



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT PORT ELIZABETH**

Case no: PR 105/14

In the matter between:

MPUMULELO McGLORY LANDU

Applicant

and

**PUBLIC HEALTH AND SOCIAL
DEVELOPMENT SECTORAL
BARGAINING COUNCIL**

First Respondent

PHUMULELE DHLODHLO N.O

Second Respondent

**MEC: DEPARTMENT OF HEALTH,
EASTERN CAPE**

Third Respondent

**SUPERINTENDENT GENERAL:
DEPARTMENT OF HEALTH,
EASTERN CAPE**

Fourth Respondent

Heard: 03 November 2016

Delivered: 04 November 2016

Summary: (Review – jurisdictional ruling – objective test – no arbitrable unfair dismissal claim)

JUDGMENT

LAGRANGE J

Introduction

- [1] On 28 May 2007, the applicant and the Eastern Cape Department of Health settled an alleged unfair dismissal dispute on the basis that the applicant was reinstated retrospectively to 1 February 2007 and would report for work on 1 June 2007. The applicant's service had been terminated because his employer had discovered that he had previously been employed by another government Department and received a severance package.
- [2] The applicant's dismissal in 2007 had been based on chapter 1 part VII B. 3.1(a) of the Public Service Regulations of 2001 which prohibited the executive authority of the Department from reappointing a former employee who had previously left the public service earlier on the condition that the employee would not accept or seek reappointment. The regulations were relaxed to give executive authorities the discretion to re-employ such former public service employees provided certain requirements were met. One of those conditions was that reappointment could only be made for a maximum fixed term period of three years, which could be renewed once.
- [3] On 21 April 2008, the settlement agreement in terms of which the applicant had been reinstated was made order of court. Despite the settlement agreement, the respondent Department was not content to let matters lie and instituted disciplinary proceedings against the applicant in August 2008 accusing him of misconduct for prejudicing the administration of the Department and misleading it by not declaring the severance package previously paid to him under the terms of the Public Service Act. By 20 May 2010 the applicant was told by the Department that he was

dismissed for misconduct. He appealed against decision and received the outcome of the appeal some three years later, on 28 May 2013.

- [4] The appeal outcome was curious because it did not confirm the finding that he was guilty of misconduct. Rather it stated that the MEC had decided that his service with the Department over the previous six years “...be regularised in line with amendments to the Voluntary Severance Package contained in the Public Service Regulations 2001, Reg VII B.3.2.” In accordance with this regulation, the MEC concluded that the applicant had been employed for two consecutive three-year contracts, which was the maximum period of employment permissible under the regulations. Consequently, the MEC reasoned, the applicant’s last three-year appointment had expired on 13 January 2013. The applicant was further advised that the period from the date of the letter (7 March 2013) until 30 April 2013 would serve as his notice period to avoid an abrupt ending to his services which the MEC considered would be “inhumane and dishonourable.”
- [5] The applicant referred an unfair dismissal claim to the bargaining Council (the first respondent) on 17 July 2013. However, when the matter was set down for arbitration, the arbitrator upheld a jurisdictional objection by the Department. The basis for the jurisdictional ruling was that the dispute emanated from the 2007 settlement agreement and the Labour Court alone had jurisdiction to deal with that since the settlement agreement had been made an order of court.
- [6] Although the determination of jurisdiction is an objective matter¹, the arbitrator’s reasoning is worth mentioning. The arbitrator considered that the nature of the applicants unfair dismissal claim concerned whether he had been unfairly dismissed in 2013 because it was contrary to the

¹ See at SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others (2008) 29 ILJ 2218 (LAC) on the proper test of review of jurisdictional rulings at 2230:

“[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.”

settlement agreement was made an order of court. To determine the dispute that would require him to interpret the settlement agreement. However, his powers to interpret agreements were confined to the interpretation of collective agreements only under section 24 of the LRA.

Condonation application

- [7] The review application is approximately three months late. The explanation for the delay is that the applicant initially sought to secure personal service of the court order with a view to pursuing contempt proceedings, correspondence with the respondents to determine the appropriate forum for the dispute and the need to take counsel's advice. The applicant claims he was faced with a quandary because the Department to be both claiming that the settlement agreement had been complied with but maintained that the dispute concerned the interpretation of that agreement. The respondents are not opposing the application and accordingly do not appear to complain of any prejudice occasioned by the delay. In the circumstances, it seems a balance of convenience favours the court dealing with the merits of the application.

Grounds of review

- [8] The applicant contends that the ruling was wrong because the dismissal dispute did not emanate from the settlement agreement and the court order. The applicant argues that the arbitrator should have realised that the termination of his employment in July 2013 was the dismissal he was required to determine the fairness of.
- [9] In his heads of argument submitted to the arbitrator, the applicant agreed that he has the option of seeking to enforce the court order by way of contempt proceedings. However he contended that the arbitrator still had jurisdiction to determine whether his dismissal was both unfair and unlawful and the settlement agreement was merely one of the matters incidental to that issue. Moreover the settlement agreement did not require any interpretation. Another ground he intended to rely on in his unfair dismissal dispute was to challenge the entitlement of the Department to rectify its previous actions by unilaterally imposing the two fixed term

contracts. Nowhere in his submissions does the applicant indicate whether he contends his dismissal was an unfair dismissal on grounds of misconduct, incapacity or operational reasons or for an unknown reason. *Mr Grobler*, who appeared for the applicant, argued that it was not necessary for the applicant to address in the heads submitted to the arbitrator which category of dismissal he was relying on because the submissions were made to address the specific jurisdictional point raised by the arbitrator relating to the interpretation of the settlement agreement. The nature of the dismissal could be elaborated on in due course when the matter was referred back to arbitration to determine the fairness of the dismissal.

- [10] In his referral form, the applicant also acknowledged that even though he had been dismissed after a disciplinary hearing, he stated that: "I appealed to the MEC who confirmed my dismissal on different grounds". In identifying the reason for his dismissal on the referral form he ticked 'Misconduct' and 'Other'. In elaborating on 'Other' he made reference to Regulation VII B.3.2.
- [11] Everything about the applicant's claim tends to point towards a claim that is based on the unlawfulness of the employer's action in terminating his services on account of the alleged effect of the provisions of the public service regulations, whether or not the settlement agreement which was made an order of court is the decisive factor. I am unaware of any authority that a bargaining Council or the CCMA can determine the substantive or procedural fairness of a dismissal on grounds other than those listed in section 191 (5) or 191 (12) of the LRA and it is plain that the applicant realized that he was not dismissed for misconduct on 28 May 2013. It is also clear he does not rely on dismissal for incapacity or operational reasons.
- [12] In the circumstances I am satisfied that the dismissal dispute the applicant referred to the bargaining council is not one that could be adjudicated by way of arbitration under the ordinary unfair dismissal jurisdiction of the abovementioned provisions of the LRA. There would be little purpose

therefore in referring the dispute back to arbitration on a completely speculative basis that an unfair dismissal dispute for misconduct, operational reasons or incapacity might yet be discovered, when it has not been clearly articulated to date.

Order

[13] The review application is dismissed.

[14] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

W Grobler instructed by
Chris Unwin Attorneys

THIRD & FOURTH RESPONDENTS:

P Kroon, SC assisted by L
Gagiano instructed by the
State Attorney

Labour Court