

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN CAPE TOWN)

CASE NUMBER: C722/2011

5 DATE: 30 JULY 2014

In the matter between:

THE DEPARTMENT OF HEALTH Applicant
(WESTERN CAPE)

and

10 **DENOSA obo P R LEBAEA** First Respondent

PHSDBC Second Respondent

THUTHUZELA NDZOMBANE N.O. Third Respondent

J U D G M E N T

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STEENKAMP, J:

This is an application to have the award of the third respondent, Commissioner Ndzombane, reviewed and set
20 aside. It flows from the dismissal of the first respondent, nurse Lebaea, who is represented by her trade union, Denosa. She was dismissed after having been charged with misconduct arising from two incidents that allegedly arose on the same day. The first is that she threatened a colleague, Ms Blignault,
25 by uttering the words “*ek sal jou wind uitskop*”. The second is
/RG /...

that later that day she attempted to stab Blignault with a pen.

The arbitrator found, and indeed Ms Lebaea conceded, that she did utter the words "*ek sal jou wind uitskop*". In this regard the arbitrator was of the view that a fair sanction would have been a final written warning. On the second incident, to which I shall refer as the pen incident, the arbitrator found that the Department's witnesses had contradicted each other and he then found that, although he accepted that Lebaea was aggressive and angry at the time, the mere fact that she pointed a pen at Blignault could not be construed as an attempt at assault.

The Department takes issue with both these findings as well as the sanction of retrospective reinstatement. I should add that the Commissioner did not quantify the back pay due to the employee, and the Department initially took issue with that failure as well. Ms *Harvey* did not press that ground of review and I think wisely so. The order is quite simple, that is that the employee should be reinstated retrospectively. Although it is always preferably to quantify any amounts due for the sake of clarity, in this case the Department knew exactly what she earned and it should have no problem in calculating the amount due.

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The review falls squarely within the test set out in *Sidumo*¹, i.e. whether the conclusion reached by the Arbitrator is one that a reasonable arbitrator could not reach. Although much of the Department's argument was based on credibility findings made
5 by the Arbitrator and his failure to consider the discrepancies between Mvunyiswa's original statement and her testimony at the arbitration, that is no longer the test, as Mr *Leslie* pointed out. The one other issue is that the record of the hearing before the Arbitrator is not complete, but nevertheless the
10 Department elected to proceed with the review application on the documents that were before the Arbitrator.

Mr *Leslie* also referred to the matter of Nathaniel v Northern Cleaners Kya Sands (Pty) Limited and Others (2004) 25 *ILJ*
15 1286 (LC) where Gamble AJ, as he then was, said the following:

“The applicant in a review has an onus to prove his or her case and must do so on all the
20 evidential material properly placed the Court. If, after consideration of all of that material (defective as it may be), the Court is unable to find a reviewable irregularity, then the applicant will obviously fail. A defective record in such

¹ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

circumstances is but one of the vagaries which
accompany the litigation process.”

A similar attitude was taken by the Courts in Brodie (2013) 34
5 *ILJ* 608 (LC), paragraph 6 and in Doornpunt (2008) 29 *ILJ*
1874 (LC).

It remains then for this Court to consider whether the
conclusion reached by the Arbitrator was so unreasonable that
10 no other arbitrator could have reached that conclusion. In
coming to the conclusion that it did, despite the fact that it
transpired to be common cause that Lebaea had uttered the
words “*ek sal jou wind uitskop*”, he found, as I have said, that
the sanction of dismissal was too harsh.

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In coming to that conclusion, he took into account the
circumstances in which the two incidents took place, namely
that it appeared that Lebaea had been provoked by Blignault.
He took into account the degree of force or absence thereof
20 used and the relationship between Blignault and Lebaea,
especially Blignault’s evidence that she would have no problem
in continuing to work with Lebaea. He also took into account
Lebaea’s clean disciplinary record and her long service with
the Department.

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It is important to note that it appears from the material that is before this Court that when Lebaea uttered the words that she did, inappropriate as they were, Blignault thought it was funny and she laughed about it. That does not constitute a serious threat. More importantly, Blignault stated that she did not want Lebaea to be dismissed and that she could continue working with her. In fact Blignault did continue working with Lebaea for the rest of that day.

With regard to the pen pointing incident, the one neutral bystander, Mvunyiswa, said in her oral evidence in the arbitration, which is a hearing *de novo*, that Lebaea was not a danger to any person on that day; that, in her view, Lebaea was not intent on stabbing Blignault; and that Lebaea could easily have gone past her, that is Mvunyiswa, if she really wanted to carry out such a threat. Mvunyiswa also testified that the trust relationship with Lebaea was not broken.

In all those circumstances the conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have come to the same conclusion. It falls within a band of reasonable outcomes. The review application must therefore fail. Both parties asked for costs to follow the result. I shall not interfere with that request.

THE APPLICATION FOR REVIEW IS DISMISSED WITH COSTS.

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STEENKAMP, J

10 APPEARANCES

APPLICANT: Suzanna Harvey
Instructed by the State Attorney.

15 FIRST RESPONDENT: Graham Leslie
Instructed by Chennels Albertyn.