



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C898/13

In the matter between:

NEHAWU obo PATRICK LUCWABA

Applicant

and

PIET VAN STADEN

First Respondent

NATIONAL HEALTH LABORATORY SERVICES

Second Respondent

CCMA

Third Respondent

Date heard: 4 June 2015

Delivered: 4 December 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review and set aside an arbitration award under case number WECT11038-13. The first respondent (the Commissioner) found that the dismissal of Patrick Lucwaba (Lucwaba) was procedurally and substantively fair.
- [2] Lucwaba had been employed by the second respondent (NHLS) for some thirty years at the time of his dismissal, having moved up the ranks to become an Executive Manager with a salary of R93 700.00 a month. The disciplinary charges against him are recorded in the award as follows:

“Charge One

5. It was alleged that he had engaged in a situation where he allowed a junior member of his staff, one Ms Viwe Vilakazi, to come around his desk during working hours, and was found with her skirt drawn up to her thighs. It was contended this was improper conduct on the part of Applicant.

6. It was also alleged that Applicant had affairs with two junior staff members. One was employed as a medical technologist in East London and the other a finance clerk at the Greenpoint Complex. It was also alleged that Applicant tried to engage another junior colleague, at the Nelson Mandela Tertiary Laboratory.

7. It was alleged that in his dealings with the aforementioned ladies Applicant had used the words ‘thanks my love’, ‘it’s ok darling’, ‘hello sweetheart’, ‘sure honey sorry not for showing that’, ‘I miss you and think about you the whole time’ and ‘I love you unstoppable’.

8. It was also alleged that Applicant had used similar words with females who were not employed with Respondent. Some five females were mentioned. One of those is employed by the IDC.

Charge Two

9. It was alleged that Applicant made or presented a false document for personal interest. It was alleged that in April 2013 he wrote and circulated an email with the subject “Public Interest” wherein he spread negative rumours about Respondent, its management and its Board. It was alleged that Applicant had spread the

rumours internally and externally and he used Respondent's computer and network system and which he had connected to his personal email address. In so doing he undermined the value system and Road Map process and he brought Respondent's name in disrepute.

10. It was also alleged that applicant had disclosed and distorted confidential information about Respondent's values to internal and external shareholders. This was a breach of his contract of employment."

- [3] In regard to the email correspondence with junior employees, the record reveals that Lucwaba explained to the Commissioner that:

"So the junior staff that I have been exchanging emails with, some are friends, some are family friends, some are close relatives in a sense. We African people extend families particularly around the clan name and stuff like that. Now my upbringing or my background is such that I am very submissive and humble in addressing people, be they males or females. I do not address them with their names if I can help it and they are comfortable with it. Rather than addressing them with their names I would use cuddly names that I know are acceptable in our society."

- [4] Under cross-examination regarding certain photos taken of one of the women contained in the emails, Lucwaba confirmed that she was one of the suppliers to the NHLS. He further conceded that the photos were taken with the camera he had been provided with by his employer. The said photos are contained in the record before the Commissioner and were taken before 9 in the morning in December 2012. Lucaba conceded he took the pictures but stated that he did not know where they were taken. Other photographs contained in the record which were taken with his camera include a photo of one of the women with whom he emailed lying on a bed.

- [5] The Commissioner found that it was wholly inappropriate for a senior executive to have dealt with junior employees in the terms that he did in the emails.

- [6] In respect of the alleged incident with Ms Vilakazi, the Commissioner heard evidence of three staff members including a Mr Abraham who testified that when he popped his head into Mr Vilakazi's office after 4.30 in the afternoon it appeared as though Ms Vilakazi was sitting on his lap. She was adjusting her dress from mid-thigh to her knees. This evidence was disputed by Lucwaba. His defence included that emails were sent by her to him on that day at the time they were supposedly together. He denied Mr Abrahams who he said always knocked loudly on his door and never came in unless invited, had stuck his head into the office as alleged.
- [7] The Commissioner could not find any basis to conclude that the evidence about Ms Vilakazi was concocted by the employer and its witnesses. He was not persuaded that the exchange of emails between Lucwaba and Vilakazi at the material time assisted Lucwaba's case. He recorded that "it is trite that emails are not necessarily office bound. One can sit next to a colleague and they will have no difficulty in exchanging emails."
- [8] In respect of Charge 2, Lucwaba denied he had ever transmitted the alleged email disparaging the leadership. This material was presented at arbitration on a document that also contains an email from a Maria Henson which read as follows:
- "Dear Patrick. The NHLS ROAD MAP PROCESS was made on your PC. Office documents track this. NHLS will find out. Make a copy of everything you have that is important on CD. Put in your car safely. Not a company car. They will take that. When you are suspended you'll have it safe. Find out how to send it to WikiLeaks you have support but act wisely. You will not hear from me again. Maria"
- [9] At 22h36 on 15 April 2013, the night before the meeting of the portfolio committee in Parliament, Lucwaba had forwarded the email from Henson to his private email address. The copy of the facsimile contained in the bundle of documents reflects "Attachments NHLS ROAD MAP PROCESS doc"
- [10] The ROAD MAP PROCESS DOCUMENT READ AS FOLLOWS:

“NHLS ROAD MAP PROCESS

THE HIDDEN TRUTH – HARDCORE INTENTION

“Hereunder is a brief executive summary of what the most popular and eagerly awaited restructuring process is going to do to the country’s diagnostic laboratory services. The detailed rhetoric you can find in the documents that have been compiled over years by the team, but all of that cover up conceals the real implications explained below, to complete the picture.

Laboratories-phased in closures: no more new labs will be built ever by NHLS because the current number of labs is way too high and should therefore be reduced significantly. More than half of the existing sites will be closed down, as part of the first phase. This will ensure that every province has, but a significantly low number of testing labs. The following phase will intensify the closure, resulting in every province remaining with at least a laboratory. The second last of these phases will reduce to one, the number of laboratories the country will have. The last and ultimately phase goal of this restructuring process will convert the one laboratory into being a triage point to courier specimens to India.

Services-Fleets of courier companies are being established as of now that will collect and deliver samples from clinics and hospitals all over the country. These will include vehicles, helicopters and aero planes. Huge numbers of clerks and community workers will be contracted to record and package specimens for testing. Contracting of large numbers of employees is being tested currently and works it well. IT will be used to transmit results back to clinics within reasonable turnaround times. The few labs will operate with a high level of automation and will deliver high throughput running 24/7 non stop. Once all labs are shut down, specimens will be sent to India by airlines that are being budgeted for to purchase.

Personnel- the present numbers of staff in all categories exceed what is required by the current workloads. When labs are reduced, massive retrenchments will be unavoidable and fair recruitment processes will be embarked upon for the remaining labs. NHLS does not have money right now, treasury will be

approached to fund retrenchment packages. Current trainees (consultants, technologists, technician, scientists and lab assistant) will given a very short stint of experience in a short term contractual employment which may be extended, a few times and ultimately terminated to go find a job in the private sector, as nhls does not train for nhls but for the rest of the industry and the world at large.

Teaching and training of professionals- NHLS will no longer recruiting future professionals. The private sector will carry the training burden to cater for their services.

This is the cheapest way to deliver services of laboratory to South African people.

A program like this, just on the eve of 2014 general elections, is a snub and insult to the country's hard earned democracy and in particular, to the African National Congress."

- [11] The record reveals that Lucwaba testified that he regarded the email from Henson as spam and did not consider the statement by her i.e. that he had created the Road Map document, as damaging to him. The following interactions recorded in the transcribed record are noteworthy.

"MR LUCWABA: Commissioner as I did say earlier you receive spam email of this or the other thing, you have won a million rand and you just ignore those things. So you park it and see what is going to happen and if nobody shows up there is no identity you will ultimately delete that. I have considered that to be that as well even though it is a putting allegations it...(intervenes)

COMMISSIONER; You regarded it as spam?

MR LUCWABA: I regarded it as spam and I was hoping somebody is going to show up and then I would then talk to this person.

COMMISSIONER: All right

MR HLATSWAYO: Okay, did you do anything when you received that email other than just sending it to you private email?

MR LUCWABA: What, I did not do anything.

MR LUCWABA: No

MR HLATSWAYO: Why?

MR LUCWABA: I delete spam.

MR HLATSWAYO: But in this case you never deleted, you sent to your private email why?

MR LUCWABA: I am saying you have spam that says (inaudible) you know it is spam but you never know so you park it for some time after which you then dispose of it.

MR HLATSWAYO: Why was it important for you to save it?

MR LUCWABA: Probably to go back and read it later on, but I never had the chance to read this because you came and you grabbed my computer.”

[12] The Commissioner records the rest of Applicant’s evidence in respect of charge 2 thus:

“42. Applicant recorded that he was part of a team that visited Parliament on 16 April 2013. The purpose was to make a presentation to the portfolio committee. The CEO did the presentation but other members of the team dealt with questions as best they could.

43. Applicant noted that he was more of a representative of the Regional Management whose knowledge lay in operations. When questions were raised on operations, Applicant dealt with them. After the CEO concluded his presentation, Applicant pointed out a number of gaps in it. He relayed this to the committee. Applicant gave additional details and he stated that he thought that he was supporting the CEO. He later understood that the CEO did not want the information to be disclosed. Applicant contended that this led to his dismissal.

44. Applicant stated that the chairperson of the enquiry linked his submissions in the email letter to what he had stated in Parliament. She assumed, on that basis,

that it was Applicant who had drafted and transmitted the letter. He contended that Respondent has led no evidence to prove that the email came from the Applicant's laptop despite it being in Respondent's possession since 19 April 2013."

- [13] In respect of charge 2 the Commissioner found that the probabilities were heavily in favour of the employer. He states as follows:

"It simply makes no sense that a document that, on his version is sent to him and which details plans by the Respondent, can be seen as spam. I am satisfied that Respondent has proved this allegation against Applicant. The conduct displayed by Applicant is inconsistent with one who had received an email rather than one who has sent one. "

- [14] In finding that the employment relationship would not be able to continue, the Commissioner records that he fully associates himself with the Chairperson of the disciplinary hearing in paragraphs 7.1 to 7.3 in the disciplinary outcome report. These read:

7.1 In light of my finding in regard to charge 2, I find that the relationship of trust between the Employer and the Employee has been so adversely affected that the employment relationship can be said to have broken down irretrievably.

7.2 The Employee conducted himself in a manner which indicates that he considered the employer to be an adversary. He embarked on a course of action with no regard for the reputation and interests of the Employer and I am of the opinion that such conduct cannot be condoned. Accordingly, it is my decision that the employee be dismissed.

7.3 Furthermore, I am convinced of the appropriateness of the sanction of dismissal in the circumstances as the Employee's relationships with junior female staff members is indicative of his disregard of his duty to act in the Employer's best interest."

- [15] The attack on the award on behalf of the applicant is that the Commissioner did not deal properly with the material disputes of fact before him and engage squarely with applicant's version – i.e. he did not have regard to facts and circumstances

tending to support the applicant's version. This, it was argued, was apparent in respect to the Vilakazi incident and the Road Map document. A most important consideration that the Commissioner ought to have taken into account according to Ms Harvey, was the timing of the charges i.e. that Lucwaba was suspended three days after he made his input in Parliament and that Abrahams complaint occurred on the very eve of the Portfolio Committee meeting.

[16] It is submitted by Ms Harvey that there was no evidence that the Road Map document was circulated to “internal and external stakeholders”. I do not understand Lucwaba’s evidence at arbitration to have been that the document was never circulated but rather that he did not author or circulate it. This stance is apparent in the following testimony when it was put to him that the document bore a striking similarity to the issues he had raised in Parliament:

“You are not implying that I am the one and only person in the whole NHLS community who has this view. Many within the NHLS share the view about retrenchments and what not, about the lab closures, any one of those could have written. I am in the EXCO; EXCO is put in the middle when it comes to the subject of ROAD MAP process. Some people within the EXCO are not for the ROAD MAP process because of exactly these implications. Why do you attach it to me, what proof do you have that it is me, the ROAD MAP process document, it is an NLHS document and just about every executive in every senior manager has got the ROAD MAP process document and everything?”

[17] The Commissioner’s finding in respect of Charge Two i.e. circulating negative information about the Roadmap to internal and external stakeholders, is less than elegant. However in deciding this matter I am mindful of the dictum of Zondo JP as he then was in **Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others**¹ when he said:

“In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not

¹ (2008) 29 ILJ 964 (LAC) at paragraph 102

reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.

[18] In my judgment the following reasons further sustain the Commissioners decision that the dismissal of Lucwaba was fair:

18.1 The timing of the receipt of the so-called 'spam' by Lucwaba late on the night before the portfolio committee meeting is significant. He did not deny the timing of the Henson message or that he received it and sent it to his personal email address. He then proceeded to attend at the meeting in Parliament on the next morning where he undermined the CEO of NHLS in the presentation to Parliament. That he did more than 'fill in the gaps' of the CEO's presentation is evident from the letter he sent to the Chairperson of the Portfolio Committee following his suspension in relation to the Vilakazi allegations. In this he wrote that: "It is undoubted that all of this is the direct result of my standing in the portfolio committee on Tuesday regarding the restructuring process of NHLS and the implementation thereof."

18.2 Although the Commissioner made reference to the findings of the Disciplinary Chairperson in respect of the improper conduct of Lucwaba in sending emails to junior female staff members, and supported same, an additional reason to sustain the decision in this matter is well-expressed in the Chairperson's finding that: "I find that the Employee was inappropriate and grossly negligent in exposing the Employer to the very real possibility of grievances and sexual harassment claims in relation to his communications with junior employees and external parties."

[19] While it is true that the timing of the Vilakazi allegations may well have been prompted by Lucwaba's conduct at the Portfolio Committee, this fact cannot render the findings on all the charges reviewable. It is not necessary for me to deal with the question of whether the Commissioner forensically examined the disputed facts in the Vilakazi incident to the requisite standard. I am satisfied that in respect of Lucwaba's inappropriate emails to female subordinates, as well as his conduct in propagating negative information about the Roadmap to stakeholders, the Arbitrator's decision should be sustained. The outcome of the Award cannot be considered one that a reasonable decision-maker could not make on all the material before the Commissioner. I see no reason why costs should not follow the result in this matter.

[20] In all the circumstances, I make the following order:

1. The application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: S. Harvey instructed by Abrahams Kiewitz Attorneys

Respondent: M.W. Dlamini instructed by MNS Attorneys

LABOUR COURT