THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR943/17

In the matter between:

STATISTICS SOUTH AFRICA **Applicant**

and

MR DIKGANG MOLEBATSI **First Respondent**

PRESIDING OFFICER: MR MZANDILE HLANJWA **Second Respondent**

Heard: **19 June 2019**

Delivered: **21 August 2019**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] Before me are two applications brought by the applicant, Statistics South Africa (Stats SA); first is the application for condonation of the delay in bringing the review application and second is the application in terms of 158(1)(h) of the Labour Relations Act[1] (the LRA), to review and set aside the sanction of one month's suspension without pay, handed down by the second respondent Mr Mzwandile Hlanjwa (Mr Hlanjwa) against the first respondent Mr Dikgang Molebatsi (Mr Molebatsi) and that it be substituted with one of dismissal. Also, Mr Molebatsi seeks condonation for the delay in filing his answering affidavit. I deal with the condonation applications in turn.

Condonation

[2] It is trite that section 158(h) of the LRA does not prescribe the time limits for bringing a review application, however, it is an accepted principle that this

[1] Act 66 of 1995 as amended.

must be done within reasonable time and six weeks has been used as a measure of such reasonableness. In the matter at hand, the delay in bringing the application is two weeks and I have considered the explanation for the delay and that is in my view, reasonable. I am, accordingly, satisfied that Stats SA has made out a case for the grant of condonation and same goes for the late filing of the answering affidavit by Mr Molebatsi. I therefore grant condonation for the late filing of the review application and the late filing of the answering affidavit. The application to review is dealt with in turn.

Failure to file the transcribed record

[3] Before proceeding with the merits of the case, I need to deal with an issue that has concerned the Court in this matter. On perusal of the court file, it became apparent that Stats SA did not file the transcribed record of the proceedings which it seeks to review. At the hearing of the matter, I raised this issue with Ms Norton who appeared for Stats SA and she submitted that the record before the Court (pleadings with attachments which include Mr Hlanjwa's reports on the verdicts in relation to the merits and the sanction) is sufficient as the facts are common cause. I disagree, for the reason that, in matters of this nature, the Court needs at the very least, a transcribed record of the proceedings to be able to appreciate the nature of proceedings before the presiding officer. This is important, not only to paint a picture of what transpired at the hearing, but to better position the Court to be able to perform its constitutional function of review[2]. Notwithstanding, in this instance, the issues are common cause between the parties and I deal with the merits from that podium.

Review

Background Facts

[4] Mr Molebatsi, is employed by the applicant as District Manager at the Springbok Office of Stats SA. He was found guilty on a charge of dishonesty in that he interfered with the recruitment process of Listers, which interference resulted in the appointment of Mr B Tshepe (Mr Tshepe) who did not meet

[2] See: *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 13 to 15.

Stats SA's requirements. The genesis of the charge is that Mr Molebatsi allegedly instructed Ms Oppel, the Acting District Office Administrator at the Springbok Office, not to contact two people who were on the list of candidates who were due to write a competency test but to instead include Mr Tshepe. According to Stats SA, Mr Molebatsi gave Ms Oppel the contact details of Mr Tshepe and one Mr Morris and arranged that Mr Tshepe write his competency test in the Stats SA's Mabopane District Office, Pretoria.

[5] Mr Molebatsi who was on annual leave and in Pretoria at that time, attended the Mabopane District Office in order to access his emails as he did not have a 3G card. Whilst in the Mabopane District Office he conducted the competency tests of about five candidates, including Mr Tshepe. He then faxed Mr Tshepe's results to the Springbok District Office. This action set in motion events that led to proceedings before this Court. According to Stats SA, this role falls within the purview of District Office Administrators.

[6] Mr Tshepe was appointed as Lister and attended training in Cape Town. According to Stats SA it was only during the training that Mr Tshepe's irregular appointed was discovered. It was alleged that the irregularity with his appointment is that it went against Stats SA's objective of employing people who were living in the Springbok Area (Mr Tshepe lived in Tshwane), and further that Mr Tshepe was not on the SAA data base, and that he had no experience in map reading.

[7] The whole incident happened in January 2014, however it was only on 10 May 2016 that Mr Molebatsi was served with a charge sheet which recorded the allegation against him as dishonestly interfering with the appointment of Mr Tshepe. This is despite the fact that Stats SA had been aware of the irregularities in the appointment of Mr Tshepe as early as January 2014. Mr Molebatsi was never suspended.

<u>The impugned verdict</u>

[8] Mr Hlanjwa's verdict on the merits was issued on 2 February 2017 and the verdict on the sanction was issued on 17 March 2017.

[9] Dealing with the issue of the sanction, Mr Hlanjwa held that there was no evidence before him to show that there was a breakdown of trust between the employer and employee which could not be repaired by other means. As such, he issued a sanction of one-month suspension without pay in terms of Regulation 1 of 2003 of the Public Service Coordinating Bargaining Council (PSCBC).

[10] Mr Hlanjwa based his findings on the Labour Appeal Court (LAC) decision in *De Beers Consolidated Mines Ltd v CCMA and Others*[3] where it was stated that:

> '[23] It is precisely because dismissal for misconduct is rooted in operational requirements and not in the need for punishment that I consider that the following dicta of Zondo AJP in *Toyota* (*supra*) must be interpreted in context. He said this:
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> > "I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted *in a particular case* as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction."
>
> I draw attention to the phrase "in a particular case". <u>The seriousness of dishonesty – i.e whether it can be stigmatised as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business</u>.
>
> [24] <u>The employees *in casu* were not dismissed in order to punish them. They were dismissed because the employer was not prepared to run the risk of employing them any longer once they had been shown to be dishonest. Long service is, of course, not entirely irrelevant. It is relevant in determining whether an employee is likely to repeat his misdemeanour</u>. An employee who has long and faithfully served his

[3] (JA68/99) [2000] ZALAC 10.

> employer has shown that he has little propensity for offending. That historical experience may persuade an employer to accept the risk of continuing to employ him now that it is known that he is not as honest as had been thought. Depending on the circumstances, long service may be a weighty consideration. But the risk factor is paramount. If, despite the *prima facie* impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and the employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed.' (Emphasis added)

[11] Mr Hlanjwa accordingly found that Stats SA's business had not been impacted negatively as Mr Tshepe's appointment was confirmed despite Stats SA's compliant that he had been recruited irregularly and his contract of employment was subsequently extended. He was of the view that Mr Tshepe was utilised to the best interests of Stats SA.

Evaluation

[12] Stats SA submitted that it has made out a case for the Court to interfere with the sanction mitted out by Mr Hlanjwa as it was irrational as Mr Molebatsi instructed his subordinates to carry out his wishes and showed no remorse. Mr Hlanjwa inexplicably found that the relationship had not been broken, so it was further argued. In this regard, Ms Norton referred to the dicta in *Hendricks v Overstrand Municipality and Another*[4], *National Commissioner of the SA Police and Another v Harri No and Others*[5], and *Ntshangase v MEC for Finance: KwaZulu-Natal and Another.*[6]

[13] On the other hand, Mr Molebatsi's attorney, Mr Hechter, submitted that the *dicta* referred to by Stats SA are distinguishable. I concur. In *Ntshangase*, the appellant employee unsuccessfully appealed against a decision of the LAC that reviewed and set aside a decision taken by the chairperson of a disciplinary enquiry into allegations of misconduct to give the appellant employee a final written warning after he was found guilty of several counts of misconduct involving allegations of wilful or negligent mismanagement of the

[4] [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC).
[5] (2011) 32 ILJ 1175 (LC).
[6] [2009] 12 BLLR 1170 (SCA); (2009) 30 ILJ 2653 (SCA).

State's finances and of abusing his authority. The allegations that were levelled against him included, *inter alia*, the unauthorised awarding of bursaries to various students amounting to approximately R1m and the unauthorised purchase by the appellant of goods exceeding R500 000 which caused the respondent employer a loss of R200 000. The Supreme Court of Appeal (SCA) held that:

> '[20] I agree that Dorkin's [chairperson's] decision, measured against the charges on which he convicted the appellant, appears to be grossly unreasonable. Given the yawning chasm in the sanction imposed by Dorkin and that which a court would have imposed, the conclusion is inescapable that Dorkin did not apply his mind properly or at all to the issue of an appropriate sanction. Manifestly, Dorkin's decision is patently unfair to the second respondent. To my mind, it fails to pass the test of rationality or reasonableness…'[7]

[14] In the present case, it would seem that Mr Hlanjwa clearly applied his mind to the prevailing circumstances. He considered the delay in charging Mr Molebatsi and the fact that Mr Tshepe's appointment did benefit Stats SA. Furthermore, not only was his appointment confirmed, but his contract of employment was extended. Stats SA's explanation for the delay proffered in its replying affidavit clearly shows that it was made aware of the transgression as early as 20 January 2014 and the investigation report was concluded on 7 July 2014. Mr Molebatsi was only charged on 10 May 2016. There is no reasonable explanation proffered for the delay of about 22 months before charging Mr Molebatsi.

[15] Mr Hlanjwa also considered the fact that Mr Molebatsi was not placed on suspension and that there was no evidence before him that showed any further indiscretions on his part. In the final analysis, he was of the view that Mr Molebatsi's misconduct was not so gross as to impact on the trust relationship. As such, the *dictum* in *Hendricks and National Commissioner of Police*[8] equally find no application.

[7] Ibid at para 20.
[8] *Supra* n 3 and 4.

[16] It is clear from the *dictum* in *De Beer*[9] that a misconduct that involves dishonesty does not automatically attract a sanction of dismissal. Tritely, each case must be adjudicated on its own particular merits. In this instance, there is no evidence that Mr Molebatsi did not hid the corrective measure or that he was incorrigible.

Conclusion

[17] Before I conclude, I need to add my voice to the chorus against the growing practice of bringing reviews of this nature before this Court. Although section 158 (1) (h) empowers this Court to review any decision taken by the State in its capacity as employer, this by no means, implies that whenever an instance occurs that the State is dissatisfied with a decision emanating from its own internal processes, the next automatic step to take is to approach this Court on review. The undue burden placed on this Court by this class of reviews is objectionable. I align myself with the sentiments of this Court in the matter of *The South African Police Services and Another v Major General Seswike N.O and Another*[10] *where the following was said:*

> '[2] The problem I have with these kind of applications is that it in essence turns the Labour Court into some kind of appeals body where it comes to disciplinary proceedings conducted against officers of the applicant. This places an undue burden on the already stretched resources of the Labour Court, and state departments such as the applicant should rather ensure that officials tasked to preside over disciplinary hearings possess the necessary competence to discharge their duties properly, instead of using this Court as some kind of a back-up plan.'

[18] This is a typical case of misuse of Court processes as back-up plan and caution should be thrown at the path of Stats SA.

[19] Having said the above, in all the circumstances, I am satisfied Mr Hlanjwa's verdict on the sanction is rational and accordingly unassailable.

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[9] *Supra* n 3.
[10] Unreported case number: JR 2395/14.

Costs

[20] The parties did not pursue the issue of costs. Nonetheless, I have considered the circumstances of this matter and do not believe that it would accord with the interest of justice to award costs.

[23] In the circumstances, I make the following order:

Order

1. The application for condonation of the late filing of the review is granted.
2. The application for condonation of the late filing of the answering affidavit is granted.
3. The application to review and set aside the sanction issued against the first respondent is dismissed.
4. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: D Norton of Mkhabela Huntley Attorneys

For the First Respondent: A Hechter of Adrie Hechter Attorneys