

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

LABOUR APPEAL JUDGMENT

Case no: HC-MD-LAB-APP--AAA-2021/00071

In the matter between:

GLORETTE CHRISTINE GERTZE

APPELLANT

and

MINISTER OF FINANCE

1ST RESPONDENT

MS KYLIKI T N N SIHLALA

2ND RESPONDENT

THE LABOUR COMMISSIONER

3RD RESPONDENT

Neutral citation: *Gertze v Minister of Finance & Others* (HC-MD-LAB-APP--AAA-2021/00071 [2023] NALCMD 3 (30 January 2023))

Coram: TOMMASI J

Heard: 19 August 2022

Delivered: 30 January 2023

Flynote: Labour Court – Section 26(6) of the Public Service Act, 1995 (Act 13 of 1995) peremptory – the disciplinary inquiry shall be conducted 21 days after the establishment of the disciplinary committee - failure to comply renders enquiry a nullity.

Summary: The appellant herein was charged during February 2016 with misconduct. She denied the allegations and a disciplinary committee was convened on or about 10 March 2016. A disciplinary inquiry was scheduled for 23 March 2016. On 23 March 2016, the matter was postponed *sine die* because a translator could not be appointed and the investigation was not completed. The disciplinary inquiry was conducted on 16 August 2016 five months after the disciplinary committee was established.

Held that: The disciplinary inquiry must be conducted within 21 days after the disciplinary committee is established. Although it is not required to be finalized within 21 days, it must at least commence within that period. Scheduling a disciplinary inquiry simply to postpone it *sine die* does not qualify as “conducting” an inquiry.

Held further that: The provision in terms of section 26(6) of the Public Service Act, 1995 (Act 13 of 1995) for the disciplinary inquiry to be conducted within 21 days is peremptory and failure to comply therewith renders the inquiry a nullity.

ORDER

1. The arbitrator’s award in its entirety is hereby set aside.
2. The inquiry held on 16 August 2016 is hereby declared a nullity.
3. The first respondent is ordered to reinstate the appellant in the position she occupied before her dismissal; and
4. The first respondent is directed to pay the appellant the remuneration she would have been paid had she not been dismissed.
5. No cost order is made.

JUDGMENT

TOMMASI J

Introduction

[1] This is an appeal against the arbitrator's award handed down on 27 September 2018. The matter was initially opposed but the Office of the Government Attorneys withdrew its opposition in this matter on 12 July 2022. The matter therefore proceeded on an unopposed basis. The appellant is appearing in person.

[2] The Appellant appeals against the whole of the decision or order of the second respondent. The order reads as follows:

- (a) 'The applicant's dismissal was both substantively and procedurally fair;
- (b) That the matter is hereby dismissed; and
- (c) There is no order as to costs.'

[3] The grounds of appeal are quoted verbatim below:

- (1) 'The arbitrator erred in law and/or facts by misdirecting herself on the fairness, procedurally and substantively of the disciplinary hearing by confusing remarks about the disciplinary hearing with the arbitration.
- (2) The arbitrator erred in law/or facts and or misdirected herself in finding on the material before her that the appellant is guilty of the allegations against her.
- (3) The arbitrator erred in law/and or (sic) not including closing arguments points in law and requesting witnesses statements, and the arbitrator mix labour dispute arguments with criminal matter disputed evidence which is *subjudice* in the Magistrate's Court for the district of Windhoek.'

Background

[4] The appellant was charged with two main counts and two alternative counts of misconduct on 18 February 2016. The first count is that the appellant during the period of 2014 – to January 2016 prepared and processed payment to a company named Yamotoko Enterprises without any source documents alternatively that she used her position to promote the interest of a private enterprise which did not provide any service to the first respondent. The second count is that she, contrary to the prescribed code of conduct, by engaging in transactions that she has a personal or financial interest in. It was alleged that the payments made to Yamotoko Enterprises was paid into the account of Namibia Properties Maintenance Plan CC which she co-owns with husband. In the alternative to this count, she was charged with fraudulently embezzling money of the first respondent by using her position in the Public Service.

[5] The appellant on 4 March 2016, in writing denied the allegations against her. It was common cause that the disciplinary committee was established around 10 March 2016. A disciplinary inquiry was scheduled for 23 March 2016. On 21 March 2016 the appellant in writing requested the services of a translator.

[6] On 23 March 2016 the date of the inquiry, the chairperson acknowledged receipt of this request for an interpreter. She indicated that an interpreter could not be appointed but that one will be made available during the next hearing. The chairperson read the charges and requested the appellant to plead thereto. She pleaded not guilty to all the charges. The chairperson then wanted to know from a certain Mr Iyambo whether he finalized the investigation. He indicated that the investigation was not completed and that he was still busy with it. The disciplinary enquiry was postponed *sine die* to allow the investigator to finalize his investigations. It is common cause that the next hearing took place on 16 August 2016.

[7] At the hearing on 16 August 2016, the representative of the appellant indicated that he wished to raise points *in limine*. He submitted that procedural errors occurred and that the inquiry should be declared a nullity. For the purposes of this judgment I shall only make reference to one of these objections. The representative

submitted that there has been non-compliance with section 26(6) of the Public Service Act, 1995 (Act 13 of 1995) in that the hearing commenced after the prescribed 21 days provided for in the said section. The chairperson's response was as follow:

'And again in terms of section 26(6) of the Public Service Act, you are again requesting the case to be dropped and again this cannot be dropped neither be nullified or discontinued as there is no basis for discontinued (sic) as well as nullification of this disciplinary inquiry.'

[8] After this ruling the appellant and her representative abandoned the proceedings protesting against the fairness of the proceedings. The inquiry continued in the absence of the appellant in terms of section 26(8)(c) which provides that the failure of the staff member charged to be present at the inquiry shall not invalidate the proceedings. The inquiry received the evidence of Mr Iyambo who is the investigating officer. Having heard and considered his testimony, the inquiry found the appellant guilty on the first main count and recommended her dismissal.

[9] The appellant appealed internally and it was dismissed. The appellant received her notice of her dismissal on 22 November 2017. The appellant thereafter referred the dispute to the Labour Commissioner for conciliation or arbitration.

[10] In the summary of the dispute the appellant stated that she gave her written statement denying the allegations on 4 March 2016 and in terms of Section 26(6) of the Public Service Act, the Disciplinary Committee should have been established within seven days from the receipt of the reply. The summary states further that:

'It is arithmetically obvious that the committee ought to have (sic) established on or about 15 March 2016 and the clock to conduct the hearing within 21 started to tick on 15 March 2016 and to run up to 13 April 2016.'

[11] The appellant claimed that the hearing on 23 March 2016 was a mere formality and should not be construed as the commencement of the hearing. She claimed reinstatement and an order directing the first respondent to pay her remuneration she should have been paid had she not been dismissed.

[12] The matter was eventually referred for arbitration. At the hearing of the matter, the chairperson of the internal disciplinary enquiry and Mr Iyambo testified on behalf of the first respondents and the appellant testified in support of her claim. The appellant testified for the first time on the merits of the charges against her. She confirmed that she did not object to a postponement on 23 March 2016 and confirmed that she requested the services of a translator.

[13] The arbitrator in her award deals extensively with the fact that the disciplinary hearing was substantively fair. Her summary of the evidence regarding the conduct of the appellant and her conclusions in this regard cannot be faulted. With regard to the procedural fairness she state the following: 'I failed to find any irregularity that is quite significant to qualify the procedure at the disciplinary hearing unfair'.

The issue

[14] Section 89 (1)(a) provides that a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 on any question of law alone.

[15] The appellant somewhat inelegantly, in her grounds of appeal, indicated that the arbitrator did not include closing arguments on points of law raised. One of the legal points raised in the closing argument of the appellant's representative was that there was non-compliance with section 26(6) of the Public Service Act and as such the disciplinary inquiry which was held on 16 August 2016, was a nullity. The appellant's representative cited decisions of *Van Niekerk J in Simataa v The Public Service Commission* (A12-2003) [2013] NAHCMD 306 (30 October 2013) and that of Mainga J, as he then was in *Zephania M Tjihumino v The Permanent Secretary of the Ministry of Finance and others* (Case No. LC3/2006, unreported judgment delivered on 2 November 2006).

[16] The arbitrator in the award makes no mention of this critique against the validity of the inquiry but concluded that no procedural irregularity took place which would render the procedure at the disciplinary hearing unfair despite the appellant's arguments to the contrary. The Arbitrator did not elaborate on this conclusion but

one may safely assume that she rejected the argument that there was non-compliance with the provisions of section 26(6) of the Public Service Act.

[17] The question is whether the arbitrator correctly concluded that no procedural irregularity took place. To answer this question, it must be determined whether the disciplinary inquiry was “conducted” on 23 March 2016. If yes then there was no procedural irregularity but if not, then there would be non-compliance with section 26 (6) of the Public Service Act. The follow up question is whether such non-compliance renders the disciplinary inquiry held on 16 August 2016 invalid.

The law

[18] Section 26(6) provides that;

‘The chairperson shall, in consultation with the other members of the disciplinary committee, fix the time and place of the inquiry and shall give the staff member charged reasonable notice in writing of the said time and place: Provided that such inquiry shall be conducted within 21 days after the establishment of the disciplinary committee.’[my emphasis]

[19] This court already in the two matters¹ which was provided by the appellant to the Arbitrator discussed section 26(6) of the Public Service Act in great detail and I do not see the need to rehash what was stated thereon. Mainga J, as he then was, in the *Tjhumino* matter stated that:

‘What is clear though is that the inquiry must commence within 21 days after the establishment of the disciplinary committee’

and

“It was the intention of the legislature that once the disciplinary committee has been established the inquiry shall take place/commence within 21 days and failure to commence the inquiry within that specified period renders the inquiry invalid and of no consequence”

[20] Van Niekerk J in the *Simaata* matter adopts a more flexible approach and state the following at para 50:

¹ *Simataa v The Public Service Commission* (A12-2003) [2013] NAHCMD 306 (30 October 2013) and *Zephania M Tjhumino v The Permanent Secretary of the Ministry of Finance and others* (Case No. LC3/2006, unreported judgment delivered on 2 November 2006).

'As far as compliance with section 26(6) itself is concerned, I am similarly of the view that the mere fact that the 21 day limit is exceeded does not in itself render the inquiry a nullity. For instance, is (sic) the limit is exceeded by a day or two it would cause greater inconvenience if the inquiry is considered invalid than if it were to be considered valid.'

Further in paragraph 51 the following is stated:

'The question is, though, whether I can state that the judgment in Tjihumino is clearly wrong on the issue of whether non-compliance with the time limit in section 26(6) renders the inquiry a nullity. After careful consideration I do not think I can. I am therefore bound to follow it.'

Discussion

[21] It is common cause that the hearing on 23 March 2023 falls within the 21 days period. The respondent maintained that there was compliance with the section 26(6). The appellant maintains that the disciplinary enquiry did not commence on 23 March 2023. The arbitrator totally ignored this issue but given her conclusion that no irregularity occurred the court will accept that she was satisfied that section 26(6) has been complied with.

[22] The hearing which took place on 23 March 2016 was to be postponed on two grounds i.e for an interpreter for the investigation to be completed. The investigating officer at the arbitration hearing indicated that there was a preliminary investigation conducted and he could at least ascertain that the appellant had processed claims in the sum of N\$600 000 in favour of Yamotoko Enterprises which was a trade name the appellant's husband used and that this money was paid into the account of the close corporation of which the appellant and her husband were the sole members. The total amount of money processed in this matter eventually increased to more than N\$1.8 million. It must be pointed out that the charges leveled against the appellant did not quantify the transactions but merely described the misconduct.

[23] At the time it was simply stated that the investigation was not completed. No explanation was given or required by the chairperson as to the duration of the

investigation. No explanation was given by the appellant as to why the services of an Afrikaans/English translator could not be obtained nor was it indicated when the next hearing would be. The matter was simply postponed *sine die*. The appellant could therefore not object that it would be beyond the requisite 21 days if she did not know the date to of the next hearing.

[24] Although the appellant was asked to plead no evidence was led. The proceedings on 23 March 2016 was clearly scheduled only to postpone the inquiry and not to conduct an enquiry. This conduct was designed to circumvent the peremptory requirement to conduct a hearing within 21 days. The inquiry was conducted on 16 August 2016 more than five months after the disciplinary committee was established which does not comply with section 26(6). The inquiry held on 16 August 2016 is therefore a nullity for lack of compliance with section 26(6) of the Public Service Act. The chairperson's refusal to have the latter inquiry declared a nullity was an irregularity.

[25] The Arbitrator, having concluded that no irregularity occurred, erred in law and the award stands to be set aside in its totality.

[26] In the premises the following order is made:

1. The Arbitrator's Award in its entirety is hereby set aside.
2. The inquiry held on 16 August 2016 is hereby declared a nullity;
3. The first respondent is ordered to reinstate the appellant in the position she occupied before her dismissal; and
4. The first respondent is directed to pay the appellant the remuneration she would have been paid had she not been dismissed.
5. No cost order is made.

M Tommasi
Judge

APPEARANCES:

APPLICANT: G Gertze (in person), Windhoek