Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

CASE NO: C30/2021

In the matter between:

POPCRU on behalf of J MFUNDISI Applicant

And

DEPARTMENT OF TRANSPORT
AND PUBLIC WORKS First Respondent

GENERAL PUBLIC SECTOR BARGAINING
COUNCIL Second Respondent

JP HANEKOM N.O Third Respondent

Date of hearing: 6 July 2022
Date of judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down the judgment is deemed to be 10h00 on 26 July 2022

Summary: Review of decision of arbitrator upholding dismissal for serious misconduct by traffic officer who assaulted two members of the public without cause on private property. Traffic officer not acting in the course of his employment. Finding of serious misconduct and fairness of sanction of dismissal in the circumstances within the band of reasonableness. Restatement of principles. Dismissal appropriate

JUDGMENT

Williams AJ

Introduction

[1] This is an opposed application to review an arbitration award under case number GPBC1766-2019. In terms of the award, the third respondent (the arbitrator) found that the dismissal of the applicant's member, Mfundisi, was substantively fair.

[2] An opposed application for condonation of the late filing of the review also served before me. Both applications were argued on the day of the hearing.

Condonation

[3] The award is dated 2 November 2020 and the review application was filed on 1 March 2021, some eight weeks late.

[4] The explanation for the delay is that the applicant received the award much later than Mfundisi did and the award must reach the applicant before attorneys can be appointed. The first respondent pointed out that the founding affidavit is silent regarding when Mfundisi sent the award to the applicant and what steps were taken upon receipt thereof by both Mfundisi and the applicant. The explanation provided is weak.

[5] Given that the period of delay was not inordinately long, and there has been no prejudice alleged by the first respondent, I am inclined to exercise my discretion to grant condonation. I deal with the merits of the review below.

The relevant background

[6] Mfundisi was employed by the first respondent as a Provincial Traffic Inspector from July 2014.

[7] Arising out of an incident which took place on 23 March 2019, Mfundisi was charged with the following:

> *"**Charge 1***
>
> *It is alleged that you committed misconduct in that on or about 23 March 2019, when you assaulted Mr Mintoor Booysen by pulling him out of the vehicle and / or choking him and / or hitting him in the face with your hand.*
>
> ***Charge 2***
>
> *It is alleged that you committed misconduct on or about 23 March 2019, in that you brought the name of the Department into disrepute, when you assaulted Mr Mintoor Booysen by pulling him out of the vehicle and / or choking him and or hitting him in the face with your hand.*
>
> ***Alternative Charge***
>
> *It is alleged that you committed misconduct on or about 23 March 2019, in that you prejudiced the Department, when you assaulted Mr Mintoor Booysen by pulling him out of the vehicle and / or chilling him and / or hitting him in the face with your hand.*
>
> ***Charge 3***
>
> *It is alleged that you committed misconduct in that on or about 23 March 2019, you assaulted Mr Basil Booysen by hitting him in the face with your hand.*
>
> ***Charge 4***
>
> *It is alleged that you committed misconduct on or about 23 March 2019, in that you brought the name of the Department into disrepute, when you assaulted Mr Basil Booysen by hitting him in the face with your hand.*

Alternative Charge

It is alleged that you committed misconduct on or about 23 March 2019, in that you prejudiced the Department, when you assaulted Mr Basil Booysen by hitting him in the face with your hand."

[8] Mfundisi was dismissed on 3 August 2019, having been found guilty only on charges one and three.

[9] The record and the summary of evidence reflect the following common cause facts. On the day in question, Mfundisi approached Mintoor Booysen, who was sitting in a stationary vehicle, on private property, and pulled him out of the vehicle against his will, tearing his shirt, and then pulled him to Mfundisi's patrol vehicle. Whist he was doing this, Basil Booysen approached him and asked him to stop. Mfundisi then pushed Basil Booysen in the face.

Grounds of review

[10] The applicant's grounds of review are as follows.

[11] Firstly, the arbitrator committed misconduct in relation to his duties by denying the applicant a fair and impartial hearing when he dealt with the substantive merits of the dispute by engaging himself in legal technicalities and adopting a biased and/or partial attitude towards the applicant.

[12] Secondly, the arbitrator misconducted himself and/or exceeded his powers by finding Mfundisi guilty of misconduct (unprofessional conduct) which never served in the disciplinary hearing or never formed the reasons for Mfundisi's dismissal.

[13] Finally, and in the event that the applicant failed on the second ground of review, it was submitted that the arbitrator misdirected himself when evaluating the evidence put forward by Mfundisi and came to a conclusion which a reasonable commissioner could not have reached on the same facts and evidence. In essence, the evidence on record did not sustain the findings of misconduct (assault) and/or the sanction of dismissal.

The arbitration award

[14] At the arbitration, the applicant challenged the dismissal on grounds that Mfundisi was merely performing his duties and/or acting in self-defence and so his conduct did not constitute assault. Further, it was alleged that there was inconsistency in the application of sanction by the first respondent and that the sanction of dismissal was too harsh.

[15] The first respondent led the evidence of the complainants and two provincial traffic inspectors, Baadjies and Stewart, the latter was Mfundisi's supervisor. Mfundisi testified for the applicant.

[16] The arbitrator, based on his assessment of the evidence as a whole and Mfundisi's evidence in particular, concluded that Mfundisi was guilty of serious misconduct and rejected his version that he had acted in self-defence. He held that Mfundisi had manhandled both complainants without reason to do so. Moreover, he found that Mfundisi laid his hand on Mintoor Boysen, tearing his shirt in the process and manhandled him when he pulled him to the patrol vehicle.

[17] The arbitrator expressed the view that Mfundisi had overreacted because of his anger problem, the evidence of which had not been challenged. He found that it was unacceptable for a traffic officer to handle members of the public in the way that Mfundisi had done. Mfundisi had acted contrary to the code of conduct and was not acting in the performance of his duties. Pursuant to the aforementioned reasoning, he found that dismissal was appropriate under the circumstances.

[18] In respect of the inconsistency issue, the arbitrator held that:

"However, during the Applicant's closing argument he seemed to abandon the issue. To my mind the Applicant did not tender enough evidence to lay a basis as far as inconsistency was concerned for the employer to tender evidence to the contrary."

The test for review

[19] The test for review is set out in *Sidumo & Another v Rustenberg Platinum Mines Ltd and Others*[1] *(Sidumo)* as one of the reasonableness of the award. The question to be answered by this court is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

[20] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[2] the court applied this reasonableness consideration as follows:

> *"For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry to arrive at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable."*

[21] With regard to the result, this will be reasonable where the outcome can be sustained as a reasonable one, even where this may be for different reasons.[3]

Evaluation

[22] I have considered the record and the award and in my view the conduct of the arbitrator at the arbitration did not amount to a gross irregularity within the meaning of s 145 of Labour Relations Act 66 of 1996 (LRA). The applicant indicated at the hearing before me that it did not pursue the first ground of review described above and this aspect was taken no further.

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[1] 2008 (2) SA 24 CC; (2007) 28 ILJ (CC).

[2] 2013 34 ILJ 2795 (SCA) at para [25].

[3] *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 964 (LAC) at [102].

[23] In as far as the second ground of review is concerned, the applicant submits that the arbitrator exceeded his powers by finding Mfundisi guilty of "unprofessional conduct" when he had been dismissed for assault. In other words, that the arbitrator misconceived the issue before him and found Mfundisi guilty an offence for which he had not been charged.

[24] In order to assess this submission, I quote para [36] of the award below, where the arbitrator states:

> *"It is my inference from the evidence as a whole and the Applicant's evidence in particular, that he overreacted. He acted as if he was a police officer chasing suspects and performed an unlawful arrest on Mintoor at the time where he had no reasonable suspicion that Mintoor committed an offence. The Applicant was not a police officer, but a traffic officer who may issue traffic fines to offender. To my mind, the Applicant overreacted because of his anger problem as stated by Stewart during his testimony. The Applicant never challenged Stewart's evidence in that regard. The Applicant accordingly mishandled both complainants while he had no reason to do so. As Stewart stated, the Applicant acted contrary to code of conduct. In my view it is unacceptable for a provincial inspector or a traffic officer to handle members of the public in a way the Applicant performed his duties. Instead of protecting the members of public, he acted like a typical police officer and arrested Mintoor when he lad his hand on Mintoor. He used the necessary force and in the process tore Mintoor's T-shirt. Further, the Applicant manhandled Mintoor when he held on to Mintoor when he took Mintoor to his patrol vehicle. To my mind, <u>that amounts to unprofessional conduct on the part of the Applicant</u>. I therefore find the Applicant guilty of serious misconduct and rejects his version as false that he acted in self-defence. I therefore find dismissal appropriate under the circumstances*." [Emphasis added].

[25] It is evident from a proper reading of this paragraph that the arbitrator found the applicant guilty of serious misconduct in that he assaulted the complainants and that his conduct was not justified by his role as a traffic officer. The reference that

Mfundisi's conduct amounted to "unprofessional conduct" must be seen in the context of Mfundisi's defence that he was simply performing his duties.

[26] In *Edumbe Municipality v Putini & Others* (2020) 41 ILJ 891 (LAC) the Labour Appeal Court stated as follows:

> "It is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the enquiry or undertake the enquiry in a misconceived manner', as this would not lead to a fair trial of the issues. Mere errors in the law and fact as well as other process-related errors are not sufficient to show that the arbitrator misconceived the enquiry. It must be shown that 'the arbitrator undertook the wrong enquiry, undertook the enquiry in a wrong manner' or 'arrived at a decision which no reasonable decision maker could reach on all the material that was before him or her'".[4]

[27] It is clearly not the case here that the arbitrator undertook the wrong enquiry or undertook the enquiry in the wrong manner.

[28] The next consideration, then, is whether the conclusion that Mfundisi committed assault was one that a reasonable decision-maker could not have reached.

[29] The applicant contended that Mfundisi's conduct was justified because he was executing his duties as a traffic officer. Mr May, on behalf of the applicant, argued that it is common knowledge that traffic officers have the authority to effect arrests for both traffic related and criminal offences. The suspects would then be handed over to the police after arrest.

[30] It was common cause that there was no traffic or criminal offence. The high water mark of the applicant's case was that Mfundisi had testified that he found the situation a "bit suspicious".

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[4] [35].

[31] On his own version at the arbitration, Mfundisi opened the driver's door of the BMW and asked Mintoor Booysen to switch off the vehicle. When he did not do so, Mfundisi took the key out of the ignition and asked Mintoor Booysen to get out. Mintoor Boysen refused and so Mfundisi pulled him out of the vehicle. When Mintoor Booysen resisted, Mfundisi pulled harder and that is when Mintoor Booysen's T-shirt tore. Mfundisi admitted that he then pushed Basil Booysen away. He demonstrated at the arbitration that he did so with his arm outstretched and the palm out, and explained that he pushed Basil Booysen's face.

[32] It was also common cause that Mfundisi did not arrest Mintoor Booysen because he was not on a public road and so, on his own version, he knew that he had no authority to do so. In cross-examination, Mfundisi admitted that his conduct was incorrect. The relevant passage reads as follows:

> "*MR MULLER: ...I am putting it to you now that you exercised your duties incorrectly when you went on to the farm, and you basically pulled him out of the vehicle and tested him for alcohol.*
>
> *MR MFUNDISI: No, that is correct."*

[33] Similarly, it was not unreasonable of the arbitrator to reject the claim that Mfundisi acted in self-defence. There was no imminent attack or threat of attack against Mfundisi.

[34] Based on the totality of the evidence, it is my view that the decision of the arbitrator that Mfundisi was guilty of the two assaults for which he had been dismissed is within the band of reasonableness.

[35] I turn now to consider the challenge to the sanction.

[36] The Constitutional Court in *Sidumo* enjoins an impartial commissioner to take into account the totality of the circumstances.[5] The commissioner is not given the power to consider afresh what he or she would do, but must decide whether what the

[5] [78].

employer did was fair, without deferring to the employer and considering all the relevant circumstances.[6]

[37] Mfundisi committed serious misconduct. He has not shown genuine remorse. While he apologised for bringing the first respondent's name into disrepute, he persisted in his claim that his conduct was justified by his position as a traffic officer.

[38] The applicant submitted that the arbitrator failed to take into account Mfundisi's five years of service with a clean record. Stewart, Mfundisi's supervisor, testified that Mfundisi was a hard worker and a good worker and does his work very well. This evidence was put forward to support the contention that the relationship of trust was not broken. However, Stewart also testified that Mfundisi sometimes could not behave himself and that he had previous cases for aggressive or unprofessional conduct. Stewart also testified that the role of provincial traffic inspectors was to care about the public and keep them safe. The purpose of the code of conduct violated by Mfundisi was to ensure that the public could trust provincial inspectors.

[39] The seriousness of Mfundisi's conduct outweighs the mitigating factors. The arbitrator's ultimate conclusion that the sanction of dismissal should stand is not susceptible to review.

[40] The applicant further submits that it was brought to the attention of the arbitrator that others had been accused of assault and/or unprofessional behaviour and not been dismissed. However, the record shows that while the names of two other employees were mentioned, no evidence was led in respect of the details and surrounding circumstances of the alleged assaults committed by them or the sanctions or procedures followed by the first respondent. The applicant failed to show the existence of a comparable instance.

[41] The decision reached by the arbitrator is within the band of reasonableness and accordingly the review must fail.

Costs

[6] [79].

[42] The Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal* 2018 JDR 0006 (CC) confirmed the principle that the rule of practice that costs follow the result does not apply in labour matters. Costs in the Labour Court are governed by law and fairness. In applying these principles to this case, I am of the view that a costs order is not appropriate and I do not make one.

[43] In the premises I make the following order.

Order

1. The application for condonation is granted.

2. The application for review is dismissed.

3. There is no order as to costs.

Williams AJ
Acting Judge of the Labour Court of South Africa

Representatives
For the Applicant:

For the First Respondent: