REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 175/15

In the matter between:

EASTERN CAPE Applicant

TREASURY DEPARTMENT

and

GPSSBC First respondent

Solomzi MPIKO N.O. Second respondent

MENDOE DUKADA Third respondent

Heard: 22 February 2017

Delivered: 28 March 2017

SUMMARY: Review – misconduct – gross negligence – award not reviewable.

Costs – Golden AJ ordered applicant's attorney to provide reasons why costs occasioned by his earlier application for postponement should not be ordered on a punitive scale. Costs considered. Applicant's attorney ordered to pay costs occasioned by postponement *de bonis propriis* on a punitive scale.

JUDGMENT

STEENKAMP J

Introduction

[1] The Eastern Cape Treasury dismissed the third respondent, Ms Mendoe Dukada, for gross negligence. She was a Deputy Director General in Treasury. She referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council. The arbitrator, Solomzi Mpiko (the second respondent) found that the dismissal was unfair and ordered Treasury to reinstate her. Treasury seeks to have the award reviewed and set aside in terms of s 145 of the LRA.[1]

Background facts

[2] The employee was a Deputy Director General: Asset and Liability Management. She was alleged to have committed misconduct on two counts. At a disciplinary hearing, she was found to have committed only the misconduct complained of in count two, being "grossly negligent in not being aware of the Executive decision and thus failing to comply with it". The "executive decision" referred to a decision of a meeting on 24 May 2012 – that the employee did not attend and was not required to attend – where a decision was taken to process teachers' and healthcare workers' salaries despite the fact that there was no budget to pay them. The employee refused to do so, given the provisions of the Public Finance Management Act. She was dismissed.

Arbitration award

[3] The arbitrator noted that it was common cause that the employee was not part of the executive meeting of 24 May 2012 where the extraordinary decision was taken to pay salaries without budget. She was not required to attend the meeting. It was also not disputed that the head of the relevant department, Ms Tibelo Mbina-Mthembu, did not convey the decision taken at the meeting to the employee. And the arbitrator was not satisfied that, despite the fact that she never received a direct instruction,

[1] Labour Relations Act 66 of 1995.

the employee "should have known" of the instruction. In fact, she was under a statutory obligation not to pay without budget.

[4] The arbitrator found, on the evidence at arbitration, that the employee had not been instructed to "deviate from the norm" and to act contrary to the law. She was given no such instruction. The dismissal was unfair. Treasury was ordered to reinstate the employee.

Grounds of review

[5] The only ground of review raised by Treasury is that the arbitrator "committed misconduct in relation to his duty as an arbitrator".

[6] The basis for that allegation is that the arbitrator "misdirected himself" in various respects, mainly in relation to his factual findings on the evidence before him.

Evaluation

[7] In his heads of argument, Mr *Motloung* expanded on the review grounds to argue that "the Commissioner occupied a very senior management position, that she was aware that her superior Ms Mthembu-Mdina[2] was at the centre of the developments, that a meeting was called at short notice to address a burning issue, but failed to ask Ms Mthembu-Mdina as to what transpired in the meeting she failed to attend." In short, therefore, he argued that it was up to the employee to find out whether perhaps she should be aware of some instruction that she was not told about. For the arbitrator to come to a contrary conclusion is clearly not unreasonable. In fact, it supports the arbitrator's finding that the employee was not instructed "to deviate from the norm".

[8] The other point raised by Mr *Motloung* is simply that, because the award is brief, it is an indication "that the Commissioner failed to apply his mind to all the relevant or material facts placed before him". That does not follow. The evidence was lengthy but the facts were simple. The conclusion reached by the arbitrator, based on the evidence led at arbitration, was not

[2] This is the spelling in the applicant's heads of argument; in the transcript and arbitration award it is reflected as Mbina-Mthembu.

so unreasonable that no other arbitrator could have come to the same conclusion.

[9] Mr *Motloung* went so far as to argue that "the Commissioner misdirected himself by failing to appreciate that if the employee was not aware of the fact that there was no budget, this constituted gross negligence on her part as everybody else in the Department was aware of this fact, and she too was reasonably expected to be aware of this fact, particularly because of the senior position that she occupied in the Department." As the arbitrator quite reasonably found, the duty is not on the employee to figure out whether she should act contrary to her understanding of the law and to pay out salaries despite the fact that there is no budget, when she was not given such an instruction.

[10] Treasury's argument on review was summarised in this way:

> "It is submitted that the cumulative effect of the evidence of the HOD and Mr Qhali shows that the employee deliberately ignored the instruction or was, at the very least, grossly negligent in ignoring it by instructing his subordinates not to pay in accordance with it."

[11] In oral argument, though, Mr *Motloung* could point to no evidence on the record that either the head of Department or Mr Qhali gave the employee an instruction to pay out salaries despite the fact that there was no budget. She could not have ignored an instruction that she was not given. And the arbitrator's finding that it was not grossly negligent of her not to ask the HOD whether perhaps there was such an instruction, is not unreasonable.

[12] The review application was based solely on the basis that the arbitrator committed misconduct. But, as the LAC pointed out in *Head of Department of Education v Mofokeng*[3]:

> "The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") *in Herholdt v Nedbank Ltd* and this court *in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will

[3] (2015) 36 *ILJ* 2802 (LAC); [2015] 1 BLLR 50 (LAC) para [30].

> result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome."

[13] In this case, the arbitrator did not misconceive the nature of the enquiry. He carefully considered the evidence before him. And having done so, he came to the conclusion that the conduct of the employee was not grossly negligent. That is not an unreasonable outcome.

[14] At the hearing, the Mr *Motloung* added a further ground of review that was not foreshadowed by the review application. I shall nevertheless deal with it.

[15] He argued that "the Commissioner committed a misconduct [*sic*] in relation to his duty as an arbitrator in that he failed to consider the provisions of section 193 of the LRA before or in ordering the reinstatement of the employee." In support of his submission, he relied on *Moodley v Department of National Treasury*[4] where the LAC, in turn, cited the recent decision of the Constitutional Court in *SARS v CCMA.*[5]

[16] The problem with that submission is that the facts are entirely different. In *SARS* the employee, Mr Kruger, "pleaded guilty" to misconduct and was given a final written warning. SARS decided to substitute the sanction of a final written warning with that of dismissal without giving him a further hearing. At the arbitration, SARS gave very specific evidence about the intolerability of the relationship with the employee. It is in that context – where the employee had admitted to the misconduct – that the Court stated:[6]

> "SARS thus advanced reasons for its contention that there is a breakdown of the relationship of trust between it and Mr Kruger. Its evidence supports the assertion that his misconduct has rendered a continued employment relationship intolerable."
>
> and[7]

[4] [2017] ZALAC 5 (10 January 2017).

[5] [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 *ILJ* 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (8 November 2016).

[6] Para [41].

[7] Para [44].

> "After concluding that Mr Kruger's dismissal was unfair, the Arbitrator immediately ordered his reinstatement without taking into account the provisions of section 193(2). She was supposed to consider specifically the provisions of section 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering SARS to reinstate Mr Kruger despite its contention and evidence that his continued employment would be intolerable. She was required to say whether she considered Mr Kruger's continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. And those are the key factors she ought to have considered before she ordered SARS to reinstate Mr Kruger."

[17] In this case, the employee did not commit misconduct. That is what the arbitrator found. And in that case, the default position is reinstatement, as the LAC pointed out in *Moodley*[8]:

> 'The section provides that the Labour Court or arbitrator (which includes a CCMA commissioner) "must require the employer to reinstate or re-employ the employee unless – (a) the employee does not wish to be reinstated or reemployed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure".

[18] In this case, none of the exceptions in subsections (a) to (d) applied. Reinstatement was an entirely reasonable remedy.

Conclusion

[19] The award is not reviewable.

[8] At para [29].

Costs

[20] Unfortunately that is not the end of the matter. And Court takes no pleasure in having to deal with the aspect relating to costs that follows.

[21] This matter was originally enrolled for hearing on 24 November 2016. It came before Golden AJ. The applicant's attorney, Mr Motloung, applied for a postponement. He delivered an affidavit in support of that application. In that affidavit, he explained the reason for seeking a postponement:

> "The applicant's legal representative (myself) [*sic*] had sight of the answering affidavit, for the first time[9], on 7 November 2016 when I inspected the court file. I personally flew from Gauteng to the honourable court in order to inspect the court file."

[22] Mr Motloung does not explain why the provincial Treasury, entrusted with the province's finances, would use taxpayers' money to pay for an attorney to fly from Gauteng to Port Elizabeth to inspect a court file. Perhaps that is something to be discussed at provincial level and between attorney and client. Be that as it may, Mr Motloung says that he then saw the notice of set down for 24 November 2016 for the first time. But more importantly, he persists with his statement under oath that he had not seen the answering affidavit before then.

[23] Mr Motloung explains that the employee's attorney, Mr Niehaus, sent him an email on 24 August 2016 where he says:

> "I refer to my client's answering affidavit filed on 28 June 2016 and note that no replying affidavit has been filed."

[24] Motloung responded, stating that he had not received the answering affidavit. On the same day, 25 August 2016, Niehaus replied:

> "I am investigating the matter. In the interim please find attached the answering affidavit filed with LC on 28 June 2016."

[25] In his affidavit requesting a postponement on 23 November 2016, Motloung then states:

> "Unfortunately, he [Niehaus] never reverted to me about the results of his investigations. In the meantime, I was of the firm view that the third

[9] My underlining.

> respondent misrepresented his position by stating that she had served her answering affidavit on me and/or my correspondent attorneys, and wanted to bust the misrepresentation."

[26] It will be seen from the above that Motloung did not, in that affidavit, deny that Niehaus had attached the answering affidavit; but when he argued the matter before me on 22 February 2017, he did deny it. It is on that basis that Golden AJ granted Motloung the requested postponement on 24 November 2016. But she added:

> "2. The costs occasioned by the postponement shall stand over for determination when the review application is heard.
>
> 3. The applicant is required to address this court why it should not pay the wasted costs occasioned by the postponement on a punitive scale.
>
> 4. The applicant's legal representative, Mr Ike Motloung, is required to explain, on affidavit, the averments in paragraphs 8, 36-41 of his affidavit in support of the application to postpone pertaining to his knowledge and receipt of the answering affidavit, for the Court to consider in its determination of the costs order."

[27] It will be noted that Golden AJ ordered Mr Motloung to deliver that affidavit in order for this Court to consider in its determination of a possible order for costs "on a punitive scale" occasioned by the postponement; given her clear misgivings about Motloung's earlier affidavit, it appears that she had in mind for him to explain why he should not pay the costs *de bonis propriis***.** It is in that context that I must consider the appropriate costs order.

[28] Despite Golden AJ's clear and unequivocal order, and despite the fact that a correspondent attorney, Siya Cokile from Port Elizabeth, and counsel on brief, Adv M Simoyi, were in court when she handed down the order on 24 November 2016, Motloung did not file a further affidavit as ordered. At the end of the hearing before me on 22 February 2017, I therefore instructed Motloung to do so. I also afforded Niehaus the opportunity to respond thereto. They did so on 1 March and 13 March 2017 respectively.

[29] In his affidavit, Mr Motloung reiterated that "there was no answering affidavit attached" to Niehaus's email of 25 August 2016; and that he saw

it for the first time when he flew to Port Elizabeth from Gauteng on 7 November 2016 to inspect the court file. In response, Niehaus acknowledged that the answering affidavit had not been delivered by email in June 2016, as he had thought; importantly, though, he states under oath that "the answering affidavit was most certainly attached to my second mail which is apparent from the content of Annexure JM-7." That annexure clearly shows a pdf attachment titled "ANSWERING AFFIDAVIT 28JUNE2016.pdf".

[30] In these circumstances, and taking into account the rule in *Plascon-Evans*[10], I must reluctantly conclude that Mr Motloung did not play open cards with the Court when he applied for a postponement and stated, as part of his reasons, that Niehaus had not sent him the answering affidavit and that he saw it for the first time on 7 November 2016.

[31] Having considered those affidavits, it was apparent to me that Golden AJ had in mind the possibility of a *de bonis propriis* costs award in her order of 24 November 2016 when she referred to costs "on a punitive scale", as she had sought an explanation from Mr Motloung in his personal capacity, and not from Treasury. I therefore issued a further directive in these terms on 14 March 2017:

> ""Having considered the order by Golden AJ of 24 November 2016, and the further affidavits filed by Messrs Motloung and Niehaus on 1 March and 13 March respectively, the parties are invited to deliver further submissions by 21 March 2017 why Mr Motloung should not be ordered to pay the wasted costs occasioned by the postponement on 24 November 2016 *de bonis propriis*."

[32] In his further submissions, Mr Motloung reiterated that the answering affidavit was not "served" on him. It is not clear whether he had in mind the formal definition of "serve" in the rules, or whether he was still denying that Niehaus had sent it to him by email on 25 August 2015. As set out above, it appears on a balance of probabilities that Niehaus did send it to him. Yet he offered as a reason for the postponement on 24 November 2015 that the employee "had failed to serve her answering affidavit on me".

[10] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[33] Having regard, then, to Golden AJ's order of 24 November 2016, this is a matter where the applicant's attorney should be held liable for the wasted costs occasioned by the postponement. There is no reason why the Treasury, funded by the taxpayer, should be held liable for those costs. I have not been called upon to decide why Mr Motloung should recover any fees or costs from Treasury for his flying to Port Elizabeth from Gauteng merely to inspect the court file, when he had instructed correspondent attorneys in PE; that is for them to consider between them.

Order

[34] I therefore make the following order:

34.1 The application for review is dismissed with costs, including the wasted costs occasioned by the postponement on 24 November 2016.

34.2 The wasted costs occasioned by the postponement on 24 November 2016 are to be paid by the applicant's attorney, Mr Ike Motloung, *de bonis propriis* on an attorney and client scale.

34.3 A copy of this judgment must be sent to the Law Society of the Northern Provinces in order for it to consider the events set out under the heading of "Costs".

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Ike Motloung (attorney).
THIRD RESPONDENT:	Minnaar Niehaus (attorney).