

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR795/03

2005-03-17

REPORTABLE

In the matter between

THE DEPARTMENT OF PUBLIC WORKS,

ROADS AND TRANSPORT

Applicant

and

TS MOTSHOSO

1st Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

2nd Respondent

MOKETE MOLOI (Commissioner)

3rd Respondent

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J U D G M E N T

REVELAS, J: This is an application to review an award made by the third respondent, the arbitrator who conducted an arbitration under the auspices of the General Public Service Sectoral Bargaining Council (or “the second respondent”). The award was made in favour of the first respondent who was a former employee of the applicant and who was dismissed by the applicant following an enquiry into certain disciplinary offences. These offences related to *inter alia*, the service weapon which was issued to him by the applicant. In terms of the arbitrator’s award he was reinstated.

The nature of these offences I am not going to discuss in any great detail in this judgment. It is however important to know that the first respondent was convicted of murder and that conviction, is now the subject matter of an appeal. The Supreme Court of Appeal has not yet determined the fate of the first respondent in that regard. The incident which gave rise to the criminal and disciplinary offences took place on about 25 January 1999. A disciplinary hearing was held only on 24 November 2000. The decision to dismiss was upheld on appeal on 23 July 2002. The outcome of the appeal to the respondent was communicated on 16 August 2002.

It took the applicant more than three years to finalise this disciplinary enquiry in respect of the first respondent’s alleged offences. His

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disciplinary hearing was held virtually two years after the alleged offences occurred.

The applicant seeks to set aside only the re-instatement part of the arbitrator's award. It was argued on behalf of the applicant, that since the arbitrator relied on a procedural defect to come to his conclusions, re-instatement was inappropriate.

It was indeed only a procedural defect which the arbitrator relied upon, that being the inordinate delay of three years and seven months to complete the disciplinary investigations, to arrive at a decision in this matter.

The applicant also relied on the several cases relating to prejudice of accused persons when there is a delay in prosecuting criminal matters.

The arbitrator then held that the delay in this case was so grossly unfair, that it vitiated the decision to dismiss the first respondent.

In my view, that view is correct, particularly on the facts of this case.

The arbitrator on numerous occasions during the hearing, enquired about the reason for the delay. On one of these occasions the arbitrator was told by the applicant's representative, that the reason for the delay will not be addressed. The record reflects that generally this line of enquiry was deflected by the applicant's representative. There simply is no explanation for the delay.

The arbitrator indeed applied his mind when applying the law and relying on the case of *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria* 1992 (1) IJ 1563. In this matter *De Kock, SM* held that

"The failure to convene an enquiry promptly in a similar in casu is

so

grossly unfair that it vitiates the decision to dismiss. (at 1570D-E)"

This judgment was not overturned on appeal.

I see therefore no reason to interfere with the decision that the arbitrator came to.

There is one portion of the arbitration award (the granting of compensation in addition to reinstatement) which was incorrect, and that could be rectified by this order:

1. The application is dismissed with costs.
2. Paragraph 4 of the award (relating to compensation) is set aside.

E. REVELAS

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DATE OF HEARING: 16 MARCH 2005

DATE OF JUDGMENT: 17 MARCH 2005

ON BEHALF OF THE APPLICANT: Mr Gough (State Attorney)

ON BEHALF OF THE RESPONDENT: Allardyce & Partners