



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

Case No: D838/11

In the matter between:

DEPARTMENT OF HEALTH - EMRS

Applicant

and

COMMISSIONER MTHETHWA

First Respondent

PUBLIC HEALTH SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

NUPSAW obo NHLEKO

Third Respondent

Heard: 2 December 2014

Delivered: 10 July 2015

Summary: Review of award – misconduct not proved – Commissioner did not misconceive the nature of the enquiry nor did he arrive at an unreasonable result.

JUDGMENT

CELE J

Introduction

- [1] This is an application in terms of section 158 (1) (g) of the Labour relations Act,¹ to review, set aside and substitute the arbitration award issued by the first respondent on 25 July 2011, in this matter, where he found the dismissal of the third respondent's member to have been substantively unfair and ordered the applicant to reinstate him. Condonation is sought for a delay of 6 days in filing the review application. The third respondent opposed only the review application and it filed an application to make the award an order of court, in the event of the review application being unsuccessful. A meritorious condonation application has been made and accordingly, condonation is granted.

Background facts

- [2] The third respondent initiated this application acting as a trade union representing its member, Mr Nhleko, the erstwhile employee of the applicant. Mr Nhleko commenced his employment with the applicant on 1 August 2004 in the Emergency Medical Rescue Services, the EMRS, based at Abaqulusi Zone in the north of Kwa-Zulu-Natal. He worked in the ambulance services, as an Ambulance Driver attending to sick patients who needed to be conveyed to medical centres according to their needs as identified by those in charge at the relevant hospitals. Different colour codes were used to classify the urgency of

¹Act Number 66 of 1995, hereafter referred to as the Act.

each case. The most critically ill patients were allocated a red code and three minutes turnaround time was prescribed as reaction time to attend to that patient, from the time a telephone call was received, calling for the transportation of the patient. A yellow code was allocated to the not so critically ill patients who however were still requiring urgent attention. The turnaround time for the yellow code was five minutes.

- [3] Mr Nhleko worked under the supervision of Mr Thokozani Sipho Mlotshwa, who in turn reported to the Vryheid Acting Zonal Officer, Mr Bhekumuzi Enoch Jele. On 12 December 2008 two ambulances were destined to travel to Pietermaritzburg. After their departure a Doctor Derrick working at Vryheid Hospital telephoned Mr Mlotshwa to arrange for the transportation of a yellow coded patient to Grey's Hospital in Pietermaritzburg. At the time of Dr Derrick's request the two ambulances had not yet returned from Pietermaritzburg to Vryheid. At about 15h00 Mr Mlotshwa then telephoned the applicant and asked him to report earlier than the regular time of 19h00 on that evening. According to Mr Mlotshwa the applicant responded with reluctance to comply, begrudgingly remarking that there was a delay in translating his rank from Ambulance Assistant to Intermediate Life Support Officer. Mr Mlotshwa said that he told the applicant that the issue would be attended to.
- [4] Mr Mlotshwa then initiated the arrangements for the transfer of the Dr Derrick's patient. The Emergency Medical Dispatcher in the evening of 12 December 2008 with whom he corresponded was a Mr Zwelibanzi Mathenjwa. Mr Mathenjwa instructed the applicant to transport the patient to Grey's Hospital. The applicant allegedly refused to carry out the instruction and the matter was reported to Mr Mlotshwa who said that he also instructed the applicant. Again the applicant allegedly refused to comply but instead denied that Mr Mlotshwa was his supervisor and he spat on Mr Mlotshwa. In the light of developments, Mr Mlotshwa telephoned Mr Mathenjwa, telling him no longer to give the particulars

of the patient to the applicant, only to be told that the same had already been supplied to the applicant.

- [5] Mr Mlotshwa reported the incident to Mr Jele and the two arranged to and did meet at the Hospital. They found the applicant and a Mr Mbatha already attending to the patient and loading her to the ambulance for transportation. The applicant was told by Mr Jele that he was to report to the base as he was being replaced by a Mr Qwabe. The applicant retorted by saying that the ambulance was allocated to him and left the office and went to the ambulance and he took off to Grey Hospital. The incident led to the applicant being charged with misconduct described as:

“It is alleged that on the 12. 12 2008 at about 19h15 you

- a) Refused to take a Patient care related case (ILS Transfer) given to you by Emergency Medical Dispatcher. By refusing to take that call, it resulted to unnecessary delay of the case affecting the response time.
- b) Disrupted EMRS activities in the Abaqulusi Zone by failing to carry out a lawful instruction given to you by Mr T S Mlotshwa your immediate supervisor this conduct amounts to gross insubordination. Furthermore you assaulted your supervisor Mr TS Mlotshwa in a most derogative manner while he was talking to you, by spitting on him inside premises of work (EMRS).
- c) Verbally abused your immediate supervisor (Mr Mlotshwa) by telling him that he is not your supervisor while he is indeed your real immediate supervisor.”

- [6] On 28 May 2009 the chairperson of the internal disciplinary hearing, Mr M Mchunu found the applicant guilty of all charged preferred against him and the applicant was dismissed from the employment of the applicant. On 26 June 2009 he referred an unfair dismissal dispute to the second respondent for conciliation. In that referral he summarised the facts of the dispute as:

“I was requested by the control centre to transfer a patient long distance. I requested the control to contact Ms F Zulu and to contact me again if they were unable to find her. I did this because we, at the base, have an arrangement that each one should take turns, on a rotational basis, to travel long distance.

The control contacted me again and told me that my supervisor wanted me to transfer the patient. I took down the details of the patient and went to the hospital to collect the patient at the hospital. My supervisor and zonal officer instructed me to go back to the base. We went to the base with the patient in the ambulance. The supervisor told me to leave the patient and somebody else would take the patient. I refused because I was responsible for the patient. I transferred the patient to Greys Hospital.

As far as the question of abuse and assault goes it is a lie. It was raining on that night and droplets of water could have fallen on him and this made him feel that I had been spitting on him.”

- [7] The dispute was not capable of a resolution and he referred it to arbitration. The first respondent was appointed to arbitrate it. The dismissal of Mr Nhleko by the applicant was common cause and so the applicant had to prove the fairness thereof. Mr Nhleko challenged both the substantive and procedural fairness of his dismissal. The applicant called three witnesses who testified, being Messrs Bhekumuzi Enoch Jele, Thokozani Sipho Mlotshwa and Zwelibanzi Mathenjwa. Mr Nhleko testified and his witnesses were Messrs Siphamandla Pennuel Qwabe and Thabani Alfred Mbatha. The first respondent issued an award with the finding that the dismissal of Mr Nhleko was procedurally fair but substantively unfair. He ordered the applicant to reinstate Mr Nhleko with retrospective effect with no loss of earnings or income.

Grounds for review

[8] The applicant seeks to review the first respondent's award on the basis of it having been improperly obtained and defective on the following grounds, *inter alia*:

- 1) that the first respondent committed misconduct in that he failed to arrive at a decision based on the evidence properly presented before him;
- 2) that the first respondent failed to apply his mind to the evidence that was presented before him and he misconstrued the evidence in finding that the third respondent did not disrupt the Emergency Medical Rescue Services ("EMRS") activities;
- 3) that the first respondent applied a criminal and therefore a wrong standard in assessing the evidence of the refusal to carry the instruction;
- 4) that the first respondent exceeded his powers as a Commissioner in finding that the third respondent's dismissal was unfair when the complaint that other people were treated differently was not proved;
- 5) that another Commissioner could have reached a different conclusion based on the evidence presented before the first respondent.

[9] In support of the review grounds the applicant contended that, the case of insubordination against the third respondent was contained in the charge of misconduct relating to the refusal to take a patient- care related case as well as disruption of EMRS activities. The evidence of Messrs Mathenjwa, Jele and Mlotshwa was described to be supporting that charge. The probabilities were said to support the contention that the third respondent refused to take the instruction. The following facts, which the first respondent, by submission, failed

to take into account when coming to his conclusion, were relevant to the probabilities:

- 1) that Mr Jele was called to attend a problem when he was off-duty;
- 2) that Mr Qwabe was called to take the transfer of the patient when he was off-duty;
- 3) that it is a known practice that only two persons are supposed to be in the ambulance at a time;
- 4) that Mr Mlotshwa had to approach the third respondent in the ambulance to address him about his refusal to take the instruction;
- 5) that Mr T A Mbatha confirmed that Mr Mlotshwa did ask the third respondent about his refusal to take the instruction;
- 6) the third respondent's conduct after Mr Jele's intervention, in particular when he was asked not to travel to Pietermaritzburg.

[10] It was submitted that the first respondent misconstrued the evidence in relation to the charge of disrupting the EMRS activities. The following was submitted to be undisputed evidence:

- a) that in all ambulances there were to be two crew members;
- b) that Mr Mlotshwa had put Messrs Mbatha and Qwabe on the trip sheet;
- c) that the third respondent, despite repeated pleas that he was to remain behind, got into the ambulance as a crew member even though Mr Qwabe

was already in the ambulance in his capacity as the intermediate life support.

Opposition to the review application.

[11] The third respondent made numerous submissions in opposition to the review application by averring, inter alia, that:

1. The record of the proceedings demonstrated that the award of the first respondent was based on the material that was before him;
2. The first respondent summarised the evidence accurately;
3. He set out his reasoning, which was logical and demonstrated that he applied his mind to the evidence before him.
4. He satisfied the test for reasonableness even if the deponent to the founding affidavit disagreed with the finding or the weight given to the evidence in the analysis;
5. The award set out each of the charges and dealt with the evidence in respect of those charges;
6. On the first two charges the finding was made on the probabilities and on the basis of a credibility finding against the applicant's witnesses that Mr Nhleko was not guilty of the misconduct he was charged with;
7. On the third charge the first respondent found that he was unable to decide who was telling the truth and he based his decision on the onus, which he correctly found rested with the applicant and therefore he found against the applicant which had not proved the dismissal to be fair;
8. The grounds of review set out in the founding affidavit do not challenge the finding that Mr Nhleko was not guilty of the first charge. The finding in the award in relation to that issue was therefore to stand;
9. The most significant feature of the award was the finding that evidence that was given on behalf of the applicant materially contradicted its own documentation. Messrs Mlotshwa and Mathenjwa were found to be not

honest and reliable witnesses of the applicant and they did not even believe their testimony;

10. Mr Nhleko was found to have complied with the instruction from Mr Mlotshwa and that he made the transfer to Grey's Hospital without any delay;
11. Messrs Mbatha and Qwabe testified that Mr Nhleko was monitoring the patient at the back of the ambulance during the trip;
12. A different case from that presented at the arbitration was made in the founding affidavit, namely that the insubordination was not in refusing to take the instruction to transport the patient but rather the refusal to accept the countermanding of the instruction by Mr Jele, contrary to the charge faced by Mr Nhleko;
13. The first respondent accepted Mr Nhleko's evidence that he had asked for the discussion between him, Messrs Mlotshwa and Jele to wait until after he had dropped off the patient because the life of the patient was the main priority;
14. The first respondent accurately recorded in the award that Mr Nhleko was not charged for going to Grey's Hospital but for refusing to take the patient there.

Evidence on disputed facts.

- [12] The applicant's version was that at the request of Dr Derrick Mr Mlotshwa issued an instruction that a female patient at Vryheid Hospital be transferred to Grey's Hospital. Mr Mathenjwa was then told by a Mr Sithole that there was a patient to be transferred. Mr Mathenjwa called on Mr Nhleko to do the transfer. Mr Nhleko cut the discussion by dropping the telephone. Mr Mathenjwa made a second telephone call, at which instance Mr Nhleko told him to request Ms Zulu to do the transfer as he was in no position, at the time, to do it. The matter was reported to Mr Mlotshwa but very soon thereafter Mr Nhleko telephoned, asking for the details of the patient and Mr Mathenjwa supplied the same. An entry in the

vehicle control form recorded that Mr Mathenjwa called Mr Nhleko at 19h18 for the transfer. Mr Mathenjwa's evidence was that he erred in recording 19h18 as he should have recorded 19h15.

- [13] Mr Mlotshwa said that he was told by Mr Mbatha that Mr Nhleko declined to do the transfer. He said that the instruction was given to Mr Nhleko at 19h15. Mr Mlotshwa then went to Mr Nhleko, apparently at the base, and repeated the instruction to him but Mr Nhleko became abusive of him and spat on him. Mr Mlotshwa telephoned Mr Jele to report the turn of events. Then Messrs Mlotshwa and Jele proceeded to Vryheid Hospital to find the patient being attended to by Mr Nhleko and his crew. Mr Nhleko asked if there was any problem. Mr Jele then withdrew the instruction given to Mr Nhleko to do the transfer but Mr Nhleko snubbed him by getting to the ambulance. Mr Jele followed him and told him to go to the base. Again, once they were all at the base Mr Jele told Mr Nhleko to hand over the transfer to another crew but Mr Nhleko left for Grey's Hospital, saying the matter was to be discussed later as he had to look after the patient.
- [14] Mr Nhleko admitted being told to do the transfer but he said that he suggested that if Ms Zulu was available she was to be asked to do it. When he was telephoned again, he never refused to carry out the request but he asked for the particulars of the patient and attended to her. He denied being abusive to Mr Mlotshwa and merely said that he remarked about the approach of Mr Nhleko. He denied spitting on Mr Nhleko. He denied having delayed in complying with the instruction. His witnesses Messrs Qwabe and Mbatha confirmed that the patient being transferred was looked after by Mr Nhleko on the way to Grey's Hospital. Mr Mbatha denied seeing any saliva on Mr Mlotshwa following an altercation with Mr Nhleko.

Evaluation

- [15] The applicant seeks to review the first respondent's award on the basis of it having been improperly obtained and defective on a number of grounds, contending that, as a consequence the award was unreasonable. The applicant had therefore to show that the award being assailed was one that a reasonable decision maker could not make.²
- [16] Before a review will succeed, the reviewing court must find that the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.³
- [17] The evidence of the applicant about the delay in respect of counts one and two was limited to the events of the evening of 12 December 2008 and it excluded the events of the afternoon of the same day. Mr Jele's evidence on the delay was none existent. In fact when he was cross-examined he conceded that there was no delay. Documentary evidence of the applicant contradicted the evidence of Mr Mlotshwa. He said that the book entry of 19h18 was incorrect and was to read 19h15. This correction was sought to be made in 2011 when the entry had been made in 2008, while the events were still fresh in the mind of the one who made the entry. It was within the power of the first respondent, in assessing evidence to reject this aspect of evidence of the applicant. Yet the evidence of the delay was very crucial to count one. The finding of the first respondent on this count is well supported by evidence led.
- [18] In respect of the charge of gross insubordination by disrupting EMRS services, in that Mr Nhleko failed to carry out the instruction given by Mr Mlotshwa the first respondent was confronted by one version from both sides, namely that the

²*Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC).

³*Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25.

instruction was carried out. Both Messrs Jele and Mlotshwa were surprised to find Mr Nhleko very busy in the process of carrying out the given instruction. On the assumption that Mr Nhleko initially refused to carry out the instruction, then he should have been charged properly for that infraction. He was not so charged. The Commissioner should be commended for not misconceived the nature of the enquiry or for not arriving at an unreasonable result on this aspect. No more need be said here as I am in agreement with the submissions of the third respondent.

- [19] On the charge of assault and abuse of the supervisor, part of count two and count three, the Commissioner was faced with two versions of a single event that could not co-exist. He was faced with the evidence of Mr Mlotshwa versus that of Mr Nhleko. The confrontation would have taken place when the two were the only ones together. Mr Mlotshwa said that he called Mr Mbatha to witness the saliva but Mr Mbatha saw nothing of the like. It was within the powers of the first respondent, having listened to witnesses, to find which version was favoured by probabilities. He found that the two versions were equally balanced. This is a finding that could only be challenged, if at all, on appeal and not on review. The submissions of the applicant did not go far enough to justify a disturbance of the finding on this issue.
- [20] As a passing remark and based on the admissions made by Mr Nhleko, while he was luckily for him not charged for it, it was not within his right to refuse to comply with Mr Jele's instruction not to go to Grey's Hospital. Messrs Mlotshwa and Jele had authority to stop him from doing the transfer. This consideration alone would have made reinstatement inappropriate in terms of section 193 (2) (b) and (c) of the Act. Fortunately for him, the applicant did not seek to review the finding on reinstatement.
- [21] Accordingly, the following order will issue:

Order:

1. The review application is dismissed.
2. The arbitration award in this matter is made an order of this Court.
3. No costs order is made.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES

1. For the applicant: Mr W S Kuboni
Instructed by Hlela Attorneys
2. For the third respondent: Mr M Pillemer
Instructed by Jafta Inc.