

SOUTH AFRICA / JUDGMENT

Khena v Passenger Rail Agency of South Africa (J2767/16) [2016] ZALCJHB 457 (6 December 2016)

[2016] ZALCJHB 457

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J2767/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 2767/16

NKOSINATHI KHENA Applicant and PASSENGER RAIL AGENCY OF SOUTH AFRICA Respondent

Heard: 23 November 2016

Delivered: 6 December 2016

PRINSLOO, J

Introduction

- [1] The Applicant approached this Court on an urgent basis initially to compel the Respondent (PRASA) to pay his 13th cheque which was payable on 27 November 2016 as well as his monthly remuneration until his disciplinary hearing has been finalised.
- [2] After the urgent application was served but before it was heard in Court, PRASA terminated the Applicant's employment with immediate effect on 18 November 2016. The Applicant subsequently amended his notice of motion and the relief that he seeks.
- [3] The application is opposed. The Respondent took issue with urgency. I do not intend to set out in detail the attack on urgency as I am of the view that the application should be heard on an urgent basis.

The facts

- [4] The Applicant was employed as chief operating officer (COO): PRASA with effect from 1 December 2012. As from December 2013 PRASA redeployed the Applicant to one of its subsidiaries, Autopax. The Applicant acted as the acting CEO of Autopax and the agreement was that he would do so for a period of 18 months, where after he would return to his position as PRASA's COO.
- [5] On 16 July 2015 the Applicant was appointed as acting CEO of PRASA and as such he was moved from his position as acting CEO of Autopax. This remained the position until 30 June 2016 when the Minister of Transport announced that Mr Collins Letsoalo (Letsoalo) was appointed as acting CEO of PRASA.
- [6] The Applicant was of the view that he would return to his position as COO of PRASA, but he was subsequently advised by the chairman of the board to return to his position as CEO of Autopax. This was confirmed in a letter dated 8 July 2016, signed by Mr Molefe, the chairman of PRASA. In the letter the Applicant was advised that his appointment as acting CEO of PRASA terminated and that he should revert to the position of acting CEO of Autopax with immediate effect.
- [7] The Applicant's case is that he was prepared to resume duties as the COO of PRASA, as there was an acting CEO appointed at Autopax and the Autopax board was not prepared to accept him as acting CEO.
- [8] On 26 July 2016 PRASA's attorneys of record responded to a letter from the Applicant's attorneys of record and made it clear that there is no position of COO at PRASA and that the Applicant should resume the position as acting CEO of Autopax on 28 July 2016. The present incumbent at Autopax was fulfilling a holding position as acting CEO of Autopax and he would be requested to return to his former position when the Applicant takes over as acting CEO of Autopax on 28 July 2016.
- [9] The Applicant insisted that he was not required at Autopax and to support this belief, he relied on the minutes of the Autopax Board meeting held on 12 July 2016 where it was resolved that the Board would retain Mr Kupe and will only appoint the Applicant in full time capacity and not as acting CEO as there is a need for permanency. The Applicant's attorneys raised this with the Respondent's

attorneys on 1 August 2016. It appears that nothing happened until another letter was addressed to PRASA's attorneys on 12

September 2016 wherein it was requested that the matter be referred to the chairman of the human committee to resolve the impasse as well as the Applicant's remuneration issues. The Applicant requested to be placed on special leave pending the resolution of the matter.

[10] On 28 September 2016 the Respondent's attorneys addressed a letter to the Applicant's attorneys wherein it was stated that PRASA did not agree to grant the Applicant special leave, that the Board of Autopax has agreed that the Applicant should report for duty and this offer was made already on 26 July 2016 and was repeated. It was specifically stated that the offer was open until 29 September 2016 and the Applicant was requested to report for duty at Autopax with effect from 30 September 2016, failing which PRASA would take action.

[11] On 30 September 2016 the Applicant's attorneys responded to PRASA's letter and reiterated that the Autopax Board has taken a resolution on 12 July 2016, the content of which had already been dealt with supra. The Applicant took the stance that his position is intolerable in view of the fact that he could not work for PRASA or Autopax. It was further stated that the Applicant regarded being instructed to report for duty at Autopax as a breach of his contract because he was appointed as COO of PRASA and by going to Autopax, he would be demoted. The Applicant demanded that the Respondent engage with him to resolve the impasse and disputes and that he be placed on special leave pending the outcome thereof.

[12] PRASA responded on 12 October 2016 by issuing a notice of intention to institute disciplinary action against the Applicant and several

charges were levelled against him, including a charge for insubordination in that he failed to report for duty at Autopax as acting CEO, despite instructions to do so and for contravention of the leave policy in that he was absent without permission.

[13] The Applicant was afforded an opportunity to provide reasons why disciplinary action should not be instituted and he duly made such

submissions on 17 October 2016. The Applicant was however issued with a charge sheet on 25 October 2016 and the disciplinary enquiry was scheduled for 28 October 2016. It was agreed on 28 October 2016 that the disciplinary hearing would be postponed sine die for the legal representatives to agree on dates for the hearing to be held.

[14] On 2 November 2016 PRASA's attorneys indicated in a letter to the Applicant's attorneys that the matter is unduly and

unnecessarily delayed and that it was imperative that the matter proceeds expeditiously. PRASA viewed the delay in a serious light,

more so where the Applicant was paid his salary but refused to work and proposed and that the disciplinary hearing proceed on 10 and 11 November 2016.

[15] The Applicant's attorneys responded to the letter on 3 November 2016 and denied that the matter is unnecessarily delayed. It was explained that the only reason why the Applicant has not reported for duty is because the Respondent made it impossible. Reference was once again made to the Autopax Board's resolution that they do not need an acting CEO under circumstances where they have an existing CEO. The Applicant's attorneys proposed that the disciplinary enquiry be set down for the week of 12 – 16 December 2016, as his senior

counsel would be available on those dates.

- [16] The Applicant awaited a response from PRASA in respect of the proposed dates of 12 – 16 December 2016 for his disciplinary hearing and whilst waiting for a response, he became aware of the fact that the Respondent intended not to pay his salary for November 2016 as well as his 13th cheque.
- [17] On 4 November 2016 the Applicant's attorneys sought an undertaking from PRASA that his salary for November 2016 and his 13th cheque would be paid. More correspondence followed wherein the Applicant suggested that the parties meet on 16 November 2016 for the purposes of a pre-hearing meeting and he again sought confirmation whether or not 12 – 16 December 2016 would be acceptable to proceed with the disciplinary enquiry as he had to brief senior counsel.
- [18] When no response was forthcoming from PRASA, the Applicant's counsel commenced with the drafting of this urgent application on 16 November 2016.
- [19] In the evening of 16 November 2016 PRASA's attorneys sent a letter to the Applicant's attorneys wherein it was alleged that the Applicant refused to report for duty and even after he received the charges, he persisted with his refusal to report for duty. It was stated that the Applicant's refusal to tender his services is unjustified and the instruction that he should report for work is lawful and reasonable. The Applicant was afforded an opportunity to provide reasons by close of business on 17 November 2016 as to why the employment relationship should not be terminated as a result of the Applicant's refusal to work.
- [20] On 17 November 2016 the Applicant served an unsigned copy of this application on the Respondent's representatives and the signed application was served on 18 November 2016. After the delivery of the application, the Applicant's services were terminated with immediate effect.

The Applicant's case

- [21] The Applicant's case is that the Respondent's purported termination of his services is in breach of his employment contract

and it is unlawful. The Applicant regarded the termination as a final attempt to circumvent the terms of his contract of employment, which incorporates the disciplinary code and procedure. Letsoalo embarked on a new disciplinary process not provided for in the disciplinary code and procedure, whilst the process as envisaged by the disciplinary code had already been embarked upon and was still pending.

- [22] The Respondent's disciplinary code and procedure supplements and forms part of its employees' conditions of service and paragraph 5.7 of the disciplinary code provides specifically for disciplinary hearings and the manner in which such hearings should be conducted. The Applicant's case is that the manner in which his services were terminated, is not provided for in the disciplinary code and he was deprived of his rights and effectively it

breached the terms of his contract. The Applicant has the right to participate in the disciplinary hearing and the Respondent has the obligation to follow the fair and proper procedure set out in the disciplinary code.

- [23] The Applicant submitted that he never refused to report for duty but his predicament is the Respondent's approach that his position as COO at PRASA no longer exists and Autopax, where he was instructed to report for duty, is unable to employ him. He stated that he is willing and able to work but he simply does not know where to report for duty.
- [24] The Applicant's case is further that he has a prima facie right to be paid his salary every month in accordance with his contract of employment. He also seeks the payment of his 13th cheque which is an additional payment calculated on his cost to company and which is paid to him annually in November.

The Respondent's case

- [25] The Respondent does not deny that the Applicant is subject to the disciplinary code and procedure and that he has the right to participate in a disciplinary enquiry as envisaged by the said code.
- [26] The Respondent's case is however that the Applicant was given an opportunity in the form of an instruction to provide reasons as to why his services should not be terminated in view of his continued failure to present himself at work. Furthermore the Applicant has not made out a case for the urgent intervention of this Court as the CCMA is the appropriate tribunal to determine whether the Applicant's dismissal was fair or not.
- [27] In respect of the claim for payment of the Applicant's salary, PRASA denies that the Applicant is entitled to payment of his salary. It is the Respondent's case that the Applicant's entitlement to remuneration would only arise in circumstances where he tendered and provided his services in accordance with his contract. The Applicant failed to report for duty, notwithstanding

numerous instructions to report for duty and due to his absence from work, he is not entitled to the payment of his remuneration.

- [28] The Respondent submitted that this application is an abuse of process as there is no basis to require payment in circumstances where the Applicant refused to tender his services. The Applicant failed to provide the Court with the basis to compel the Respondent to pay his salary in circumstances where he ignored lawful instructions and did not do any work for the Respondent. The payment of remuneration is a quid pro quo for work done and where there is a refusal to work, there is no reason to pay.
- [29] In respect of the Applicant's claim for his 13th cheque, the Respondent tendered the payment of a pro rata amount up to the end of September 2016 when the Applicant stopped to render services.

The relief sought

- [30] The relief sought is two-fold. Firstly the Applicant seeks an order declaring the decision to terminate his contract to be in breach of his contract and for the termination to be set aside. The Applicant seeks reinstatement until there has been compliance with PRASA's disciplinary code.
- [31] Secondly the Applicant seeks an order compelling the Respondent to pay his monthly remuneration until the disciplinary hearing is finalised and to pay his 13th cheque that was due to him in November 2016.

Breach of contract

- [32] The Applicant's case is that his contract of employment comprises his appointment letter and the Respondent's disciplinary code and procedure. He has a contractual right to a formal disciplinary enquiry and as such he is entitled to enforce compliance

with those terms.

- [33] Mr Cassim for the Respondent did not dispute that the disciplinary code and procedure is incorporated in the Applicant's contract of employment and that it forms part of the terms and conditions of employment. He however argued that clause 1.3 of the disciplinary

code provided that formal disciplinary procedures do not have to be invoked every time a standard has been breached and the Applicant

therefore has no contractual right to a formal disciplinary hearing.

- [34] There is no merit in this argument. The disciplinary code has to be considered holistically and it is evident that it makes provision for a system of corrective and progressive discipline and I accept that a formal disciplinary process would not be necessary where the misconduct or transgression is of a less serious nature and the corrective measure is counselling or the imposed sanction is a verbal or first written warning. However, where the charged employee is as senior as the Applicant, where the charges are seemingly serious and the possible outcome a dismissal, it can hardly be argued that a formal disciplinary process should not be invoked under those circumstances. More so where the employer elected to appoint a chairperson and prosecutor, both senior counsel, and also afforded the employee the right to be legally represented.

- [35] Furthermore the Applicant's case is that PRASA elected to proceed with a formal disciplinary enquiry when it issued a charge sheet on 24 October 2016 wherein it was recorded that the Applicant has the right to be legally represented, to give evidence and call witnesses and to cross-examine PRASA's witnesses. Having conferred these rights upon the Applicant, PRASA was not at liberty to unilaterally withdraw them.

[36] PRASA initially, when it decided to charge the Applicant with misconduct, complied with the terms of his conditions of service when a chairperson was appointed and rights were afforded to the Applicant and those rights were to be exercised during the disciplinary

process. However, midstream the Respondent decided to terminate the Applicant's employment without taking those rights into

consideration. The Applicant's contractual rights to give evidence and to call witnesses and to cross-examine PRASA's

witnesses were breached and he was denied his contractual rights.

[37] The Applicant seeks specific performance of his contract and seeks to enforce his contractual right to insist that the disciplinary process be followed in accordance with the disciplinary code and procedure before there could be any decision taken on the termination of his services.

[38] In essence the Applicant seeks an order reinstating him in order for the disciplinary hearing to continue.

[39] In *Ngubeni v The National Youth Development Agency and others*[1] this Court considered whether an employer had breached a contract of employment when it decided unilaterally to terminate the contract while the disciplinary hearing was still incomplete. The Court has held that:

"Even if I am wrong in coming to the conclusion that Ngubeni's contract of employment entitled him to a fair procedure before the termination of his employment on grounds of misconduct, the fact remains that the NYDA's letter to Ngubeni on 27 July offered him a hearing on specific terms. The NYDA could have said, as envisaged by the Code of Good Practice: Dismissal, that Ngubeni be afforded the opportunity to state a case in an informal manner in response to the allegations against him. This is what the code of good practice envisages. Instead, for reasons known only to it, the NYDA offered Ngubeni a procedure that would have made any criminal court proud. Ngubeni accepted those terms, and the enquiry was commenced on that agreed basis. In these circumstances, it is not

open to the NYDA unilaterally to change the terms of that agreement, or as it has in effect done, to renege on the agreement".

[40] In *Ngubeni* the Court further held that:

"Insofar as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages. The balance of convenience dictates that the order sought should be granted - there is little inconvenience to the NYDA should it continue with and complete the disciplinary hearing; the result may well be the same. For Ngubeni, the effect of the NYDA's decision to terminate his employment at this stage is to deprive him of his employment and

livelihood. Similarly, I am satisfied that Ngubeni will suffer irreparable harm should the application not be granted”.

[41] In casu the Respondent levelled charges against the Applicant relating inter alia to insubordination in that he failed to report for duty at Autopax as acting CEO, despite instructions to do so and contravention of the leave policy in that he was absent without permission. A disciplinary hearing process was to commence and the Applicant was afforded certain rights, as per the disciplinary code and procedure and as recorded and afforded in the charge sheet.

[42] On 16 November 2016 the Respondent abandoned the disciplinary proceedings it elected to embark upon and addressed a letter to the

Applicant wherein he was afforded until close of business on 17 November 2016 to provide reasons why his services should not be

terminated. The letter addressed the issues that the Applicant was instructed to report for duty at Autopax but that he refused and failed to render his services and to comply with the lawful and reasonable instruction. The Applicant's services were

terminated on 18 November 2016 due to his refusal to report for duty.

[43] Apart from the fact that the Applicant has a contractual right to a disciplinary hearing prior to a decision to dismiss him, PRASA made an election as to the manner in which it was going to deal with the allegations against the Applicant, including the allegations that he was absent and failing to comply with reasonable instructions, which was the ultimate reason for his dismissal. The election was made in October 2016 when PRASA issued a charge sheet, appointed a chairperson to chair the disciplinary hearing and afforded the Applicant the right inter alia to adduce evidence and call witnesses.

[44] Having elected to do so, the Respondent is obliged to continue with the disciplinary process to deal with the allegations of misconduct

against the Applicant and it cannot midstream abandon the process it elected to follow. PRASA is bound by the election it has made[2].

[45] There can be little inconvenience for PRASA to continue with a disciplinary hearing where the charge sheet had been drafted, the prosecutor and chairperson appointed and the proposed dates for the hearing are 12 – 16 December 2016.

[46] In my view the Applicant has satisfied the requirements and has shown a clear right to be entitled to specific performance insofar as he seeks an order to set aside the termination of his employment and reinstatement until there has been compliance with the Respondent's disciplinary code and procedure.

[47] Effectively the Applicant is reinstated until the disciplinary process the Respondent elected to initiate in October 2016, is finalised.

Payment of remuneration

- [48] The second part of the relief sought by the Applicant is an order compelling the Respondent to pay his monthly remuneration until the disciplinary hearing is finalised and for payment of his 13th cheque that was due to him in November 2016. Both these claims relate to the payment of remuneration and I will deal with them as the 'remuneration claims'.
- [49] The entitlement to the payment of remuneration is of course an entirely different and separate question.
- [50] It is evident from the Respondent's opposing papers that this part of the Applicant's claim is vigorously opposed. The

Respondent's case is that the Applicant is not entitled to payment of his salary as his entitlement to remuneration would only arise in circumstances where he tendered and provided his services in accordance with his contract. The Applicant failed to report for duty and therefore he is not entitled to the payment of his remuneration.

- [51] It is not the Applicant's case that he indeed reported for duty and rendered services. His case is that he never refused to report for duty and that he is willing and able to work, but he simply does not know where to report for duty.
- [52] It is not for this Court to decide whether the Applicant is guilty of the acts of misconduct as set out in the charge sheet. The

chairperson of the disciplinary hearing has to decide that issue with due consideration of the reasons why the Applicant alleges that he was unable to render his services.

- [53] Whether the Applicant reported for duty and rendered his services is to be considered by this Court only insofar as it is necessary to determine if the Applicant has a prima facie right to be paid his monthly salary and his 13th cheque.
- [54] In an employment relationship remuneration is the quid pro quo for an employee's services. An employee is entitled to his or her remuneration when the time for payment has arrived and the employee has performed under the terms of the contract. In fact it is an exchange of work for money. Tender of service is a prerequisite to the employee's right to claim remuneration and where services are not tendered, the principle of 'no work no pay' will apply.
- [55] I have difficulty to accept that the Applicant does not know where to report for duty as numerous instructions were given to him to report for duty at Autopax. The instructions so given were given after the date of the Autopax Board Resolution of 12 July 2016 and it was repeated in a letter from PRASA's attorneys dated 28 September 2016 wherein it was stated that the Board of Autopax has agreed that the Applicant should report for duty and this offer was made already on 26 July 2016 and was open until 29 September 2016. The Applicant was specifically requested to report for duty at Autopax with effect from 30 September 2016.

- [56] The Applicant places reliance on a Board resolution that predates the instruction and he also relies on discussions he had with the chairperson of Autopax, Ms Lulu Letlape, yet he failed to attach a confirmatory affidavit of Ms Letlape to confirm that she indeed advised him that he could not return to Autopax, even as at 30 September 2016.
- [57] Even if the position on 12 July 2016 was that the Autopax Board resolved that they could not accommodate the Applicant, I am on the papers before me not convinced that it was the position as at 30 September 2016 when the Respondent advised the Applicant that the Autopax Board has agreed that he should report for duty with effect from 30 September 2016.
- [58] As I already alluded to, it is not for this Court to determine whether the Applicant is guilty of misconduct, but this Court has to decide whether he has made out a prima facie case to be paid his remuneration where he has not tendered his services, more so where there was a specific instruction to report for duty at a specific workplace.
- [59] The Applicant seeks an order to compel the Respondent to pay his salary until the disciplinary hearing is finalised. This Court cannot decide on an urgent application and without hearing evidence whether the Applicant is entitled to the remuneration he claims.
- [60] I am not satisfied that the Applicant has made out a prima facie case that he is entitled to his remuneration and that the Respondent should be compelled to pay him his salary until the disciplinary hearing is finalised when he has not and does not render or tender any services. The Applicant will be entitled to his salary for as long as he tender his services and in the absence of such tender, the entitlement to be paid his salary does not arise.
- [61] Whether the Applicant had a valid reason not to report for duty, is not an issue for this Court to decide. It can only be decided after oral evidence has been adduced and would be best decided by the chairperson of the disciplinary enquiry. If it is found that the Applicant could not tender his services for a valid reason, the chairperson should make such a finding and should decide on the Applicant's entitlement to remuneration, alternatively the Applicant could sue the Respondent for payment of his salary and his 13th cheque.
- [62] The Applicant has not made out a prima facie case that he is entitled to the payment of remuneration until the disciplinary hearing is finalised where he failed to tender his services.

Furthermore in this regard the Applicant has alternative remedies available to him.

Costs

- [63] The last issue to be decided is the issue of costs.

[64] Costs should be considered against the provisions of section 162 of the Labour Relations Act[3] and according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would

follow the result.

[65] The Labour Appeal Court recently confirmed that[4]:

“The rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court, and such orders are made in accordance with the requirements of law and fairness. See in this regard Member of the Executive Council for Finance: Kwazulu-Natal and Another v Dorkin NO and Another[5] where Zondo JP explained the rationale for that approach:

‘[T]he norm ought to be that costs orders are not made unless those requirements [of law and fairness] are met. In making decisions on cost[s] orders this Court should seek to strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. This is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes...’[6]

[66] The Applicant sought a punitive cost order against Letsoalo personally, alternatively against the Respondent. The Respondent sought the dismissal of the application with costs.

[67] In casu the result is that the Applicant was partially successful in that he is granted the relief he sought to have his dismissal set aside and be reinstated pending the outcome of a disciplinary hearing. The Respondent on the other hand was partially successful in defending

the Applicant’s claim that he be paid his remuneration until the disciplinary hearing is finalised.

[68] In my view the interest of fairness is best served by making no order as to costs.

[69] In the premises I make the following order:

Order:

1. It is declared that the Respondent’s decision of 18 November 2016 to terminate the Applicant’s employment in the absence of a disciplinary hearing, is a breach of the Applicant’s contract of employment;
2. The termination of employment is set aside and the Applicant is reinstated into the Respondent’s employ;
3. The Respondent is ordered to pay the Applicant’s remuneration for the period between his dismissal and reinstatement (i.e 18 November 2016 until 6 December 2016);

4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances

On behalf of the Applicant: Advocate G Hulley SC with Advocate A Kruger

Instructed by:

De Klerk Mandelstam Inc Attorneys

On behalf of the Respondent: Advocate N Cassim SC with Advocate X Matyolo

Instructed by:

Werksmans Attorneys

[1]

(2014) 35 ILJ 1356 (LC).

[2] Andile Phillip Dyakala v City of Tshwane Metropolitan Municipality and others (Unreported judgment issued on 23 March 2015 under case number J572/15).

[3] Act 66 of 1995.

[4] Lawrence v Mutual & Federal (Pty) Ltd, Unreported case number JA 77/2014, handed down on 15 September 2016.

[5] [2008] 6 BLLR 540 (LAC).

[6] At para 17.

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