



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA18/2019

In the matter between:

NGATHA ANDRIES KOKO

Appellant

and

GREATER TUBATSE MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

S K NTSUMELA N.O

Third Respondent

Heard: 12 November 2020

Delivered: 10 December 2020

Coram: Davis JA, Coppin JA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This case raises at least two important questions for labour law. In the first place, the dispute concerns an alleged unfair dismissal in circumstances where the first respondent claims that the appellant had not been legally appointed into the post from which the latter had thereafter been dismissed. The second important issue concerns the consequences for the appellant in circumstances whereby it fails in the appeal. The arbitration award was reviewed and set aside in the court a quo. It is this award which is the subject of this appeal was delivered on 11 February 2014, subsequent to the third respondent's services having been terminated on 30 July 2013. In turn, this raises the question of the appropriate penalty.

The factual matrix

- [2] It appears to be common cause that the appellant was employed by the first respondent on 24 February 2013 as a legal administrative officer. The decision to dismiss him was confirmed on 19 August 2013 at an arbitration hearing to determine the fairness of the dismissal.
- [3] It was also common cause that appellant had applied for the position of Legal Administrative Officer, although there was some dispute as to when appellant had applied for the post. It was agreed that the closing date for applications was on 26 October 2012. The Appellant contended that he had applied for the post on 12 October 2012, although the representative for the first respondent at the arbitration hearing, Mr Motha had conceded that there was a letter of application generated by appellant on 12 October 2012.
- [4] Ms Mapheto, the human resources officer of first respondent, testified that the appellant had not applied for the position in that his name did not appear on the original list of applicants. In her view, the process involved a shortlisting of all who had applied. All those shortlisted would be interviewed. The successful candidate would then receive an appointment letter.

- [5] Ms Mapheto insisted that only persons on the shortlist could have been appointed and that 'if a person does not appear on the Original List of Applications then that would mean, that person would not be shortlisted, therefore they would not be interviewed which means that ... whoever gets appointed... would have to have applied and have appeared on the Original list.'
- [6] The problem with her evidence was that when the original list of applicants was examined, on the top of the appellant's application (date 6 November 2012) appeared the letter "C" which meant "captured". Ms Mapheto was constrained to accept that once the "C" appeared that meant that 'it was actually confirming that this application for Mr Koko was captured.' There was no evidence provided from the person who had actually compiled the original list nor was any evidence led about the dismissal of the appellant.
- [7] By contrast appellant testified that he had submitted his application to first respondent' on 12 October 2012 by placing the application in a box at the reception of first respondent's premises. He had then been called to an interview and told he was the successful candidate and given an appointment letter.
- [8] Regarding his termination, he testified 'I was in the office at around 4 o'clock when I was about to knock-off; when I received a Letter that my Services of being Terminated with effect from 8 August.'
- [9] The notice of termination of 30 July 2013 read as follows:
- 'Kindly note that your employment with the municipality will be terminated with effect from the 8th of August 2013, therefore this serves as a one week's notice.
- Your appointment did not conform to recruitment process as provided for in the employment practices policy for:
- According to the records at our disposal you did not apply for the position of Legal Admin Officer as required by the advertisement.

- Your application was not received within the stipulated period as advised by the advertisement.

This resulted in your appointment being made out of irregular recruitment process.

It is against this background that the municipality views your appointment as null and void and has decided on good course and in the interest of the public to terminate you from its services.'

The award of third respondent

- [10] The third respondent examined the evidence and found that the first respondent had failed to dispute the version put up by the appellant, namely that he had applied for the position in question and had been duly appointed. Third respondent assessed the relevant evidence and found:

'Mapheto admitted during cross-examination that applicant's application was captured by Momoagi Debora (MD) on 6 November 2012. In the light of the aforesaid admissions, it could not be true that the application was received after the closing date. In the circumstances, I find that the dismissal of the applicant is substantively unfair for want of valid reason.'

- [11] The third respondent found further that no disciplinary proceedings had been instituted but that the appellant had been summarily dismissed. For these reasons, the third respondent held that the dismissal was both substantively and procedurally unfair and ordered the reinstatement of the appellant to his previous position as from 7 March 2014. In terms of the award, the first respondent was ordered to pay the appellant R 167 200.00 as back pay.

The court *a quo*

- [12] First respondent sought to review and set aside this arbitration award in terms of s 158 (1)(g)) of the Labour Relations Act 66 of 1995 ('LRA').

[13] In his judgment Cele J referred to the pre arbitration minute as if constituting the basis of the factual dispute. The pre-trial minute set out facts that were common cause the facts that were in dispute. The facts that were common cause were as follows:

- The applicant's appointment was made out of an irregular procedure
- The applicant was employed on 24 of February 2013 as a legal admin officer by the respondent until the date of dismissal, which is 19 August 2013. The applicant was dismissed for unknown reasons after serving in the post of legal admin officer for a period of five months.
- The applicant was dismissed by the respondent.
- It is a fact that the applicant applied for a post of legal admin officer and went for an interview, scored high and ultimately appointed.
- The respondent did not follow a fair procedure when dismissing the applicant by denying him the right provided for in the Act to be given a chance to represent his case.
- The applicant cannot be held responsible for internal systems of the municipality. Any illegal actions referred to by the employer is an internal matter and the applicant cannot be held liable for such."

[14] The facts that were in dispute were set out as follows:

- That the applicant's appointment was made out of an irregular process
- That the dismissal of the applicant was procedurally and substantively fair.

- That the respondent did not comply with clause 6.3 of the disciplinary procedure, collective agreement for dismissing the applicant in July 2013 for an incident that took place in February 2013.

[15] After noting the full contents of this minute, Cele J found that third respondent had failed to apply his mind properly to the evidence that had been presented to him. The learned judge then engaged with what unfortunately was no more than speculation:

‘There might have been a number of reasons why the application was not captured. Ms Deborah might have seen deficiency maybe such as the later filing of the application and decided not to include this application into the list of people from whom a list of interviews would be drawn.’

[16] Cele J held, on the basis of the shortlist provided, and thus the absence of the appellant’s name thereon that, ‘the interview of Mr Koko by the applicant (was) irregular. It therefore made the appointment of Mr Koko irregular as well’. Given the finding there had been an irregular appointment, Cele J held that, as a beneficiary of a wrongful appointment, there was no basis by which to find in favour of the appellant and therefore reinstate him into his position. For these reasons, the court a quo reviewed and set aside the arbitration award.

The appeal

[17] With leave of this court, the appellant has appealed against both the findings of procedural and substantive fairness of the dismissal. At the hearing before this court, Mr Mosam, who appeared together with Mr Motsepe on behalf of first respondent, raised the question of the unreasonable delay in the appellant’s filing of heads of argument. The appellant’s heads were filed on 26 March 2020 and were therefore 28 weeks out of time. The delay is hardly acceptable. However, this court adopted the approach that it wished to hear the appeal, as the merits of the this appeal determined that it be heard. The Court thus granted condonation.

- [18] The difficulty confronting Mr Mosam and hence first respondent was that, regrettably the court a quo jettisoned reliance on the pre arbitration minute; in particular, the facts that were common cause between the parties. It was common cause that the appellant had applied for the post of legal administrative officer, had been interviewed, had scored highly at the interview and had then been appointed.
- [19] It is regrettable that the court a quo engaged in speculation as opposed to drawing reasonable inference why the appointment had been made rather than concentrating on the facts placed before the court, including those that were common cause, including the concession that applicant's application had been captured with a "C", that he had been interviewed and scored highly.
- [20] Hence, the basis of Mr Mosam's defence of the judgment of the court a quo was confined to a contention that first respondent was obliged to comply with s 67 of the Municipal Systems Act 32 of 2000. In his view, this section regulated fair, efficient, effective and transparent personal administration. He contended on the basis of the available evidence, that the court a quo could not conclusively have found that the appellant had applied timeously for the position and, that the appropriate procedure in terms of s 67 of the municipal systems Act had been followed. Hence, the learned judge had been correct to find that the appointment was irregular and thus null and void *ab initio*.
- [21] There are a number of difficulties with these submissions. In the first place they attempt to elide over a fact that was accepted, namely, that the appellant had applied for the post had been interviewed, had achieved high scores and thus had been appointed. The failure to obtain evidence from Ms Mamoagi Deborah meant that the fact that the appellant's application had been marked with a "C" and had thus been captured could not be gainsaid by first respondent.
- [22] S 67 (1) of the Municipal Systems Act provides that a municipality, in accordance with Employment Equity Act, must develop and adopt appropriate

systems and procedures to ensure a fair, efficient, effective and transparent personal administration including:

- (a) the recruitment selection and appointment of persons as staff members.

S 67 (2) provides for systems and procedures to be adopted in terms of subsection (1) to the extent that they deal with matters falling under applicable labour legislation and effecting the rights and interest of staff members (that) must be consistent with such legislation.'

[23] It is difficult to understand on what basis it could be contended, on the strength of the evidence placed before third respondent and later before the court *a quo* as to how s 67 (1) of the Municipal Systems Act could aid first respondent. On its own, this section does not invalidate the appointment of the appellant. Thus, absent any evidence none of which was presented, the inextricable conclusion is that the appellant had been appointed to the position and then had been dismissed without the provision of justifiable reasons and without a disciplinary hearing having been conducted.

[24] In my view, the award which had been made by third respondent stands to be classified as a reasonable award on the basis of the evidence which had been presented at the hearing. As was stated in *Herholdt v Nedbank Limited* 2013 (6) SA 224 (SCA) at para 25:

'A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.'

[25] This finding obviates any engagement with appellant's further argument that his appointment constituted administrative action which remained valid until set aside on review by a competent court. In this connection, appellant invoked the doctrine as set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) 222 (SCA) which doctrine finds further development and affirmation in the Constitutional Court in *Merafong City Local Municipality v Anglo Gold Ashanti Limited* 2017 (2) SA 211 (CC).

- [26] First respondent countered this submission by arguing that the appointment of the appellant does not amount to administrative action. In support thereof, Mr Mosam relied on the decision in *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) at para 142, in which he found ‘the subject matter of the power involved here is a termination of a contract of employment for poor work performance. The source of the power is the employment contract between the appellant in Transnet. The nature of the power involved here is therefore contractual. It does not involve the implementation of legislation which constitutes administrative action.’
- [27] Whether an invalid decision to appoint a person to a post, such as argued by first respondent, falls within the *Chirwa dictum*, is not a question which requires a decision from this court, notwithstanding the detailed submissions made in this regard of both counsel. It is clearly unnecessary to decide this question in the light of the finding that the award was a reasonable one which does not stand to be set aside.
- [28] In the result, the appeal must succeed in that no evidence was presented by the first respondent which justified summary dismissal from the employment of first respondent.

Relief

- [29] The question of relief raises the second of the two issues of importance set out in the introduction to this judgment. Section 193 (2) of the LRA provides that Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee unless:
- (a) the employee does not wish to be reinstated or reemployed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practical for the employer to reinstate or reemploy the employee; or

(d) the dismissal is unfair only because the employee did not follow a fair procedure.

[30] This section does not provide powers to this court once the arbitrator or the Labour Court has acted in terms of S 193(2) of the LRA. The consequent problem can be posed thus: What occurs in a case such as the present one where reinstatement has been correctly ordered in that the dismissal has been found to substantively and procedurally unfair? The consequence of this court having no discretion to alter this remedy is that an impecunious municipality is required to pay remuneration for more than six years notwithstanding that he was employed for but a few months. This is an untenable situation as is the broader question about having to decide on appeal regarding events which occurred in 2013 and are now subject to an appeal before this Court some seven year later.

[31] This case, which is not an outlier makes a mockery one of the objectives of LRA being the expeditious resolution of labour disputes. The legislature must reconsider not only the narrow question of providing this court with a more expansive set of discretionary powers so as to prevent what is otherwise an excessive amount of money which is to be paid by the successful appellant, a case such as the present. Secondly, there is an urgent need to investigate the causes of the extraordinary length of time that it is now taking to dispose of all too many labour disputes. The legislature should consider this problem and develop legislative amendments accordingly.

[32] In the result therefore the following order is made:

1. The appeal succeeds with costs.
2. The order of the court a quo is to be set aside and replaced with the following:

“The application to review and set aside the arbitration award for Case Number LPD081305 of 17 February 2014 is dismissed with costs.”

DAVIS JA

COPPIN JA v MURPHY AJA concurred

APPEARANCES:

FOR THE APPELLANTS:

Adv E Liebenberg

Instructed by MML Attorneys

FOR THE FIRST RESPONDENT:

Adv A Mosam SC and Adv N Motsepe

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