IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C92/2018 &
C757/2018

In the matter between:

WESTERN CAPE GOVERNMENT:	**Applicant**
DEPARTMENT OF EDUCATION	
and	
ADV HANEKOM N.O.	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL	
BARGAINING COUNCIL	**Second Respondent**
J S QUTSHU	**Third Respondent**

Date heard: 16 October 2019

Delivered: 17 October 2019

JUDGMENT

CONRADIE, AJ

[1] This is a review application which was heard simultaneously with case number C757/2017 in which the third respondent in this matter (the employee) seeks an order in terms of section 158(1)(c) of the Labour Relations Act to make the

arbitration award handed down by the first respondent (the arbitrator) on 8 December 2016 an order of court.

[2] I indicated to the parties that I would only deal with the merits of C757/2017 if the review application fails.

The Review

[3] The background to the matter can be summarised as follows:

3.1 The employee was employed by the Applicant (the Education Department) as a general assistant at the Imizamo Yethu Secondary School in George.

3.2 On 16 April 2015, the employee was given notice to attend a disciplinary hearing in order to answer to the following "charge":

"Charge 1: It is alleged that you are guilty of theft, in that you removed gas burners from the school premises, during the last term of 2014, without the necessary permission of your supervisor with the intention of permanently depriving the school of these items.

ALTERNATIVE TO CHARGE 1

It is alleged that you are guilty of improper conduct in that you removed gas burners from the school premises, during the last term of 2014, without the necessary permission of your supervisor with the intention of permanently depriving the school of these items."

[4] Following a disciplinary hearing that was concluded on 2 June 2015, the employee was dismissed. The employee did not lodge an internal appeal against his dismissal but referred an unfair dismissal dispute to the second respondent (the Bargaining Council).

[5] The arbitrator heard the matter and his award can be summarised as follows:

5.1 The employee's dismissal was procedurally fair.

5.2 The acting principal at the school during the time of the incident, Mr. Gunther testified that he applied the policy rule that no-one could remove the school's property without permission. However, under cross examination he could not say whether the rules strictly applied to the removal of scrap before his time at the school.

5.3 The other witness for the Education Department, a teacher, Ms Frans, confirmed the employee's version that the burners were defective and that she requested that they be replaced. Further, that the employee took the old burners and sold them as scrap;and when confronted he indicated that he would pay for the burners if he must and that the employee claimed that the service provider had given him the defective burners. Ms Frans did not regard the matter as a serious one.

5.4 With regard to the appropriate sanction, Mr Gunther testified that the employee was guilty of serious misconduct and that dismissal was appropriate given that the employee had a previous record for theft. This related to the employee stealing groceries at the school in 2013.

5.5 The employee testified that he had no intention to steal the defective burners. As far as he was concerned, the service provider was the owner of the old burners and had given it to him as scrap and they were allowed to take scrap in the past. The service provider was not called as a witness. Neither of the Education Department's witnesses could attach a value to the defective or old burners. They were also not able to refute the employee's version that in the past they could take scrap regardless of ownership. The arbitrator inferred that the burners were of little or no value and questioned why they would need to be replaced if they were in working condition.

5.6 As Mr. Gunther was not the chairperson of the employee's disciplinary hearing, he could only give his view as to why he believed that the employee's dismissal was fair.

5.7. The arbitrator could not hold the employee's previous record against him "to prove theft in the instant case". This was because according to the law, similar fact evidence was irrelevant as it merely showed a tendency or propensity to commit theft;

5.8. The Education Department bore the onus to prove that the employee had the intention to steal the burners;

5.9. The arbitrator could not exclude the possibility that the employee personally was not aware of the rule and as such found that he did not have the intention to steal.

5.10. The *minimus non curat lex* (the law does not bother itself with trivial issues principle applied in the matter). Even if the school was to dispose of the scrap, it made no difference whether it did so or the employee did so.

5.11. After weighing up what he thought were the relevant factors as required by **Sidumo and Others v Rustenburg Platinum Mines (Pty) Ltd**[1], the arbitrator concluded that it was not a serious case and at most the employee should have known that he required permission to remove the scrap metal. He also found that the trust relationship had not broken down. He further found that the employee did not secretly remove the items and the employer did not suspend him after the incident. In the circumstances he found that dismissal was inappropriate. He however found the employee guilty of removing items without permission.

5.12. In the circumstances, the arbitrator found the dismissal of the employee to be substantively unfair. He however declined to award retrospective reinstatement as he believed that the employee contributed to his own fate.

[1] 2007 28 ILJ 2405 (CC).

Preliminary Points

[6] Before dealing with the Education Department's grounds of review, there are two preliminary points that need to be dealt with. Firstly, there is an application for condonation which relates to the failure by the Education Department to serve the review application on the Bargaining Council within the time period prescribed by Section 145 (1) (a) of the LRA.

[7] The review application was timeously served on the employee and Mr Phoko who appeared on behalf of the employee did not oppose the granting of condonation. I am therefore granting condonation.

[8] The second preliminary point raised by the employee is that the application is deemed to have been withdrawn because the record of the proceedings was not filed within the 60 days as provided for in clause 11.2.2 of this court's practice manual. There is no merit in this argument, because if one has regard to how days are calculated as provided for in clause 3 of the practice manual then the Education Department is correct when it states that the last day for filing the record was 20 November 2017, the date on which it delivered the record.

Grounds of Review

[9] In broad terms the Education Department seeks to review the arbitration award on the basis that the arbitrator committed misconduct in relation to his duties as an arbitrator and committed a gross irregularity in the conduct of the arbitration proceedings. Overall it is of the view that the decision reached by the arbitrator that the dismissal was substantively unfair, is one that a reasonable decision maker could not reach. The review grounds are dealt with below.

No intention to steal the gas burners

[10] The uncontested evidence of Mr Gunther was that anything at the school belongs to the school. According to him, no property at the school belonged to the service provider and if the service provider replaced the burners they would give it to the school to be placed in a storeroom.

[11] The allegation in Charge 1 was that the employee was guilty of theft in that he removed gas burners from the school premises without the necessary

permission of his supervisor with the intention of permanently depriving the school of these items.

[12] Based on the evidence the gas burners were removed from the school premises without permission from the employer. It must therefore follow that the employee's intention was to permanently deprive the school of those items, unless the employee could show that he laboured under the incorrect impression that the burners belonged to the service provider and that the service provider had given him permission to take the burners. The evidence of the service provider was critical to the employee's defence, yet it did not testify on his behalf. In this regard the Labour Court in **Heath v A & N Paneelkloppers**[2] relied on the Labour Appeal Court judgment of **Absa Investment Management Services (Pty) Ltd v Crowhurst**[3] in assessing why a witness was not called to put its version before the court, and held that:

"'[I]t is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support — and may even damage — that party's case.".

[13] Sight must also not be lost of the fact that the Education Department is a government department which of necessity needs to ensure that all its assets remain firmly under its control. It would be unable to do this if employees could simply walk off with its assets and when confronted claim, without confirmation from the service provider, that the assets belonged to a service provider who gave them permission to remove the assets.

The *de minimus* principle

[14] I see no basis for the arbitrator concluding that the goods were of little value.

[15] As argued by the Education Department, there was no evidence led that the burners were not of any economic value to it. This court and the Labour Appeal Court have on several occasions rejected the notion that the value of the stolen goods is relevant.[4]

The employee did not secretly remove the items

[2] (2015) 36 ILJ 1301 (LC).
[3] (2006) 27 ILJ 107 at par 14.
[4] See *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC).

[16] There is no basis for this finding by the arbitrator. I

[17] It was only when the Education Department confronted the employee about his removal of the burners that he owned up to removing the burners.

Failure to suspend the employee

[18] I also find no basis to support the reasoning of the arbitrator in this regard.

[19] The failure of an employer to suspend an employee should not easily be used to support an argument that dismissal was not inappropriate. Our law is clear on the circumstances in which an employee can be suspended. If those circumstances are not present, then an employee should not be suspended and be allowed to continue performing his services pending the outcome of a disciplinary hearing.

Reliance on similar fact evidence

[20] The arbitrator's reliance on the law applicable to similar fact evidence is also misplaced.

[21] According to the documentary record, on 27 June 2014, a few months before the incident relating to the removal of the burners, the employee was given a final written warning and a suspension for two months without remuneration for theft of food.

[22] This disciplinary transgression should have been a material consideration in the arbitrator's assessment of the appropriate sanction in the circumstances.

[23] Rather, the arbitrator applied the 'similar fact principle' which is mainly used in criminal cases to effectively exclude this critical evidence.

[24] Schwikkard and van der Merwe in their book, Principles of Evidence, describe similar facts as *"facts that are directed at showing that a party to the proceedings or a witness in the proceedings has behaved on other occasions in the same way as he is alleged to have behaved in the circumstances presently being considered by the court".* Although it is evidence that is ordinarily inadmissible due to its irrelevancy, it will be admissible when it is logically and legally relevant. The exclusion of similar fact evidence is primarily because of

its potential prejudice exceeding the probative value of it. In **DPP v Boardman**[5] confirmed by the Appellate Division in **S v D** [6]it was held that the admissibility of similar fact evidence was only possible where its probative value exceeds it prejudicial effect

[25] The admission of similar fact evidence may result in prejudice to the accused in a number of ways, one of which is that it may place 'an accused person' in the precarious position of having to defend the present matter and any previous charges of misconduct. [7]

[26] The LAC in **Gaga v Anglo Platinum Ltd & others**[8]has had an opportunity to deal with similar fact evidence in a case of misconduct relating to sexual harassment. Murphy AJA found in regards to an arbitrator's refusal to admit similar fact evidence, that:

"As regards the commissioner's ruling in respect of the similar fact evidence, that too was a reviewable irregularity. The exclusion of evidence that ought to be admitted will be either misconduct in relation to the duties of a commissioner or a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a) of the LRA. In the context of an unfair dismissal arbitration, similar fact evidence of a pattern of behaviour or serial misconduct will often be relevant to both the probabilities of the conduct having been committed and the appropriateness of dismissal as a sanction. It may be more so where the alleged misconduct is characterised by an element of impulsivity …. There ordinarily would be a sufficient link or nexus between the earlier similar misconduct (if proved) and the disputed facts pertaining to a method of commission, or a pattern possibly revealed, to make that evidence exceptionally admissible. Given the nature of the evidence which the first respondent proposed to lead, and the fact that the allegations would have been known to the appellant, it would not have been unfair or oppressive to have allowed the evidence because the appellant had adequate notice and was in a position to deal with it".[9]

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[5] 1975 AC 421.
[6] 1991 (2) SACR 543 (A) 543.
[7] Schwikkard and van der Merwe *Principles of Evidence* 77.
[8] [2012] 3 BLLR 285 (LAC).
[9] At par 45.

"The absence of the similar fact evidence has some bearing on the determination of the appropriate sanction in this case. Without such, this Court is obliged to regard the appellant as a first offender, albeit one who had been advised and counselled by his superior in the past, and who by virtue of his position in the company would have been aware of the reprehensible nature of sexual harassment in general".[10]

[27] Had the arbitrator properly dealt with the undisputed evidence that a few months before the removal of the burners the employee was sanctioned with a final written warning and docked 2 months' pay, he would not have come to the conclusion that dismissal was inappropriate.

[28] For all the reasons stated above, I am of the view that the review application must succeed. This means that there is no need for me to deal with the merits of the application under case number C757 /2017 to make the arbitration award an order of court.

[29] As far as costs are concerned, I see no basis for awarding costs in either case based on the ongoing relationship between the parties and bearing in mind the Constitutional Court's judgment in **Zungu v Premier of the Province of KwaZulu-Natal and others**[11]. While it is correct that the Education Department wrote to the employee's union warning it that it would seek a punitive cost order if the application under case C757 /2017 was not withdrawn, it is clear to me that Mr Phoko, from the employee's union, who represented him in court was mistaken in the course of action he adopted in this case. When this was pointed out to him he did not persist with his arguments in support of the matter.

Order

[35] In the circumstances I make the following order in respect of case C92/2017.

1. The Applicant's non-compliance with the rules of this court is condoned.
2. The arbitration award of 8 December 2016 under Case No GPBC390/16 is reviewed and set aside.

[10] At par 47.
[11] [2018] 4 BLLR 323 (CC).

3. The dismissal of the third respondent was substantively fair.

4. There is no order as to costs.

[36] In the circumstances I make the following order in respect of case C757/2017.

1. The application is dismissed.

2. There is no order as to costs.

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BN. Conradie

Acting Judge of the Labour Court

Appearances:

Applicant: Adv. A Coetzee

Instructed by: State Attorney P Melapi

Third Respondent: J S Qutshu representative of the GPSSBC