

REPUBLIC OF SOUTH AFRICA



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: **D175/15**

In the matter between:

UMHLATHUZE MUNICIPALITY

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

obo M HLALATU

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL (SALGBC)

Second Respondent

COMMISSIONER V SONI

Third Respondent

HEARD: 30 June 2020. In Chambers on the papers by consent of the parties.

Delivered: 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 is deemed to be 10h00 on 14 July 2020.

Summary: Review. Application dismissed

JUDGMENT

GUSH J

- [1] The applicant is a local municipality duly incorporated in terms of the relevant provisions of the Local Government: Municipal Systems and Municipal Structures Act. It is common course that the applicant is a party to "The Disciplinary Procedure and Code Collective Agreement.
- [2] The first respondent is an erstwhile employee of the applicant, having been employed as a traffic officer in 2007.
- [3] On 5 December 2013 the applicant charged the first respondent with sexual harassment that had taken place on 29 August 2013. The disciplinary inquiry in respect of this charge commenced on 12 December 2013. On 10 April 2014 the charges leveled at the first respondent were "provisionally withdrawn".
- [4] On that date the applicant addressed a letter to the first respondent recording the basis of the withdrawal as follows:

The complainant has opted not to pursue with the matter. (sic) in the light of this it was decided to provisionally withdraw the charges of misconduct.

Please note that the letter of complaint will be kept on record and in the event that you get involved in a reoccurrence of an incident of misconduct of a sexual nature or any other serious form of misconduct Council will be at liberty to conjure the letter of complaint and hold you accountable for your actions before disciplinary tribunal. (sic)¹

¹ Record of proceeding page 83

- [5] On 21 July 2014, the applicant again charged the first respondent with the same misconduct viz. "On or about 29 August 2013 at about 22H30 you sexually assaulted Council employee Lethiwe Ndamane" and conducted a disciplinary inquiry on 28 July 2014. There is no evidence on the record or in the pleadings that suggests the first respondent was "involved in a reoccurrence of an incident of misconduct of a sexual nature or any other serious form of misconduct"
- [6] At the conclusion of the new disciplinary inquiry, the applicant was found guilty of the misconduct and he was dismissed on 20 October 2014.
- [7] Ultimately the dispute regarding first respondent's dismissal was arbitrated by the third respondent. The primary issue that the third respondent was required to consider related to the status of the first respondent's dismissal in circumstances where it was alleged by the first respondent that the applicant had not complied with the Disciplinary Procedure and Code Collective Agreement. In particular the first respondent averred that the applicant had failed to comply with the provisions of clause 6.3 thereof that requires an employer to conduct a disciplinary inquiry within three months of becoming aware of the infraction. Clause 6.3 reads:
- The employer shall proceed forthwith were soon as reasonably possible that disciplinary hearing but in any event not later than three months from the date upon which the employer became aware of the alleged misconduct. Should the employer failed to proceed with the period stipulated above and still wish to pursue the matter it should apply for condonation to the relevant division of the SALGBC.²
- [8] At the conclusion of the arbitration the third respondent declared the disciplinary hearing of the first respondent to be "invalid and of no force and effect" and ordered the applicant to reinstate him retrospectively within fourteen days of receipt of the order.³
- [9] This order was contained in the third respondents "JURISDICTIONAL RULING" dated 20 February 2015.

² Disciplinary Procedure and Code.

³ Award paras 23 – 27 pages 35 – 36 of the pleadings

[10] Apart from having filed its application out of time and having applied for condonation the applicant has set out in his founding affidavit the basis upon which it contends that the third respondent's ruling is reviewable. The grounds of review the applicant relies on as set out in the affidavit are:

1. to the extent that the issue before the third respondent was the jurisdictional issue at all, it was decided incorrectly by the third respondent ;
 2. the third respondent in fact made no jurisdictional finding but purported to reinstate Hlalatlu with back pay without ever considering the substantive fairness of his dismissal ;
 3. he therefore made a ruling which she had no jurisdiction to make;
 4. purported to decide an issue which is not properly before her.⁴
5. Before considering the applicant's application for condonation or the merits of the applicants application to review the award of the third respondent it is pertinent for the court to consider whether or not the applicant complied with the provisions of the collective agreement to which it is a party. Specifically whether the applicant proceeded with the disciplinary inquiry within three months of becoming aware of the misconduct.
6. The evidence clearly establishes that the applicant proceeded with the disciplinary inquiry within three months of becoming aware of the first respondent's misconduct. For reasons which appear to relates to the complainant not wishing to pursue the matter the applicant withdrew the charges in a letter addressed to the first respondent. It bears repeating the contents of the letter addressed to the first respondent:

The complainant has opted not to pursue with the matter. (sic) in the light of this it was decided to provisionally withdraw the charges of misconduct. Please note that the letter of complaint will be kept on record and in the event that you get involved in a reoccurrence of an incident of misconduct of a sexual nature or any other serious form of misconduct Council will be

⁴ to para 8 page 10 of the pleadings.

at liberty to conjure the letter of complaint and hold you accountable for your actions before disciplinary tribunal. (sic)⁵

7. The applicant argued that the provisional withdrawal of the charges enabled it to proceed with the disciplinary inquiry at a later stage without falling foul of the collective agreement. By withdrawing the charge of misconduct provisionally or otherwise the applicant brought the disciplinary inquiry to an end. When it elected to again charge the third respondent it did so outside of the three month prescribed by the collective agreement. This is borne out by the fact that the applicant started the process *de novo* by serving notice of a new disciplinary charge.
8. It is common cause that the applicant did not apply for condonation from the Bargaining Council.
9. It is important to take into account the circumstances relating to the applicant's withdrawal of the charges. This issue, not specifically addressed by the applicant, is the conditional nature of the withdrawal. The letter addressed to the first respondent unequivocally suggests that it is only in the event of a similar "occurrence or incident of misconduct of a sexual nature or any other serious form of misconduct", that the incident that took place on 29 August 2013 would be resurrected.
10. I am satisfied in the circumstances that, having withdrawn the charge of misconduct against the first respondent on 10 April 2014, the attempt by the applicant to again charge the first respondent with the same misconduct on 21 July 2014 constituted proceeding with the disciplinary inquiry after the expiry of three months without having applied for condonation. Relying on the authority of the judgment in *SAMWU obo Jacobs v City Council of Cape town and others*,⁶ failure to comply with the collective agreement, and in particular clause

⁵ Record of proceeding page 83

⁶ (2015) 36 ILJ 484 (LC) (26 May 2014)

6.3 renders, any dismissal consequent upon the disciplinary inquiry of no force and effect.

11. The circumstances the matter suggest that had the applicants applied for condonation it would have been granted such condonation and could have proceeded with the inquiry. It did not.
12. It is in the circumstances not necessary for the court to determine whether the award or ruling handed down by the third respondent is reviewable on the grounds pleaded by the applicant. It is only necessary to determine whether the applicant complied with the provisions of the collective agreement. I am satisfied from the transcript, the supporting documentation's and pleadings that the applicant did not.
13. Given the facts, the third respondent's award is not reviewable. It is clear from the award and the ruling that the third respondent understood the issue to be determined and correctly concluded that the failure of the applicant to comply with the collective agreement and in particular clause 6.3 rendered the dismissal of the first respondent of no force and effect.⁷ The balance of the order issued by the third respondent to be followed consequentially upon the conclusion that the applicant had not complied with the collective agreement.⁸and⁹
14. In so far as it is necessary given the facts of the matter the applicant is granted condonation for the late filing of its application.
15. the circumstances and for the reasons above I make the following order:
 - a. the applicants application is dismissed;
 - b. there is no order as to costs.

⁷ Award paras 22 – 23 of the award and the ruling page 35 of the pleadings.

⁸ Award paras 23 - 27

⁹ SAMWU obo Jacobs v City of Cape Town and Others (C 701/13) [2014] ZALCCT 25; [2014] 10 BLLR 1011 (LC); (2015) 36 ILJ 484 (LC) (26 May 2014)

D H Gush
Judge of the Labour Court of
South Africa

LABOUR COURT