REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 1560/12

In the matter between:

CITY OF JOHANNESBURG	**Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
LUNGILE MATSHAKA *N.O.*	**Second Respondent**
IMATU OBO B VOLSCHENK	**Third Respondent**

Heard: 14 August 2014

Delivered: 10 September 2014

Summary: (Review – failure to make out a case on review – arbitrator's award not one that a reasonable arbitrator could not have made on the evidence).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator found that the dismissal of the third respondent was substantively and procedurally unfair and awarded her reinstatement with retrospective effect to 1 June 2012.

Background

[2] The third respondent had been employed by the applicant since 1987. On 10 May 2011, following a lengthy period of suspension pending a disciplinary enquiry for alleged fraud, she and a colleague, who had also been suspended, received an email from the applicant instructing her to report to the office of Mr S Rasoesoe, the applicant's legal adviser to enable them to "receive and sign their letters and consequently resume work."

[3] On reporting to the office as instructed on 11 May 2011 the third respondent claims that when they asked Mr Rasoesoe ('Rasoesoe') for the letters they were supposed to sign and the workstation where they could report for duty he started harassing them telling them that he was going to carry on with the case and that if they did start to work there it would not be easy for them. She claims he went on a diatribe about the O.J. Simpson case and when she reiterated her quest for the letter to sign and to which she wants to know where to report for work he would not answer her. She also claims that he started to refer to her as a white person and that if there was a case he would sort them out. She phoned the union to complain about what she perceived as harassment by Rasoesoe and again asked for the letter which he provided although it bore her colleague's name.

[4] The body of the letter, which was unsigned, read:

> *"RE: Lifting of suspension in respect of yourself*
>
> *Be kindly advised that Revenue and Customer Relations Management Department has decided to lift the suspension*

against you, however, the intended prosecution against your alleged misconduct will continue as planned.

You are therefore requested to avail yourself at 61 Thuso House, Braamfontein as soon as possible after the receipt of this notification"

[5] She repeated the advice received that she should come and signed a letter to commence work and asked him where she should sign, but he refused to answer and told them that seeing they were not happy with the situation they should leave, whereupon they did it.

[6] Rasoesoe's evidence was to the effect that the third respondent and her colleague became upset when they were presented with the letter which indicated that the disciplinary proceedings against them would still continue, at which stage they phoned their attorney to get legal advice. According to him they decided to leave saying they would return on 13 May 2011 after obtaining advice from their attorney.

[7] On the question of whether he harassed them as the third respondent alleged, he maintained that all he had done was to tell them that the prosecution would still proceed. When he was asked whether the email did not imply that they would resume employment after signing the letters, he said that if they signed the letters he would have told the employee that "… they can in two days time, I have to wind up this and that."

[8] It was put to him that there was no need to seek legal advice because the email was clear, because it did not indicate that the charges had been dropped. He eventually conceded that this was clear from the email and then said that the third respondent and her colleague had said that they did understand the letter but they were not going to sign it. The third respondent herself had testified that she had no problem with the content of the letter.

[9] Later in his testimony, Rasoesoe claimed that the two employees had tried to engage him on the main charges against them, but he had insisted that they could not deal with that and the sole issue was their upliftment of their suspension.

[10] The same day a letter was written by the third respondent's attorneys complaining of the alleged ill treatment at the hands of Rasoesoe. Although the letter does relate the history of attempts to resolve the disciplinary issue, it does not take issue with the statement in the letter that the disciplinary proceedings would proceed. Notably, there was no response to this letter.

[11] There was a dispute whether a letter ostensibly sent on 25 May 2011 was received. It was entitled a 'second notification' of the upliftment of the third respondent's suspension, and was addressed to the third respondent using the workplace address. Its format was identical to the first letter but called on her to report for work on 26 May 2011. According to Rasoesoe it was supposedly scanned and emailed to her attorneys but there was no evidence of the email produced at the hearing. The third respondent denied ever receiving it.

[12] There was evidence that a similar letter sent to her colleague was received to which the latter replied.

[13] A letter was then addressed to the employee's attorney on 10 June 2011 from the Executive Director of Revenue and Customer Relations Management, Mr G Dumas ('Dumas'). It refers to an email from the third respondent of the same date and declined to meet separately with the employees and their representatives to discuss the problems they had encountered with Rasoesoe, who had refused to tell them where and when they should report for duty and had continued to harass them. The gist of his reply set out in the letter is that he saw no need for a separate meeting and they should again report to Rasoesoe on 13 June 2011. This letter also contained no hint of where they would be required to perform their duties. Mr Selana, the HR officer said that this letter was sent by Dumas after the HR department had told him what had transpired to date.

[14] It should be mentioned that in her email, the third respondent notes that she had been booked off sick following a hijacking and would hand in a doctor's note for 10 June 2011. Somewhat improbably, the third respondent testified that her email was a response to the letter, which

simply does not make sense. Be that as it may, it is self-evident Dumas' letter was a response to the email and nothing really turns on this.

[15] The applicant's view was that five days after the third respondent was due to return on 13 June 2011, she was deemed to have absconded in terms of its policy. The third respondent claims that she did hand a sick note to a secretary at the general manager's office by the name of Lethiwe. It was issued by the third respondent's psychiatrist explaining that the third respondent had been under her treatment since 24 June 2009 and somewhat cryptically expressed the view that the she was not emotionally fit to attend a disciplinary hearing. The applicant testified that she went to see the psychiatrist after the hijacking incident because she was traumatised and she received further medication. Further, the third respondent testified that her general practitioner provided her with an additional sick-note declaring her unfit for work from 18 May to 12 June 2011. She said claimed to have handed in the original and had to obtain a copy for the arbitration proceedings from the doctor who could only issue a confirmatory certificate as the doctor did not make duplicates of certificates issued. She claimed that she was hospitalised after that and did not receive the letter advising her to report for work on 13 June 2011.

[16] On 22 June 2011 a letter terminating the third respondent's contract of employment with the city due to abscondment was issued. The body of the letter stated:

> *"This letter serves to inform you that your employment contract with the city of Johannesburg has been terminated in absentia due to your abscondment. The termination of your employment contract follows several attempts by City of Johannesburg requesting you to report to work after lifting suspension.*
>
> *On 11 May 2011, you were officially informed by both a word of mouth and in a form of a letter that was personally given to you on the same day. The letter was informing you that the City of Johannesburg. Has decided to lift your suspension pending your disciplinary tribunal. He was a further instructed that you missed report for duty on 13 May 2011 and you opted to ignore such a*

reasonable and unlawful strike from City of Johannesburg management. You requested to be given a time off for Thursday, 12 May 2011 so that you can consult with your Lawyer first before you sign the letter uplifting your suspension and time off that was given by management. You then agreed and committed that you will report for duty on Friday, 13 May 2011.

You further were instructed to report on 25 May 2011, and again you intentionally opted to ignore such a reasonable and lawful instruction from the City of Johannesburg management.

The third and last notification was further sent to you on 10 June 2011 instructing you to report for duty, and again you intentionally decided to disobey such a reasonable and lawful instruction from City of Johannesburg management.

Your continued refusal and failure to obey reasonable and lawful instruction has left the city of Johannesburg with no option but to stop your salary and terminate your contract of employment with the City of Johannesburg with effect from 22 June 2011.

City of Johannesburg management views your continued absence from duty as a serious misconduct that amounts to abscondment from duty. It is also clear that your continued refusal to report for duty after some the attempts by City of Johannesburg management is done intentionally and indicates that you're not willing to report for duty as instructed. Please note that the termination of the employment contract with the City of Johannesburg is based on the Conditions of Service Agreement clause 9.17.1 and 9.17.2."

(sic)

The arbitrator's reasoning

[17] The essence of the arbitrator's reasoning is set out in summary below.

[18] She found that the third respondent and her colleague had complied with the instruction to report for work but that the atmosphere at Rasoesoe's

office was unpleasant and it was clear they were not welcomed in terms of the spirit of the letter. She based this on the fact that the interaction was dominated by Rasoesoe going on about the continuing prosecution and that there was no information provided as to where they were supposed to resume their duties. Moreover, the letters they were supposed to sign had not been signed by the person in whose name they had been issued, Mr T Nkgoedi, the Acting Director: Billing Revenue & CRM.

[19] The arbitrator also concluded that Rasoesoe's hostile approach as well as his refusal to advise them where and when to report for duty persisted after the initial attempt to report for work. This dual approach of emphasising the disciplinary proceedings without providing details of their return to work was reflected in the letter of 25 May 2011, which the arbitrator accepted the third respondent never received as was the case with the letter of 10 June 2011. The arbitrator could not see why it was necessary to keep reminding the applicant and her colleague of the pending proceedings, instead of just charging them and, if necessary, suspending them again.

[20] Regarding her failure to report for work on 13 June 2011, the arbitrator held that, in light of the applicant's medical condition, it was inappropriate to conclude that third respondent had disobeyed a reasonable and lawful instruction. The arbitrator found that there was ongoing interaction between the parties throughout until the applicant issued the termination letter on 22 June 2011.

[21] The arbitrator had regard to authority that an act of desertion did not take place when an employee who was absent from work intends to return. She found that, in the present instance, it could not be said that the third respondent's failure to return to work amounted to desertion or abscondment on her part.

[22] Moreover, the employer was not excused from holding an enquiry prior to dismissing an employee for desertion. The arbitrator also noted that the LAC decision in ***SABC v CCMA & Others*** [1] did not attach significance to

[1] [2002] 8 BLLR 693 (LAC)

the kind of provision contained in the applicant's disciplinary code, which deemed an employee as having absconded if they failed to not report for duty for five consecutive days and the employee has not notified it of the reasons therefor. Accordingly, the applicant could not rely on it.

[23] Consequently, the arbitrator concluded that the dismissal was both substantively and procedurally unfair and in view of what she had to go through entitled her to a fully retrospective reinstatement.

Grounds of review

[24] In the applicant's founding affidavit, it was submitted that the arbitrator's award was one that no reasonable arbitrator could make and advances various reasons in support of that contention, namely:

24.1 that the arbitrator failed to apply his mind to the material facts before him;

24.2 that the employee failed to return to work despite her suspension been lifted and despite several instructions given to her to do so;

24.3 the applicant had no alternative but to terminate the third respondent's employment as she had no intention of returning to work;

24.4 the third respondent's act of abscondment amounted to a repudiation of her contract of employment, and

24.5 the applicant was relieved of the obligation to hold a hearing where adequate warning is given to the employee of the consequences of extended absence from work without an explanation and where the employer has made reasonable efforts to contact the employee.

[25] Strictly speaking, stated as such, these grounds relied upon by the applicant do not properly make out a case for review. The applicant's heads of argument likewise simply reiterates its version of the facts as correct. This in turn drew a response from the third respondent which also engaged in setting out the evidence in refutation of the applicants factual contentions.

[26] Quite apart from the fact that an application for review couched in this form is improper, an applicant on review cannot simply make a broad allegation that an arbitrator failed to apply their mind to the facts. The applicant must substantiate that allegation by alluding to those facts which it claims the arbitrator failed to consider. Moreover, since the decisions in **Herholdt v Nedbank** [2] and ***Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA*** [3] the key question the court must decide is if the outcome is one that could reasonably have been reached on what was properly before the arbitrator, irrespective of whether an arbitrator properly applied her mind to the material before her. In my view, the application stands to be dismissed as defective on this basis alone.

[27] Nonetheless, assuming very generously in the applicant's favour that the other factual issues referred to under its grounds of review were intended to identify the material which the arbitrator supposedly failed to consider, and could not reasonably have arrived at the outcome he did, if he had considered them, I will consider them on that basis.

[28] In essence, apart from the fact that the arbitrator found that the third respondent did not receive the second notification to return to work, the arbitrator was of the view that the applicant had embarked on a course of conduct that was not genuinely intended to facilitate the third respondent's return to work but to complicate and obstruct it. There is ample evidence to support this finding. One telling factor in this regard was the failure of the applicant at any stage to advise the third respondent and her colleague of where they were supposed to render their duties, despite this issue being raised pertinently and repeatedly by the third respondent as a matter that needed to be resolved. It is also apparent that the third respondent was constantly referred back to the obstructive legal officer, despite it being patently obvious that the interaction with him on her first attempt to return to work had been fraught with conflict and unnecessary tension and despite her complaint that he was avoiding answering her question about where she would be working.

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[2] (2013) 34 ILJ 2795 (SCA) at 2806, para [25]

[3] (2014) 35 ILJ 943 (LAC) at 950, para [21]

[29] Moreover, the arbitrator's conclusion that the third respondent did not receive the second and third notices to return to work, is a plausible interpretation of the evidence, even if an alternative interpretation is possible. Consequently, it cannot be said this is a conclusion no reasonable arbitrator could have drawn.

[30] The applicant led no evidence to show that at any stage it had identified the work the third respondent and her colleague would perform and that it had notified them of this. It ought to have been the simplest matter for the applicant, if it genuinely wanted to facilitate their return to work, to have simply advised the third respondent and her colleague at which department they had to report for work and the relevant manager in that department whom they should report to.

[31] There was also sufficient evidence to support the arbitrator's conclusion that there was ongoing communication in the period between the third respondent's initial attempt to return to work to warrant the inference that she did want to return to work and had not absconded. The evidence does not support a case that this was a situation in which an employee is inexplicably absent and shows no interest in returning to work.

[32] The applicant did attempt to rely on the authority of the judgment court *a quo* in ***Phenithi v Minister of Education and Others***[4] to argue that it was relieved of the obligation to hold a hearing and, presumably, the arbitrator failed to appreciate that no hearing was justified in this case. In the Orange Free State High Court's decision it was stated:

> *[7] In considering the issue of procedural fairness I deal with the audi principle as a facet of dismissal in the context of desertion. Procedurally the question is whether in these circumstances the respondent was required to convene a hearing before deciding to allow the deeming provision to operate. The obligation on an employer to hold a hearing before dismissing an employee for abscondment or desertion has been extensively traversed under the Labour Relations Act 66 of 1995 (schedule 8 and para 4 of the*

[4] (2005) 26 ILJ 1231 (O). The judgment was upheld on appeal in ***Phenithi v Minister of Education & others*** **(2006) 27 ILJ (SCA)**.

Code of Good Practice). See also SA Broadcasting Corporation v CCMA & others(2001) 22 ILJ 487 (LC); [2001] 4 D BLLR 449 (LC) at 454J.

The correct approach seems to be that where adequate warning is given of the consequences of extended absence without an explanation, the employer is relieved of the obligation to hold a hearing. The real issue is whether adequate warning has been given in that all reasonable efforts have been made to contact the employee. The conclusion I come to in the present case on the present set of circumstances is that proper and adequate warning was in fact given by the first respondent to the applicant and that being so the applicant's dismissal was procedurally fair"[5]

[33] Firstly, the *Phenithi* case dealt with holding a hearing to consider whether an educator should be re-instated following her automatic termination by operation of s14(1)(a) of the Employment of Educators Act 76 of 1998 on account of being absent for more than 14 days without the employer's consent and not with a hearing to decide if an employee should be dismissed for absconding. Secondly, in that case the educator was charged with misconduct for failing to perform her duties by not attending classes and was expressly warned that if she did not report for work by a stipulated date her services would be terminated on grounds of abscondment.[6] By contrast, in this matter the applicant's last letter to the third respondent on 10 June 2013, contains no hint that it would view her failure to return to work as an act of abscondment and that she could be dismissed for failing to return to work. Contrary to what it claims, the applicant did not adduce any evidence in the arbitration that it had given the third respondent "*adequate warning … of the consequences of extended absence from work without an explanation*" before it terminated her services. It can hardly criticise the arbitrator for not considering evidence it did not provide.

[5] At 1239

[6] At 480, para [6] of the SCA decision in *Phenithi*

[34] In conclusion, I am satisfied that even if I ignore the manifest deficiencies in the review application on which it ought to fail, in any event, even on a generous interpretation of the application, the applicant has failed to place grounds of review before the court on which it might be concluded that it should be set aside.

Costs

[35] The applicant adopted a hostile and unhelpful approach in handling the third respondent's attempt to return to work and has forced her to oppose a woefully deficient application to try and thwart the implementation of the arbitrator's award. In the circumstances, there is no reason not to grant the third respondent her costs. Had she asked for costs on an attorney own client scale in her answering affidavit, I would have been inclined to grant such an order in view of the applicant's conduct.

Order

[36] The application is dismissed with costs.

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R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: T Tshitereke instructed by Mogaswa Attorneys

FIRST RESPONDENT: A Glendinning instructed by Otto Krause Inc.