THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 95 /2020

In the matter between:

NEHAWU OBO Mahomed Yusuf Sader **Applicant**

And

EDUCATION TRAINING AND DEVELOPMENT PRACTICES
SECTOR EDUCATION AND TRAINING AUTHORITY **Respondent**

Heard: 9 January 2024

Delivered: 10 January 2024

Summary: Non payment of salary during the period between date of dismissal and finalization of internal appeal.

JUDGEMENT

KRUGER A J.

Introduction

[1] The applicant in this matter is NEHAWU obo Mahomed Yusuf Sader who was employed at the Education Training And Development Practices: Sector Education And Training Authority (ETDP SETA) the Respondent.

[2] In terms of the amended notice of motion, the applicant apply for an order that Sader be paid his full remuneration for the period 1 March 2019 until the date of his unfair dismissal on 1 July 2020.

[3] Both parties filed supplementary affidavits as well as supplementary heads of argument. In light of the fact that these affidavits assisted me to consider all the relevant facts to dispose of this matter, I found that it would be in the interest of justice to consider all the affidavits and heads of arguments that were placed before me.

Factual Background

[4] The Respondent appointed Sader on 8 July 2015.

[5] On 5 December 2017, Sader was charged with misconduct and he was dismissed on 22 August 2018.

[6] On 27 August 2018 the respondent wrote the following email to Sader
"*The ETDP SETA will pay you a salary up to 22 August 2018, which is the date of your dismissal. Should you lodge an Appeal, the decision will not be implemented pending the decision on your Appeal"*[1]

[7] Sader lodge an appeal and as a result, the Respondent paid his salary until his salary was stopped on 25 February 2019. In a letter dated 4 February 2019 the respondent advised Sader as follows[2]:
"I regret to inform you that having taken further advice on the matter the ETDP SETA will not be paying your Salary (this includes payment pending the internal appeal) as the employment relationship between the ETDP SETA and yourself ended on 23 August 2018 when you received the letter of dismissal"

[8] On 30 September 2019, the Appeal Chairman found that the dismissal was too harsh and he recommended a final written warning valid for a period of 12 months.

[9] Sader tender his services but he was denied access and he was advised that he was dismissed.

[1] Page 127 of the bundle
[2] Page 77 of the bundle

[10] On 28 November 2019, the respondent applied for a review application in terms of *Section 145 of the LRA*. In the application, it seek to review the ruling of the internal chairperson.

[11] On 30 June 2020, the respondent withdrew the review application and on 1 July 2020, the respondent issued Sader with a letter of dismissal.

[12] On 29 July 2020, Sader referred the matter to the CCMA and on 25 March 2022, the Commissioner found the dismissal to be unfair. The Commissioner ordered reinstatement without back pay.

[13] The respondent was not satisfied and the award was taken on review. The respondent furnished security equivalent of 24 months' salary.

<u>Points in Limine</u>

[14] In the answering affidavit, the respondent raised four points in limine.

a. There is a pending review application with similar facts;

b. The applicant failed to attached certain annexures;

c. The person that dispose of the affidavit did not have intimate knowledge of the facts;

d. The founding affidavit was not properly commissioned;

[15] In the supplementary answering affidavit, the Respondent raised a defence of Lis Pendens and from the bar; it raised a defence of Res Judicata. The other points in limine were not pursued. In any event, Sader did file a confirmatory affidavit and all the relevant annexures were provided to the respondent. As stated above both parties filed supplementary affidavits and therefore both parties had the opportunity to ensure that all the relevant facts were placed before the court. The facts were largely common cause and it would not be in the interest of justice to dismiss this application based on technical reasons. For these reasons save for the Res judicata / Lis Pendens defences, the other points in limine are dismissed.

[16] Res Judicata means that a matter that has been finally determined by a court of competent jurisdiction cannot be re- litigate by the same parties. If the respondent want to rely on this defence they must prove all the elements, - in that the parties were the same; it was the same relief; on the same cause.[3] For a defence of lis pendens the requirements are - there is pending litigation between the same parties; the cause of action is the same; the same relief is sought.[4]

[17] The applicant based their application on Section 158 (1) (a) (iii) of the LRA read with Section 158 (1) (b).[5] In short, the crux of the relief is that Sader want to be paid his salary from 1 March 2019 until the date of his dismissal dated 1 July 2020.

[18] The dispute before the CCMA, which was taken on review, is an unfair dismissal dispute. In terms of the unfair dismissal dispute, the Commissioner can order reinstatement, reemployment or compensation. This is not the relief that is sought in these proceedings. In these proceedings, Sader want to be paid his outstanding salary from the date that his salary was stopped until the date of his dismissal.

[19] The respondent withdrew the review application that was brought against the ruling of the internal chairperson. Therefore, there is no pending litigation between the same parties based on the same cause of action. Furthermore, the relief sought at the CCMA is one of reinstatement whereas the relief sought in this application is the payment of Sader's outstanding salary. The relief is not the same and for these reasons both the defence of res judicata and lis pendens are dismissed.

<u>Evaluation on the merits</u>

[20] In light of the above, the question is whether Sader was dismissed on 22 August 2018. If this were the case, he would not be entitled to his salary from

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[3] Democratic Alliance v Brummer (2021)2 ALL SA 818 (WCC)
[4] Nestle SA (Pty) Ltd v Mars 2001 (4) SA 542 (SCA
[5] Section 158(1)(a)iii reads as follows
(1) The Labour Court may –
(a) Make an appropriate order, including –
(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act.

February 2019 until 1 July 2020. If however he was dismissed on 1 July 2020, he will be entitled to his salary despite the fact that he did not render services to the respondent.[6] See also the Labour Appeal Court in ***National Electronic Media Institute of South Africa v Buthelezi***[7] at par 9

"At common law, until an employee's services have lawfully been terminated, an employer is obliged to remunerate the employee upon the tender, by the employee, of his services but the employer is not, however obliged to make use of the employee's services"

[21] In considering the date of dismissal it is important to consider the following –

a. After Sader was dismissed on 22 August 2018 he was informed that if he lodge an appeal the decision will not be implemented;

b. The respondent then went ahead and paid his salary until February 2019;

c. The appeal was successful. If the appeal ruling was only a recommendation the respondent had the choice not to accept the recommendation however they elected to bring an application to review the ruling;

d. The respondent then withdrew the review and issued Sader with a letter of dismissal dated 1 July 2020;

[22] Based on the above considerations it is clear that Sader was only dismissed on 1 July 2020. It was also not disputed that he tendered his services to the respondent.

[23] It follows that if Sader was dismissed on 1 July 2020 he is entitled to his salary up until the date of his dismissal.

Costs

[24] Costs should be considered against the requirements of the law and fairness.

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[6] Myers v SA Railways & Harbours 1924 AD 85 AT 90 where the court stated that - If however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid notwithstanding that no services had been rendered by him. See also HOSPERSA & Another v MEC for Health Gauteng Provincial Government (2008) 29 ILJ 2769

[7] (JA 19 /03) (2004) ZALAC 7

[25] The requirement of law has been interpreted to mean that the costs would follow the result.

[26] In the premises I make the following order:

Order

1. The respondent is ordered to pay Mahomed Yusuf Sader his full remuneration from 1 March 2019 until 30 June 2020. The amount due to Mahomed Yusuf Sader is 1 521 585,00 (One million five hundred and twenty one thousand and five hundred and eighty five rand alone) (R101 439.00 x 15);
2. The amount in paragraph 1 must be paid on or before 28 February 2024;
3. The respondent must pay the applicant's costs on a party party scale;

Werner Kruger

Acting Judge of the Labour Court

Appearances:

For the Applicant : T Thaanyane

Instructed by : Thaanyane Attorneys

For the Respondent: Adv Mhlanga

Instructed by :KNT Attorneys