



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable

CASE NO: JS 844/11

In the matter between:

MBHELE MUSAWENKOSI

APPLICANT

(Respondent *a quo*)

And

SOUTH AFRICAN BANK NOTE

COMPANY (PTY) LTD

RESPONDENT

(Applicant *a quo*)

Heard: 14 March 2013

Judgment delivered: 15 March 2013

JUDGMENT

VAN NIEKERK J

- [1] Before the court are a number of interlocutory applications, the primary application being an application to strike out a number of averments contained in the respondent's statement of case filed on 27 October 2011. The applicant has applied, in so far as it is necessary, for condonation for the late filing of the application to strike out. The respondent opposes that application, and has filed an application in terms of Rule 30A of the Uniform Rules of Court for an order to the effect that the applicant should withdraw his application to strike out.
- [2] The background facts material to these proceedings are that the applicant was dismissed after a disciplinary enquiry conducted in December 2010. The applicant disputed the fairness of his dismissal, and in terms of a ruling made under s 191(6) of the Labour Relations Act, 66 of 1995 (the LRA), the dispute has been referred to this court for determination. In the statement of case filed by the respondent (the substantive proceedings, unusually, were initiated by the respondent), reference is made to forensic reports prepared by Ernst and Young. The preamble to paragraph 67 of the statement of case states "The investigation revealed the following..." and proceeds to describe, in four subparagraphs, more precisely the results of the investigation. The preamble to paragraph 70 of the statement of claim states "The allegations against the respondent stemmed from the findings of the investigation. However, the following issues are also relevant to these proceedings..." In nine subparagraphs, the respondent proceeds to describe issues that arose during the applicant's employment and which it contends are the basis for the allegations of misconduct made against him.
- [3] The applicant contends that certain of the averments made are frivolous, vexatious and irrelevant because the respondent did not pursue charges of misconduct in relation to the matters that form the subject matter of the paragraphs concerned, or because the chairperson of the disciplinary hearing did not deal with them, or find him guilty of that misconduct.

- [4] Reduced to its essence, the applicant's complaint is that any averments of misconduct that fall outside of the scope of the chairperson's adverse findings are not relevant to the pending trial.
- [5] Condonation for the late filing of the strike out application was sought in the answering affidavit to the Rule 30A application. The strike-out application is brought in terms of Rule 23(2) of the Uniform Rules, read with Rule 11 of the Rules of this court. The application was lodged on 15 August 2012, almost ten months after the respondent's statement of case was filed, and almost eight months after the applicant's response to the statement of claim was filed. Rule 23 (2) requires that an application to strike out be brought 'within the period allowed for any subsequent pleading'. The respondent contends that condonation ought to be refused, since it is *inter alia* sought after the fact in an attempt to purge an irregular step, and because no justifiable basis has been established for condoning the applicant's failure to comply with the time-period within which strike-out applications must be brought.
- [6] Although the issue of condonation was dealt with at some length in the applicant's heads of argument, at the hearing of the application Mr. Halgryn SC, who appeared for the applicant, contended that it was not necessary for the applicant to seek condonation, and that the applicant remained entitled to seek to strike out the paragraphs concerned at any stage. He equated the relief sought by the applicant to that which applies in the case of an exception, and submitted that despite the prescribed time limit, there was no bar to the applicant raising his objections either at this stage, or indeed at the trial.
- [7] In my view, the present application can be disposed of on the question of relevance. Adv. Gauntlett SC, who appeared for the respondent, submitted that even if at trial, the respondent was precluded from the traversing factual material that is the subject of the impugned paragraphs for the purposes of discharging its onus to establish acts of misconduct on the part of the applicant, they were relevant in relation to the question of sanction, and in particular, to the appropriateness of dismissal as a sanction for any misconduct established.

- [8] The applicable approach in this regard is that established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines & others* 2008 (2) BCLR 158 (CC). Navsa AJ said the following:

[78] In approaching the dismissal dispute impartially a Commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The Commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employees challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employees conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long service record. This is not an exhaustive list.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

- [4] What this requires is that the commissioner takes seriously the reason for the employer establishing any rule that might have been transgressed, and the reason for prescribing the penalty of dismissal for a breach of that rule. The commissioner must seek to understand the reason for the rule and its importance and significance. The commissioner is further required to undertake a balanced and equitable assessment of all of the relevant factors, remaining impartial throughout and not elevating the interests of one party over the other.

- [//] Given the s 191 (6) ruling, this is value judgment that this court will be required to exercise in due course. Issues of trust and confidence ordinarily assume a degree of significance and form an integral element of the assessment that must necessarily be performed. In a case such as the present, where the applicant is employed as a senior executive (indeed, he

was the respondent's chief executive officer) the outcome of the forensic audits, any conduct that the respondent may consider to have been indicated and which might serve to compromise considerations of trust and confidence, will almost inevitably be relevant to the determination of an appropriate sanction for any misconduct found to have been established.

[//] In these circumstances, it is not necessary for me to decide whether any application for condonation for the late filing of the strike out application is necessary, nor is it necessary for me to decide whether for the purposes of establishing any act of misconduct for the purposes of justifying the substantive fairness of the applicant's dismissal, the respondent is necessarily bound by the parameters of the chairperson's recommendation. It is also not necessary for me to make any ruling in the Rule 30 A application.

[//] In relation to costs, there is no reason why costs should not follow the result. Both parties engaged senior counsel, and in my view, the costs of two counsel are warranted. For these reasons, I make the following order:

1. The application to strike out is dismissed with costs, such costs to include the engagement of two counsel.

Andre van Niekerk
Judge of the Labour Court

Appearances

For the applicant: Adv. L Halgryn SC, with him Adv. F Venter, instructed by Sharusha Moodley Attorneys

For the respondent: Adv. J Gauntlett SC, with him Adv. F Pelser, instructed by Werksmans Inc

