IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA9/17

In the matter between:

LEGAL AID SOUTH AFRICA **Appellant**

And

VINCENT NKULULEKO MAYISELA **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

ANTONY OSLER **Third Respondent**

Heard: **10 September 2018**

Delivered: 05 February 2019

Summary: Review of arbitration award – employee dismissed for gross insubordination – commissioner finding that dismissal substantively fair and that employee misconducted himself by failing to obey to lawful and reasonable instruction.

Held: the idea that a senior manager, with legal training, should be permitted to take run of the mill workplace grievances to the Public Protector, Parliament and to the Minister is difficult to sustain. Employee's actions, besides being insubordinate, reveal a poor level of judgment supporting the conclusion that he was not suited to the post he occupied. The commissioner's finding that employee was acting insubordinately with ulterior motive is accordingly a decision which a reasonable commissioner could reach on the evidence. Appeal upheld and the application for review dismissed.

Coram: Waglay JP, Sutherland JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the decision of the Labour Court (Cele J) setting aside in part the arbitration award of the third respondent ("the commissioner"), reinstating the first respondent, Mr Vincent Mayisela ("Mayisela") and granting ancillary relief related to the order of reinstatement.

[2] The appellant is the state-funded provider of legal services to the indigent. It provides services at Justice Centres throughout the country. Mayisela was employed as the Justice Centre Executive ("JCE") managing the Kimberley Justice Centre. He reported to the Regional Operations Executive ("ROE") for the Western and Northern Cape, Ms C Robertson ("Robertson"). Mayisela was based in Kimberley while Robertson was in the Western Cape.

[3] During the course of 2013, the relationship between Mayisela and Robertson deteriorated resulting in Mayisela being charged with numerous disciplinary infractions. After a disciplinary enquiry, he was found guilty of 17 charges and dismissed. Mayisela referred the matter to second respondent ("the CCMA"). On 8 October 2014, commissioner T Potgieter issued an arbitration award finding that the dismissal was substantively and procedurally fair. The Labour Court set aside that award and remitted the matter to the CCMA for reconsideration by a different commissioner.

[4] The matter then proceeded to arbitration before the commissioner who handed down his award on 14 February 2016. In the pre-arbitration conference, the appellant indicated that it would persist against Mayisela only on four of the charges (made up of nine distinct counts) for which he had been dismissed. The commissioner concluded that Mayisela was guilty on all the counts and that the dismissal was substantively fair. The commissioner also rejected all Mayisela's contentions alleging procedural impropriety and held that the dismissal was procedurally fair.

[5] The Labour Court, on review, upheld the procedural fairness of the dismissal, but on the basis that the commissioner had erred in his findings on six of the nine counts of misconduct, held that the dismissal was substantively unfair.

[6] On appeal, the appellant submitted that the findings of the commissioner on substantive fairness were reasonable and ought not to have been set aside on review. Mayisela did not file a cross-appeal against the Labour Court's findings on procedural fairness. It is necessary then to consider the reasonableness of the commissioner's findings on each of the counts of alleged misconduct. It will be convenient to deal with the evidence and findings in relation to each count separately and fully.

Charge 1.1 – Gross insubordination: refusal to arrange a teleconference regarding performance assessment

[7] This charge was that Mayisela was guilty of gross insubordination in refusing or failing to arrange a teleconference call to discuss his supervisory assessment, despite being asked to do so by his manager on more than one occasion.

[8] In March 2013, Robertson scored Mayisela at 54% for his supervisory assessment. Mayisela took umbrage at receiving this low score. In ensuing correspondence, he complained that his performance should have been discussed with him and indicated that he intended to lodge a grievance. He sought an explanation for his low score and asked for the relevant source documents. Robertson replied in an e-mail including relevant documentation, stating that she intended to discuss the score with him and explaining that he still would be afforded an opportunity to persuade her to amend the score.

Robertson thereafter attempted to schedule a teleconference to discuss the score.

[9] On 11 April 2014, Mayisela emailed Robertson intimating that he saw little point in discussing the matter further as the assessment had been finalised. He stated his intention to raise constitutional issues with various constitutional bodies. The proposed teleconference did not take place, apparently on account of Mayisela's refusal to co-operate in the scheduling of it. Robertson testified that Mayisela basically refused to co-operate to set up a meeting to discuss the matter and that she perceived his conduct as obstructive and insubordinate.

[10] In his submissions before us, Mayisela maintained that he had been willing to discuss the matter further but Robertson had not persisted with her request for a teleconference and face to face meetings. The matter, he said, could also have been pursued in various subsequent telephonic communications.

[11] Mayisela's attitude to the convening of a meeting is captured in the contemporaneous correspondence. On the morning of 10 April 2013, Robertson addressed an e-mail to Mayisela stating that her previous attempts to contact him telephonically about arranging further discussion had been unsuccessful. She asked him to let her know when he would be available. He responded a few hours later as follows:

> 'I will appreciate if I can have the explanation in writing as requested. I am unhappy about the assessment and I intend using your explanation as reasons for my grievance. I think I am being vilified and this has been coming on for a very long time now.

> I don't feel safe in my work anymore as an African Manager in this region and I intend taking matter up (sic) with Management and the Portfolio Committee.
>
> I honestly think that Africans are being vilified in the region under the coded name of poor performance….'

[12] Later that day, Robertson responded by e-mail reiterating that she needed to schedule the discussion for the purpose of discussing the score and scoring process. She explained as follows:

> 'Furthermore, as per normal procedure you will have the opportunity in this discussion to advise me why your scores should be changed, one way or the other. This is the process that I am following with all my managers. Once again I thus request a time and date for this discussion. If you are still dissatisfied after our discussion, an internal grievance can be filed.'

[13] Mayisela responded:

> 'I am aware of the grievance policy but matters that have Constitution implications can be raised with constitutional bodies, and there is nothing that bars me from writing letters to the Public Protector, Parliament or Human Rights Commission (sic). I am completely free to do so as a citizen of this Country.
>
> I do not have a problem discussing the assessment with me but I will have no input at all because the assessment has been completed and done. I am aggrieved and require reasons for each finding so that I analyse and lodge my grievance.'

[14] Mayisela clearly believed that he was justified refusing to schedule a teleconference. In argument, he seized unconvincingly on his statement that he did "not have a problem discussing the assessment" as an indication that he was willing to comply with the instruction. But there is no escaping that he did not make himself available or provide a time and date for the teleconference to take place, as he had been requested to do. He was evidently aggrieved and took up the attitude that on that account he was not obliged to comply.

[15] In his award, the commissioner, after making the general observation that insubordination and insolence constitute a challenge to managerial authority, held that the evidence (as reflected in the wording and tone of the contemporaneous correspondence) demonstrated resistant and obstructive behaviour on the part of Mayisela. He held that it was not for Mayisela to effectively block further discussions because he disagreed with Robertson's approach. His conduct amounted to a general challenge to Robertson's authority and thus amounted to insubordination rendered gross by its manner and sustained nature.

[16] The Labour Court held that Robertson's calling for a meeting was inappropriate. Her reaction to Mayisela's request for information, it said, complicated matters and was unreasonable because there was no evidence of any internal regulation or policy entitling her to call a meeting. In its view, there "really was no need for any meeting" and Robertson was "sidestepping" Mayisela's request for information. Thus, it concluded that "the charges were ill-founded and conviction on them was premised on misdirection in failing to conduct a proper enquiry, leading to an unreasonable result".

[17] The appellant submitted that it is not up to an employee to dictate how management should conduct a performance assessment. The submission is well-founded. Likewise, there is no basis for the Labour Court's finding that

Robertson's instruction was unreasonable because there was no regulation or policy entitling her to call the employee to a meeting. There was no need for any explicit policy or regulation on which to base a request for a meeting. The right or prerogative of management to request a meeting to discuss performance is self-evidently inherent in every employment relationship. An employer has the authority to determine how issues of performance should be addressed. Robertson reasonably and fairly sought to deal with Mayisela's concerns around his assessment by way of a teleconference and later a meeting. It was not open to Mayisela to dictate how Robertson should deal with the issues. The Labour Court misdirected itself in finding to the contrary, especially when it had not been alleged on the pleadings or in the evidence that Robertson lacked authority to call Mayisela to a meeting. The conclusion that there was no need for a meeting because Robertson had completed the assessment ignores the evidence that the score could be changed. The purpose of the proposed meeting was to explore that possibility.

[18] In the result, the finding of the commissioner that Mayisela was guilty of insubordination in terms of this charge was a reasonable conclusion. The Labour Court accordingly erred in setting it aside.

Charge 1.2- Gross insubordination: refusal or failure to attend a meeting with his manager to discuss various issues

[19] This charge related to insubordination for a refusal by Mayisela to attend a meeting with Robertson to discuss various issues which he had raised with her and with Mr Brian Nair, the appellant's National Operations Executive ("the NOE"), despite being requested to attend such a meeting on more than one occasion.

[20] On 21 May 2013, Mayisela lodged a grievance with the NOE complaining about the failure of Robertson to approve a travel request for him to attend a meeting and making unsubstantiated allegations that she was victimising him. The NOE responded on 23 May 2013 asking for more details and information. Mayisela responded by e-mail withdrawing the grievance but making additional allegations against Robertson. The NOE proposed a meeting between Mayisela and Robertson to resolve the matter.

[21] Robertson phoned Mayisela on 24 May 2013 requesting a meeting to discuss the grievance he had raised. Mayisela responded by saying that he would "think about it" and revert. Further attempts to arrange a date were not successful. Mayisela accordingly addressed an e-mail to Robertson on 27 May 2013 stating that he would "advise of a suitable date some other time!" Roberson responded by e-mail on 29 May 2013 as follows:

> 'From the attached I note that you do not have a suitable date.
>
> In view of this, please ensure your attendance at Regional Office, Stellenbosch on Tuesday, 4 June 2013 @ 09h00 to enable us to resolve the issues.
>
> Please ensure that your travel arrangements are attended to urgently and that I am advised when it is completed to enable me to approve same.'

[22] A few hours later, Mayisela, again appearing to take umbrage, responded by e-mail, the relevant part of which reads:

> 'Please confirm whether this is an instruction or not. It is very clear from my side that the e-mail amounts to an instruction.

> If yes, I will attend. If not, I do not think this is the right time to engage on the issue. The reason for same is that I will tell you things that you may not want to hear.
>
> I will certainly tell you what you need to do as a person in order for you to change for the better.'

Robertson testified that she regarded this e-mail as obstructive and insolent.

[23] On 31 May 2013, Robertson addressed another e-mail to Mayisela informing him that the meeting to deal with his grievances would be re-scheduled for Monday 10 June 2013 as he would be attending a JCE forum in Cape Town on the following day. In response, Mayisela unconvincingly claimed to be confused. Robertson answered clarifying that the meeting originally scheduled for 4 June 2013 had been changed to 10 June 2013. Mayisela replied cryptically:

> 'Regarding our meeting, I will advise you of a date.'

[24] Mayisela did not arrive at the meeting on 10 June 2013. At 12h05 that day, Robertson addressed an e-mail to him as follows:

> 'Our meeting was supposed to have been held today (10 June 2013). I note that you have not arrived.
>
> As a result of the fact that you will be attending the JCE forum tomorrow, our meeting will now take place on Wednesday, 12 June 2013 at 09h00 at the RO Stellenbosch.
>
> Please note that RO will make the necessary changes to your flight to accommodate this meeting.'

[25] Mayisela reacted over the next hour with three e-mails the content of which reads:

> 'Please don't give me instructions that are clearly unlawful!
>
> I will escalate my problems with you to the CEO now because Brian don't seem to understand the harassment I am enduring under you…..
>
> Please take note that should my travelling be changed without my permission, I will report the harassment to the CEO.
>
> I requested you the last time to state that the meeting of the 10th was clearly an instruction and requested you to confirm same but with no response.
>
> Let me officially advise you that should these harassment (sic) continue, I will report you to the CEO, the Board and the Portfolio Committee.
>
> Brian Nair knows the issues and [I] will not escalate issues to him anymore.'

[26] Robertson replied immediately, explaining that as his manager she required a meeting with him to discuss the issues he had raised. She reiterated that since he had not provided an alternative date, she required him to meet with her on 12 June 2013 and for him to change his flight back to Kimberley accordingly. If he intended not to attend the meeting, she requested him to furnish reasons why his presence would not be feasible. Mayisela responded as follows:

> 'You are clearly intimidating and harassing me and unfortunately I am not going to allow it.
>
> I have clearly and unambiguously informed you that I will inform you of a date. How can we resolve issue if you continue to harass me!

> As things stand now, I withdraw my intention to meet you until such time you decide to treat me with respect.'

[27] Mayisela did not attend the meeting re-scheduled for 12 June 2013.

[28] The commissioner found that this behaviour, involving: repetitive failures to revert; the ignoring of instructions to attend meetings; a contrived misunderstanding of clear instructions; insolence in arrogating to himself the right to set the date; and unreasonably accusing Robertson of unlawful conduct; amounted to insubordination on the part of Mayisela. The commissioner described it aptly thus:

> 'This is in itself a mixture of defence, defiance and attack and is astoundingly unreasonable in the face of his palpable resistance to making arrangements; again, even if the employee did not agree with this manager's going about things, his response is persistently disrespectful and challenging to her authority.'

On this basis, the commissioner found Mayisela guilty on this charge.

[29] The Labour Court did not discuss or deal with the evidence in relation to this charge. It nonetheless, for reasons that remain a mystery, set aside the commissioner's finding. The e-mail correspondence unassailably establishes that Mayisela was insubordinate and insolent. The Labour Court erred in setting aside the finding of the commissioner on this charge which was indisputably reasonable.

Charges 1.3 and 1.4 – Gross Insubordination: refusal to attend a meeting to represent the views of Legal Aid and refusal to give required information

[30] Under charge 1.3, Mayisela was charged with insubordination for refusing or failing to attend a meeting with the Regional Court President about part-heard matters of a certain magistrate (Mr Hole) despite being advised to do so and thereafter agreeing with the ROE to attend a meeting, but then failing to do so, on questionable grounds.

[31] On 9 July 2013, Ms Robertson sent Mayisela an e-mail she had received from the Regional Court President in the Northern Cape which requested the presence of a representative from Legal Aid at a meeting on 11 July 2013 to discuss the part-heard matters of Hole, a Regional Court Magistrate, who had been suspended but was to return to work on a limited basis.

[32] Robertson stated that the e-mail was intended for Mayisela's attention and information and that he was required to attend the meeting.

[33] At the time, Mayisela had joined in litigation to have Hole's suspension set aside. He took the view that the litigation presented him with a conflict which prevented him from attending the meeting on 11 July 2103. The appellant did not accept that there was a conflict. Although Mayisela (together with others) had applied to set aside Hole's suspension and the application was still *sub judice*, the appellant did not see any barrier to his attending an administrative meeting on its behalf to discuss the scheduling of cases. But even if he could not attend, he should have delegated someone in his office to go. He failed to do that and failed to inform his manager of that fact.

[34] Robertson discovered that no-one from the Kimberley office had attended the meeting on the morning of the meeting when she received a phone call from the Regional Court President, causing her some embarrassment. Mayisela excused his non-attendance to Robertson on the grounds of his perceived conflict and being told by Mr Ligaraba from the NPA that the meeting was not going to take place.

[35] A second meeting was arranged for 26 July 2013 to discuss the Hole matters. Robertson instructed the employee to arrange for one of his managers to attend given that he was supposed to meet with the NOE that day. He was requested to inform Ms Robertson by close of business on 24 July 2103 who would be attending. Mayisela informed Ms Robertson that he would be attending on account of his meeting with the NOE having been postponed. During their interaction, he informed her that he intended at the meeting to advance the same point of view of the DPP regarding Hole. Robertson told him that he was required to represent the appellant at the meeting and should align himself with the stance of the organisation rather than pursuing his own position. Mayisela defiantly questioned Robertson's authority to pronounce on the stance of the organisation. He later failed to attend the meeting as he was expected to do by Robertson and sent two colleagues in his place.

[36] The commissioner held that confrontational stance taken by Mayisela in relation to attending the meeting and representing the organisation amounted to insubordination.

[37] The Labour Court held that the evidence did not establish that Robertson had instructed Mayisela to attend the meeting of 11 July 2013 and that Mayisela had disclosed his apparent conflict. The commissioner's failure to properly apply his mind to this evidence, the Labour Court opined, rendered his finding unreasonable. However, the Labour Court failed to deal at all with the evidence that Mayisela in effect refused to represent the appellant at the meeting because he disagreed with its stance on Hole's conduct. The

commissioner's finding, having regard to that evidence, was reasonable and the Labour Court erred in setting it aside.

[38] The Labour Court agreed with the commissioner that Mayisela was guilty of insubordination under charge 1.4 by refusing to give Robertson information about the practitioners who were on record in the part-heard matters in Hole's court. Robertson sought this information after the meeting of 26 July 2013, but Mayisela without good reason refused to give it. His conduct here too was insubordinate. Mayisela did not file any cross-appeal against this finding of the Labour Court.

Charge 2.1 – Gross insolence in accusing manager of going on a witch hunt

[39] In the course of correspondence regarding Mayisela's performance assessment, Robertson asked why he was copying the NOE in his correspondence. On 26 March 2013, Mayisela replied in an e-mail as follows:

> 'I copied Brian because this is part of the witch-hunt process.'

[40] The commissioner held that the allegation was clearly an unjustified accusation by Mayisela that Robertson was orchestrating some kind of campaign against him and thus amounted to insolence. The Labour Court upheld the commissioner's finding as reasonable in that Mayisela, obviously wounded by his poor performance assessment, "became offensive and went on the attack" by making a comment that was "certainly derogatory, disrespectful and cheeky". There is no cross-appeal against the Labour Court's finding.

Charge 2.2 – Gross insolence in that Mayisela screamed and shouted at the ROE on the phone on 13 September that he wanted to be suspended

[41] The allegation in this charge is that during a telephone conversation in relation to the Hole matters, Mayisela shouted at Robertson that he wanted to be suspended and that he would be contacting the CEO and chairperson of Legal Aid to suspend him.

[42] The commissioner, relying on the surrounding evidence about the relationship between Robertson and Mayisela, held that the probabilities favoured the appellant's version and that this conduct too constituted insolence. The Labour Court accepted this finding as reasonable and there is no cross-appeal against its finding.

Charge 3.1 – Attack on the honour, dignity or good name of the ROE in making tacit accusations of racism

[43] This charge alleged an attack on the dignity of Robertson in that during the period of March 2013 to October 2013, Mayisela made tacit accusations of racism against her and, in doing so, attacked her honour and integrity. The commissioner found the employee guilty on this charge based on the e-mail dated 10 April 2013 referred to earlier and in particular the following statements:

> 'I just don't feel safe in my work anymore as an African manager in this region and I intend taking matter (sic) up with Management and Portfolio Committee.'
>
> I honestly think that Africans are being vilified in the region under the coded name of poor performance and it's also clear in the non-appointment of African managers in the region.'

[44] The e-mail clearly implies that Robertson (a coloured person) was racist in that she was allegedly vilifying and prejudicing African because they were Africans. The accusation was undoubtedly levelled at Robertson given that the e-mail was addressed to her and the complaint was about the region for which she was responsible.

[45] Mayisela stood by his allegation, pointing to the fact that six of the seven African managers in the Northern Cape region received negative performance assessments.

[46] The commissioner felt that the allegations were unjustified in that there was insufficient evidence to substantiate them, and that the statistics could be interpreted in different ways. He opined that the issue was not "to dissect the politics of the employer's region" but whether it was appropriate for Mayisela to have made the accusation to his superior in the manner he did. He concluded that the conduct constituted an unjustified personal attack on Robertson's dignity and that it would have been more appropriate for Mayisela to have raised any legitimate concern about discrimination in a different forum and in a different way. Hence, the commissioner found Mayisela guilty on this charge.

[47] The Labour Court was sympathetic to Mayisela. It took the view that Mayisela was entitled to raise the matter and even take it to the Parliamentary Portfolio Committee. His mere announcing of the complaint, in its view, did not amount to misconduct and the commissioner's finding that the accusation was made inappropriately constituted a failure to conduct a proper enquiry into the allegation, resulting in an unreasonable finding. It professed that Mayisela should never have been charged with this offence.

[48] The Labour Court's conclusions, with respect, miss the mark in an important respect. Although one naturally may be sympathetic to a colleague who has subjectively experienced a negative performance assessment as racial discrimination, unjustified allegations of racism against a superior in the workplace can have very serious and deleterious consequences. Employees who allege tacit racism should do so only on the basis of persuasive objective information leading to a compelling and legitimate inference, and in accordance with grievance procedures established for that purpose. Unfounded allegations of racism against a superior by a subordinate subjected to disciplinary action or performance assessment, referred to colloquially as "playing the race card", can illegitimately undermine the authority of the superior and damage harmonious relations in the workplace.

[49] Moreover, false accusations of racism are demeaning, insulting and an attack on dignity, more so when the person attacked, by reason of a previously disadvantaged background, probably has suffered personally the pernicious effects of institutional and systemic racism. As the Labour Court rightly said in *SACWU and Another v NCP Chlorchem (Pty) Ltd and Others*:[1]

[1] (2007) 28 ILJ 1308 (LC) at para 13

> 'I can hardly conceive of any place or circumstance or country where, if a person is told that he is racist, it will not be experienced by such person as him or her being insulted and abused.'

[50] In light of that, the commissioner was justified in finding that Mayisela ought to have raised any issues he had regarding Robertson's alleged racism in the proper forum. It was not appropriate to attack Robertson by way of an e-mail to her, especially when there was no clear objective basis for it. The appellant had a grievance procedure with which Mayisela was familiar as he had lodged grievances in the past.

[51] Moreover, while the commissioner based his finding principally on the e-mail of 10 April 2013, there were other instances of false accusation canvassed with Mayisela during cross-examination upon which the appellant relied in argument to further demonstrate his guilt on this charge. For instance, in an e-mail to the NOE dated 26 July 2013, Mayisela, without substantiation, referred to "issues of racism and harassments" in Robertson's office and stated that the "situation of racism in the Western Cape will explode, people are just afraid to talk and rather channel their advances to me." No evidence has been presented confirming that any employee in Robertson's office experienced racism. This e-mail must be viewed in a more serious light given that the NOE warned Mayisela on 23 May 2013 that he should not make unsubstantiated allegations. Without adequate validation of the accusations, it may be inferred that Mayisela was wrongfully aiming to discredit Robertson.

[52] The evidence thus demonstrates convincingly that Mayisela was guilty of this charge and that the Labour Court erred in concluding that the commissioner decided the issue unreasonably.

Charge 3.2 – An attack on the good name and dignity of the ROE in the form of unfounded allegations of harassment.

[53] This charge relates to Mayisela attacking Robertson's honour, dignity and good name by making unfounded accusations of harassment in responding to reasonable requests that he attend meetings on 4 June 2013, 10 June 2013 and 12 June 2013. It is alleged that Mayisela's responses were unacceptable, insolent, rude and disrespectful.

[54] There are two parts to this charge. The first relates to the accusations of harassment and the second to the employee's responses to the meeting requests.[2]

[55] Mayisela made various allegations that he was being harassed because Robertson wanted him to attend a meeting with her in June 2013. The commissioner found that her requests were reasonable and within her discretion to determine and insist on a meeting with her subordinate. There was no basis for alleging that that was harassment.

[56] The finding of the Labour Court on this count is difficult to follow. It seems to have concluded that both parties made allegations of harassment and the charge was unfounded because "it was never made clear what was harassing in being told the business of the [appellant] was to be run, even if the advice was misguided." This is not a basis upon which it might legitimately be concluded that the decision of the commissioner on this question was unreasonable. The charge must be assessed on its merits and the evidence

[2] On the surface there is a measure of duplication in this charge and charge 1.2. In his discussion of procedural fairness, the commissioner rejected the contention that there had been unfair splitting of the charges. He held that the language used in an email may give rise to discrete charges in the context of workplace discipline. The Labour Court agreed and there is no cross-appeal against its finding.

does not indicate that Robertson in assessing Mayisela's performance harassed him in any way.

[57] The e-mail of 29 May 2013, in response to an instruction to attend a meeting on 4 June 2013, was rude and insulting in that Mayisela told Robertson that he would tell her things she did not want to hear.

[58] In the result, the evidence provided a reasonable basis for the commissioner to conclude that Mayisela was guilty on this charge made worse by his communication of the unfounded allegations to Robertson's superiors with the probable intention to embarrass her.

Charge 4.1 - Threats and intimidation made via e-mail

[59] This charge alleged that during the period of April 2013 – November 2013 Mayisela made a number of threats via e-mail with the intention of intimidating Robertson.

[60] There were a number of e-mails in which Mayisela threatened to take action against Robertson unless she stopped doing what was upsetting him. Under cross-examination, Mayisela conceded that he had made threats to report Robertson to the CEO, the Board, the Parliamentary Portfolio Committee and the Minister of Justice and Constitutional Development.

[61] The commissioner captured the issue on this charge insightfully as follows:

> 'The employee's case is simply that it is not intimidation to tell someone what you are going to do. In one sense, I agree; the employee is certainly entitled to take whatever steps he may. However, the real thrust of this charge is that, while the action (the reporting) may appear benign or even high-minded, it is actually not, because the purpose of the threat is to undermine his superior into simply doing what the employee thinks she should do, presumably relying on her fear of being put in a bad light with those higher up to get his way. In this sense it is a playground tactic that is yet another manifestation of insubordination.'

[62] The Labour Court took the view that there was no evidence that Mayisela did not believe in the truthfulness of the allegations he made against Robertson and that she was issuing incorrect instructions. In its view, Mayisela's disclosures were akin to protected disclosures under the Protected Disclosures Act[3] ("the PDA") "which should be encouraged rather than discouraged". Therefore, the Labour Court reasoned, the commissioner had failed to conduct a proper enquiry for this charge with the result that he reached a conclusion which no reasonable decision-maker could reach.

[63] Again, the Labour Court missed the mark. The finding of the commissioner was that Mayisela had an ulterior motive in making the threats and had not followed proper procedure by indulging in "a playground tactic". The Labour Court's equation of the circumstances surrounding this charge with the making of a protected disclosure is misplaced and misconstrues the provisions of the PDA. Mayisela was making threats; he was not making any disclosure of information of any impropriety to Robertson. Moreover, it is more than arguable that the threats to report Robertson to the outside constitutional bodies (made to her) did not constitute the disclosure of information which Mayisela had reason to believe (objectively) showed or tended to show any impropriety as defined in the PDA.

[3] Act 26 of 2000.

[64] On the evidence the conclusions of the commissioner are entirely reasonable. The idea that a senior manager, with legal training, should be permitted to take run of the mill workplace grievances to the Public Protector, Parliament and to the Minister is difficult to sustain. Mayisela's actions, besides being insubordinate, reveal a poor level of judgment supporting the conclusion that he was not suited to the post he occupied. The commissioner's finding that Mayisela was acting insubordinately with ulterior motive is accordingly a decision which a reasonable commissioner could reach on the evidence.

Conclusion

[65] It is clear from the arbitration award that the commissioner properly applied his mind with reference to relevant considerations when determining the issue of whether dismissal was an appropriate sanction. He accepted Robertson's evidence that the extent and repetition of the insubordinate and insolent conduct on the part of a senior manager had broken the trust relationship irretrievably. His conclusion that the dismissal was substantively fair was reasonable and is not susceptible to review.

[66] The appeal against the decision of the Labour Court, therefore, must be upheld and the application for review dismissed. This is not a case in which the employee should be mulcted with costs. The issues required ventilation and Mayisela did not act vexatiously and unreasonably in seeking review or vindication of his position, albeit unsuccessfully.

[67] In the premises, the appeal is upheld. The order of the Labour Court is set aside and replaced with the following order:

"The application for review is dismissed".

_____

JR Murphy

Acting Judge of Appeal

I agree

_____

B Waglay

Judge President

I agree

_____

R Sutherland

Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: Adv CS Bosch

Instructed by CK Attorneys Inc

FOR THE RESPONDENT: In person