



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 33/13

In the matter between:

KATISHI JOB MAILE

Applicant

and

**DEPARTMENT OF CORRECTIONAL
SERVICES**

Respondent

Heard: 22 March 2017

Delivered: 24 March 2017

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

- [1] The applicant, a Correctional Services Officer, was dismissed on account of allegations of misconduct pertaining to theft. He had lodged an internal appeal, and prior to the appeal process commencing, he was sent to jail in July 2004 to serve a six-year imprisonment sentence. He had served about two years of his jail sentence and was released on parole.

- [2] About more than six years after his release, he then approached this Court in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act¹ (the BCEA), to seek payment of his salary with effect from July 2004 until 17 January 2013 when he lodged this claim. The claim is opposed by the respondent.
- [3] The following background material is common cause;
- 3.1 The applicant earned a monthly salary equivalent to R10 000.00;
 - 3.2 On 26 November 2003, the applicant was arrested for theft of scrap metal and was released on bail the following day on condition that he did not enter the premises of the respondent. The suspension followed upon allegations that the applicant had *inter alia*, committed theft by stealing 42134 kg of stainless steel to the value of R176 964.00 from the respondent. Two other charges pertained to similar transgressions allegedly committed between 2001 and 2003 at the respondent's Zonderwater premises;
 - 3.3 On 23 December 2003, the applicant was issued with a letter of suspension (with pay). A disciplinary enquiry was held in the absence of the applicant on 18 March 2004, and on 02 July 2004, he was advised of the decision to terminate his services;
 - 3.4 The applicant lodged an internal appeal on 5 July 2004. On 9 July 2004, the applicant following his criminal conviction, was handed a six year jail sentence. He was released on parole on 13 September 2006 after serving two years and two months of his original sentence.
 - 3.5 The statement of claim was filed on 17 January 2013, some six years after the applicant was released from jail
- [4] No oral evidence was led in these trial proceedings in view of the common cause facts and the narrow issues for determination which are;
- a) Whether the applicant was still an employee of the respondent by virtue of his appeal against the dismissal; and
 - b) Whether the applicant was entitled to remuneration as a result of having appealed against his dismissal.

¹ Act 75 of 1997.

The Arguments and Evaluation:

[5] Central to the determination of the issues for consideration are the provisions of 'Resolution of the Departmental Bargaining Council: Department of Correctional Services', which entails the Disciplinary Code, the Disciplinary Procedure, the Disciplinary Procedure Manual, and the Suspension Policy. (Resolution 1 of 2001).

[6] Appeals are dealt with in terms of clause 7.16 of the Disciplinary Code and Procedure. The applicant relied upon clause 7.16.2.1 for his contentions that he was still an employee. This clause provides that;

'If an employee lodges an appeal following his dismissal, he remains in service until the outcome of the appeal hearing'

[7] The above clause should be read together with clause 7.16.2 of the Disciplinary Procedure manual, which provide that;

"7.16.2.2 The appellant must file a written intention to appeal within five (5) working days after the disciplinary hearing;

7.16.2.3 The employer must provide verbatim (word for word) minutes of the disciplinary hearing to the appellant/representative within ten (10) working days from the receipt of intention to appeal

7.16.2.4 After having received the verbatim minutes within five (5) working days, the employee must file his formal application for appeal at the Head Personnel in the office of the Area Manager on the prescribed form (Annexure E), containing the grounds of appeal. Late lodging of an appeal could be condoned if good reasons are given;

7.16.2.5 Within five (5) working days from having received the application for appeal, the employer shall furnish the appellant with a notice informing him of the appeal stating the date, time and venue of the appeal hearing (Annexure F)"

[8] An important consideration with the appeal procedures is that a formal appeal hearing is then convened, where the appellant or his/her representative is

required to *inter alia*, confirm the grounds of appeal, and are afforded an opportunity to motivate the grounds of appeal. In dismissal cases, the chairperson of the appeal is required to re-convene the appeal to present his or her findings.

- [9] Central to the applicant's case was that the appeal was lodged on time, and that the respondent had not made any effort to comply with the appeal procedures. The respondent's contention on the other hand was that the time-line of events was such that it could not have complied. In this regard, it was argued that the dismissal took place on the Friday of 2 July 2004. The appeal was then lodged on the Monday of 5 July 2004, and on the Friday of 9 July 2004, the applicant started his jail sentence.
- [10] In view of the time line of events, it is apparent that even if the respondent wished to comply with the provisions of clause 7.16.2.3, as at the date that the applicant started his jail sentence, the 10 working days within which it was required to provide a verbatim record had not expired. The parties were in agreement that intervening circumstances overtook the appeal proceedings, and as a result, that process could not have taken place.
- [11] The contention however made on behalf of the applicant that since he served time in the respondent's facilities, nothing prevented it from convening those appeal proceedings where the applicant was incarcerated. This contention in my view is misplaced. The fact that the applicant was a correctional service official and happened to have served time in the respondent's correctional facilities does not in my view give him special privileges. There was no requirement that the respondent had to convene the appeal proceedings at its correctional facilities where the applicant was incarcerated. This is so in that any employment relationship between an employer and an employee invariably becomes suspended upon that employee's incarceration.
- [12] The applicant's reliance on clause 7.16.2.1 for the contention that he was still an employee and is therefore entitled to his remuneration is equally misplaced. In *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation*

and *Arbitration and Others*², it was correctly held that that imprisonment suspends the obligation of an employer to pay the employee a salary and for the period of imprisonment, an employee is not entitled to remuneration. This is so in that an employee, by virtue of his or her imprisonment is unable to perform in terms of his contractual obligations. Equally, an employer cannot in law or logic be expected to pay an employee who is serving time in jail, especially where the theft, as evinced from the conviction in this case, was against the employer.

- [13] The question whether the applicant was still an employee on the basis that he had lodged an appeal prior to his incarceration further needs to be answered within the context of what constitutes an 'employee' as defined in the BCEA³; the Labour Relations Act⁴, or the Employment Equity Act⁵. Based on the definitions therein, the applicant by virtue of his imprisonment could not for all intents and purposes, have been classified as an employee. This is so in that he could neither render his services nor receive any form of remuneration from the employer.
- [14] It therefore follows from the above that an employee for the purposes of clause 7.16.2.1 cannot be defined beyond the ability of the respondent to complete the appeal process as contended on behalf of the applicant. Once there are intervening circumstances after a dismissal, that prevent an appeal process being completed for the purposes of clause 7.16.2.1, the employee remains dismissed for all intents and purposes.
- [15] A further hurdle faced by the applicant in this case is that upon his release in 2006, his immediate action was to approach the respondent with a view of securing his pension benefits. Not once, until the lodging of this claim, did he confront the respondent to claim that he was an employee, and that it should

² (2005) 26 ILJ 1519 (LC). See also *Laminate Profile CC v Mampai and Others* (2007) 28 ILJ 1092 LC

³ Act No. 75 of 1997

Section 1 provides that;

"employee" means -

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer.'

⁴ Act No 66 of 1995. The same definition is to be found in section 213

⁵ Act No. 55 of 1998. Section 1

convene an appeal hearing, *albeit* at that belated stage. It was only some six years after his release that it occurred to him that he might be owed some money on an incorrect or contrived interpretation of clause 7.16.2.1. This claim is ultimately misconceived and appears to be an afterthought. The applicant could not have been an employee as defined by virtue of his appeal against the dismissal prior to his imprisonment, and he is therefore not entitled to any remuneration as a result of having appealed against his dismissal prior to his imprisonment. The applicant's claim has no merit and thus ought to be dismissed.

[16] I have further had regard to the issue of costs which neither of the parties had pursued, and I am satisfied that considerations of law and fairness militates against any cost order being granted.

[17] In the premises, the following order is made:

Order:

1. The Applicant's claim as brought in terms of the provisions of section 77 (3) of the Basic Conditions of employment is dismissed.
2. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Advocate RG Masipa

Instructed by:

HD Rammutla Attorneys

For the Respondent:

Adv. MB Matlejoane

Instructed by:

The State Attorney, Pretoria

LABOUR COURT