

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: JA 19/03

In the matter between:

NATIONAL ELECTRONIC MEDIA INSITUTE OF SOUTH AFRICA
Appellant

and

NKANYISO BUTHELEZI
Respondent

JUDGMENT

WILLIS JA:

[1] The Labour Court (*per* Pammenter AJ) granted the following order on 30th January, 2003:

“1. It is declared that the continued refusal by the Respondent to allow the Applicant to tender his services and to perform his duties in terms of his contract of employment between the parties is unlawful and amounts to a repudiation of the said contract;

2. The Respondent is ordered to pay the Applicant's remuneration for the period 6 April 2002 until date of this order, and thereafter to pay his remuneration in the ordinary course as provided for in his contract of employment;

3. The Respondent's obligation, provided for in paragraph 2 above, to continue paying the applicant in the ordinary course in terms of his contract of employment is subject to the Applicant rendering services in terms of such contract, if called upon to do so by the Respondent;

4. Nothing in this order shall be construed as precluding the Respondent from taking steps in terms of the Labour Relations Act 66 of 1995 as regards the applicant's employment;

5 The respondent is ordered to pay 75% of the applicant's taxed costs of this application."

The Court *a quo* granted relief in the form sought by the employee. Reasons were furnished later. The reference in the order to the applicant was a reference to the present respondent and the reference to the respondent was a reference to the present appellant. The appellant (to which I shall refer as "the employer") appeals against this order with the leave of the Court *a quo*.

[2] The respondent (to whom I shall refer as "the employee") had been employed by the employer as the Head of Corporate Services on a renewable three-year contract. His responsibilities included the overall management and control of the finance and administrative services component of the employer. He reported directly to the Executive Director, Ms Thandi Bengu-Towo. During February 2002, the employee was charged with the following acts of misconduct:

"1. Undermined the authority of the Executive Director

2. Behaviour unbefitting a head of department which is tantamount to gross insubordination.

3. Gross misconduct-Your behaviour at the meeting of 14 February 2002.

4. Behaviour and actions which have brought about a breakdown in the Employer/Employee trust relationship.”

To this was later added, before the disciplinary hearing, a charge of gross negligence which related to authorising accommodation for students at the Eskom Convention Centre in excess of budget allowances. A disciplinary enquiry was held during March 2002. The disciplinary enquiry was chaired by an attorney, Mr Yusuf Nagee. He presented a report to the executive director dated 4 April, 2002. In terms of that report he found the employee guilty of all acts of misconduct with which he had been charged. The report ended as follows:

“I took into account the Employee’s personal circumstances, however in view of the seriousness of the charges and the breakdown in the relationship, I recommend that he be dismissed.”

[3] It would appear that during a teleconference board meeting of the employer held on 5 April, 2002, a decision was taken to dismiss the employee. The employee then lodged an internal appeal. The appeal hearing was chaired by one Advocate W R Mokhari. Advocate Mokhari presented a report which was given to the employee on 9 July, 2002. Advocate Mokhari’s findings read as follows:

- “ 1. The appeal is upheld;
2. The finding of the chairman a quo (Mr Y. Nagdee) is reversed to

read as follows:

- 2.1 I find the employee, Mr Nkanyiso Buthelezi not guilty of all charges;
- 2.2 The employee is to be reinstated into his former position with retrospective effect from the date not earlier than the date of his dismissal with all benefits accruing to him;
- 2.3 in the event it is not practicable to reinstate the employee into his former position, the employee is to make adequate placement of the employee in a position not less favourable than the one the employee held prior to his dismissal."

[4] In a letter to the employee advising him of the outcome of the appeal hearing, the Chairperson of the employer's board, Ms Pumelele Ntombela-Nzimande, advised him, among other things, as follows: "There could be no substantive or procedural grounds for dismissal as per the findings." and "The Board has decided to institute an exit mechanism on the grounds that your relationship with the organization is not reconcilable." A member of the Board was appointed to negotiate a settlement with the employee. The two of them met but could not reach agreement. Thereafter, a member of the Board recommended to it that attempts be made to reconcile the Executive Director and the employee so that the employee could continue in the employer's employ. Her recommendation was apparently ignored. The employee's attorneys subsequently addressed a letter to the employer on 14 August, 2002, protesting the failure of the employer to pay the employee or to allow him to resume his duties. In that letter the employee tendered his services from 19 August, 2002.

The Executive Director replied by way of a letter dated 15 August, 2002 in which she said, among other things, the following:

“Please be advised that Advocate Mokhari recommended that your client, Mr Buthelezi, be reinstated. However, NEMISA has taken a decision not to reinstate him. He is therefore not required to present himself at NEMISA on Monday, 19th August, 2002. Your client has all the right to take this matter to the Council for Conciliation, Mediation and Arbitration for the alleged unfair dismissal. The Board has, however, resolved that they will prefer to resolve this matter amicably should this be possible.” Subsequent attempts to resolve the dispute proved fruitless. The employee then brought an urgent application in the Transvaal Provincial Division of the High Court. The employee had sought substantially the same relief which it sought in the Court *a quo*. This application was struck off the roll on 15 November, 2002 as the Court apparently took the view that it did not have jurisdiction to hear the matter. The employer alleges that, in addition, the Court took the view that the matter was not urgent.

[5] The employee then brought an urgent application in the Court *a quo*. The application was served on the employer on 12 December, 2002 and was heard on 19th December, 2002. At that stage the employer had filed no notice of intention to oppose the application. Pillay J ordered the issue of a rule *nisi*. The employer delivered its answering affidavits on or about 27 December, 2002. The employer then anticipated the return day which resulted in the order given by Pammenter AJ on 30 January, 2003.

[6] The appellant submits that the Court *a quo* erred in the following respects:

1. It heard the matter as one of urgency when it should not have done so;

2. It did not have jurisdiction to hear the matter in view of the provisions of section 191(1)(a) (ii) of the Labour Relations Act, No 66 of 1995 as amended (“the LRA”);
3. In finding that “the applicant was not dismissed by the respondent and that he therefore followed the correct procedure in approaching the Court directly.”;
4. The requirements for a final interdict were not satisfied.

I shall deal with each of these grounds in turn.

[7] Urgency

This ground is of academic relevance. The employer was given an opportunity to file answering affidavits and did so. It was given a full and proper hearing. I can see no reason why the employer’s complaint about the decision of the Court a quo to accept that the matter was urgent should be a basis for an appeal when there has been no complaint that, because the matter was heard on an urgent basis, the employer was not afforded a fair opportunity to be heard. No authority to justify a contrary conclusion was given to us. This ground of appeal stands to be rejected.

[8] The Court’s alleged lack of jurisdiction to hear the matter in view of the provisions of section 191(1)(a) (ii) the LRA

Section 191(1) (a) of the LRA provides as follows:

“If there is a dispute about the fairness of a dismissal or an unfair labour practice, the dismissed employee or the employee alleging the unfair labour

practice may refer the dispute in writing to-

- i) a council, if the parties to the dispute fall within the registered scope of that council; or
- ii) the Commission, if no council has jurisdiction.” (emphasis added)

It was submitted on the employer’s behalf that the Court a quo did not have jurisdiction to hear this matter. The argument was that the employee should instead have referred his dispute to the CCMA in terms of section 191(1) of the Act rather than approach the Court for the relief which he sought. This provision relates to the referral of disputes relating to an alleged unfair dismissal or an alleged unfair labour practice. The employee does not rely on an alleged unfair dismissal. He also does not rely on alleged unfair labour practice. There is accordingly no dispute between the parties about the fairness of any dismissal. In the absence of such dispute, no referral to the CCMA would have been competent. The employee relies on his common law rights. In terms of section 77(3) of the Basic Conditions of Act No 75 of 1997, “The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.” It is clear that the Labour Court had jurisdiction to hear and determine this matter. There is no merit in the submission that the Labour Court did not

have jurisdiction to grant the relief which it did.

[9] **The merits**

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 or her services but the employer is not, however, obliged to make use of the employee's services. (See, for example, **Smit v Workmen's Compensation Commissioner** 1979 (1) SA 51 (A); at 56F-G; **Toerien v Stellenbosch University** 1996 (1) SA 197 (C) at 201B-C; **National Union of Textile Workers v Jaguar Shoes (Pty) Ltd** 1987 (1) SA 39 (N) at 45H-46I. In this matter the employee's claim is dependent, essentially, upon whether there was a valid and enforceable contract of employment between himself and the appellant during the relevant period and whether, during that same period, he tendered his services. It is common cause that he did, indeed, tender his services. It is common cause that the employer did not accept this tender. In these circumstances, the employee would be entitled to payment of his remuneration provided there was a valid contract of employment between the parties. The employer's defence is that the employee had been dismissed during the relevant period and, because of this, it was not, so the argument went, obliged to pay the contested remuneration.

[10] In the light of the above, the determinative issue both in the Court a quo and before us, was whether the employee had been dismissed prior to the relevant period. If he had been validly dismissed, his application should have been dismissed. If, however, he had not been validly dismissed, the employer's defence was correctly rejected. The Court a quo found that subsequent to the internal appeal the employee was not a dismissed employee. It found that there was a contract of employment between the appellant and the respondent when the appellant would not allow the respondent to resume his duties. However, in its judgement granting leave to appeal the Court a quo referred to section 90 (2) (b) of the Act and indicated that it might have been wrong in finding that the employee had not dismissed. It reads as follows: "if the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work." In my opinion, section 90 (2) (b) applies only where there is a dispute about an alleged unfair dismissal. As has been noted before, there has been no alleged unfair dismissal dispute in this case. The concerns of the Court a quo is granting leave to appeal are not justified.

[11] In relation to the question of whether or not the employee had been dismissed, the employer submitted that on the papers there was a material dispute of fact whether the employee was a dismissed employee when it did not allow him to resume his duties. The employer submitted that, on the basis of **Plascon Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634E-G, the Court a quo should have decided the matter on the basis of its version as the respondent in those proceedings as because there was no request for the matter to be referred to oral evidence. The employer submitted that the Court a quo erred in this regard. Although the employer alleges that the employee had been dismissed, it is clear from the papers that the only time he was dismissed was on 5 April, 2002. This decision was reversed and set aside by Advocate Mokhari. There is no allegation that he was

dismissed again after Advocate Mokhari's decision. The Court *a quo* found that, as the dismissal had been set aside during the internal appeal by Advocate Mokhari, there was no valid dismissal of any force and effect and, therefore, the employee was entitled to the relief he sought. The dismissal was clearly reversed by the chairperson of the appeal tribunal.

[12] It is clear from the employer's letter of the 9th July 2002 to the employee that the employer accepted that its decision to dismiss the employee had been reversed by Advocate Mkhari. It would render nugatory the established practice of employees having a right to take a decision to dismiss to an internal or "in-house" or "domestic" appeal tribunal, if Advocate Mokhari's unequivocal decision to set aside the dismissal could be ignored. As noted above, there has been no allegation that the employee was dismissed again after Advocate Mokhari's decision. There was no genuine dispute of fact as to whether or not the employee had been validly dismissed. (See the **Plascon Evans** case at 634IC.) Accordingly the Court *a quo* did not err in finding that the employee did not have the status of a dismissed employee.

[13] The requirements for a final interdict were allegedly not satisfied

In the leading case on this issue, **Setlogelo v Setlogelo** 1914 AD

221 at 227, Innes JA, as he then was, said: “The requisites for the right to claim an interdict are well known: a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.” The employee’s dismissal had been set aside in an internal appeal. He therefore remained in employment. He tendered his services. He had a clear right to be paid his salary. The employer was clearly in breach of this right and on a continuing basis. I do not think it would be a satisfactory remedy for the employee to wait until he had proven a claim for damages for non-payment of salary. In my opinion, the requirements for a final interdict were indeed satisfied.

[14] There is no reason why costs should not follow the result.

[15] The appeal is dismissed with costs.

N.P. WILLIS

JUDGE OF APPEAL

I agree.

R. M. M. ZONDO

JUDGE PRESIDENT

I agree.

C. N. JAFTA
ACTING JUDGE OF APPEAL

Counsel for Appellant: *G. A. Fourie*

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Date of hearing: 18th May, 2004

Date of Judgment: 9th July, 2004