



**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

Not reportable

CASE NO: JR 173/13

In the matter between:

**SOUTH AFRICAN MUNICIPAL
WORKERS' UNION**

First Applicant

LETHLOHONOLO MEKO

Second Applicant

and

RAND WATER

First Respondent

**COMMISSIONER ANSIE SWANEPOEL
(N.O.)**

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 16 April 2015

Delivered: 29 April 2015

Summary: (Review – reasonableness – findings not unreasonable)

JUDGMENT

LAGRANGE, J

Background

- [1] This matter concerns a review of a pre-dismissal arbitration award as a result of which the individual applicant, Ms L Meko ('Meko' or 'the applicant'), was summarily dismissed after being found guilty of refusing to carry out reasonable and lawful instructions amounting to gross insubordination and serious disrespect. The pre-dismissal arbitration took place over six days and the arbitrator wrote a most detailed and extensive 40 page award. Both parties were legally represented during the proceedings. In the main, the applicant did not take issue with the arbitrator's detailed summation of the evidence. Meko had been employed as a Transformation and Change Management Consultant Designate on a fixed term contract of one year commencing on 1 April 2012. Although Meko was charged in early June 2012, the prolonged disciplinary proceedings meant that she was only dismissed on 10 December 2012 nearly three quarters way through her contract term.
- [2] Meko's position was essentially a developmental post during which she would be trained for a full year and would work hand in hand with a qualified consultant. The designates would not be placed in fully fledged roles before they had developed a real appreciation for the work and were able to cope properly. Nonetheless, in terms of her contract of employment, she was expected to perform duties related to her appointment and others assigned to her from time to time. She also agreed to comply with all reasonable and lawful instructions given to her, and to acquaint herself with all the company policies, rules and practices and regulations. It was further stressed that she needed to achieve her developmental requirements within a year and undergo a rigorous evaluation process.
- [3] The incidents on which the charge of insubordinate conduct was based, and for which the applicant was ultimately dismissed, were described as follows:

“1. You have failed to provide Daily Deliverable and Hourly Output Report as per your email dated 7 June 2012, as requested by ODD manager.

2. You have again verbally refuse to provide the Daily Deliverable and Hourly Output Report, when asked by the ODD manager on 8 June 2012.

3. You have failed to provide your University Schedule as requested by the ODD manager.

4. You have verbally abused and shouted at your supervisor, Mpho Kotane, on 25 May 2012 which amounts to gross insubordination and disrespect, when she followed up on an earlier instruction given to you to wrap up the handover of tasks from Juliet Kobane.”

The ODD manager referred to was Ms Sekoto, to whom Ms Kotane reported.

- [4] The applicant had been charged with an additional charge of failing to properly coordinate a series of interviews, but the arbitrator found her not guilty of this charge.

Contextual background

- [5] The chain of events leading to the applicant facing a disciplinary enquiry began when Ms Sekoto decided during May 2012 that two of the applicant's colleagues should be seconded to the Rand Water Academy as part of their training. There was some dispute as to whether they were informed of the secondment on 14 or 21 May, but the applicant, who was not going to be seconded at that stage, was not happy with the decision because she believed they should have been given more notice. A consequence of the intended secondment was that it was necessary for the seconded employees to do a handover of work and to complete a report on work they were expected to deliver in order to determine if they were ready to be seconded. In the case of Ms J Rakobane ('Rakobane'), the handover was to be done with the applicant. This was to take place during the week of 21 May. That week Rakobane was due to spend two days at Standard Bank that week as part of her training and on 22 May the applicant asked Kotane for time to be set aside for herself and Rakobane to go through all the activities so that a

proper handover could be done. She asked Kotane to inform her of the number of days left before Rakobane had to report to the Rand Water Academy so they could find a suitable time to go through any of Rakobane's activities that still had to be completed. She was concerned that she would be left with activities she could not account for or would be unable to cope with. Kotane responded by asking the applicant to outline what each of them were doing respectively at that time.

- [6] On 23 May 2012 the applicant asked if that could be cancelled so that the handover could be completed. However, according to Sekoto it was not feasible to cancel the arrangement with Standard Bank.
- [7] On 23 May 2012, when Kotane met Rakobane and the applicant she asked them if the handover had been completed. The applicant responded with an outburst complaining that it was unreasonable to expect her to do the handover because she was inundated with work. As far as Kotane was concerned, the handover would not have taken more than an hour as it simply required Rakobane to tell the applicant what she was doing and the status of processes she was involved in. The outburst took place in the open plan office where they worked and the employee's behaviour concerned Kotane so much that she decided to involve Sekoto.
- [8] At the time Kotane asked Sekoto to mediate between herself and the applicant, she was in a meeting with other senior managers including the group t HR Executive Manager, Ms W Mohammed ('Mohammed'). Mohammed sought to mediate between Kotane and the applicant and gave the applicant a day off to consider if she still wanted to be part of the organisation. Mohammed was struck by the degree of hostility displayed by the applicant which she found unusual in someone who had been employed for such a short period.
- [9] Two days after the incident, the applicant sent an email to her superiors in which she complained about a lack of direction about her role and requesting to be redeployed in another department aligned with her skills and career path. She further complained about comments made about her during her day off which she

said had caused her to lose any trust she had with her direct superiors. The email ended on a somewhat aggressive tone with the following remark:

“If this is a response I received from asking questions, I shudder to see what type of treatment I will receive going forward.”

- [10] Sekoto requested the applicant to provide her with details of her workload, in view of her complaint that she was swamped, but was met with a barrage of reasons why the applicant felt she could not comply fully with the request. An indication of the tenor of the applicant's response is contained in an email she sent the day she returned to work after taking a day off. Sekoto had asked her to extract her own tasks from those of the team so that her workload could be assessed because she was the person who was complaining about her own workload and not the workload of the team. The applicant responded:

“I have already provided you with the spreadsheets that indicate my tasks alone.

Please do not hold me responsible for any work behind, since you have been keeping me busy printing and mailing information back and forth, which I have already supplied you with.”

When Sekoto asked for more detailed information about the date of assignment of tasks to her, the commencement dates of those tasks and the due date, the applicant's response was to question the purpose of providing such information. Even when Sekoto asserted her right to such information as the ODD manager, the applicant's response was to argue that information of this nature had previously not been required by her immediate supervisor Kotane.

- [11] Later in early June, when Sekoto asked the applicant again to provide her with the same type of daily deliverable reports which her colleague Rakobane provided to her, this prompted another lengthy email from the applicant complaining about her treatment.

The award

[12] The important penultimate findings of the arbitrator which led her to reach the conclusion she did may be summarised as follows:

12.1 The applicant's explanation that she was not insubordinate when she failed to provide a report on her daily deliverables and hourly outputs was not credible. To complete the report did not demand too much of her and it was undisputed part of her daily duties. If she was indeed swamped with work as she claimed by completing the reports she would have validated that claim.

12.2 On 23 May 2012, the applicant had already planned to go and see her MA supervisor at Wits University and the need to perform the handover duty would have interfered with her arrangement. This most probably raising her voice with Kotane. As a junior and the novice she overstepped the boundaries of respect and decency when she did so. Even though Kotane had forgiven her and their relationship had been mended, this was not the only incidence of insubordination but the start of a series of incidents which affected not only the applicant but the whole team in the department. Although the general practice of loitering in the Department that being rooted out, the applicant was frequently absent from her desk for more than an hour and continued to arrive late which indicated an ongoing reluctance to submit to Kotane's authority.

12.3 This was also evidenced by her refusal to sign off on her job description apparently because it would require her to spend time in HR or doing other tasks. The arbitrator regained the distinct impression that the applicant did not see the need to "start at the bottom of the ladder", which everyone else was expected to do, but believed that her education did not require her to undergo basic training. Similarly, her attitude towards her employer's perfectly reasonable request for a schedule of her university commitments was further evidence of her unwillingness to submit to authority. The overall impression gained was that the applicant was not willing to live with the terms and conditions on which she had been employed.

12.4 A further factor the arbitrator was shocked by was the absence of any remorse by the applicant when she was asked in the hearing why she had not accepted Kotane's advice to apologise to Sekoto. The arbitrator concluded that if the applicant still had that attitude after hearing all the evidence during the enquiry then the possibility of restoring a normal or harmonious working relationship was "doubtful to say the least".

[13] The arbitrator turn to consider the question of the degree of insubordination demonstrated by the applicant and noted that a situation in which an employee initially defies instruction and then subsequently complies fully with it could, in the appropriate circumstances, justify an employee not being dismissed. Similarly, a mere failure to comply with the instruction was less serious than a deliberate refusal to do so accompanied by a defiant challenge of the employer's authority in the presence of other employees. Even having regard to this, if the conduct of the applicant had ended with the intervention of Mohammed that intervention might have been sufficient to address the situation.

[14] However, in the arbitrator's view, it was just the beginning of a pattern of disrespect and insubordination on the part of the applicant. She noted, for example, that it was only after the hearing had been in progress some time, during October 2012 that the applicant started to provide daily deliverables and reports on her hourly outputs which she had been requested to do from the end of May. Further, the applicant's attitude that Sekoto had attended her interview and so ought to have been aware of her study commitments was a poor excuse for not responding to the direct request for details of those commitments, even if she no longer intended to take time off for them. Her refusal to sign off on her job description, when it was essentially the employer's right to determine how she would be trained was inexplicable and further evidence of how difficult she was to manage. The arbitrator dismissed the applicant's defence that she did not fully understand the instructions given to her and noted that she was able to complete the reports on her activities when she eventually did do so in October 2012.

[15] Turning to the question of the appropriate sanction, the arbitrator considered carefully whether dismissal or some lesser sanction was appropriate. What clearly weighed heavily with the arbitrator was the cumulative effect of the various acts of insubordination and the lack of any acceptance by the applicant of the seriousness of her actions or admission of any fault on her part. The absence of any indication of regret on her part which might indicate her willingness to conform and comply with the reasonable instructions of her superiors in the future provided no assurance that a sanction short of dismissal would serve a purpose. Even though she had clearly been minded to impose a final written warning coupled with some kind of punitive sanction such as unpaid leave (ignoring for the moment whether that would be possible without the applicant's consent), she was not persuaded in the light of the applicant's own expressions of distrust of her superiors and absence of any admission of wrongdoing that such a sanction would have any impact on the applicant.

Grounds of review and evaluation

[16] On review, the applicant's principal complaint is that the arbitrator's finding of gross insubordination and that the employment relationship was irretrievably broken down was one that no reasonable arbitrator could have reached.

[17] In particular, the applicant contends that the finding of gross insubordination was unsustainable because:

17.1 She had made an attempt to complete the daily schedule even if it is true that she had been reluctant to do so and had been obstructive in complying with the instruction fully until October 2012.

17.2 To the extent that her failure to provide a schedule of her university commitments, was because she had unfortunately taken the view that it was not necessary to respond because those commitments would no longer interfere with her working hours, she had attended an apology for this at the disciplinary enquiry.

17.3 The altercation which arose on 23 May 2012 occurred in the heat of the moment and Kotane had forgiven her and put the matter behind her.

[18] In relation to the question of whether the breakdown was irretrievable, the applicants contend that:

18.1 the arbitrator was ought not to have taken account of the applicant's utterances about the distrust of her superiors that she expressed in May 2012, but should have considered matters as they stood at the time of the disciplinary enquiry.

18.2 It was irrational of the arbitrator to say that no matter what the applicant said in her evidence before her, she could not cure what she had said about the breakdown of trust between her and her superiors as early as 23 May 2012, in the absence of any expression of remorse on her part.

[19] Of course, the essential question in considering the merits of these claims is whether, on the evidence before the arbitrator, no reasonable arbitrator could have reached those conclusions. As mentioned previously, the applicant did not take issue with the arbitrator's summation of the evidence. It is worth mentioning when considering the above grounds of review the following passages from the award:

19.1 At the end of her cross-examination it was put to Sekoto that the second applicant felt that the trust relationship between her and Sekoto had not broken down. The arbitrator summarised her response thus:

"[103] It was put to her that the employee [the applicant] felt that the trust relationship between her and the witness [Sekoto] has not broken down. She disagreed given the number of events that have taken place. The reason for no contact between her and the employee was intentional and from her side. There is no working relationship between her and the employee at this stage. She denied the problems could be resolved through counseling. The employee for example was asked to sign off on her Key Responsibility Area document. She refused to do so stating that she would only consider discussing it after the case was finalised."

19.2 Part of the evidence in chief of Kotane, was captured by the arbitrator in the following terms:

"[133] She did not regard the trust relationship has been destroyed, but there was a broken down relationship with her employer, which she had hoped to salvage. She had had numerous discussions with the employee and after one counseling session they had she went to the employee and asked her to her own address the situation between the employee and Ms Sekoto. She tried to mediate, that the employee remained unforgiving towards Ms Sekoto. It was impossible to salvage the situation since the employee assumed that she had ulterior motives in everything she did. She became the middle person in the situation. She wanted the employee to go and apologise to Ms Sekoto and then to forge a new basis for their relationship. The employee remained steady fast and unforgiving. The team is small and this affected their productivity. Ms Sekoto issues the instructions. It is important to get the employee to approach Ms Sekoto and to address the situation, and even though the employee remained unrepentant, she remained hopeful, yet the trust between the two had been broken."

19.3 Further, under cross-examination, the arbitrator summarised the following portion of her evidence in these terms:

"[171] She added that on a personal level her relationship with the employee had been fine. She forgave the employee and moved on. The employee had not after this incident disrespected her or said anything wrong to her, but the relationship at work was tense and uncomfortable. Both the interventions planned did not work. She has given the employee guidance of the employee does not take guidance from her, the business coach, or the psychologist. The matter could have been resolved in the office had the employee being willing to play her part."

[20] At the end of the applicant's cross-examination, the arbitrator gave her an opportunity, alluded to above, to make amends for her disrespectful attitude towards Sekoto. The transcript reads:

"COMMISSIONER: There's two aspects in clarifying from my side. Ma'am Mpho Kotane testified here that she advised you to simply go to Sekoto, apologise, and that would have stopped this whole process. What is your comment on that?"

MS MEKO: Firstly, Madam Commissioner, I did not understand what I would have to go and apologise for. Several things that happened when I was being victimised. So therefore need to be victimised and then I have to go to the same person and so I apologise was a bit and tearful me and I did specify that to Ms Kotane to under-explain to you how heard was by how the process had gone and that feel like process continued just because I was not clear as to why I had to apologise.

So for me I still remain here as to what I need to apologise for, because if they are saying to me that these are that, this is where you went wrong and this is what you must apologise for, maybe who would have made a difference, but I still am unclear what I had to apologise for even today, because there has been a meeting with Ms Sekoto to say this is what I have are concerned with as I have requested on several occasions for a meeting with Ms Sekoto with no luck."

[21] What clearly struck the arbitrator about this response was the fact that after a six-day hearing in which the complaints about her disrespectful and insubordinate behavior had been canvassed *ad nauseam*, the applicant was unable to appreciate the seriousness of her conduct or accept any responsibility for wrongdoing on her part, even if she might justifiably have felt immediately after the incident of her outburst that Sekoto had improperly cautioned other employees not to follow her example.

[22] On the finding of gross insubordination, even if one accepts as the arbitrator did, that the outburst of the applicant on 23 May 2012 was not sufficient to justify her

dismissal, the evidence of a pattern of the applicant treating every instruction she did not agree with as a matter for negotiation at best, or something to be disregarded at worst, was completely inimical to rebuilding a trust relationship which had been damaged on that occasion. There were sufficient examples provided by her subsequent conduct that she did not accept that it was a norm of her employment relationship to comply with the reasonable instructions of her seniors even if she sometimes found those instructions disagreeable to her. It is understandable that Sekoto simply sought to avoid contact with her as a way of dealing with the situation. But there is no reason why an employer has to tolerate an employee who prefers always to march to the beat of their own drum. It is difficult to see how one can interpret the applicant's repeated disregard of reasonable instructions as anything but a direct challenge to the right of her superiors to expect her to obey them.

- [23] In this matter, the central question relating to sanction is whether there was any prospect of the relationship being restored to anything like a normal working relationship. It is not unreasonable on the evidence before the arbitrator to have concluded that since the outburst in May 2012, the applicant had simply not done anything she did not want to do despite instructions to the contrary. It is true that she eventually provided Sekoto with the reports on her work, but that was only in October 2012 a few months after the request had initially been made on repeated occasions. There was also ample evidence that the employer had adopted a number of interventions and counseling initiatives to try and turn the situation around, but to no avail. There really was scant credible evidence that there was likely to be any long-term improvement to the point where the applicant would accept that she was subordinate to her superiors in the training position she had been appointed to and that complying with their reasonable instructions was not optional at her discretion. It was suggested that the relationship though strained had not reached a breaking point. The difficulty I have with that submission is that there was no tangible evidence of an intention on the part of the applicant to cooperate with her superiors going forward. If there was evidence of a realistic prospect that things were more likely to improve than to remain perpetually

strained or deteriorate further there might be some merit in that argument, but on what was before the arbitrator, she would have to have been most naïvely optimistic to believe that was possible.

[24] In the circumstances I do not think that the arbitrator's overall findings can be said to be ones that no reasonable arbitrator could reach on the evidence before her. On the matter of costs, neither party pressed the issue and accordingly it seems appropriate not to make any order.

Order

[25] The review application is dismissed, with no order as to costs.



R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicants: K Naidoo of Cheadle Thompson & Haysom Inc

For the First Respondent: T. Mokhatla

Instructed by: Mokonyane Inc Attorneys

Appearances:

For the Applicant: K Naidoo of Cheadle, Thompson & Haysom Inc.

For the Third Respondent: T Mokhatla instructed by Mokonyane Attorneys