

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **JR 246/16**

In the matter between:

GAUTENG DEPARTMENT OF HEALTH

Applicant

and

SJOLUND A

First Respondent

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL
("PHSDSBC")**

Second Respondent

NUPSAW OBO XENGE L AND 5 OTHERS

Third Respondent

Heard : 24 January 2024

Delivered : 7 February 2024

JUDGMENT

NORTON AJ

Introduction

1. This case deals with an unprotected strike, misconduct during the strike, and the inordinate delay by the employer, the Gauteng Department of Health (the "Department"), to prosecute a review of an arbitration award in favour of the NUPSAW union members, following their dismissal in May 2015. The case raises legal issues regarding the jurisdiction of the PHSDSBC (the "Bargaining Council") to arbitrate

misconduct cases in the context of unprotected strikes, and the test for the reinstatement of a review application once it has lapsed. Ultimately I must decide whether the Department has made out a sufficient case to grant their application to reinstate their lapsed review, and related thereto, whether to condone the delay in prosecuting the review application

2. I set out the factual background below, and then proceed to set out the relevant legal principles that arise, thereafter I apply the law to the facts and finally I will hand down my ruling.

Factual Chronology

3. Between the 13 – 17 October 2014, health workers went on an unprotected strike. Regrettably as is too often the case in industrial relations disputes it was marred by periodic incidences of violence.

4. The Department charged employees with misconduct - bringing the department into dispute, preventing personnel from fetching ambulances, damage to 9 vehicles and singing vulgar songs about management – all in the context of the unprotected strike. Each charge is prefaced with reference to the unprotected strike between 13 – 17 October, and then continues with the particularities of the misconduct.

5. Employees were summonsed to a disciplinary enquiry, which sat over 8 sessions from December 2014 – April 2015. The employees were found guilty and dismissed.

6. The union then referred an unfair dismissal dispute to the PHSDSBC.

7. At the first hearing, the Department raised a point *in limine* that the Bargaining Council had no jurisdiction to entertain the matter. The Department argued that as the basis of the misconduct arose during the occurrence of an unprotected strike, the

fairness of the dismissals should be ventilated in a trial in the Labour Court. Presumably the Department sought to rely on section 191 (5)(b)(iii) of the LRA : *“...the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is the employee’s participation in a strike that does not comply with the provisions of Chapter IV (ie Strikes and Lockouts);”*

8. The arbitrator, considered the submissions from the employees, and the charges, and found that the reason for dismissal was misconduct. In such circumstances section 191(5)(a)(i) applies.

“The council or the Commission must arbitrate the dispute at the request of the employee if the employee has alleged that the reason for the dismissal is related to the employee’s conduct or capacity unless paragraph b (iii) applies”

9. On 22 July 2016, the arbitrator dismissed the jurisdictional challenge, and the arbitration proceeded in September 2016.

10. On 15 September 2016, the Commissioner found that the Department had failed to discharge the onus that the dismissals were fair and ordered reinstatement with backpay to the date of dismissal. Presumably the fact that the Department led no witnesses, compromised their case. It would appear that the Department failed to diligently present its case at the Bargaining Council, and that was the genesis of a prolonged dispute from which the Department now seeks to recover.

11. On 15 November 2016 the Department filed their review papers and did very little thereafter to prosecute the matter. The union filed a notice of intention to oppose two days later, and for years thereafter persisted with their opposition to the review, seeking to enforce the award. In this respect for example the union:

11.1. Approached the CCMA to certify the award (which the CCMA did) on 25 February 2017;

11.2. Instructed the Sheriff from Halfway House to execute on 15 May 2017 (he made an inventory of goods at the Department’s premises); and

11.3. Launched a Rule 11 application to dismiss the review due to lack of diligent prosecution on 6 February 2018.

12. The Department in contrast tended to respond to the union's litigation efforts without paying attention to the review application in which they were *dominus litus*. So for example on 5 July 2017 faced with the execution processes underway the Department approached the Labour Court on an urgent basis for an order staying the enforcement of the arbitration award pending the outcome of the review. On 27 July 2017 Justice Whitcher granted the order sought.

13. Around 18 September 2017, the Department filed a Supplementary Affidavit, in their review application, essentially setting out their key challenge to the arbitration award - which is that the Bargaining Council had no jurisdiction to arbitrate the matter as the reason for the dismissal concerned misconduct during an unprotected strike, and for that type of dispute only the Labour Court had jurisdiction.

14. In February 2018 the union launched their Rule 11 application to dismiss the review. The Department filed opposing papers. Various legal skirmishes not relevant to the case before this court then ensued,

15. On 19 May 2021, the Department's attorneys, Viljoen Attorneys withdrew as attorneys of record.

16. The Rule 11 application was heard by Justice van Niekerk on 6 October 2021. In short the court found that the application to review had been withdrawn by virtue of the application of the Practice Manual, and a Rule 11 application was unnecessary, as there was no review application pending in the Labour Court.

17. The Department finally stepped into gear and proceeded to launch an application to reinstate the review on 21 October 2021. The Department made the following submissions:

17.1. The purpose of the application was to reinstate the review, condone the late filing of the record, and condone the failure to prosecute the review application within the 12 month period.

17.2. On the subject of “degree of lateness” the Department provided no time period. The Practice Manual (clause 11.2.7) refers to a 12 month period within which to prosecute a review and approach the registrar for a hearing date. The 12 month period come to an end in November 2017. The review application had been left in abeyance for close on 4 years. An inordinately long period.

17.3. The reasons for the delay were presented as “*some litigation between the parties up to this stage*”, as well as “*the impact of the current worldwide epidemic*”¹ and delays occasioned by their attorneys Viljoen Attorneys “*We had instructed Viljoen Attorneys to prosecute the review application...we have since become aware that there has been non-compliance with the rules of this court*”². The final reason presented was difficulty obtaining the file from their Attorneys.

17.4. Under “*Prospects of success*” the Department restates the jurisdictional argument that the bargaining council lacked jurisdiction, and that the correct forum was the Labour Court, because the reason for the dismissal was participation in an unprotected strike.

17.5. The Department argued that the interests of justice weighed in their favour noting the health services the employees perform, and the criminal conduct of the workers during the strike.³(which was denied by the union).

18. The application to reinstate was finally set down on 24 January 2024 for hearing, some 27 months after the application was launched.

¹ Paragraphs 22 and 23 of the Founding Affidavit to reinstate

² Paragraph 25

³ Paragraphs 49 and 50.

Legal issues

19. The facts trigger a consideration of the following legal issues:

- 19.1. The provisions of the Practice Manual;
- 19.2. Whether the Applicant has discharged the onus for reinstatement of the review application and a consideration of the factors constituting good cause.

20. The provisions of the Practice Manual

20.1. According to clause 11.2.2 “...records must be filed within 60 days of the date on which the applicant is advised by the registrar that the records has been received.”

20.2. According to Clause 11.2.3 “If the applicant fails to file a record within the prescribed period (60 days from the registrar notifying the applicant that the record may be collected), the applicant will be deemed to have withdrawn the application ...”

20.3. Clause 11.2 7 is relevant and reads, “A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application (excluding heads of argument) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless **good cause** is shown why the application should not be archived or be removed from the archive.” (my emphasis)

20.4. According to Clause 16.2 of the Practice Manual, “A party to a dispute in which the file has been archived may submit an application on affidavit, for the retrieval of the file...”

20.5. In this case, there has been no complete record of the arbitration filed by the Department. The registrar notified the parties around the 16 November 2016 that a bundle and recording was ready to be collected. The 60 days would have expired around February 2017. When challenged in court about this omission, the counsel for the Applicant explained that a record was unnecessary as the issue was a legal one (meaning the characterisation of the dispute and the relevant *fora* which flowed which had a bearing on jurisdiction.) I disagree, principally because the correct

characterisation of a matter arises from an objective conspectus of the material facts. In circumstances in which there is disagreement about the correct characterisation of a dispute the Labour Appeal Court has opined that the true nature of the dispute must be ascertained from the objective facts.⁴ Absent the record, the analysis of the characterisation may be found wanting.

20.6. The review would have lapsed around November 2017. In October 2021, some 4 years later the Department sought to reinstate the review.

20.7. The Applicant bears the onus of establishing good cause to reinstate the review. In *Samuels v Old Mutual Bank*⁵ Tlaletsi DJP held at paragraph 14, *“The consolidated Practice Manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. It’s purpose is inter alia to provide access to justice by all those whom the Labour Court serves; promote uniformity and / or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practice and litigate in the Labour Court. Its objective is to improve the quality of the court’s service to the public, and promote the statutory imperative of expeditious dispute resolution.”*

20.8. At paragraph 17 the court held, *“In essence an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation for the default; and show that he / she has reasonable prospects of success in the main application, and lastly that it is in the interests of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his / her success...”*

⁴ Davis AJ at paragraph 18 in *G45 Cash Solutions SA (Pty) Ltd v Motor Transport Workers Union of SA and others* (2016) 37 ILJ 1832 (LAC)

⁵ (2017) 38 ILJ 1790 (LAC)

21. Whether the Applicant has discharged that onus for reinstatement of the review application, and a consideration of the factors constituting “good cause”

21.1. In summary then “good cause” as evidenced in the *Samuels* case denotes the following factors: bona fides; a reasonable explanation for the delay; reasonable prospects of success in the main application; and the interests of justice.

21.2. I do not doubt that the Department is *bona fides* in their efforts to reinstate the review application, and ultimately to prosecute the review to finality. However the matter doesn’t end there. The Department was prepared to proverbially sit on its hands whilst the employees went to great length to execute the award, and when faced with the prospect of execution, then defended the matter. The Department fails to explain why it didn’t set the review down much earlier; they filed their Supplementary Affidavit in September 2017, and then the line went dead. Surely, noting that the employees were determined in their efforts to execute, it was incumbent on them (and patently prudent) to have the review heard expeditiously within the requisite time frame of 12 months (ie by November 2017) as set out in clause 11.2.7 of the Practice Manual.

21.3. For the delay to prosecute the review the Department gives two main reasons, firstly COVID and the detrimental effect on parties to litigate; and secondly the poor performance of their attorneys who appear to have been dilatory in the extreme. I don’t accept either explanation.

21.4. It is true that COVID principally had an impact on parties abilities to efficiently litigate in 2020; but from around the latter half of that year parties were engaging by way of MS Teams and Zoom; and later on by way of hybrid means. In July 2020 the Court issued such a directive, which was reaffirmed in Directive 01 / 2021 on 15 January 2021.

21.5. The Department gives no adequate explanation for the time from 2018 to 2021 as to why it neglected to prosecute the review and arrange a set down.

21.6. It is trite that there is a limit to which a litigant can blame the conduct of their attorney for the poor management of their matter.⁶ The Department is part of government; litigation against the state happens on a daily basis. It is not reasonable for the Department to instruct attorneys and then abdicate their responsibility to monitor the case. Follow up meetings or email communication was reasonably required, as well as written progress reports on the matter which would have enabled the Department to check whether the attorneys were diligently pursuing their review application. Surely, the Department was alerted as early as May 2017 to the execution intentions of the employees (the sheriff did arrive at their offices to prepare an inventory of items); as well as the Rule 11 Application to dismiss the review in February 2018.

21.7. As an applicant the Department batted away the employees execution efforts, and neglected to pursue their own case, which was the review of the adverse arbitration award. The Court had granted the Department a stay in the execution pending the outcome of the review. It is inexplicable why the Department, following Justice Whitcher's order, did not simply set in motion the necessary steps to prosecute the review. All in all I am not satisfied that the Department's explanation for their delay is satisfactory. Far from it.

21.8. I now turn to the issue of prospects of success in the review application. I do understand that the Department simply has to set out sufficient facts, which could give rise to reasonable prospects of success. The Department hangs its entire review on the characterisation of the dispute, the related *fora* and the issue of jurisdiction.

21.9. The wording of the charges triggers a debate between the parties about whether or not the Bargaining Council had jurisdiction to arbitrate the dispute. In brief, if the reason for the dismissal is correctly characterised as misconduct then section 191(5)(1)(a)(i) of the LRA applies and the Bargaining Council has jurisdiction to

⁶ Refer for example to *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A). See too *UTI South Africa v Pilusa and Others* (JR 1732 / 12)

arbitrate the fairness of the dismissals; but if the reason for the dismissal is correctly characterised as participation in an unprotected strike then section 191(5)(b)(iii) applies and the Labour Court has jurisdiction to adjudicate the fairness of the dismissals.

21.10. Short of repeating myself the Department argues that the misconduct took place in the context of an unprotected strike, and that the Bargaining Council had no jurisdiction to hear the matter, instead the dispute should have been adjudicated by the Labour Court. The Department's argument is founded on section 191(5)(b)(iii) of the LRA. In turn the employees argue that they were dismissed for misconduct, and that section 191(5)(a)(i) applies, that therefore the Bargaining Council is the correct *fora* to hear their unfair dismissal dispute.

21.11. The LAC in *SA Transport & Allied Workers Union & Others v MSC Depots*⁷ found that misconduct during an unprotected strike "*was directly related to the strike action. It was not something that happened independent of the strike action...*". The Labour Court was the appropriate forum to adjudicate the fairness of the dismissals.

21.12. In *SACCAWU v Sun City*⁸ Justice Prinsloo, found that employees who were charged with absenteeism, incitement and intimidation would ordinarily be dealt with by the CCMA, (as misconduct) even though the charges related to an unprotected strike. However, the employees were also charged with participating in an unprotected strike and that engaged the jurisdiction of the Labour Court.

21.13. In the case before me the misconduct took place during an unprotected strike, but the employees were not dismissed for participating in an unprotected strike, but for blocking access to ambulances, vandalising cars and singing derogatory songs about management.

⁷ (2021) 42 ILJ 127 (LAC)

⁸ (2018) 39 ILJ 436 (LC)

21.14. A perusal of the report on the internal disciplinary enquiry, prepared by the chairperson, attached as an annexure to the Rule 11 Application reads as follows *"It is common cause that employees were not charged with participating in an unprotected strike but rather were charged with acts of misconduct that emanated during the strike..."*⁹

21.15. Justice van Niekerk comments in obiter in his judgment concerned with the Rule 11 application that *"The three charges brought against the employees related to what was alleged to be misconduct by them; there was no charge to the effect that they had participated in an unprotected strike"*¹⁰

21.16. It seems to me, having considered the cases above, that if an employee commits misconduct during an unprotected strike, but is not charged for participating in the unprotected strike, then the CCMA has jurisdiction. If on the other hand the employee is charged with participating in an unprotected strike; or is charged as such and is charged with misconduct; then the Labour Court has jurisdiction to determine the fairness of the dismissal.

21.17. Noting this analysis, as well as the comment by the presiding officer in the internal enquiry I am inclined to find that the Department's prospect of success are weaker than the union's.

Discussion and analysis

22. The Department has not filed a complete record and have given their reason (that the dispute turns on legal argument). I am unpersuaded, noting that the record could have provided factual context and clarity to the reason for the dismissals.

⁹ Pg 16

¹⁰ Para 2 of the judgment

23. My greater concern is the delay in prosecuting the review, in that the Department waited some 4 years before seeking to reinstate the review, despite warning bells from employees intent on executing the award as early as 2018. This is an inexcusable and inordinate delay. Blaming their attorney does not save them. The jurisprudence in this regard is trite.

24. With respect to the prospects of success, in my view they lie more favourably towards the union than the Department. In any event it is well known that if the delay is inordinate and largely unexplained, (which in this case it is) the consideration of prospects of success is minimal in the conspectus of condonation factors.

25. For these reasons, I am unpersuaded by the merits of the reinstatement application.

26. In the circumstances I make the following order:

Order

27. The reinstatement application is dismissed.

28. The delay in prosecuting the review is not condoned.

29. No order as to costs.

D Norton

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant

Adv Buthelezi

Instructed by:

State Attorney JHB

For the Respondent

Mr Mogotsi (Union Official - NUPSAW)