IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

Reportable

CASE NO: C 828/2012

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU) obo J DAMENS Applicant

And

BREEDE VALLEY MUNICIPALITY First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL Second Respondent

ALAN RYCROFT N.O. Third Respondent

Heard: **29 October 2013**

Delivered: **04 December 2013**

Summary: (Review- proof of misrepresentation-arbitrator entitled to decide issue of duplication of signatures without calling for expert evidence-application dismissed)

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Ms J Damens, was a Tourism Development Officer employed by the Breede Valley Municipality until her dismissal on 28 December 2011 after she was found guilty of four charges of dishonesty and contravening the Local Government Systems Act, 32 of 2000.

[2] She subsequently referred an unfair dismissal dispute to the South African Local Government Bargaining Council, which led to an arbitration award being issued by Professor A Rycroft, the arbitrator and third respondent, on 3 September 2012. The arbitrator found that the applicant's dismissal was substantively fair but procedurally unfair and ordered payment of six months remuneration as compensation for the procedural unfairness.

[3] The applicant was unhappy with the arbitrator's finding on the substantive fairness of her dismissal and has applied to set this aside on review.

Condonation application

[4] The review application should have been filed by 16 October 2012, but was filed on 19 October 2012, making it three days late. I'm satisfied that the short delay was not due to any serious neglect on the part of the applicant or his union. In part, it was a result of the applicant’s attorney being overseas. In any event, the prejudice to the respondent in the circumstances is insignificant and it is clear that the matter is of some importance to both parties. Consequently, I am satisfied in the circumstances that the late filing of the review application should be condoned.

The award

[5] The arbitrator decided that it would be unfair to find the applicant guilty of acting without authority or being dishonest in entering into three contracts she was instrumental in concluding. The arbitrator also acquitted the applicant of raising and using funds under the so-called “Cool Lagoon” contract for an undisclosed dishonest purpose, and acquitted her of exceeding her authority in identifying a training need. Nevertheless, he found that the evidence supported a finding that she had presented an ’altered/forged’ business plan to her superior to facilitate payment, and even though there was no evidence that she gained personally from it, it was a dishonest act which undermined the trust necessary for continuing the employment relationship.

[6] In arriving at the last conclusion, the arbitrator found that the applicant’s explanations as to how the initialled signatures on the amended plan appeared identical to those on the original plan were unsatisfactory. He also took account of the fact that no expert testimony was led on the initials. However, his view was that:

> *"... [t]his is a matter with commonsense, normal observation and experience must prevail. In the other pages of the contract the initials have slight differences, differently spaced and written at different angles. Yet on the original and revised business plan is the initials are identically placed in the same size and at the same angles. Chances are three sets of initial should be meant the exact same positions as another page is, in my view, they remarked possibility. In my view the probability is very strong that Ms Damens used the initials on the original business plan on the revised business plan. No one else had a reason to do so. The purpose of doing so is obviously to deflect attention away from the change in a business plan. This was something that could have been achieved in an aboveboard manner but was, in my view done in a dishonest manner. In my view it is immaterial that Ms Dames did not personally benefit from the full tree or the time to BVM [Breede Valley Municipality] was not proved. In manipulating the original document to appear different, I find that Ms Damens conducted herself in a dishonest manner by presenting the revised business plan to Mr January.”*

[7] In deciding the dismissal was an appropriate sanction the arbitrator considered items 113 and 114 of the CCMA Guidelines[1] and decided that the municipality had complied with those. He also found that the applicant's failure to admit the manipulation of the business plan and demonstrate remorse for doing so impacted on the question whether or not it was possible for her to remain in employment. He also considered CCMA Guideline item 98 concerning the circumstances of a contravention and concluded that, on the evidence of Hartzenberg and January together with the continued dishonesty of the applicant in relation to the revised business plan, dismissal was an appropriate sanction.

Applicant's grounds of review and evaluation

First ground of review

[8] The applicant claims the arbitrator made an award that was unreasonable and entailed a gross error of law amounting to a gross irregularity in the conduct of the arbitration proceedings in arriving at their finding of guilt. This submission is based on fact that:

8.1 He failed to accept the evidence of the employee that she had procured amendments to the original business plan which had been duly signed by the representatives of the CWDM.

8.2 His uninformed visual consideration of the plans from which he drew his conclusion was irrational and had the effect of denying the applicant a fair hearing, particularly in the absence of any of the signatories as witnesses.

8.3 Had the arbitrator applied the onus properly he would have found that the employee was not guilty of the only charge which had formed the basis for her dismissal.

[1] Guidelines on Misconduct Arbitrations, Gov Notice 602 of 2011 published in GG no 34573 dated 01/09/2011.

8.4 Following from this, he would also have found that there was no merit to the allegation that the trust relationship had broken down.

[9] The issue of the arbitrator's reliance on the evidence of the initials of the signatories to the contract must be placed in context. The applicant contended the initials on the amended contract were genuine. The respondent did not call any of the signatories to give direct evidence that the initials were not theirs or that they had not initialled the second contract. The issue therefore was whether the circumstantial evidence of the appearance of the three initials and their arrangement in relation to each other was sufficient basis for the arbitrator, using his ordinary powers of observation, to reasonably conclude that it was more likely that the initials had been photocopied from the first agreement. Put differently, was there no rational basis on the evidence before =the arbitrator for him to have drawn the inference that the initials had been transposed from the first document?

[10] What was in dispute was whether or not the original initials on the first contract had simply been copied and transposed onto the copy of the new contract. It was not a question of confirming if the three initials appearing on the second agreement belonged to each of the original signatories, but whether the initials appearing on the second contract were original signatures or copies of those appearing on the first contract. I see no reason why the arbitrator needed the assistance of a handwriting expert before he could draw his own conclusions about the similarities between the initials and the spatial relationship between them. His observation is not one that required any special expertise, any more than an arbitrator would require an expert to estimate the distance and spatial relationship between physical objects during an *in loco* inspection or distances estimated by a witness in Court. He evaluated the probability of an identical alignment of the initials occurring from one contract to the next. His conclusion that the coincidence was improbable can hardly be said to be unreasonable.

[11] It should be mentioned that in ordinary civil proceedings, the evidence of handwriting experts is normally treated with caution[2] and is not regarded as

[2] See e.g, ***S v Van Dyk*****1998 (2) SACR 363 (W)** 375*g-h*

essential, even if it may be desirable. Section 4 of the Civil Proceedings Evidence Act 25 of 1965 provides that:

> *"4 Evidence of genuineness of disputed writings*
>
> *Comparison of a disputed writing with any writing proved to be genuine may be made by witnesses, and such writings and the evidence of any witness with respect thereto may be submitted as evidence of the genuineness or otherwise of the writing in dispute".*

Section 228 of the Criminal Procedure Act 51 of 1977, which is the equivalent of s 4, "...has been interpreted to mean that the Court may rely on its own comparison of the writings unassisted by expert evidence, although as a matter of practice such a course is greatly discouraged".[3]

[12] There is also no basis for saying that the arbitrator effectively reversed the onus of proving the applicant's dishonesty in arriving at this conclusion. In ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*** **1 1977 (3) SA 534 (A)** Corbett JA succinctly set out the distinction between the evidentiary burden and the onus of proof:

> *"As was pointed out by Davis AJA in Pillay v Krishna 1946 AD at 952-3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In Brand v Minister of Justice1959 (4) SA 712 (A) at 715 Ogilvie-Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one*

[3] D T Zeffert and A P Paizes, *The South African Law of Evidence*,(2ed),2009,p 331. See also ***S v Boesak*** **2000 (1) SACR 633 (SCA)** at [57] and [58].

party or the other. (See also Tregea v Godart1939 AD 16 at 28; Marine and Trade Insurance Co Ltd v Van der Schyff1972 (1) SA 26 (A) at 378-9.)"[4]

[13] In my view it was not unreasonable for the arbitrator to expect an explanation from the applicant as to how the same constellation of initials appeared on two separate documents completed on different occasions. Mr White, for the applicant, suggested that it was not improbable that three initials could easily appear in an identical pattern on different pages in the same affidavit. No doubt, if the applicant had demonstrated at the arbitration hearing how easily this could occur by reference to some other multipage document initialled by a number of individuals or had tendered other similar evidence, then she might have succeeded in displacing the reasonable inference that the initials had been transposed from one document to the other. When confronted with the evidence she could not offer an alternative explanation, but merely reiterated her version that all the signatories had initialled the new document and that she could not comment on the coincidence because she was not a handwriting expert. The adverse inference to be drawn from the unusual coincidence was strong enough to require something more by way of rebuttal from the applicant, especially in the context of other evidence led in the arbitration hearing that the original initialled version of the amended business plan could not be found. This was not a situation where it could reasonably be said that the adverse inference was too weak to require rebuttal.[5]

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[4] At 548,cited with approval by Van Heerden AJ in the Constitutional Court case *Mohunram v National Director of Public Prosecutions (Law Review Project as* Amicus Curiae) 2007 (2) SACR 145 (CC) at par [75].

[5] See e.g Putter ***v Provincial Insurance Co Ltd And Another*** **1963 (3) SA 145 (W)** .in which Colman AJ stated: "*It does not follow* [from the approach adopted in *Galante v Dickinson*, 1950 (2) SA 460 (A), where an inference adverse to the defendant was drawn because he had failed to testify] *that an adverse inference should or may be drawn against a party who fails to testify or call evidence in refutation of a weak or improbable case against him.*" (at 150B-C)

Second ground of review

[14] The applicant criticises the arbitrator on the basis that none of the signatories were called to verify that it was not their initials which appeared on the amended document. This argument somewhat misconstrues the employer's case on this issue. The question is not whether the applicant had attempted to forge the signatures or initials of the signatories herself. The question was whether as a matter of probability she had somehow transposed the undisputed authentic signatures from the previous contract to the second one, by photocopying or otherwise. On the face of it, it appears that the cluster of signatures which appeared in the original contract had been transposed onto the new contract without any alteration, and it was their identical arrangement which required an explanation.

[15] It was pertinently put to the applicant that the amended business plan bearing the contentious initials entailed a misrepresentation by the applicant. This was also raised with her in the context of having canvassed the fact that the original version of the amending document could not be traced, suggesting that there was no original of the document bearing the initials as they appeared on the purported copy of the document.

Third ground of review

[16] The applicant argued that the arbitrator had no evidence for concluding that the employer had established a breakdown in the trust relationship between the employee and it on a balance of probabilities. In this regard,

16.1 The arbitrator had erred in finding allegation of a breakdown of trust because Mr P Hartzenberg was not the employee's superior and he conceded he was ill placed to comment on the trust relationship between the Municipality and the employee.

16.2 Mr C January had claimed that the trust relationship had broken down as a result of the cross-examination he was subjected to by the union representative in the disciplinary enquiry, whereas this had nothing to do with the relationship between January and the employee.

16.3 Moreover, as the employee had not been dismissed for this reason, cannot be relied on as a basis for confirming the sanction in the arbitration.

[17] Although Hartzenberg was not the employee's direct superior, it was common cause that he was next in the line of authority above January who was her direct superior. He did testify that the relationship with January had become difficult once the employee learnt that January was lodging a complaint against her. He also testified that he found it difficult to trust her with administrative documentation because of what had happened and he felt that he and January had been misled. The respondent disputed the contention that the cross-examination of January in the disciplinary enquiry was irrelevant to determining the breakdown in the relationship, because it contended that the cross-examination could only have been done on the basis of what the employee had told her representative.

[18] I am satisfied given the evidence before the arbitrator that there was sufficient basis for him to conclude that the trust relationship could not be restored, not only from the direct evidence on this question, but also given the finding that the employee had acted in a way that revealed a deceptive intention.

[19] In light of the above considerations, the application must be dismissed.

Order

[20] The late filing of the review application is condonend.

[21] The review application is dismissed.

[22] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Mr. J Whyte for Cheadle Thompson & Haysom Inc

RESPONDENT: Mr. J MacRobert for Bradley Conradie Attorneys