

SOUTH AFRICA / JUDGMENT

Department Of Agriculture And Land Administration v GPSSBC and Others (JR 1689/2012) [2023] ZALCJHB 27 (23 February 2023) [2023] ZALCJHB 27

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR 1689/2012

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR

1689/2012

In

the matter between:

DEPARTMENT OF
AGRICULTURE
AND
LAND ADMINISTRATION Applicant
and
THE
GPSSBC First
Respondent
COMMISSIONER
Z S SIBEKO N. O Second
Respondent
FORSTER
PHORCE MAISANE Third
Respondent
Heard: 21
February 2023
Delivered: 23
February 2023

Summary:

An application seeking to review and set aside an arbitration award. On application of the trite review test, the arbitration award is one that falls within the bands of reasonableness. In the exercise of this Court's discretion, the arbitration award is made an order of this Court. Held: (1) The application for review is dismissed. Held: (2). The arbitration award is made an order of this Court. Held: (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] One of the stated purposes of the Labour Relations Act (LRA)[1] is to promote effective resolution of labour disputes. What happened with regard to this dispute is an anathema to the stated purpose.

Sadly, this dispute should have been put to bed a very long time ago. With great shame, a dispute that emerged in 2009 remained unresolved in 2023. It is now almost fourteen years after the dismissal of the third respondent, Mr Forster Phorce Maisane (Maisane). When the LRA was ushered in, it was never envisaged by the drafters of the Act that a simple dismissal dispute based on allegations of misconduct can take a decade and a quarter to be resolved. It is unfortunate that the public purse shall be haemorrhaging by having to put into effect an arbitration award issued a decade ago. This Court is certain that some officials of the State must take responsibility of this seemingly callous conduct.

[2] At present what serves before me is a review application seeking to review and set aside an arbitration award issued by Commissioner Z S Sibeko (Sibeko) under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) on 12 June 2012. The manner in which this entire review application was prosecuted leaves much to be

desired. Instead of concentrating on finalising the review application, there were skirmishes and adjuncts ranging from an application in terms of rule 11 of the Rules for the Conduct of Proceedings in the Labour Court (the rules), which was withdrawn on the eleventh hour and reincarnated on the eleventh hour, and applications to have the review deemed withdrawn or to be archived. All of those skirmishes and adjuncts failed to take into account the stated purpose of the LRA.

Background

facts

- [3] Mr. Maisane commenced employment with the State in the Department of Agriculture, Rural Development and Land Administration (DARDLA), now Mpumalanga Department of Agriculture and Land Administration (MDALA), in the Mpumalanga province in December 2005.
- Around 2008, Maisane was charged with four allegations emanating from a failure to disclose his interests in an entity known as Ndzali Trading and Projects (Ndzali). I interpose to mention that having had regard to the charge sheet, there was a perspicuous unfair splitting of charges. Arising from the same set of facts, DARDLA managed to dichotomize, four charges of negligent or willful failure to disclose, failure to carry out a lawful instruction by not disclosing, furnishing a false statement during a disciplinary enquiry, and dishonest misrepresentation.
- [4] Following a disciplinary hearing, on 23 April 2009 Maisane was dismissed from the employ of the State. Disenchanted by his dismissal, on 21 May 2009, Maisane referred a dispute to the GPSSBC and alleged unfair dismissal. The GPSSBC appointed Sibeko to resolve the dispute through arbitration. It is apparent from the body of the arbitration award that the arbitration proceedings ran for a period of two years. I interpose again and state that this was contrary to the stated purpose of the LRA. Ultimately, on 12 June 2012, Sibeko published the impugned arbitration award. He found that the dismissal of Maisane was procedurally and substantively unfair. He awarded Maisane the relief he sought which was one of reinstatement with retrospectivity in relation to his pay.
- [5] Chagrined by the outcome, DARDLA, launched the present review application on or about 13 July 2012. As indicated above the application was litigated at a snail's pace. Maisane contends that the application has since lapsed or deemed withdrawn in terms of the provisions of the practice manual of this Court. In due course, this Court shall deal with this contention.
- [6] In addition to the present application, Maisane launched an application seeking to have the review application dismissed in terms of rule 11. The interlocutory application was launched in February 2014. It is apparent that the interlocutory application served before my brother Van Niekerk J, who made an agreed draft order an order of this Court. In terms of that order the interlocutory application was postponed sine die. On or about 03 March 2020, Maisane withdrew the interlocutory application[2]. He, for reasons that are not altogether clear and irrelevant for the purposes of this judgment, reincarnated the rule 11 application. Having reincarnated the application, on 26 August 2021, Maisane applied to be allocated a date for the rule 11 application that was reinstituted. Having done that, for some strange reason, DARDLA served a notice of removal of the new rule 11 application from the roll of 21 February 2023. On 02 February 2021, the DARDLA attorneys applied for the "matter" to be enrolled on the opposed motion roll.

- [7] The DARDLA being a dominus litis in the review application, it must be safely assumed that the “matter” is the review application and not the interlocutory application already withdrawn and reinstituted by Maisane.

Grounds of review.

- [8] DARDLA has raised a barrage of review grounds some of which mimics grounds of appeal. Regard being had to the fact that the test on review is by now threadbare, it is obsolete to enumerate the grounds punted for in the present application. It suffices to mention that some of the grounds punted for are as bare as they come. As an example, it is bad pleading for a party to simply plead a misdirection by ignoring facts, without exposing the facts so ignored.

Evaluation

Is the review application deemed withdrawn or regarded as having lapsed?

- [9] In dealing with this aspect, it is important to acknowledge that the drafters of the practice manual stated that the practice manual is not intended to limit judicial discretion. Recently, the Labour Appeal Court (LAC)[3] sought to provide the much needed clarity on this question of lapsed and deemed withdrawn reviews. What is apparent from the judgments of the LAC is that a review application acquires a status of being deemed withdrawn or regarded as lapsed. Once a matter acquires that status, it would require a Court to unarchive it and or reinstate it.
- [10] Inasmuch as the present review application had acquired the status, it is an undisputed fact that the review application is ripe for a hearing. Mr. Mataka appearing for DARDLA, as the dominus litis submitted that the review is ripe for hearing. Although Mr. Nhlapo, appearing for Maisane offered some resistance to that submission, he was not forceful in the submission that the application is not ripe for hearing. If this Court were to take an inflexible approach, it would mean that this Court must strike this matter off the roll for want of jurisdiction[4]. The difficulty with that approach is that this very archaic dispute would re-emerge before this Court as a reinstatement and or unarchiving application. It has already been decreed that such an application is effectively an application for condonation. Regard being had to the provisions of section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution), this Court would probably grant a reinstatement application. It has been observed by the LAC that the practice manual does not prescribe a procedure on how a Court should go about in removing the status acquired by a review application.
- [11] In the present application, the DARDLA, did not bring a formal application to have the review application unarchived. What it did

was to apply to the registrar to enroll the application on the opposed motion. The Registrar obliged. Given the view I take at the end, and considering the circumstances of this dispute, I intend to regard the application for enrolment as an application to unarchive the application. This approach is taken given the unique circumstances of the present application. In order to

remove any doubt that may ensue in the future, it is not the intention of this Court to suggest that any application for enrolment constitutes an application for unarchiving. Each case ought to be considered on its own facts, regard being had to the fact that the practice manual is not there to limit judicial discretion. In fact the LAC in *SAPS v Coericius and others*[5] authoritatively stated the following:

“[14] In our view, the Labour Court ought to have found, on a charitable view of the papers, that a reinstatement application was before it and as such, was an answer in opposition to the respondent’s Rule 11 application. Such an approach is consistent with the dictum ... in Macsteel Trading Wadeville v Van der Merwe NO and others:

...The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual depending on the facts and circumstances of a particular case before the court.”

[12] When a charitable regard is had to the opposing affidavit deposed to by one Mr. Phiwe Radebe, the Director of Legal Services and Labour Relations, an explanation occurs as to what caused the delay with regard to the record. He effectively testified that Maisane was alive to the difficulties appertaining the record. At the end, Radebe implored that the rule 11 application be dismissed. By asking the registrar to enroll the review, the DARDLA was effectively making a statement that the application be reinstated. Mercifully, Mr. Nhlapo did not persist with the contention that the review application may not be entertained on its merits given the unique circumstances of this dispute.

[13] In conclusion, in order to answer the question outlined above, it is indeed so that the review application had acquired the status of being archived. However, in the exercise of my discretion, the review application is unarchived and shall be dealt with below.

The merits

[14] In terms of the LRA, it remains the task of a Commissioner to determine the fairness of a dismissal dispute. Where a dismissal is predicated on misconduct, the duty of the commissioner is to establish whether the employee dismissed is (a) guilty of the misconduct that led to his or her dismissal and if guilty (b) is dismissal as a sanction the appropriate sanction. The parties before Sibeko concluded a pre-arbitration minute and confined the justification of the dismissal to the disclosure relating to the financial year of 2007-2008. Mr. Mataka submitted that evidence was led at arbitration relating to the conduct of Maisane giving falsity at a disciplinary hearing and that evidence formed part of the justification of the dismissal. The difficulty with this submission is that it is at odds with the pre-arbitration agreement[6]. The second difficulty is that the transcript reveals, to which Mr. Mataka, who also appeared on behalf of the DARDLA at arbitration,

never disputed to be the case, the following:

‘MR SETSWANE: He was found guilty by the Chairperson but those charges were never at any stage, there was no evidence about them, and even in the ruling from the Chairperson there is nothing mentioned about those charges yet he was found guilty on both of them.

COMMISSIONER: No evidence was lead (sic)

MR SETSWANE: That is correct Mr Commissioner. And even the ruling from the Chairperson does not reflect any evidence on both charges.’

[15] What compounds the submission by Mr. Mataka, is that at the arbitration proceedings, which are proceedings de novo, DARDLA led evidence of three witnesses (Mr. Ramathiki, Mr. Goxo (forensic investigator) and Mr. Van Niekerk). None of them led any evidence in support of charges 3 and 4.

[16] Further, Mr. Mataka was unable to point to the Court in the founding papers where this aspect is dealt with. When this Court performs its review functions, it is confined to what was before the Commissioner, whose arbitration award is being impugned. An applicant is not permitted to, during argument, stride outside its supporting papers or what served before a Commissioner.

[17] In performing his statutory duty, Sibeko reached the following felicitous finding:

“It is my considered view that when the acting HOD accepted the explanation from the applicant the issue was then resolved and the respondent [DARDLA] had no valid reason to charge the applicant on the issue.”

Findings

The respondent had no valid reason to dismiss the applicant [Maisane] as the issue on which the applicant had been charged had been resolved by the acting HOD...”

[18] The above finding is consistent with the evidence of the acting HOD, Mr. Mathebula. On this pertinent aspect, the DARDLA simply contends that the fact that Mathebula was acting HOD does not confer any authority on him to override the rule as per chapter 3 of the SMS Handbook. This contention does not dispute the finding that Mathebula accepted the explanation. The law on authority was clarified by the Constitutional Court in its judgment of *Makate v Vodacom Ltd*[7]. In dealing with ostensible authority, the erudite Jafta J had the following to say:

“[65] This question must be considered with a view to doing justice to all concerned. The concept of apparent authority as it appears from the statement by Lord Denning was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent had authority to act on its behalf...”

[19] It ought to be borne in mind that chapter 3 provides that an employee who fails to disclose an interest is guilty of misconduct. In his letter to Mathebula, Maisane provided an explanation, which Mathebula as the person in authority accepted. He amongst others stated that:

“The position that I hold does not fall within the above definition.

Please be advised that I became aware of my membership in the said Close Corporation on 17 March 2008. On the same date I requested the CC file from CIPRO to establish who applied for the registration of the CC. I have now been provided with a copy of the founding statement which bears my particulars but was clearly not completed or signed by me. (see copy attached)[8]

It is in view of the above that my membership was not disclosed.”

[20] Stripped to its bare essentials, the explanation by Maisane is that he is not guilty of misconduct of failure to disclose. This is what Mathebula accepted. As a matter of fact, Maisane was effectively saying, I do not have any interest in the entity and the fact that I am listed as a member of the entity is a falsity, because in truth I am not. It is bizarre and actually illogical for the DARDLA to expect disclosure for an entity that has falsified its members, as Mr. Mataka sought to argue. Had Maisane disclosed in the following financial year that he has interest and is a member of the entity in question, as Mr. Mataka forcefully argued

that Maisane was obligated to disclose, such a disclosure would be false owing to what he had already informed the previous HOD. In terms of chapter 3, it is misconduct to willfully provide incorrect or misleading details. In terms of clause D of chapter 3, the kind of interests to be disclosed are spelled out and include being a director or partner. Logic dictates that if a member is not a partner and or director, there is nothing to disclose. The purpose of chapter 3 is not to prevent members from taking directorship and or partnership in legal entities. The purpose is for members to be transparent in order to obviate a conflict of interest. In terms of clause G of chapter 3, if a conflict is spotted a bespoke procedure unfolds.

[21] In terms of clause 2.2 (1) (c) of the SMS Handbook, one of the principles that must inform any decision to discipline a member is that discipline is a management function. There can be no dispute that Mathebula at the relevant time was part of management. Having accepted the explanation provided by Maisane, it is reasonable for Sibeko to accept that ostensibly Mathebula was authorized and disciplining and dismissing Maisane under those circumstances defies the logic of justice as accepted in our law. Taking into consideration that what kicked Mathebula into action is the discovery made by the forensic investigator and as sensibly required, Mathebula required Maisane to provide reasons for what prima facie amounted to a non-disclosure. Mr. Mataka ultimately conceded that Mathebula was within his management rights to have requested to be provided with reasons. Logic dictates that if the reasons were not acceptable, disciplinary action would naturally follow and if the reasons are acceptable, discipline will be unnecessary. Discipline is the function of management and not the Public Service Commission (PSC). Clause G is clear as to what the

functions of the PSC are. Should the PSC form a view that there is a conflict, it is required to take certain steps, which includes consultation with an employee as well as referring the conflict to the executive authority, who may institute discipline or waive future conflict of interest. Therefore, there is no merit in the submission by Mr. Mataka that Mathebula as part of management has no authority at all over the disclosure issue, particularly in relation to discipline.

- [22] Owing to the trite test on review, the veritable question is: is the finding of Sibeko so unreasonable such that no other decision maker may reach the finding? The answer must be a resounding NO. In the circumstances, this Court is not constitutionally empowered to exercise its review powers in this regard.

Section 158 (1) (c) powers

- [23] The section endows the Labour Court with wide discretionary powers to make any arbitration award an order of the Court. In order to exercise those powers, there must be (a) a lawful and clear arbitration award, and (b) evidence that the other party refuses to comply with the arbitration award. It is apparent that the DARDLA made an attempt to suggest that the arbitration award of Sibeko is unenforceable in law. That suggestion was appropriately answered by the Constitutional Court[9] and it requires no further consideration in this judgment. It is undisputable that the arbitration award of Sibeko is valid and lawful and that for a decade, the DARDLA failed to comply with the arbitration award. Therefore, there is nothing in law that prevents

the Labour Court from exercising its discretionary powers.

Conclusions

- [24] For all the above reasons, the present application for review must be unarchived and on application of the trite test on review, it is bound to fail. Axiomatically, the arbitration award must be made an order of this Court.

- [25] In the result, the following order is made:

Order

- 1 The archived review application is unarchived.
- 2 The review application is dismissed.
- 3 The arbitration award issued by Sibeko under the auspices of the GPSSBC under case number GPBC 247/2009 dated 12 June 2012 is hereby made an order of this Court.
- 4 There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr.

R Mataka of Morathi

and Mataka Attorneys,

Potchefstroom

For the Third Respondent: S B Nhlapo with a Pupil

Instructed by: B

Rikhotso Attorneys,

Pretoria

[1] Act No. 66 of 1995 as amended.

[2] Notably, the withdrawal complies with rule 13 (1) (a) of the rules.

[3] See: South African Police Services v Coericius and Others [2023] 1 BLLR 28 (LAC).

[4] See: Macsteel Trading Wadeville v Francois van der Merwe NO and others

(2019) 40 ILJ 798 (LAC).

[5] [2023] 1 BLLR 28 (LAC) at para 14.

[6] See SAB (Pty) Ltd v Louw

(2018) 39 ILJ 189 (LAC) and Telkom SA SOC Ltd v Van Staden and others

(2021) 42 ILJ 869 (LAC) at paragraph 16 with regard to the binding effect of minutes.

[7] 2016

(4) SA 121 (CC).

[8] Letter dated 07 May 2008 in response to the letter of Mathebula dated 29 April 2008.

[9] Myathaza v JMBS (SOC) Ltd (2017) 38 ILJ 527 (CC). See also: Ramothwala v Hudaco Trading (Pty) Ltd t/a Ambro Steel. Unreported judgment (J1744/2022). Dated 26 January 2023.

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