Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 580/18

In the matter between:

AUBREY NDINANNYI TSHIVHANDEKANO — **Applicant**

and

MINISTER OF MINERAL RESOURCES — **First Respondent**

THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES — **Second Respondent**

THE DEPARTMENT OF MINERAL RESOURCES — **Third Respondent**

Heard: 01 March 2018

Delivered: 02 March 2018

Summary: (Urgent – declaratory relief – dismissal unlawful and void ab initio)

JUDGMENT

LAGRANGE J

Background

[1] This is an urgent application seeking a declaration that the applicant's dismissal on 15 February 2018 as unlawful and void ab initio.

[2] The application was launched on 21 February for a hearing on 23 February but was postponed by agreement until 27 February. On 28 February the matter was postponed again by agreement through no fault of the parties on account of the Labour Court being without electricity because of a power cut and a failure of the backup generator, which in any event, for inexplicable reasons, provides powerful four lifts but no power to operate the courtrooms.

[3] Following a disciplinary enquiry the chairman decided on 30 January 2018 found the applicant guilty of various charges but recommended the imposition of a final written warning valid for six months. The awning warning was duly issued to him on 2 February 2018 in accordance with the outcome of the enquiry. However, on 15 February 2018 he was issued with a notice of dismissal by the director-general in terms of which the final written warning was altered to a dismissal.

[4] The applicant argues in effect, that having already been sanctioned following a disciplinary enquiry, the employer could not dismiss him without at least convening another disciplinary enquiry since the previous disciplinary proceedings had run their course and the employer was now for *functus officio* in respect of the proceedings which led to the imposition of the final written warning.

Evaluation

[5] Although the actual hearing of the matter was delayed more than once, neither counsel for the parties' prepared written heads of argument, an omission which was not helpful to the urgent court.

[6] In an application for final relief, an applicant must establish (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c)

the absence of any other satisfactory remedy.[1] In addition, the applicant must demonstrate urgency.

[7] In essence, the crisp issue is whether the employer could lawfully alter the chairperson's finding. If not, then the dismissal was unlawful and the applicant has demonstrated a clear right to relief.

[8] The application is opposed principally on grounds that this court does not have jurisdiction to hear the application and it is not urgent. The respondents do not deal with the substantive merits of the alleged unlawfulness of the applicant's dismissal.

Urgency

[9] The applicant advances a number of grounds why his application deserves immediate attention, *inter-alia*, that the dismissal was affected without giving him a disciplinary enquiry which he was contractually entitled to; that his dismissal was reported in a prominent daily newspaper and he would be able to maintain monthly obligations including payment of his children's education.

[10] In part, the question of urgency is tied up with the alternative remedy available. There is no question that in due course, if he brought an application based on the same grounds it might obtain substantial redress. However, given the pressur on the Labour Court motion roll at present it is unlikely such an application could be enrolled before October. The newspaper article cites reasons why the applicant's dismissal might have been based on improper motives relating to him issuing a non-compliance notice to a Tegeta Resources mine, which has been implicated in the 'state capture' imbroglio. To the extent that the applicant might be vindicated the end of the year, when memories of the event are likely to have faded from the public imagination, the reputational damage is unlikely to be restored at that point, and given the very clear unlawfulness of his dismissal which is discussed below, there is no reason why he should not be entitled to relief on an urgent basis.

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[1] [Setlogelo v Setlogelo 1914 AD 221 at 227; V & A Waterfront Properties (Pty) Ltd & another v Helicopter & Marine Services (Pty) Ltd & others 2006 (1) SA 252 (SCA) at para 20.]

Clear right

[11] The respondents objected to the court hearing this application on the basis that it essentially asserts the applicant's right to fair labour practices in the form of a substantively and procedurally fair dismissal. I agreed that since the Constitutional Court decision in ***Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)***[2], it is clear that the Labour Court should not entertain claims based on the invalidity of a dismissal. However, the Constitutional Court was concerned there with declarations of invalidity of dismissals based on non-compliance with the provisions of the Labour Relations Act 66 of 1995 ('the LRA'). It was not concerned with the court's exercise of its powers to determine contractual disputes under s 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') nor was it concerned with the exercise of the court's powers to "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law" as provided for in section 158 (1) (h)"

[12] The applicant points out that clause 1.1 of his employment contract specifically incorporates the provisions of the Senior Management Service ('SMS') Handbook. The SMS Handbook effectively requires an employer to convene a disciplinary enquiry in cases of alleged misconduct which may result in dismissal. It also requires the employee to be given an opportunity to make submissions in mitigation before ascension is imposed. Further, section 16 B of the Public Service Act, Proclamation Number 103 of 1994 (' the PSA') states:

> "**Discipline**-(1) subject to subsection (2), when a chairperson of a disciplinary hearing pronounces sanction respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:
>
> (h) In the case of a head of department, the relevant executive authority;
>
> (b) In the case of any other employee, the relevant head of department."

[2] (2016) 37 *ILJ* 564 (CC)

[13] The respondent had already acted upon the chairperson's recommendation and issued a final written warning, but then purported to revise its own decision. It is well established that in such cases the State as employer has the right to review its own decision in certain circumstances.[3] That does not equate to a right to simply take the matter into its own hands and reverse a decision already taken.

[14] Consequently, I am satisfied that since the employer had already imposed the sanction of a final written warning, the respondent simply did not have the power to amend that and any subsequent dismissal would , at the very least have been a fundamental breach of the applicant's clear contractual right to a disciplinary hearing in terms of his contract of employment. Consequently, the decision to dismiss the applicant was both ultra vires and in breach of his contract of employment.

Alternative remedies

[15] The applicant's claim is quite independent of his claim to challenge his dismissal as unfair in terms of the Labour Relations Act. It is not substantially equivalent relief for the rights discussed above. Moreover, the issues are particularly crisp in this case and the employer acted without the necessary power anymore when it dismissed him. There is no reason why in the circumstances he cannot insist on specific performance of a contract invalidly terminated.

Costs

[16] There was a strenuous argument made by the applicant for a punitive cost award made against the second respondent, the director-general. The claim was foreshadowed in the founding papers, though I tend to agree that probably he ought also to have been sighted in his personal capacity. Although there are indications that *mala fides* might have played a role in the attempted reversal of the original sanction of a final written warning, there is insufficient evidence in the affidavits to support such a claim. Nonetheless, the respondents ought not to have defended the matter in

[3] See **Ntshangase v MEC: Finance, KwaZulu Natal & another [2009] 12 BLLR 1170 (SCA)**

circumstances where they did not even advance a substantial defence on the merits and where the merits are so clear. Accordingly, a cost order on the higher scale is appropriate.

Order

[1] The application is heard as one of urgency and the applicant's non-compliance with the Rules of the Labour Court relating to service and time periods in terms of Rule 8 is condoned.

[2] The applicant's dismissal in terms of the letter dated 12 February 2018, annexed to the founding affidavit, is unlawful and *void ab initio* and is set aside. '

[3] The first and second respondents are directed to forthwith reinstate the applicant to the position he held prior to his dismissal and to allow him to continue with his duties and responsibilities in that capacity.

[4] The respondents are ordered to pay the costs of this application on the attorney own client scale, save for the costs of appearing on 27 February 2018.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	D Mtsweni instructed by Shandu Attorneys
RESPONDENT:	W R Mokhari SC instructed by the State Attorney.