



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

C514/2011

In the matter between:

NUPSAW obo HLELI L

Applicant

And

LESLIE MARTIN N.O.

First Respondent

PUBLIC HEALTH & SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

DEPARTMENT OF HEALTH

(WESTERN CAPE)

Third Respondent

Date heard: 5 August 2014

Delivered: 23 January 2014

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application for condonation for the late filing of a review application. Both the condonation application and the review were argued before me. The application for review was filed some three months out of time and the reasons for the delay were not satisfactorily set out in detail by the applicant. I have however decided that the matter merits an enquiry into the

prospects of success in the review application and I consider the review below.

- [2] The applicant seeks to review and set aside an award issued by the first respondent on 22 April 2011, under case number PSHS207. The individual applicant (Hleli) had been employed by the third respondent since the 7 January 1997. At the time of his dismissal on the 22 June 2010, he was employed as a senior administrative clerk. He was dismissed after having been found guilty on a charge of “insubordination and impoliteness.” He was given a final written warning in relation to absence from the workplace without authorisation, the first charge in his disciplinary hearing, and in relation to a charge of “absence without authorisation”, demotion and the deduction of pay for dates where no proof of authorization was provided.
- [3] The first respondent was therefore dealing solely with his dismissal on the “insubordination and impoliteness” charge. In his award, the arbitrator found as follows in his analysis of the evidence and argument before him:

“The evidence shows numerous incidents of Hleli’s refusal to obey lawful instructions and a failure to participate in the disciplinary system of the respondent. This is manifested, particularly in his act of closing his ears when addressed by his superiors in relation to matters concerning discipline. In this regard I have no reason to doubt the testimony of van der Westerhuizen and Vermeulen. There is no reason other than a bland denial on the part of Hleli as to why Vermeulen and van der Westhuizen would want to level these allegations against him without good cause. In fact, much of the testimony of the witnesses of the respondent went unchallenged by Hleli, thereby denying those witnesses an opportunity to respond to his version.

A further example of Hleli’s thumbing his nose at the disciplinary procedures in place of the respondents is Hleli’s disregard for the instructions given him regarding his communication of his absence from the workplace. I have no reason to doubt that the employees at the respondents are aware the manner in which such communication must be effected. It must be borne in mind that until there is proof of a

valid reason for absence from the workplace, the employer's condonation thereof would be an indulgence until such proof is provided. It goes without saying that in the event of acceptable evidence ultimately not being furnished by the absent employee, such employee remains subject to being disciplined in respect of that absence.

While it is clear from the evidence before me that Hleli had acted in an insolent and insubordinate manner, it is also clear that Hleli has not shown any remorse in respect of his conduct.

Notwithstanding the fact that Hleli had been in the employ of the respondent for 13 years, the fact that his conduct demonstrates the disposition of an employee unlikely to reform, it would be inappropriate to expect the respondent to continue a relationship with him."

- [4] Much of the summary of evidence in the award deals with the issue of unauthorized absence from the workplace and days off without authorization at year end. As stated above, Hleli received sanctions for these offences. The following paragraphs of the award deal with the issue for which Hleli was dismissed. The first respondent records as follows:

"The further testimony of Van Der Westhuizen and Vermeulen was that they had on 26 March intended to serve on Hleli the notice to attend a disciplinary hearing, but that Hleli refused to accept the notice and covered his ears with his hands when they tried to verbally tell him what it was. Hleli then walked out of his office. Hleli denied that he was in his office at the time and that van der Westhuizen and Vermeulen had served the notice to attend a disciplinary hearing on him. Hleli's version was that he was notified telephonically on 12 April to attend his disciplinary hearing.

Van der Westhuizen had also tried on 11 January 2010 to serve Hleli the audi alterem partem form regarding his absenteeism. On that occasion he had also refused to sign the document and also covered his ears so as not to hear what she was saying to him and walked out.

Hleli however denied this, stating that he had accepted the document but had not signed for it.

She had also generally found Hleli to be abrupt and disrespectful to authority when interacting with him.”

- [5] A reading of the record of the arbitration proceedings reveals that for the most part the evidence led by the employer’s witnesses concerned the unauthorised leave at year end, and the taking of sick leave by Hleli on a particular day when he was asked to work in a specific department. There is no indication in the record or the award that the first respondent was alive to the fact that sanctions had been handed down by the disciplinary chairperson in regard to these charges. What is evident from the record is that evidence regarding the charges relating to absenteeism was led in order to prove that Hleli was fairly dismissed in respect of the charge of “insubordination and impoliteness”
- [6] The applicant union alleges that the award stands to be reviewed because the first respondent failed to apply his mind to the facts and evidence properly before him. Further, that in finding the applicant guilty of insubordination warranting dismissal, the first respondent does not indicate the facts upon which such findings are based and appears to connect this charge with Hleli’s refusal to accept the notice of the disciplinary hearing and refusal to attend the proceedings – conduct post-dating the charges against him.
- [7] In my judgment, the award read together with the record before the arbitrator reveals that the first respondent committed a gross irregularity in he failed to identify the issue to be decided before him. In **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others**¹ the LAC per Waglay JP held that in reviews applications such as this:

¹(2014) 35 ILJ 943 (LAC)

“The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?

- [8] Having found that the first respondent failed to understand the issue he had to decide and thus did not deal with the substantial merits of the dispute in relation to that issue, I must consider whether his award was one that a reasonable decision maker could not reach. That test involves a reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator.²
- [9] For the most part the evidence led before the arbitrator was not properly before him, taking into account the true issue raised by the dispute. In my judgment, on the evidence properly before the arbitrator, on the charge of insubordination, (absent the evidence on the charges for which Hleli received sanctions lessor than dismissal), the outcome reached by the arbitrator was not within the bounds of reasonableness. That evidence concerned Hleli's behavior after he was charged and the view of van der Westhuizen that he was generally abrupt and disrespectful. His other managers, including his direct supervisor, who testified for the third respondent, gave evidence that he was a hard worker. In all the above circumstances, I consider that the award in question stands to be set aside. The applicant has sought that the dispute

² Herholdt v Nedbank Ltd (COSATU as Amicus Curiae) 2013 (6) SA 224 (SCA)

be referred to the bargaining council for arbitration anew. I consider this to be appropriate. I make the following order:

1. Condonation is granted for the late filing of the review application;
2. The award under case number PSHS207 is reviewed and set aside;
3. The unfair dismissal dispute is referred back to the second respondent for arbitration anew before an arbitrator other than first respondent.

H. Rabkin-Naicker

Judge of the Labour Court

Applicant: NUPSAW J.M. Dube

Third Respondent: Adv. Mangcu-Lockwood instructed by P. Melapi, State Attorney