



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

Not Reportable

Case no: D309/15

In the matter between:

**ETHEKWINI MUNICIPALITY**

**Applicant**

and

**NAMTU obo NONHLANHLA CELE**

**First Respondent**

**M B MASIPA NO**

**Second Respondent**

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL**

**Third Respondent**

**Heard: 22 March 2018**

**Delivered: 15 June 2018**

**Summary: Review**

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**JUDGMENT**

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**GUSH J**

- [1] The applicant, in this matter, applies to review and set aside the arbitration award handed down by the second respondent in which award, the second respondent concluded that the first respondent had been unfairly dismissed and directed the applicant to reinstate the first respondent retrospectively to the date of her dismissal and to pay the third respondent's costs "14 days

which amount shall be computed together with the applicant's costs" [whatever that might mean]. In a subsequent variation ruling, the second respondent apparently *mero motu* sought to vary the award and clarify her costs order and without an indication as to how the calculation had been made, quantify the third respondent's costs as amounting to "actual costs R44,004 and [respondent's] costs are limited to disbursements."

- [2] In addition, the second respondent sought to attend to "certain errors/discrepancies in that award requiring variation. Save for the amendment costs order, the only variation of any importance was to record that she had not found the dismissal to be procedurally unfair only substantively unfair.
- [3] The arbitration hearing took place on 15 August 2014; 3, 4, 5, 19 and 20 November 2014; 9, 28 and 30 January 2015, 4, 6, and 11 February 2015 and 11 and 12 March 2015. At the conclusion of the arbitration, the second respondent handed down an award comprising some 125 pages! In the variation ruling, the second respondent in addition to the issue of costs corrects certain errors in the original award, none of which are of any importance.
- [4] It is inexplicable why the second respondent found it necessary to write an award of the length she did. For example, under the heading survey of evidence and argument, the second respondent in 307 paragraphs over 107 pages of 11-point type records the evidence.
- [5] It appears from the record that the second respondent herself not only called a number of witnesses whose evidence was entirely irrelevant to the charges of misconduct thereby adding unnecessarily to the record but also to the length of the award, but that at no stage did the second respondent in any way seek to curtail the proceedings or ensure that the parties dealt only with the relevant evidence to the charges. The first respondent's representative for example, had to cross-examine the witness almost two days, the bulk of cross-examination was entirely irrelevant and or repetitive.
- [6] The background to the matter is simply this:

a. the first respondent who had been employed by the applicant as a principal clerk with a salary of R40,249.41 per month was dismissed by the applicant for having been found guilty of the charges of misconduct;

b. the charges of misconduct were as follows:

1. Charge 1: "Refrain from any rude, abusive insolent, provocative, intimidatory or aggressive behaviour to a fellow employee or member of the public"

On 12 December 2013 at the Pinetown Regional Office, at about 15H00, you intimidated your immediate supervisor (Satha Govender), Senior Manager (Harry Haripersad) and security officer (W M Dladla) and on 18 December 2013 at the Kingsburg Office, at about 13H40, [the first respondent] threatened Mr. W M Khumalo a Building Supervisor."

2. Charge 2: "obey all lawful and reasonable actions by a person having authority to do so"

"In that on 18 December 2013 at about 13H30, you violated a condition of your suspension by entering the Sizakala offices at Kingsburgh. You refused to leave when you were requested to do so by W M Khumalo."

"Again on 18 December 2013 at about 14H00 you violated a condition of your suspension by making use of the Council vehicle NDM 9230 which you drove from the Kingsburgh office to your home, thereby contravening section 1.2.3 of the disciplinary procedure and code collective agreement."

Charge 3: "the employees are expected to comply, respect conditions of employment and collective agreements and any related regulation, order, policy and practice and to refrain from any conduct just cause for discipline"

“In that on 5 December at about 17h30, and on 10 December 2013 at about 20h00, you entered the Umhlanga Sizakala Centre under false pretence of being the building supervisor in charge of that centre. You proceeded to the office of a principal job and make use of a computer assigned to Ms. V Pillay without prior authorisation or permission thereby contravening section 1.1 of the Disciplinary Procedure and Code Collective Agreement.”

- [7] At the disciplinary enquiry, the first respondent was found guilty of the first charge, but only in respect of Govender, guilty of the second charge; and not guilty on charge 3. The applicant imposed a sanction of dismissal.
- [8] The first respondent, dissatisfied with the outcome of this enquiry, referred a dispute to the third respondent which in turn appointed the second respondent to arbitrate the dispute.
- [9] At the arbitration, the first respondent was represented by a trade union official and the applicant was represented by an employee in the HR department. Inexplicably at the arbitration, the applicant's representative sought, on the strength of the arbitration being a hearing *de novo*, to prove that the first respondent was guilty of all the charges including the intimidation all those referred to in charge one (not only Govender); and to prove that the first respondent was guilty of charge three.
- [10] There is no explanation as to why the second respondent allowed this to happen. It is trite that the applicant dismissed the first respondent for only two counts of misconduct having been found guilty of intimidating Govender only in relation to the first count and charge two; but was not found guilty of the third charge. The third charge played no part in the decision to dismiss the first respondent.
- [11] The only issue that the arbitrator was required to consider was whether the applicant could and did establish:

- a. firstly, on a balance of probability that the first respondent was guilty of that part of charge 1 relating to the intimidation of Govender; and whether she was guilty of charge two, viz. violating the conditions of her suspension; and
- b. secondly whether the decision to dismiss the applicant was fair and whether dismissal was the appropriate sanction.

[12] I am not persuaded that it is necessary to go into any great detail regarding the applicant's application to review and set aside that part of the second respondent's award that concluded that the first respondent was guilty of intimidation. It is clear from the evidence led at the arbitration that the applicant did not establish that the first respondent had in fact intimidated Govender.

[13] Both at the arbitration and in its application to review the decision, the applicant relies on alleged intimidation, threats and/or phone call from a number of people other than the applicant herself. This mistaken assessment of the suggested intimidation on the part of the applicant's representative took up an inordinate amount of time during the arbitration and entailed calling the evidence of unnecessary witnesses. It is inexplicable why the second respondent did nothing to deal with this issue at the time and ensure that only relevant evidence was led.

[14] The charge of misconduct in respect of intimidation, alleged that the first respondent had intimidated Govender. The evidence that was adduced at the arbitration referred to the actions of others and telephone calls that were made but not by the first respondent. In so far as it is possible to determine that the second respondent understood the nature of the charges is clear from the record that the applicant did not discharge the *onus* with regard to charge one and that the decision of the second respondent was correct.

[15] The issue relating to charge two is entirely different. The essence of the charge was that the first respondent violated the conditions of her suspension. The suspension letter read:

'Dear Madam.

**SUSPENSION FROM DUTY**

With reference to your suspension hearing the first day 18 December 2013, we hereby advise that the Presiding Officer Mr. Brendan Chettiar, has confirmed management's intention to suspend you from duty pending investigation into an alleged misconduct and your suspension is with effect from **18 December 2013**.

You are hereby notified that your suspension is in accordance with the applicable collective agreement and is therefore with full pay. You also advised that in terms of your suspension you are not allowed to enter any municipal building in your official capacity, and you are also not allowed to represent the municipality in any manner.

You are hereby requested to return or municipal assets and equipment in your possession including the municipal vehicle and office keys.

Failure to obey the conditions attached to your suspension will be viewed in a very serious light and could result in further disciplinary steps taken against you.<sup>1</sup>

[16] It is difficult to imagine any clearer instruction than the letter of suspension, not only the terms of the suspension the consequences of not complying:

- a. Do not enter any municipal building in your official capacity;
- b. Return the assets; and
- c. Failure to comply will be regarded as serious.

[17] The record of the arbitration reflects essentially the following as being common cause:

- a. the first respondent was handed a letter suspension at the applicant's Pinetown office;

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<sup>1</sup> Respondents bundle A page 57.

- b. At the time of her suspension, the first respondent had alleged that the vehicle was not in her possession and she had undertaken to fetch the vehicle and return it to Pinetown. The witness Tshabalala gave evidence that the first respondent had been instructed to return the vehicle within two hours;
- c. the first respondent then, despite the clear instruction to return the vehicle to Pinetown, used the motor vehicle in her possession to travel to Kingsburg;
- d. At Kingsburg, despite having been told that in terms of the suspension she could only access the building as customer, she went to her office and entered into a confrontation with the officials who had accessed her office as they had required access to the computer in the office;
- e. Tshabalala, having learned that the first respondent had travelled to Kingsburg in the vehicle, advised security staff at Kingsburg that she was to return the vehicle immediately;
- f. The security guard at Kingsburg, Khumalo, told her that she was not to continue using the vehicle but was to leave it at Kingsburg and that this instruction had been issued from Tshabalala;
- g. The first respondent disregarded this instruction on the spurious and unjustified grounds that this instruction had been conveyed to her by a subordinate and left with the vehicle;
- h. On leaving Kingsburg, the first respondent did not take the vehicle to Pinetown as was required of her but travelled to her home with the vehicle;
- i. Sometime later at 23h52 on the same day, (18 December the day of her suspension), she had contacted Tshabalala by SMS advising him that she would leave the vehicle at her home, with the keys inside, to be collected. Tshabalala replied the following morning at 06h26 requesting her to deliver the vehicle to Pinetown. The first respondent

undertook to do so at 07h00. This was not done and Tshabalala remotely deactivated the vehicle and arranged for the applicant's security to collect the vehicle.

- [18] The first respondent's defence was to suggest that in some way her disregard of the terms of her suspension was agreed to by the applicant. It is improbable in the circumstances and particularly in the light of Tshabalala's evidence that the applicant at any stage waved the conditions of the suspension. Likewise, it is inconceivable that the second respondent could have concluded that the first respondent had not contravened her suspension when despite the condition that she was not to enter any of the applicant's offices (other than as a customer) she had gone to her office.
- [19] As far as the return of the vehicle is concerned, it is abundantly clear that Tshabalala did nothing more than seeking to ensure compliance with the terms of the suspension letter and did not agree to vary or reduce the import of the terms of her suspension as set out in the letter.
- [20] The second respondent in finding that the applicant had, through Tshabalala, entered into some agreement contrary to the suspension letter ignored and apparently disregarded the terms of the suspension and the contents of the letter. There can be no doubt that the first respondent was aware of the terms and conditions of her suspension and simply disregarded them.
- [21] The essence of the applicant's grounds of review are that the second respondent misdirected herself in her understanding of the suspension letter and her conclusion that the first respondent had not contravened the terms of her suspension; and that based on the evidence placed before her decision was not a decision that "falls in a band of decisions to which a reasonable decision-maker could come on the available material"<sup>2</sup>.
- [22]
- [23] A similar misdirection by the second respondent concerns her conclusion that the first respondent was harassed by Khumalo that as a result, the first

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<sup>2</sup> *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC)

respondent “could not comply with the terms [of the suspension]”. Apart from clearly demonstrating that the second respondent understood and realised that the first respondent had not complied with the terms of the suspension, there is no logic in the proposition that Khumalo had prevented the first respondent from complying.

- [24] It would seem that the second respondent lost sight of the issue that she was required to determine viz. whether the first respondent was guilty of the misconduct and if so whether dismissal was the appropriate sanction. The following passage from the award (despite the obvious error) is indicative that the second respondent lost sight of the dispute she was required to arbitrate.

‘5.49 The evidence in this case present[sic] a sad story of an employee who was ill-treated through a certain period of her employment with the [applicant] by certain persons in senior managerial positions who are also employees of the [applicant]. Other than referring a dispute to the Bargaining Council, the applicant has since sought recourse from different spheres of government and other entities established to protect members of the public. Her evidence was that despite this, she was still willing and able to work with these individuals. In view of this I find that the dismissal of the [respondent] was substantively fair[sic].<sup>3</sup>

- [25] I am satisfied from the relevant evidence adduced at the arbitration that the first respondent was indeed guilty of contravening the terms of her suspension. Not only did her letter of suspension clearly set out the terms of the suspension but warned the first respondent that failure to obey the terms thereof would be regarded in a serious light. Despite this the first respondent deliberately decided that she would continue to use the motor vehicle to travel not only to Pinetown to return it but to Kingsburg to fetch her possessions. At Kingsburg, she was instructed to leave the vehicle there. She did not but drove home where the vehicle had been. She obviously deliberately decided not to immediately return it to Pinetown. Her suggestion to Tshabalala late on the same day was that she would leave at her home for collection again deliberately ignoring the instruction “to return” the vehicle.

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<sup>3</sup> Award page 123 para 5.49.

[26] The attempts by Tshabalala to secure the return of the vehicle cannot be construed as waiving the terms of the suspension. He was, as was acknowledged by the second respondent, simply trying to protect the applicant's assets. The evidence of the first respondent, apart from simply attempting to divert the attention from her deliberate and blatant ignoring of the terms of her suspension, was to blame anyone and everyone for causing the problem.

[27] The test to be applied in determining whether the award of the second respondent is reviewable is succinctly set out in the *Gold Fields* matter where the Labour Appeal Court sets out the questions to be asked and answered when considering whether an award is reviewable.

'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 employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he 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? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'<sup>4</sup>

[28] Taking into account the volume of unnecessary evidence the second respondent allowed to led and the unnecessary length of the award it cannot be said that the second respondent dealt with the matter expeditiously or with a minimum of formalities. It also does not appear from the award that the second respondent understood the nature of the dispute or dealt with the relevant merits of the issue in dispute. This is highlighted inter alia by the second respondents finding that the evidence "presented a sad story of an employee who was ill-treated through a certain period of her employment with the [applicant].

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<sup>4</sup> *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at para 20.

- [29] The fact remains that the evidence clearly demonstrates that the first respondent was guilty of contravening the terms of her suspension. From the evidence, her contravention was deliberate. The reason the second respondent reinstated the first respondent was based solely on her conclusion that the first respondent was not guilty of the misconduct of contravening her terms of suspension. I am satisfied that that conclusion is a decision to which a reasonable arbitrator could not come based on the material placed before the second respondent.
- [30] There is sufficient relevant evidence in the record to enable the court to decide the matter and not to refer it back to the third respondent to be heard *de novo*.
- [31] That being so, the Court is required to consider the question of the sanction. In the absence of any evidence to the contrary, there is nothing to suggest that if the first respondent is guilty of the misconduct that the sanction of dismissal should be set aside.
- [32] In the circumstances, I find that the award of the second respondent should be set aside as substituted with an order that the dismissal of the first respondent was fair and that her application be dismissed.
- [33] There is one further aspect to the award. At the conclusion thereof, the second respondent decided on the basis, firstly that she was "enjoined by the [third respondent] to consider the issue of costs and secondly the discretion in terms of section 138(10) of the Labour Relations Act 66 of 1995, to order the applicant to pay the third respondent's costs "for 14 days which amount shall be computed with the Applicant's costs".
- [34] Sometime after her award was handed down, the second respondent handed down a variation ruling in which the costs order was amended to reflect the costs order as "[third respondent's actual costs are R44,004.00 and the [first respondents costs are limited to disbursements".

[35] The issue of costs does not appear from the record to have been dealt with at all. It is also unclear as to what led the second respondent to quantify the amount of the third respondent's costs. If the third respondent "enjoins" its arbitrators to consider the issue of costs, fairness dictates that this issue should be brought to the parties' attention to allow them to argue the issue. Likewise, this applies equally if the arbitrator intends to exercise her discretion in terms of section 138. This from the record did not happen.

[36] The duration of the arbitration that was in no small measure due to all parties including the arbitrator leading unnecessary evidence and the failure of the second respondent to take heed of the requirement in section 138 to "determine the dispute fairly and quickly, ... deal with the substantial merits of the dispute with a minimum of legal formalities".

[37] I am not persuaded that in it is in the interest of fairness that the parties should be ordered to pay neither the costs of this matter nor of the arbitration.

[38] Accordingly, for the reasons set out above, I make the following order:

- (a) The award of the second respondent is reviewed and set aside and substituted with an order that "the dismissal of the [first respondent was fair] and the [first respondent's] application is dismissed with no order as to costs";
- (b) There is no order as to the costs of this application.

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D H Gush  
Judge of the Labour Court of  
South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv. G van Niekerk SC

Instructed by Nkosi Sabelo Inc.

FOR THE RESPONDENT:

Mr Shandu NAMTU

LABOUR COURT