



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2727/13

MOLOKO ANDREW NCUBE

Applicant

and

MUSINA MUNICIPALITY - COUNCIL

First Respondent

JOHNSON MATSHIVHA – MUNICIPAL MANAGER

Second Respondent

MIKE MUKOMA

Third Respondent

ROBERT TAKALANI RAMBUDA

Fourth Respondent

PEDRON NNDWA

Fifth Respondent

RIKA LE ROUX

Sixth Respondent

Decided: 15 July 2015 (in chambers)

JUDGMENT – LEAVE TO APPEAL

SNIDER, AJ

- [1] Application for leave to appeal has been made by the applicant in this matter on a variety of grounds.
- [2] The applicant asserts that I treated the review application, which was based on the principle of legality, as if it was a review based on section 145 of the Labour Relations Act (“the LRA”)¹ or in terms of the Promotion of Administrative Justice Act² where, on the appellant’s assertion, I should have had reference to and relied on the Constitutional Court decision in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* (CCT 10/13).³ The applicant refers to paragraph [16] of my judgment in this regard. In that paragraph I made reference to *Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services*.⁴
- [3] I further referred, in footnote 8, to the decision in *Pharmaceutical Manufacturers Association of South African: in re: Ex Parte Application of the President of the Republic of South Africa*⁵ and referred therein specifically to the relevant *dicta* in that case.⁶ In *Khumalo (supra)* the Constitutional Court deals with the issue as follow –

“[28] To me, the true nature of the application is one for judicial review under the principle of legality, sought in terms of s 158(1)(h). The principle of legality is applicable to all exercises of public power and not only to ‘administrative action’ as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. Mr Khumalo’s promotion is argued to be unlawful because of an alleged failure to comply with s 11 of the PSA. . .”Skweyiya J giving the unanimous judgment of the constitutional court in *Khumalo (supra)* refers, with approval, to *Pharmaceutical Manufacturers (supra)* with particular reference to paragraphs 84 to 86 thereof on page 708. It will be noted, upon caparison, that the principles set out in *Basson (supra)*, in this regard, are the

¹ Act 66 of 1995, as amended

² Act 3 of 2000

³ [2013] ZACC

⁴ [2003] 4 BLLR 341 LC

⁵ 2002 SA 674 (CC)

⁶ See also paragraphs [89] and [90] on page 709 of the *Pharmaceutical* judgment.

same as those set out in *Khumalo (supra)*. Accordingly there is no merit in this first ground of appeal.

[4] *Pharmaceutical (supra)* was specifically referred to, with approval, in *Khumalo (supra)*.⁷

[5] It is clear then from this brief consideration of the jurisprudence dealt with in the judgment that the correct test was applied, proper regard was had to the principles surrounding legality, and accordingly this ground of appeal must fail.

[6] The applicant seeks to challenge my finding that the applicant had available to him the route of referring his dispute to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) as an unfair labour practice.

[7] I am bewildered by this ground of appeal. Although I did deal with this issue and it is clearly an aspect which could be held against the applicant, I did not do so, and considered the matter in full. Accordingly this cannot conceivably constitute a ground of appeal.

[8] There is a theme, throughout the application for leave to appeal, to the effect that the failure on the part of the first to fourth respondents to deliver answering affidavits should strengthen the applicant’s case and weaken their own. Whilst this may be the case, it is not necessarily so, and not the case in this matter.

[9] There is also a suggestion at paragraph 1.3 of the application for leave to appeal that I went “*all out to defer*” to the first and second respondent’s decision. I reject this contention; it is without foundation or substance.

[10] The general principle, which must necessarily be of universal application, is that an applicant has to set out a proper case in his or her founding affidavit for the

⁷ Paragraph [28] of *Khumalo*, starting on page 622.

relief which is sought. It is necessarily open to the Court to consider and scrutinise the application to determine if such a case has been made out.⁸ Accordingly, even if I regard this application as being entirely unopposed, it is still incumbent upon the applicant to make out a case for the relief sought. I found that he failed to do so. Accordingly this ground of appeal, which is repeated several times in the application for leave to appeal, must fail.

[11] I dealt, extensively, in the judgment, with the issues surrounding the fifth respondent's evidence. There is no need for me to embroider further on the issue in this judgment. There is no ground for appeal made out in this regard. I refer to paragraph [19] of the judgment starting at page 5.

[12] The fact that the applicant must make out a case in his founding affidavits and that the relevant respondents are not obliged to deliver answering affidavits does not impact on the rules of evidence relating to the matters dealt with in the paragraph referred to above. Accordingly this does not constitute a ground of appeal.

[13] With reference to *Basson (supra)*, it is stated in the application for leave to appeal, that the judgment in that case referred to letters and internal memos. This is irrelevant. Clearly Ndlovu AJ must have been satisfied that the relevant material was evidence which was properly before him. I was not. Similarly this ground of appeal cannot succeed.

[14] As set out above I dealt with the relevant letter extensively. I considered the contents of the letter and whether they would support the applicant's contentions. They do not. I adopted a belt and braces approach in determining not only that the evidence was not relevant but that, in any event, it was not admissible. No reason was advanced as to why there was no confirmatory

⁸ *Top Security (Pty) Ltd v CCMA* (2012) 33 ILJ 992 (LC) per the judgment of Molahlehi J [23] it is trite that the duty of the court to scrutinise an award for reasonableness remains even unopposed review applications including determining the presence of the defects envisaged in section 145 of the LRA. The test for determining the reasonableness or otherwise of an arbitration award is set out in ... This is an example of the recognition of the said principle in the labour court.

affidavit. No store could be placed by this letter.

[15] Allegations are made around the increase in the amount of salary in respect of the fourth respondent. I have found that there is nothing, in isolation, and without more evidence, to indicate that this was in any way problematic. The conduct surrounding the training of the fourth respondent is similarly of no relevance and cannot found a ground of appeal.

[16] The contents of paragraphs 7.1 and 7.2 of the affidavit in the review application are purely legal and I did not find that the first and second respondent's, on the facts, read in conjunction with the relevant jurisprudence, including *Basson*, *Khumalo* and *Pharmaceutical Manufacturers (supra)* had conducted themselves in a way which rendered their conduct and decisions reviewable. I deal with these matters comprehensively in the judgment. Again the fact that the allegations went unanswered is not relevant.

[17] To extrapolate from the judgment that there is somehow a finding that the third and fourth respondent's appointments were lawful is an unwarranted extrapolation. The focus and meaning of my judgment in this matter is nothing more or less than that the applicant failed to make out of case for the review which he sought. Similarly this does not constitute a ground for appeal.

[18] My comment that the application was of an extremely technical nature is clearly *obiter* and an allusion to the application focusing on the technical aspects and not providing a factual basis for a cause of action in respect of the relief sought by the applicant. Similarly this is not a ground for appeal.

[19] The decision in *Basson (supra)* clearly deals with lawfulness, and that decisions must not be arbitrary or capricious. "Arbitrariness" and "capriciousness" are clearly akin to antonyms of "rationality" and thus there is little to distinguish between *Basson*, *Khumalo* and the other decisions referred to in this regard above. As set out above I referred to *Pharmaceutical Manufacturers (supra)* in

my judgment which is cited with approval in *Khumalo (supra)*.

[20] In relation to whether the applicant qualified for the jobs, again, I made no finding in this regards but simply remarked on the applicant's allegation that the fourth respondent did not have the experience for the position and nothing more. This is not a ground for appeal.

[21] Given the above, I am of the view that an appeal against my judgment in this matter would not have a reasonable prospect of success.

In the premises I make the following order –

- I. The application for leave to appeal is dismissed; and
- II. There is no order as to costs.

Snider, AJ

Acting Judge of the Labour Court of South Africa