



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D128/12

In the matter between:

**DR. WAYNE MATHEWS**

**Applicant**

and

**THE COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**G JENKINS N O**

**Second Respondent**

**EZEMVELO WILDLIFE**

**Third Respondent**

**Heard: 21 May 2015**

**Delivered: 7 August 2015**

**Summary: review. Application dismissed**

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### JUDGMENT

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GUSH J

- [1] This is an application to review and set aside the second respondent's award under case number KNPM 846/11 dated 13 December 2011. In the award, the

second respondent concluded that the third respondent's dismissal of the applicant was fair both substantively and procedurally and dismissed his claim of unfair dismissal.

- [2] The applicant was employed by the 3<sup>rd</sup> respondent as a Regional Ecologist based at the Tembe elephant Park.
- [3] The third respondent had dismissed the applicant following a disciplinary enquiry. The charges against the applicant fell under five headings namely:
  - a. Misappropriation: improper use of EKZNW money;
  - b. Neglect or Improper performance of duties, disregard of specification (Breach of Operating Instruction);
  - c. Theft;
  - d. Serious cases of poor workmanship, quality and performance related to inadequate capacity to perform the task; and
  - e. Bringing organisation into disrepute – does or causes to be done, any act, which is prejudicial or potential prejudice to Ezemvelo KZN wildlife.
- [4] Each of these charges included an elaboration that formed part of the charge sheet.
- [5] At the conclusion of the disciplinary enquiry, the applicant was found guilty of a number of these counts of misconduct and was dismissed. The misconduct of which the applicant was found guilty and which lead to his dismissal related to payments due to the third respondent by the University of Pretoria in respect of student field trips to the Tembe Elephant Park each year, which payments the applicant accepted into his own bank account and failed to pay over these amounts into the third respondents bank account for some 5 months. Dissatisfied with his dismissal, the applicant referred a dispute to the first respondent who in turn appointed the second respondent to conduct the arbitration.

- [6] The second respondent's summary in the award of the "ISSUES TO BE DECIDED" and the "BACKGROUND" (under these headings) were not challenged by the applicant in his review application.
- [7] The second respondent succinctly records the issue as "was the employee unfairly dismissed by the employer and if so, what is the appropriate remedy?"
- [8] The background (which the second respondent records as "common cause alternatively undisputed") is set out as follows::

5.1 the employee was employed by the employer as a regional ecologist based at the Tembe elephant Park. At the time of his dismissal the employee had some eighteen years service with the employer and was earning a basic salary of R24,335.45 per Month.

5.2 on or about 3 February 2011, the employee was charged with five counts of misconduct, [the second respondent then sets out the details of the counts of misconduct]

5.3 [in this paragraph the second respondent recorded *inter alia* that the multiplicity of charges included some repetition in that "they were classified under different categories of misconduct – per the employer's disciplinary code"]

5.4 The fifth charge was: disciplinary code number twenty-four: bringing the organisation into disrepute – does or causes to be done, any act which is prejudicial or potentially prejudicial to his fellow KZN wildlife.

5.5 following an internal disciplinary enquiry held in sixteen, twenty-one twenty-five February 2011, the employee was found guilty on various counts and was dismissed on 25 February 2011.

5.6 Dartmouth University (USA) in partnership with the University of Pretoria has, since about 1999, arranged a student field trip to the Tembe Elephant Park each year. The employee was closely involved in these trips and with the assistance of his technician, prepared an annual invoice, for submission to

Pretoria University to cover the reimbursement Ezemvelo staff for the use of Ezemvelo facilities by the Dartmouth students.

5.7 from 1999 to 2007 these invoices were paid by Pretoria University to Ezemvelo and the funds later found their way into the employees research account; however, securing the money from Ezemvelo's became more and more difficult due to administrative bungling. This became known to those involved at Pretoria University who decided to pay the whole amount, invoice and 25 August 2008, directly into the employee's personal banking account on 16 September 2008. Soon after receiving the money the employee telephoned Dr Jansen van Rensburg at Pretoria University and asked him not to do this. He then paid R14400.00 of the R27802.00 to Ezemvelo on 19 September 2008, after deducting R13402.00 to pay himself and others, apparently for their personal time and travel devoted to the visiting students.

5.8 after the 2009 Dartmouth student visit, the employee raised an invoice of R188440.00 for payment by Pretoria University. The University mistakenly paid the money directly into his personal banking account on 27 October 2009. For one or other reason he did not pay the money into Ezemvelo but paid back R17210.00 to the University of Pretoria on 31 March 2011; once again after the deduction of certain disbursements. The money was later paid to Ezemvelo by the University of Pretoria.

5.9 on 29 March 2010 the employee was interviewed by Groenewald – the forensic auditor – and assured Groenewald that the money from the 2009 Dartmouth visit had been paid into Ezemvelo.

5.10 on 1 April 2010, Groenewald received a phone call from the employee who then disclosed to him that he had personally received the 2009 money for the Dartmouth visit and had intended to pay it (to Ezemvelo) but had not yet done so.<sup>1</sup>

[9] The misconduct that the 2<sup>nd</sup> respondent found the applicant to be guilty of and that justified his conclusion that the dismissal was for a fair reason involved the

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<sup>1</sup> Award pages 3-4.

payments made by the University of Pretoria of monies due to the 3<sup>rd</sup> respondent which monies the university paid directly into the applicant's bank account.

- [10] The applicant had accepted the payment from the University of Pretoria into his own bank account during October but failed to pay the amounts into the third respondents bank account for some 5 months.
- [11] Shortly after having received the amount in his account the applicant failed to disclose the payment to the third respondent's auditors.
- [12] On 29 March the following year the applicant was interviewed by the 3<sup>rd</sup> respondent's forensic auditor Groenewald (a witness at the arbitration) and still did not disclose that the funds were in his account. During this interview the applicant assured Groenewald that the money had been paid into the 3<sup>rd</sup> respondent's account. This was not the case and the applicant subsequently on 1 April telephoned Groenewald disclosing that he had received the money and had intended to pay it to the 3<sup>rd</sup> respondent but had not yet done so.
- [13] In the award the 2<sup>nd</sup> respondent records the applicant's own admissions regarding the payment of the monies which recording was not challenged:

the employee's own admissions in relation to the delay in paying the money back included:

I didn't give it attention. When the auditors came (late 2010) I didn't want to touch it (the money). Then I went away for Christmas. Then I was all for 2 months with sciatica. Then Lionel (auditor) came and I got scared<sup>2</sup>

- [14] The second respondent, recording under the heading "FINDING", came to the conclusion that the applicant "was dismissed for a fair reason and that his dismissal was effected in accordance with a fair pre-dismissal procedure".<sup>3</sup>

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<sup>2</sup> Award paragraph 10.3

- [15] Having come to this conclusion, the second respondent proceeded to set out the reasons for this finding. The second respondent recorded that he confined his finding to the charge of misconduct set out in charge 2.5 namely that the applicant was guilty of “neglect or improper performance of duties: in that [the applicant] contrary to pre-scripts code of ethics of Ezemvelo KZN wildlife and policy on financial management [he] contravened the disciplinary code by allowing the Ezemvelo KZN wildlife monies to be deposited and kept into [his] personal banking account without the authority of KZN wildlife” which he noted was the same as charge 1.4 save that charge 1.4 was classified as “misappropriation or improper use of EKZNW money.
- [16] The second respondent was satisfied that the third respondent had proved on a balance of probabilities that the applicant had received the payment for the 2009 Dartmouth visit, an amount of R18410.00 which was deposited into his own bank account and that it had taken him a full five months to pay back the bulk of the money. The second respondent was also satisfied that the money had only been paid back after the applicant had been interviewed by the forensic auditor to whom he had not disclosed that the money was not only still in his account had represented to the forensic auditor that he had in fact paid the money over to the 3<sup>rd</sup> respondent
- [17] The second respondent was satisfied that the applicant understood that his actions constituted misconduct and that he was well aware of the seriousness of his actions.
- [18] The second respondent has set out in the award detailed reasons for his conclusion and finding. In particular, the 2<sup>nd</sup> respondent has weighed up all the circumstances relevant to determining the issue namely “whether fair reason existed to justify his dismissal”.
- [19] The grounds upon which the applicant bases his application to review and set aside the second respondent’s award are basically that the misconduct the

second respondent found the applicant guilty of namely allowing monies belonging to the third respondent to be kept in his account without authority and his failure to disclose this to the auditor when interviewed does not accord with Ezemvelo's policy and procedure. This, the applicant argues renders the finding that the he was guilty of misconduct a decision to which a reasonable decision-maker could not come.

[20] The difficulty with the applicant's grounds of review is that it is clear from a perusal of the record and the award that, at all times, it was perfectly obvious that the applicant himself appreciated that he had done wrong by retaining the funds in his account and not disclosing this to the auditors.

[21] The test to be applied in determining whether an award is reviewable was restated in the matter *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*<sup>4</sup> as follows:

'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (This may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'<sup>5</sup>

[22] In so far as the applicant relies on "unreasonableness" as a ground of review, it is apposite to refer to the matter of *Head of the Department of Education v Mofokeng and Others*.<sup>6</sup> In this matter, the court specifically considers, in light of the decisions in the *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) and

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<sup>4</sup> [2014] 1 BLLR 20 (LAC) (*Gold Fields*).

<sup>5</sup> *Gold Fields* at para 20.

<sup>6</sup> [2015] 1 BLLR 50 (LAC).

Goldfields, the “determination of whether a decision is unreasonable”. The court held:

‘The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceived the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues. ... Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.’<sup>7</sup> [Footnote omitted]

- [23] In this matter, it is abundantly clear that the second respondent allowed the parties a full opportunity to “have their say”, identified and understood the dispute he was required to arbitrate and dealt with the substantial merits of the dispute. There can be no question regarding all the parties understanding of the sequence of events that constituted the misconduct let alone understanding that the actions of the applicant constituted misconduct.
- [24] The second issue with which the applicant takes issue is the second respondent’s conclusion that the sanction of dismissal was appropriate. There is a plethora of authority for the fact that the court will not lightly interfere with the decision made by an arbitrator on sanction. The second respondent’s reasoning as to why he was not persuaded to interfere with the third respondent’s decision to dismiss the applicant cannot be criticised. The second respondent has taken into account the seriousness of misconduct, the applicant’s awareness of the seriousness of his actions and the applicant’s responsibilities and seniority.

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<sup>7</sup> At paras 31 and 32



[25] For all of the above reasons, I am not persuaded that the award of the second respondent is reviewable. There is no reason in law or fairness why costs should not follow the result in this matter.

[26] It is so that at the commencement of the matter, the applicant applied for condonation for the late filing of his application. This application was not opposed and the matter proceeded on the merits.

[27] In the circumstances, I make the following order:

The applicant's application is dismissed with costs.

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D H Gush

Judge of the Labour Court of South Africa  
Johannesburg

APPEARANCES:

FOR THE APPLICANT: D S Rorick instructed by Brett Purdon Attorneys

FOR THE RESPONDENT: M Titus instructed by Macgregor Erasmus Attorneys