



**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Case No: D 1220/19

Not Reportable

In the matter between:

**DEPARTMENT OF PUBLIC WORKS-KZN**

**Applicant**

and

**PAWUSA obo ASHWIN KALICHARAN**

**First Respondent**

**GPSSBC**

**Second Respondent**

**VUSUMUZI MTHETHWA**

**Third Respondent**

**Heard: 22 February 2023**

**Delivered: 11 May 2023 (Electronically)**

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**JUDGMENT**

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**WHITCHER J**

Introduction

- [1] This is a review application in terms of section 145 of the Labour Relations Act, 1995.
- [2] Mr Kalicharan was employed by the applicant (the Department) as a Chief Works Inspector. In February 2018, he was in charge of a contracted project to replace

a roof at the School of Industries, Newcastle. The contractor's tender was approved on 13 February 2018. The rule is that projects must be discharged in line with a job specification, which specification sets out specific tasks, materials to be used, the agreed price for each task and the total contract price. Any changes to the job specification must be authorised via the correct authority. However, it is accepted that in an emergency changes may be made, but the relevant supervisor must be informed at the time where there is no time to secure written approval. Once the project is completed, the Chief Works Inspector signs a certificate of final completion. The rationale for the rules is financial accountability and to prevent abuse and corruption. The reasonableness and knowledge of the rule was not disputed.

- [3] In this case, the signed off job specification called for *inter alia* Chromadek roofing at the contracted price of R45 000.00 and the installation of portable chemical toilets on site for the construction workers at the contracted price of R5000.00 and the certificate of final completion signed off by Mr Kalicharan in early March signified that this was done.
- [4] However, Mr Kalicharan and the contractor did not install portable toilets. They also did not install a Chromadek roof and instead galvanised corrugated roofing was installed and painted. This was discovered following an anonymous tip off<sup>1</sup> long after payment had been made to the contractor on the basis of Mr Kalicharan's signature that the job had been completed according to specification.
- [5] When Mr Kalicharan was asked to explain this, he resigned but retracted same a few weeks later and filed a written explanation on 26 March 2018. He offered the same explanation at arbitration.
- [6] He said the roof of the school was infested with bees, so he instructed the contractor to have it fumigated and for this they used the money which was allocated for mobile toilets. The Chromadek sheeting could not be supplied and delivered within the stipulated time by the supplier, hence the galvanised corrugated roofing. He made the changes to eliminate risks on the job and to fast

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<sup>1</sup> In the cross-examination of the respondent's witnesses, a lot was made about the fact that the respondent did not discover the tip off email, a sterile point as the email and the failure to produce it had no probative value to any issue in the case.

track the finalisation of the project. There was no financial loss to the department as the changes did not affect the original costing of the project.

- [7] Mr Kalicharan attached two documents to his written explanation: the first a supposed invoice from Melville Pest Control, Newcastle to the contractor dated 14 February 2018 in the amount of R4500.00 and the second an undated document from the contractor which recorded that in the place of the mobile toilets costed at R5000.00 and a Chromadek roof costed at R45 000.00 to a total of R50 000.00, bees were fumigated at the cost of R4500.00 and galvanised roofing costed at R38 880.00 was installed and painted at the price of R6620.00 which also totalled R50 000.00.
- [8] At arbitration, further documents were put up by Mr Kalicharan supposedly received from the supplier on 12 February 2018 that Chromadek sheeting was not available at the time.
- [9] None of these documents were submitted to the Department prior to or when Mr Kalicharan signed off the project. This was the undisputed evidence of Mr Mngadi who approves payment of contracts.
- [10] The content of particularly the handwritten document from the supplier placed into question whether the documents were drafted on 12 February 2018. And, none of the authors were called to confirm and/or clarify same, despite the fact that the arbitration was held in Newcastle.
- [11] Mr Kalicharan was in the main charged with fraud and in the alternative with gross negligence. In essence, it was alleged in the particulars of the charge that he falsely, alternatively negligently certified that the school roof was replaced with Chromadek roof at a cost of R45 000.00 and that mobile toilets were hired for the site workers at a cost of R5000.
- [12] The arbitrator, after considering the definition of fraud and gross negligent, found as follows:

*“The Applicant deviated from the project specifications in order to accommodate the fumigation of bees, an unforeseen emergency situation on site. He may not have followed the correct procedure in that he did not obtain approval of the supervisor beforehand. However, deviation from procedure is one thing, and fraud is another. The Respondent has not shown that the Applicant made false*

*statements which are potentially prejudicial to it. Therefore it cannot be said that the actions of the Applicant are consistent with the common law definition of fraud. Furthermore, the evidence before me does not establish that the Applicant committed misconduct which is dishonest misconduct. I accordingly find that the Applicant did not commit fraud or even misconduct which has an element of dishonesty."*

[13] Furthermore:

*"The Applicant's conduct did not involve a departure from the standard of a reasonable chief works inspector in the position of the applicant to such an extent that it can be properly be categorised as extreme or particularly inexcusable negligence" and accordingly the Applicant was not guilty of gross negligence."*

[14] For all these reasons, the arbitrator concluded that the dismissal of Mr Kilicharan was substantively unfair and ordered full retrospective reinstatement.

[15] I agree with the Department that the arbitrator overlooked crucial considerations and facts which were material to the outcome.

[16] As already indicated, the clear allegation in the charges was that Mr Kalicharan falsely, alternatively grossly negligently certified that the school roof was replaced with the superior Chromadek roofing at a cost of R45 000.00 and that mobile toilets were hired for the site workers at a cost of R5000. The charge therefore did not call for Mr Kalicharan to be judged in line with the criminal definition of fraud.

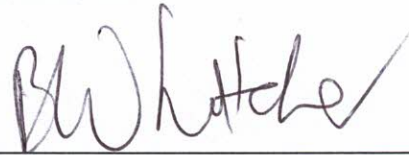
[17] It was evident that Mr Kalicharan falsely represented that the project was done strictly in line with the signed off job specification. The documentation he furnished when he signed off the job did not alert the Department to the changes. The certificate of final completion he signed represented that the project was carried out in accordance with the job specification.

[18] If he did not do so deliberately, he was grossly negligent given the fact that the changes were material and the new price of the project coincidentally also added up to R50 000.00. Basically, the Department was sitting with a roof that was inferior to the one it had ordered.

- [19] It was only after the changes were discovered and after he sought to evade the call to explain himself – he resigned when he was confronted - did Mr Kalicharan seek to explain the changes. His evidence reveals no explanation for why he made the false representation. Explaining the changes does not explain why he failed to reveal the changes. If he had good reason to make the changes, why signify that there were no material changes?
- [20] His explanation also did not explain why the supervisor was not called and informed about the need for the changes at the time.
- [21] According to the documentation he provided, he discovered the alleged bee problem days before the project was due to start and before the contract was awarded to the contractor. On this version, he had time to follow protocol, but did not. The documentation also lacked credibility for the reasons alluded to earlier on.
- [22] In the face of all these facts and considerations, a reasonable arbitrator would have concluded that the conduct of Mr Kalicharan was sufficiently serious to warrant a dismissal, that is, his conduct had irretrievably damaged the trust relationship. Ultimately, he not only flouted important rules, but was dishonest.
- [23] As to costs, I find no exceptional reason to make a cost order against the first respondent.

#### The Order

1. The award dated 9 July 2019 issued by the second respondent under case number GPBC2532/2018 is set aside and substituted with an award that the dismissal of Mr Kalicharan was substantively fair.



**Benita Whitcher**

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv N G Winfred, instructed by State Attorney, KwaZulu-  
Natal

For the First Respondent: Mr Mathonsi of PAWUSA

Labour Court