedings.’

[55] In arriving at the conclusion that the applicant was to pay the cost the arbitrator reasoned that the applicant had acted in a frivolous and vexatious manner in instituting the arbitration proceedings.

[56] Except for contending that none of the parties before the arbitrator asked for costs, the applicant does not challenge the finding of the arbitrator that he acted in a frivolous and vexatious manner in instituting the arbitration proceedings. In other words, the essence of the arbitrator's finding is that the applicant instituted the arbitration proceedings even when there were clearly no prospects of succeeding. On the facts and circumstances of this case, there was no basis for the applicant to institute the arbitration proceedings.

[57] Accordingly, I find no basis for faulting the arbitrator in his finding concerning the conduct of the applicant and the conclusion he reached that the he should pay the costs.

Order

[58] In the premises, the applicant's application to review arbitration award made under case number NDC 090809 dated 24 March 2011 is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: In person

For the Respondent: No appearance