



Of interest to other judges

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

Case No: J 2747/17

In the matter between:

LESLEY KOLOBE

Applicant

and

**MEMBER OF THE EXECUTIVE
COUNCIL, DEPARTMENT OF
HEALTH: NORTH WEST PROVINCE**

First Respondent

**DEPARTMENT OF HEALTH:
NORTH WEST PROVINCE**

Second Respondent

Heard: 07 November 2017

Delivered: 09 November 2017

Summary: (Clear and material breach of right to an inquiry in which the chairperson determines the sanction – dismissal ultra vires the PSA – exceptional circumstances warranting urgent relief)

JUDGMENT

LAGRANGE J

Background

- [1] This is an urgent application to declare the applicant's dismissal unlawful and *void ab initio*.
- [2] The applicant claims his dismissal by the first respondent, the MEC for Health in the Northwest Province contravened his employment contract and is unlawful and contrary to the principles of fairness. In effect, the applicant is claiming specific performance of his employment contract. It is not appropriate for the court to consider his claim of unfairness as a separate ground in these proceedings as he has alternative remedies to pursue that claim.
- [3] In early December 2016, the applicant was accused of fraud or, alternatively, attempted fraud.
- [4] The applicant made representations why he believed the allegations were unfair, but was suspended on 8 February 2017. He also complains about the extension of his suspension beyond the 60 day period which he claims was contrary to the Public Service Disciplinary Code. That was apparently also the subject matter of a separate referral as an unfair labour practice, but was withdrawn at the date of the hearing to allow the respondent to finalise its investigation that it claimed was nearly complete.
- [5] However, the enquiry did not resume and on 22 September 2017, he simply received a letter asking him to make written representations why he should not be dismissed for misconduct in terms of section 17 (2) (d) of the Public Service Act 103 of 1994. The applicant made representations on 2 October and subsequently followed up on what was happening including trying to find out what happened regarding the previous intimations he had received that the investigation of his case was nearly concluded. However, on 13 October, he received a peremptory letter notifying him that he was dismissed. He was also advised that if he was unhappy with the decision he should go directly to the relevant bargaining Council and not lodge an internal appeal.
- [6] He launched these proceedings 11 days later. I am satisfied he acted with reasonable expedition in instituting proceedings.

[7] The respondent contends that it complied with the requirements of *audi alterem partem* by giving him a chance to make written representations in answer to the accusations against him and that this satisfied the requirements of a procedurally fair enquiry under the Labour Relations Act, 66 of 1995 ('the LRA'). It is clear that the respondents simply decided to short circuit the disciplinary enquiry procedure they had instituted in order to arrive at a quick resolution. This occurred in circumstances where the enquiry was delayed by the respondent's own purported need to finalise its investigation.

[8] In terms of clause 3.16 of his contract of employment, the Public Service Disciplinary Code and Procedures are applicable. In addition, clause 3.18.2 of the contract stated that, *inter alia*:

"...the remainder of the service conditions are contained in the Public Service Act, 1994; Public service regulations, 1999 and Provincial Policies."

The respondents do not dispute the applicability of these provisions but simply argue that anything relating to procedural improprieties is a matter for arbitration. That is generally true as a broad principle, but if a contractually obligatory and statutory procedure is completely disregarded the court may intervene. Moreover, where a statutory body has clearly acted *ultra vires* that is an important consideration.

[9] The applicant claims that:

9.1 The PSA procedures require that a disciplinary hearing must be conducted and it is in the enquiry that a sanction is determined, if any. Section 77 (3) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') empowers the Labour Court to deal with disputes arising out of contracts of employment, which would include what is in effect an application for specific performance of a contract.

9.2 Secondly, only the chairperson of a disciplinary hearing can pronounce on sanction of dismissal in terms of section 16 B (1) of the PSA.

[10] Accordingly, he disputed the power of the MEC to dismiss him. Although the power to dismiss an employee vests in the relevant executive

authority, it must be exercised in accordance with the Labour Relations Act, 66 of 1995. More specifically, section 17(1)(b) of the PSA states that “the power to dismiss an employee on account of misconduct in terms of subsection (2) (d) shall be exercised as provided for in section 16 B(1). The last mentioned provides that the head of Department or relevant executive authority gives effect to the sanction of the chairperson of a disciplinary enquiry which is imposed on an employee found guilty of misconduct.

- [11] I am satisfied that this is a very clear case where the executive authority dismissed an employee without acting in terms of the above provisions, and accordingly acted *ultra vires* quite apart from whether he breached the employer’s contractual obligation to conduct an enquiry in compliance with the PSA. This is one of those exceptional circumstances where urgent final relief is appropriate. The fact that the applicant may have other remedies does not deprive him of the remedy to challenge action which is a clear breach of the principle of legality and an equally clear breach of his contractual entitlements. Under the circumstances, the applicant’s dismissal was unlawful and void *ab initio*.

Order

- [1] This application is dealt with as one of urgency in terms of rule 8 of the rules of the Labour Court and the applicant’s failure to comply with the ordinary rules of service and time periods is condoned.
- [2] The first respondent’s dismissal of the applicant is unlawful and *void ab initio*.
- [3] The respondents must reinstate the applicant with retrospective effect to the date of his dismissal.
- [4] The respondents must pay the applicant’s costs.

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

M Sikhakhane instructed by
Mokgara Attorneys

RESPONDENT:

H J Scholtz instructed by the
State Attorney (Mafikeng)