THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2434/17

In the matter between:

GIFT BHEKUMUZI BUTHELEZI **Applicant**

and

GENERAL PUBLIC SERVICES

BARGAINING COUNCIL **First Respondent**

NGAKO PM, *N.O*. **Second Respondent**

DEPARTMENT OF TELECOMMUNICATIONS

AND POSTAL SERVICES **Third Respondent**

Heard: **17 January 2020**

Delivered: **27 August 2021**

JUDGMENT: LEAVE TO APPEAL

HAFFEGEE AJ

Introduction

[1] This is an application for leave to appeal the judgment of 2 November 2020.

[2] The application was filed 28 December 2020 — outside the time limits required to apply for leave to appeal. The applicant has thus applied for condonation for the late filing of the application for leave to appeal. The third respondent (the Department) opposes the condonation application.

Condonation

[3] While the judgment in this matter was delivered on 2 November 2020, it appears that the registrar had erroneously sent a draft judgment to the parties on 3 September 2020.

[4] The applicant applied for leave to appeal the judgement on 28 September 2020 before receiving a letter, on 4 October 2020, from the Labour Court indicating that the judgement of 3 September was a draft judgment.

[5] Because, according to the applicant, the final judgement did not differ from the draft judgment, his attorneys “elected not to file any supplementary leave to appeal as there was no material difference between the judgments.” (sic)

[6] The applicant’s attorney (Mr Makhafola) and Department's attorney (Mr Phukubje) held a telephone conversation in the week of 9 November 2020. There is some dispute about the contents of this telephone conversation. Mr Makhafola informed Mr Phukubje that the applicant would not be supplementing his papers and stands by the initial papers (filed on 28

September 2020). Mr Phukubje says he had at that stage informed Mr Makhafola that the initial application for leave to appeal was *void ab initio* because no judgement had been issued at the time. And, he says that Mr Makhafola told him that counsel was still supplementing the application and that that supplemented application will be served on the parties and filed in Court in due course but that this did not happen.

[7] On 16 November 2020, Mr Phukubje wrote to Mr Makhafola. He asked for clarity on the applicant's position, given that the application for leave to appeal was filed before the judgement was officially issued.[1] The applicant's position was that it was unnecessary to re-serve the same application for leave to appeal.

[8] The Department's position, conveyed to the applicant on 15 December 2020, is that the application for leave to appeal filed on 28 September 2020 is an irregular step as no judgment existed until 3 November 2020.

[9] The applicant subsequently filed this application seventeen days after 24 November 2020 – the date it ought to have filed his application.

[10] The Department opposes the condonation application mainly because the delay lacks an explanation. After all, it was self-created and the applicant's poor prospects of success on leave to appeal.

[11] The factors to be considered for condonation have long ago been set out in *Melane v Santam Insurance Co Ltd*[2] *(*and applied in this Court and the

[1] The letter erroneously states that the application for leave to appeal was filed on 28 November 2020 instead of 28 September 2020
[2] [1998] 11 BLLR 1141 (LC)

Labour Appeal Court (LAC)[3]) – the degree of lateness, the explanation for the lateness, the prospects of success and the importance of the case. The Court in *Malane* warned against a piecemeal approach but said: "that if there are no prospects of success, there would be no point in granting condonation." A slight delay and good explanation may compensate for weaker prospects of success or strong prospects, coupled with the importance of the case, which may compensate for a long delay. These factors, however, should be weighed up against the other party's interest in finality.

[12] The delay, in this case, may not be excessive, but the explanation for the delay is lacking. Even though Mr Phukubje had alerted Mr Makhafola that the initial application was filed before the judgement was issued, the applicant's lawyers still chose not to file the application once the judgment was formally delivered. Thus, the applicant's lawyers had indeed caused the delay.

[13] Even though the prospects of success are not strong, I am inclined to grant condonation. It would be in the interests of finality instead to address the prospects in the context of the application for leave to appeal.

<u>The test for leave to appeal</u>

[14] Section 17 (1) of the Superior Courts Act 10 of 2013 (SCA) reads as follows:

"17. Leave to appeal

[3] See, for instance, *SATAWU v SA Airways (Pty) Limited [2015]* 2 BLLR 137 (LAC)

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a);

(c) and the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties." [emphasis added]

[15] In *Seathlolo v CEPPWAWAWU*, van Niekerk J stated the following regarding an application for leave to appeal:

"[3] …Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this Court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where it is a legitimate dispute on the law." [emphasis added].

[16] The Department, appropriately, refers to *Mgezeni Gasbat Nxumalo v the National Bargaining Council for the Chemical Industry (NBCCI) and Others*[4] where the Court that the use of the word "would" in s17(a)(ii) raises the previous threshold when "all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion."

[17] This application is one to appeal the Court's decision of an application to review and set aside an arbitration award. Review applications themselves are distinct from appeals in that the Court is not merely to substitute the award with its own interpretation of the facts but, rather, to assess whether

[4] (JR1170I2013)

the award is a decision of a reasonable decision-maker and rationally connected the evidence that served at the arbitration.

Grounds of appeal

[18] The applicant states that the crisp issues for determination are:

18.1 whether it is procedurally fair for the Director-General of the third respondent to charge and dismiss the applicant, who is a Deputy Director-General without any delegation of authority from the Minister of the third respondent;

18.2 whether the reasons advanced by the third respondent in disciplining the applicant are reasonable; and, or

18.3 whether the employer had any intentions of disciplining the applicant;

18.4 whether it is fair to uphold a sanction of dismissal against the applicant for charges 7,8 and 9.

[19] It appears that the main issues are:

19.1 whether the Director-General of the Department had the necessary authority to discipline and dismiss the applicant;

19.2 whether the delay in disciplining the applicant was unreasonable; and

19.3 whether dismissal was an appropriate sanction.

[20] I do not understand how issues such as whether the Department intended taking disciplinary action against the applicant and its reasons for doing so forms part of the review application and, therefore, part of this application for leave to appeal. It is irrelevant whether the Department had intended to take disciplinary action against the applicant or its reasons for doing so. The fact remains that the Department had, in fact taken disciplinary action. Thus, the Commissioner had to determine whether the Department acted fairly (procedurally and substantively) in taking such disciplinary action. The applicant, once again, appears to confound matters by detracting attention from the main issues at hand.

Delegation of authority

[21] The applicant contends that in terms of the Public Service Act (PSA) of 1994 only the Executive Authority (the relevant Minister) has the power to recruit appoint, performance manage, transfer and dismiss employees. The Human Resources function, so the argument goes, "belongs to the Executive Authority" and "for anyone to exercise those powers, they must be delegated by the Executive Authority to do so on its behalf."

[22] There is little, if any merit, in this argument. As I stated in my judgment, the allegations that form the substance of the dismissal were not allegations against the applicant in his capacity as Acting Director-General. The applicant was a Deputy Director-General. The Director-General did not need any delegation of authority to take disciplinary action against the applicant in that capacity. Sections 16B(1)(b) and 17(2)(d) of the PSA are clear in this regard.

[23] Section 16B (1) reads as follows:

> "16B. Discipline. — (1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:
>
> (a) In the case of a head of Department, the relevant executive authority; and
>
> (b) in the case of any other employee, the relevant Head of Department."

[24] Section 17(2) reads:

> 17. Termination of employment. — (1) (a) Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act.
>
> (b) The power to dismiss an employee on account of misconduct in terms of subsection (2) (d) shall be exercised as provided for in section 16B (1).
>
> (2) An employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of—
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> (a)incapacity due to ill health or injury;
>
> (b)operational requirements of the Department as provided for in the Labour Relations Act;
>
> (c)incapacity due to poor work performance; or
>
> (d)misconduct." (Emphasis added)

[25] Moreover, it is not accurate that only applicant had conceded (during the arbitration) that the Director-General had the necessary authority to disciplinary and dismiss him. I recorded in my judgment that during oral argument in the review application, the applicant's counsel changed tact. Counsel of the applicant initially claimed that the applicant's dismissal was *void* because of the lack of delegated authority applied to all charges but later conceded that the Director-General might have had the power to take disciplinary action but lacked the authority to dismiss the applicant.

[26] The applicant makes much about the change from the Department of Communications to the Department of Telecommunications and Postal Services and that these departments operated under several different

Ministers. It is in this context that the judgement points out that the applicant stresses form over substance. The applicant occupied the same position and worked under the same Director-General and cannot rely on these changes to escape disciplinary action.

[27] In any case, section 16B(4) of the PSA provides for employees who change departments to be disciplined by the head of the new Department even for misconduct committed while employed in a previous department. The section reads:

> "If an employee of a department (in this subsection referred to as 'the new department'), is alleged to have committed misconduct in a department by whom he or she was employed previously (in paragraph (b) referred to as 'the former department'), the head of the new Department—
>
> (a) may institute or continue disciplinary steps against that employee; and
>
> (b) shall institute or continue such steps if so requested—
>
> (i) by the former executive authority if the relevant employee is a head of Department; or
>
> (ii) by the head of the former Department, in the case of any other employee."

Delay in taking disciplinary action

[28] The Department gave the applicant notice to attend a disciplinary hearing on 3 December 2014. While some of the allegations concerned events during 2013, some dated back to 2010. In relation to these allegations, the applicant claims that the delay in taking disciplinary action against him amounted to a prescription of the charges.

[29] Employers must not unduly delay taking disciplinary action against employees. It would be unfair and could give rise to waiver or deemed waiver to take disciplinary action. However, the delay has to be calculated not from the date of the alleged misconduct but from when an employer

became aware of the alleged misconduct and from when it investigated the allegations.

[30] The applicant points to reports of the DPSA and the Auditor-General (AG). The AG report was signed off in March 2011 and the DPSA report was issued in September 2011. Besides the Director-General only starting employment in June 2011, both reports referred to irregular appointments without identifying who was responsible for the irregular appointments. The Department brought charges of misconduct against the Applicant and other employees soon after an internal audit identified employees responsible for irregular appointments.

[31] The Commissioner took cognisance that the Director-General was suspended during part of the period causing the delay. When she returned, some of her powers as Director-General still resided with the applicant. She did not have the power to take disciplinary action against the applicant while deprived of these powers. The Department had not waived its right to charge the applicant. I considered the Commissioner's conclusion that the delay in taking disciplinary action against the applicant as justifiable not to be a conclusion that a reasonable decision-maker could not make. I found no fault in the Commissioner's reasoning for accepting the explanation for the delay.

[32] The judgment sets out the reasons for not reviewing and setting aside the Commissioner's conclusion that the applicant is guilty of charges 7, 8 and 9 and his reasons for concluding that dismissal was an appropriate

sanction. Accordingly, it is unnecessary to repeat those reasons in detail here.

[33] As he did in the review application, the applicant still does not deal with proper grounds of review. Again, the papers are burdened with what amounts to an appeal rather than an application to review the award. The applicant fails to substantiate why the findings of the Commissioner are not those that a reasonable decision-maker could not have made. The judgement addresses each of the charges and the applicant's failure to attack the Commissioner's findings on proper review grounds. The Commissioner's conclusions that the applicant is guilty of serious misconduct and that dismissal was appropriate because, amongst other things, each of the charges involved an element of dishonesty are indeed those of a reasonable decision-maker and rationally connected to the evidence that served before him.

Costs

[34] While the application for leave to appeal is not one specifically against the order or costs, the applicant submits that it was "unfair to award costs against the applicant as the application was a good faith attempt by the applicant to vindicate himself from the unfair labour process that led to his dismissal." It is, therefore, necessary, even briefly, to address the issue of costs.

[35] The Department points out that even though the applicant claims to be unemployed, he has engaged an attorney and two counsel and litigates in bad faith.

[36] I pointed out in my judgment that the review application was unduly voluminous and for how the review application was presented. As I pointed out in the judgment, the record consists of several thousand pages of documents and almost twenty arch lever files. The review application resembled an appeal or, worse still, in many respects, new arguments and submissions to convince the Court to find in favour of the applicant. In short, how the review application was prosecuted amounts to an abuse of process. In that light, I considered it appropriate to award costs against the applicant.

Conclusion

[37] I am not persuaded that another court would come to different conclusions for the reasons set out above. The applicant's grounds of appeal and the reasons in support of those grounds do not justify leave of appeal to be granted, and there are no compelling reasons to grant leave in terms of section 17(1) of the SCA. Accordingly, the appeal would not have a reasonable prospect of success.

Order

[38] Accordingly, I make the following order:

1. The application for leave to appeal is dismissed with costs.

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Haffegee, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Advocates M Mhambi and F Thema

Instructed by: Makhafola & Verster Inc

For the Third Respondent: Mr C N Phukubje

C N Phukubje Attorneys