



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: J 1124/2017

In the matter between:

JONES BONAKELE GXOLO

Applicant

and

HARMONY GOLD MINE (PTY) LTD

Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Respondent

Heard: 24 October 2017

Delivered: 27 October 2017

Summary: (Application – declaratory order – unlawful termination of contract
– no contractual term established – no basis for declaratory order)

JUDGMENT

LAGRANGE J

Background

- [1] This is an unopposed application to declare disciplinary processes and all subsequent proceedings under the CCMA unlawful and *void ab initio*. The consequential relief sought is retrospective employment to the date of dismissal. The CCMA has no legal interest in the matter and ought not to have been cited as a respondent.

The claim

- [2] The applicant was dismissed in 2010 and unsuccessfully tried to review an arbitration award which presumably upheld the fairness of his dismissal. The applicant did not furnish the details of that award to the court. Approximately 7 years after his dismissal, he has applied for a declaratory order in the form mentioned. In essence, the basis for alleging that his dismissal was unlawful is that, he was dismissed following a disciplinary process which was invalid and unlawful from its inception. He bases this claim on a submission that the charge sheet does not disclose an act of misconduct and that he was found guilty on a charge different to the one he was called upon to plead to. He was charged with fraudulently claiming overtime pay he was not entitled to because in October and November 2010, because it was neither authorised nor worked by him.
- [3] The applicant contends that it was only at the disciplinary enquiry itself that the documents purportedly authorising his overtime were produced and he claims that, what appears to be his signature on the forms is not in fact his own. The applicant submits claim that essential allegations that he had falsified the overtime forms was not made. He further claims that the amount of overtime he allegedly illegitimately claimed was not specified in charge sheet. While I agree that the charge sheet might have been better set out, it is sufficiently clear that he was accused of fraudulently claiming for overtime not due to him and that it related to overtime claimed in the months of October and November. The charge sheet indicated those overtime payments which the employer considered legitimate and by implication any other payments received were not.
- [4] In essence, what the applicant is seeking is the setting aside of his dismissal as unlawful because of the poor formulation of the charge sheet.

As the employer is a private company, the basis for a declaratory order setting aside the dismissal must be found in contract. In so far as his claim is based on a defect in the disciplinary procedure, the applicant has failed to identify why non-compliance with the disciplinary procedure would amount to a material breach of his employment contract. Instead, he simply asserts that the supposedly defective charges rendered his dismissal and all the antecedent disciplinary processes unlawful, which must not be confused with a claim that his dismissal is unfair.

- [5] Applicant's attorney, *Mr Mogotsi*, who came on record belatedly argued strenuously that the applicants entitlement to a declarator fell squarely within the principles enunciated in the case of ***Makhanya v University of Zululand***¹, save that in that case the legal validity of charges against Prof Makhanya were not in issue. In that matter, the plaintiff had claimed that the respondent university had unlawfully terminated his contract of employment and the issue which arose for the SCA was whether he was barred from pursuing that claim by virtue of having referred an unfair dismissal claim to arbitration which had been unsuccessful. The SCA reaffirmed the principle that a claim for breach of contract is a distinct claim which is not extinguished by a concurrent unfair dismissal claim.² the applicant also cited the case of ***Mokopanele en Andere V Administrateur, Oranje Vrystaat, en Andere***.³ That case concerned whether employees could be dismissed summarily without the right to a hearing in terms of clause 5(2) of Public Service Staff Code instituted in terms of s 36 of Public Service Act 111 of 1984. As such, the case was not concerned with the validity of a dismissal in the context of a private employment relationship but was concerned with the obligations of the state as an employer.
- [6] In the context of a claim of an employee who cannot assert administrative law rights against the employer but is limited to exercising their statutory or other common law rights, the SCA case of ***SA Maritime Safety Authority***

¹ 2010 (1) SA 62 (SCA)

² At paras [35] to [47].

³ 1989 (1) SA 434 (O)

v McKenzie⁴ is more apposite. In that matter, the plaintiff had also prosecuted a claim for unfair dismissal which had been settled with a payment of compensation by the employer. He then instituted a claim for contractual damages on the basis that there was 'an explicit, alternatively implied, further alternatively tacit term ... that the employment contract would not be terminated ... without just cause'. He alleged that this clause had been breached and that he was entitled to claim damages calculated on the basis that he would otherwise have continued working for his employer until his retirement. The court in *McKenzie* held that, *inter alia*, that "an employee is entitled to a pre-dismissal hearing where that right is conferred by a statute or by an employment contract. The right arises contractually where the contract provides for it either expressly or tacitly".⁵

The SCA also dismissed the suggestion that the common law employment contract ought to be developed by importing rights flowing from the constitutional right to fair labour practices into employment contracts.⁶ In this application, the applicant did not attempt to explain where the right not to be dismissed on incorrect charges arose. To establish such a right in the context of an employment relationship where the employer is not an organ of state, he ought at the very least to have alleged and provided a basis for substantiating that his employment was subject to an express or tacit term to that effect, the breach of which entitled him to a declaration that his employment had been unlawfully terminated.

- [7] There is one other issue that must be addressed. Even if the applicant had been able to establish the existence of such a term in his contract and that the term had been breached and that such a term was a material term entitling him to invoke the contractual remedies for a fundamental breach, it is highly unlikely the court would grant him the particular relief he seeks. It is trite that the alternative remedies for a fundamental breach of contract are that, the plaintiff may accept the repudiatory breach and sue for damages, or may call upon the party in breach to remedy the breach upon tender of counter-performance by the plaintiff.

⁴ 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA)

⁵ At 550, para [43]

⁶ At 553-4, paras [55] to [57].

- [8] In this instance, the applicant does not seek damages. He has applied for a declaratory order and, consequential upon such an order, full retrospective re-employment to the date of his dismissal. Such a remedy would not be available to him even if he had established the employer had committed a material breach of contract for allegedly dismissing him on an ill-conceived or unproven charge of misconduct. The reason for this is twofold. Firstly, there is no evidence that the applicant ever tendered his services (the counter performance) and put the employer on terms to reinstate him, even after his failed attempt to secure reinstatement through his unfair dismissal claim. Furthermore, in effect the applicant is effectively claiming specific performance of his employment contract a number of years after his termination. An order of specific performance is within the discretion of the court to grant and it is highly improbable under these circumstances that the court would consider such relief appropriate after such an elapse of time, even if he had belatedly tendered his services.
- [9] In conclusion, I am satisfied that the applicant has failed to establish a legal basis for his claim. Fortunately for the applicant, the application was unopposed so he will not be burdened by a cost order as well.

Order

The application is dismissed with no order as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

M B Mogotsi of M B Mogotsi

Attorneys

RESPONDENT:

No appearance

LABOUR COURT