



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable
C353/2018

In the matter between:

PALESA DORRIS RAMATSEKANE
 and

Applicant

NATIONAL TRANSPORT MOVEMENT

First Respondent

MARINA TERBLANCHE

Second Respondent

**COMMISSION FOR CONCILIATION,
 MEDIATION AND ARBITRATION**

Third Respondent

Date heard: 9 June 2021 by means of virtual hearing

**Delivered: 27 October 2021 by means of email. Deemed received on the 28
 October 2021 at 10.00hr.**

JUDGMENT

RABKIN-NAICKER J

- [1] This review application was opposed by means of a notice of opposition by the first respondent (the union) but no further papers were filed. A union official made oral submissions at the virtual hearing of the application. In terms of the

Award, the second respondent (the Commissioner) found the dismissal of the applicant substantively and procedurally fair.

- [2] The applicant was employed as a Deputy Provincial Secretary of the union for approximately three years before her dismissal. In a letter to her dated 7 March 2017, she was notified of her suspension and the following charges:

“1. Abscondment in that you failed to report for work from the 16th January 2017 to the 16 March 2017.

2. Fraud in that on or about the 1st February 2016 you defrauded the Union by mislead membership/subscription fees in to your bank account.

3. Dishonesty in that you fraudulently collecting salaries from the Union in the months of January 2017 and February 2017 without notifying the General Secretary that you were not reporting.”

- [3] However, according to a Charge Sheet she signed for on the 6 April 2017, she was charged with: ‘Riotous behavior’, ‘Fraudulent time-keeping’ and ‘undermining union and disrespecting official leadership’. A report on her by the union, included in the Record before the Commissioner, reads:

“The applicant was suspended on the 07 March 2017. She was noticed to attend hearing on the 10 April 2017 at 10h00. The applicant came without representative, and she was given opportunity to go and prepare herself with representative, at the same time we agreed with the date of the 18th April 2017 at 10h00.

On the 18th April the applicant came telling me that she is going to court I said she can go and bring the note that shows she was in court so that I can decide another date she disappeared until I took decision recommend dismissal on the 25 May 2017.”

- [3] The Chairpersons Findings are contained in the record and reads in part as follows:

“IN THE HEARING HELD ON THE 18TH MAY (sic) 2017

PARTIES PRESENT

1. Zamide Booie CHAIRPERSON

2. Mziwakhe Mvunyiswa Charging officer

3. Zamile Booï Witness

On the evidence presented before me I hereby make these findings on balance of probability:

I find the applicant guilty on all charges brought before her which are as follows.....”

[4] It is hardly surprising then, that given the discrepancies in the documentation provided by the union, the Award records that the following issues were clarified and agreed upon between the parties:

“- Charge 3 referred to dishonesty in that during January/February 2017 the applicant fraudulently collected subscription fees from members of the Union without reporting same. It did not refer to the salary of the Applicant whilst she was not at work.

- The Applicant was suspended on the 7th March 2017;
- The disciplinary hearing was conducted on the 18th April 2017;
- The Applicant was dismissed on the 25th May 2017.”

[5] The Commissioner did not find the applicant guilty of Charge 3. However she found her guilty on Charges 1 and 2. On the charge of absconding, it is evident from the material properly before the Commissioner that the applicant was suffering from bipolar disorder during the period in question. Medical certificates produced during the de novo arbitration proceedings and other relevant documents reflect the following:

1. She was booked off from the 11 January 2017 to 20 January 2017 for hospital treatment and recovery of depression.

2. She was again booked off after relapsing with her Bipolar Disorder from the 20 February 2017 to 3 March 2017.

3. On the 1 March 2017 she visited her ophthalmologist. A letter from the practice included in the bundle of documents reads inter alia that:

“In 2017 alone she has mentioned two times that her eyes have been placed at risk for serious injury by assault. These include an alleged blow to the face by

an open hand, as well as being assaulted with water thrown at her eyes, soon after the above mentioned surgery to her eyes.

In light of her known retinal holes in both eyes, as well as recent surgery to both eyes with intralocular lens implants, I hereby request that Ms Ramatsekane's Ophthalmological history be taken into account when making decisions about her safety and protection from further assault."

5. She did attend at her workplace on the 16 January 2017 to lay a grievance which included the following:

"I Palesa Ramatsekane would like to lodge a complaint as follows:

On the 16 January 2017 at about 8:30 in the morning whilst I was at the office, Ms Palesa Moahlodi was not happy about the changes that she found at the office. She went on and on uttering offensive words and I did not say anything. Amongst other things she also said that mentally disturbed people are bringing their madness at the office....."

[6] It is submitted on behalf of the applicant that the union's attempt to argue at the arbitration that the applicant was supposed to report for duty during her suspension was nonsensical. The wording of the suspension letter specifically stated that she "was not allowed to enter NTM union offices." In as far as absenteeism for the period 16 January 2017 to 6 March, the union only relied on a purported attendance register for the period 16 January 2017 to 20 January 2017. On applicants version, save for 16th January 2017 when she handed in her grievance and medical certificate, she was booked off sick for that period. The Commissioner did not determine the factual disputes and contradictory versions between the applicant and Mr Mvunyiswa of the union regarding her attendance at work for some days, i.e. that she did execute his instructions during the period and recruited members to the union.

[7] It seems to me that the over and above the Commissioner's failure to delve into disputes of fact and credibility issues in her Award, she did not take account of the evidence before her in that it would appear that the union did not want the applicant in the office. I refer here to the grievance laid by the applicant on what she saw as abuse relating to her mental health as well as the initial charges as signed by the applicant of 'riotous behavior'. In addition, a letter from staff in the

Provincial Office complaining about applicant's conduct when she came into the office during the material period, was not taken into account by her. The letter appeared to have prompted her suspension.

- [8] As to Charge 2, that "in respect of that on or about the 1st February 2016 you defrauded the Union by mislead membership/subscription fees in to your bank account", the Commissioner recorded that:

"[49] The Applicant submitted her bank account for the period in question and explained that the peculiar amounts deposited into her bank account¹ was done by her husband. *Although no proof to the contrary was provided, the Respondent's case was not specifically only restricted to direct payments into her bank account, but also related to any cash payments received.* It was furthermore the Respondent's evidence that the Applicant and Andrew Mokooane had a practice of doing this and that he was actually dismissed prior to her and whilst she was still being investigated. The Applicant could not rebut this evidence and even conceded that Andrew Mokooane was indeed guilty of this misconduct." (*my emphasis*)

- [9] The Commissioner's concept of the union's case being broader than the charge that was actually laid against the applicant is concerning. This is raised in the grounds of review in the founding affidavit before me. The transcribed record reflects that the applicant testified that the General Secretary was made aware that she had given out her personal bank account details and that she was reprimanded for it, and did not do so again. Further, that on the union's version the applicant was suspended when the issue of the giving of personal bank details arose, but her suspension was then lifted as further investigations continued. The charge against her was brought a year later.
- [9] In its oral submissions, the union stated that there was no cogent case made out by the employee and that the Award was reasonable in all respects. It was emphasized that charge 2 involved dishonesty. Members were misled by the provision of her private account details. The applicant had not disputed the

¹ These were two cash deposits. The first in the amount of R65 on the 8 February 2017 and the second of R315 on the 16 February 2017.

veracity of the receipt contained in the documentary record on which she had written her account information. It was argued that the applicant must have known the union's own banking details and that her misconduct went to the heart of the employment relationship.

- [11] In as far as procedural fairness of the dismissal was concerned, it is alleged that the Commissioner did not take into account the material evidence before her when finding that the dismissal was procedurally fair. In her Award she found that there were disparities in applicant's explanation regarding what had transpired on the 18 April 2017 and she could not therefore attach any weight to it. However, the fact that she did attend court that day was in documentary evidence before the Commissioner. The union's own report reflected that no date was given for the hearing to continue on the 18th April 2017. It is further apparent from the minutes of that hearing that Mr Booï was both chairperson and witness at the hearing. Despite these shortcomings, and the confusion over the charges against the applicant, the Commissioner found her dismissal to have been procedurally fair.
- [12] In all the above circumstances, I disagree with the oral submissions made by the union that the Award was reasonable in all respects. On the evidence before the Commissioner, the applicant cannot be said to have absconded during the period in question. As to Charge Two, the Commissioner did not take into account the fact that the applicant was suspended in relation to giving out her bank details, but that on the respondent's own evidence as reflected in the transcript, her suspension was then lifted. However, while the wording of Charge 2 is not a model of clarity, it is so, on applicant's own version, that she gave at least one potential member the bank details of her personal account. The fraud alleged in Charge 2, relates to the provision of her bank details and not as submitted on behalf of the applicant to the receipt of members' monies into her bank account. I thus do not consider that a finding of guilt in respect of charge 2 can be considered an unreasonable result. Nor can the sanction of dismissal in respect thereto.
- [13] In these circumstances, I find that the outcome of the Award on procedural fairness is susceptible to review. In exercising my discretion in as far as equitable compensation to the applicant is concerned, I take into consideration

that the employer *in casu* was a trade union fully aware of the procedural fairness rights accorded an employee. That it deviated from these to such an extent in relation to an employee experiencing mental health problems is a poor reflection on it. I make the following order:

Order

1. The Award under case number FSBF3321-17 is reviewed and set aside and substituted as follows:
 - 1.1 The dismissal of the applicant was substantively fair but procedurally unfair.
 - 1.2 The first respondent is to pay the applicant an amount equivalent to five months of her salary at the time of her dismissal, being $4 \times R8000 = R32,000$ (Thirty-two thousand Rand) as compensation.
 - 1.3 There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: T Du Preez instructed Kramer Weihmann & Joubert

First Respondent: Union official