

SOUTH AFRICA / JUDGMENT

Lukhuleni v National Public Service Workers Union (NPSWU) (JS 986/20) [2022] ZALCJHB 355 (14 December 2022)

[2022] ZALCJHB 355

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JS 986/20

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IN

THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG

Not

Reportable

Case

no: JS 986/20

In

the matter between:

WALTER
LUKHULENI
Applicant
and
NATIONAL
PUBLIC SERVICE WORKERS
UNION
(NPSWU)
Respondent

Heard: 03 – 05 May 2022
This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 14 December 2022.

JUDGMENT

MAHOSI J

Introduction

- [1] The applicant, Mr. Walter Lukhuleni (Mr. Lukhuleni), referred a dispute for an order declaring his dismissal substantively and procedurally unfair in terms of section 187(1) as read with section 5(2)(c)(iv) of the Labour Relations Act (LRA). The relief he seeks is retrospective reinstatement and an order of costs against his employer, the National Public Service Workers Union (NPSWU).
- [2] In opposition, the NPSWU filed a statement of defence and prayed for the dismissal of Mr. Lukhuleni's claim.
- [3] There is no proper claim of procedural and substantive unfairness of the dismissal in the statement of claim. Despite this, the parties placed the following as issues in dispute in their pre-trial minute:
- 3.1 Whether the dismissal of Mr. Lukhuleni was automatically unfair for expecting him to attend to a member of the union without a permit, or
- 3.2 Whether the dismissal was procedurally and substantively fair in terms of section 186 of the LRA.
- [4] To the extent that there is no proper claim made regarding the procedural and substantive unfairness in terms of section 186 of the LRA, the Court will confine itself to the issue relating to whether the dismissal of Mr. Lukhuleni was automatically unfair in terms of section 187(1), read with section 5(2)(c)(iv) of the LRA as its jurisdiction is constrained by the pleadings.

Background

- [5] NPSWU is a registered workers' union. It employed Mr. Lukhuleni as a Liaison Officer/Organizer, with effect from 01 September 2016. At the time of his dismissal, Mr. Lukhuleni had a clean disciplinary record.

Mr Lukhuleni's case

[6] Mr. Lukhuleni's plight commenced on 06 April 2020 when he failed to telephonically attend to one of NPSWU's members, Ms. Patricia Simba (Ms. Simba), who was in need of assistance at her workplace, being Bheki Mlangeni Hospital. Instead, he provided her with the cell number of NPSWU's president, Mr. Pat Mphela (Mr. Mphela), for her to request a travel permit (the permit) for him. This was to enable Mr. Lukhuleni to travel from where he was to Bheki Mlangeni Hospital, as required in terms of the regulations issued following the national lockdown that resulted from the Covid-19

outbreak.

[7] On the same day, Mr. Lukhuleni received a telephone call from Mr. Mphela in which the former was questioned about his conduct of sharing the latter's cell phone number with NPSWU's members. Subsequent to the aforesaid telephone conversation, Mr. Lukhuleni sent a WhatsApp message to Mr. Mphela in which he, inter alia, apologised and requested a travel permit which would enable him to attend to one of the members in Alex Clinic. The WhatsApp message was met with no response.

[8] On 7 April 2020, Mr. Lukhuleni was served with a letter that placed him on precautionary suspension with immediate effect. This was followed by the issuing of a notice to attend a disciplinary hearing scheduled to take place on 30 June 2020, which outlined the charges as follows:

'Count 1

1. Gross Dereliction of Duties

1.1 GROSS DERELICTION OF DUTIES in that on or during the period 06 April 2020 you failed to attend to a member Ms P Simba, Persal No: 2[...], based at Bheki Mlangeni Hospital, Transport Department by failing to attend the member by referring the member directly to the President, Cde Pat Mphela who had to attend and assist [to] the member.

1.2 This was a very serious, important and urgent matter referred by the member who was [experimenting] sic harassment and intimidation in the workplace and was stressed at the time and the Union could have lost a member.

Count 2

2. GROSS DERELICTION OF DUTIES In that on 06 April 2020 you disrespected the office of the President by exposing him and undermining him by giving a member the cell phone numbers of the President without authorisation and without first phoning the institutional Shopsteward, your colleagues i.e other Organisers as well as the Deputy National Secretary.

2.1 Your actions on the above date amounted to a Gross Dereliction of Duties, as an Organiser of the trade union it is your duty to ensure the smooth running of the trade union administration and not break, bend or disobey procedures and protocols.'

- [9] During the disciplinary hearing, Mr. Lukhuleni pleaded guilty to all the charges levelled against him. After the applicant had submitted an affidavit in mitigation of the sanction, the chairperson recommended dismissal. Accordingly, Mr. Lukhuleni was dismissed on 30 July 2022.
- [10] Aggrieved by NPSWU's decision to dismiss him, Mr. Lukhuleni referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). In his referral, he identified his dismissal to be related to misconduct.
- [11] The dispute was conciliated unsuccessfully on 17 September 2020. As a result, a certificate of non-resolution was issued. Mr. Lukhuleni then referred the dispute for arbitration. During the arbitration hearing, NPSWU raised the point that the CCMA lacked jurisdiction as Mr. Lukhuleni earned above the threshold as set out in the Basic Conditions of Employment Act (BCEA). The CCMA issued a ruling that the matter be referred to this Court for adjudication. Curiously, the ruling does not form part of the documents filed in this Court.

[12] Mr Lukhuleni's case was that:

12.1 He was dismissed for charges that he was not called to answer in that he was dismissed for disrespect and insubordination and not for dereliction of duty.

12.2 His plea of guilty should not have been accepted at the disciplinary hearing because the reasons he had provided for his actions could only be tested by leading evidence.

12.3 He was dismissed for refusing or failing to comply with an illegal instruction, which makes his dismissal automatically unfair.

NPSWU's case

- [13] NPSWU disputed that Mr. Lukhuleni's dismissal was automatically unfair on the basis that he was charged for misconduct and was subjected to a disciplinary hearing in which he pleaded guilty. It contended that, being a seasoned organizer who presided over many hearings and represented members at the CCMA, bargaining councils and internal hearings for many years, Mr. Lukhuleni understood the charges that were read to him and was not coerced to plead guilty. This, according to NPSWU, is supported by Mr. Lukhuleni's categorisation of his dispute at the CCMA as dismissal relating to misconduct.
- [14] It was NPSWU's further contention that, to the extent that there was no instruction for Mr. Lukhuleni to travel during the national lockdown without a permit, his dismissal could not have been automatically unfair. In addition, NPSWU contended that neither Mr. Lukhuleni nor his witnesses led evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It was for this reason that it argued for absolution from the instance.

Material aspects of the evidence

- [15] On the one hand, Mr. Lukhuleni led evidence in support of his case and called Mr Khanyeza, Ms. Simba and Mr. Moeketsi to testify in support of his case. On the other hand, NPSWU led its evidence through Mr. Mphela and Mr. Zulu.

Mr Lukhuleni's evidence

- [16] Mr. Lukhuleni's evidence was that, subsequent to receiving a message regarding the closure of NPSWU's offices during the national lockdown, which message also directed the members to contact specific officials including him for assistance, he asked Mr. Khanyeza for a permit. Mr. Khanyeza informed him that he was in a process of discussions with the Acting National Secretary, Mr. Zulu, about the issue of the permits and that he would contact him later.
- [17] Subsequently, Mr Khanyeza informed him, inter alia, that he hit a brick wall with the issue of permits and that if the members contacted him for assistance, he must provide them with Mr Mphela's cellphone number. It was for this reason that he provided Mr. Mphela's cellphone number to Ms. Simba, who had contacted him for assistance with an issue of intimidation at her workplace. As aforesaid, Ms Simba was requested to request Mr Mphela to issue a permit for him (Mr Lukhuleni) to travel to her workplace. Later that day, Mr Lukhuleni enquired from Ms. Simba as to what transpired, but the latter informed him that she would get back to him. That was the last time he heard from her.
- [18] Later that day, Mr. Lukhuleni received a telephone call from Mr. Mphela who enquired as to who provided his cellphone number to members of the union. Mr. Lukhuleni confirmed that he did and also explained that it was as per Mr. Khanyeza's instruction. Subsequently, Mr. Lukhuleni sent a message to Mr. Mphela's cell phone in which he, inter alia, apologised and requested a permit.
- [19] Mr. Lukhuleni testified that the reason he took what he thought was an instruction from Mr. Khanyeza was because the latter was his supervisor in that he was responsible for the day-to-day running of NPSWU's Gauteng office. He denied that he occupied the same position as Mr. Khanyeza and stated that he had taken instructions from him on many previous occasions.
- [20] When an enquiry was made as to whether he understood his charges, he indicated that he did and stated that he was charged for failure to attend to a member and referring Ms. Simba to Mr. Mphela as well as the possible loss of a member.
- [21] Mr. Lukhuleni was aggrieved by the decision of the chairperson of the disciplinary hearing who refused to entertain his preliminary point and insisted on him pleading to the charges. According to him, he was dismissed for failing to assist a member. His version is that he assisted the member telephonically. However, having assisted her previously, Ms Simba sought his physical presence, which was impossible as he had no permit to travel.

- [22] Under cross-examination, Mr Lukhuleni confirmed that his contract of employment requires him to reports to the General Secretary. He further admitted that he neither requested a permit nor received any instruction regarding travelling from the General Secretary or Mr Mphela. Instead, he requested Ms. Simba to request it for him from Mr. Mphela.
- [23] When quizzed whether he was expected by NPSWU or Ms. Simba to attend to the member physically, Mr. Lukhuleni stated that it was both as NPSWU had put him on the list of officials who were on standby to assist members, whilst Ms Simba wished to be assisted physically. He explained that the mere fact that he was on standby meant that he was expected to attend to members telephonically and physically.
- [24] Ms. Simba led evidence in support of Mr. Lukhuleni's case. In essence, she confirmed that she requested Mr. Lukhuleni to travel to her workplace to assist her and that she gave Mr. Mphela a telephone call to request him to issue a permit to Mr Lukhuleni as requested by him (Mr. Lukhuleni). Mr. Mphela advised her to request her shop-steward to assist her, but she insisted that she wanted Mr. Lukhuleni to assist her. In the end, no official was sent to assist her. She was issued with a suspension letter and requested her friends to assist her with her matter. Although she had threatened to leave NPSWU, she remained its member.
- [25] Mr. Lucky Moeketsi (Mr. Moeketsi) also testified in support of Mr. Lukhuleni's case. He testified that he was employed by NPSWU from June 2018 to September 2019 and that in June 2018, he was informed by Mr. Mphela to report to Mr. Khanyeza. Further that he also reported his whereabouts to his other colleagues. Under cross-examination, he confirmed that when Mr. Lukhuleni was dismissed he was no longer employed by NPSWU and that he did not know whether the reporting structures had changed after he had left the employment of NPSWU. He further testified that reporting to Mr. Khanyeza was an internal arrangement.
- [26] Mr. Khanyeza testified that although Mr. Lukhuleni was required to report to the National Secretary, he reported to him in office. According to him, the message that was broadcasted to all members on 18 March 2020 was an instruction to the officials to service NPSWU's members as and when it was required. He confirmed that the message did not specify how they were expected to assist the members, but explained that there was no need for specificity as they were expected to attend to members telephonically and physically. For that reason, he expected that permits would be issued.
- [27] Mr. Khanyeza testified that never gave an instruction regarding the permit per se. However, he remembers informing Mr. Lukhuleni to directly contact Mr. Mphela because there was nowhere else to go as the latter sometimes allowed them to seek assistance from him. He also informed Mr. Lukhuleni to seek assistance from the General Secretary before proceeding to Mr. Mphela. His view was that if contacted directly, Mr Mphela would ensure that the General Secretary does his work. Under cross-examination, Mr. Khanyeza denied that he gave Mr. Lukhuleni an instruction to inform the members to directly contact Mr.

Mphela for his permit and stated that it was just an advice.

NPSWU's evidence

- [28] Mr. Mphela testified that although the responsibility to attend to members' needs is that of the officials and organisers, when he received a call from Ms. Simba, he requested to speak with her shop-steward telephonically to assist her. He then spoke to both Ms. Simba and her shop-steward, who later reported to him that the matter was resolved. Mr. Mphela further testified that he was not responsible for the issuance of permits and that it was the National Secretary's responsibility.
- [29] Mr Mphela confirmed that he called Mr. Lukhuleni to enquire if he was the one who gave his cell phone number to the members and the latter answered in the affirmative. He denied that Mr. Khanyeza was an office manager of the Gauteng office and that Mr. Lukhuleni reported to him (Mr. Khanyeza) as they both reported to the National Secretary.
- [30] Mr. Sandile Mxolisi Zulu (Mr. Zulu) testified that he is the Acting National Secretary of NPSWU and that Mr. Lukhuleni was aware that all employees were required to contact his office for a permit and not the office of Mr. Mphela. He denied that Mr. Khanyeza was the manager of the Gauteng office and that Mr. Lukhuleni reported to him. Mr. Zulu confirmed that as a seasoned organiser, Mr. Lukhuleni understood the charges to which he pleaded.

Applicable law and analysis

- [31] The crux of the matter is whether Mr. Lukhuleni's dismissal was automatically unfair in terms of section 187(1) read with section 5(2)(c)(iv) of the LRA, or whether his dismissal related to misconduct as envisaged in section 188(1)(a)(i), which is not automatically unfair. Section 187(1) provides, inter alia, that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 of the LRA.
- [32] Section 5 provides for the protection of employees and persons seeking employment. Mr Lukhuleni relied on section 5(2)(c)(iv), which must be read with section 5(1). They read as follows:
- '(1) No person may discriminate against an employee for exercising any right conferred by this Act.
- (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following –
- ...
- (c) prejudice an employee or a person seeking employment because of past, present or anticipated –
- (iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do.'

[33] The evidentiary burden arising in an alleged automatically unfair dismissal was laid out by Davis AJA in *Kroukam v SA Airlink (Pty) Ltd* as follows:

‘In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible

possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in section 187 for constituting an automatically unfair dismissal.’

[34] In *Legal Aid South Africa v Jansen*, the Labour Appeal Court (LAC) stated that the test in determining whether a dismissal is automatically unfair on any of the grounds listed in section 187(1) is essentially an inquiry into the causation of the dismissal as articulated in *SA Chemical Workers Union and others v Afrox Limited (Afrox)* as follows:

‘The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected

strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the ‘main’ or ‘dominant’, or ‘proximate’, or ‘most likely’ cause of the dismissal... It is important to remember that at this stage the fairness of the dismissal is not yet an issue... Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a).’

[35] In dealing with a dispute relating to section 187(1)(c), the Constitutional Court in the judgment of *National Union of Metalworkers of SA and others v Aveng Trident Steel* (a division of *Aveng Africa (Pty) Ltd*) and another confirmed that in cases where the court is faced with two opposing reasons for dismissal, an impermissible reason on the one hand and a permissible reason on the other hand, an enquiry into the true reason for the alleged dismissal is required. However, there was a dissent in the approach to be adopted in conducting this enquiry.

[36] The judgment of Mathopo AJ (as he then was), with which four of the judges concurred, supported the causation test as followed in *Afrox*, whilst that of Majiedt J, with which four other judges concurred, disavowed reliance on the *Afrox* test and followed the approach adopted in *Chemical Workers Industrial Union and others v Algorax (Pty) Ltd (Algorax)* where the LAC, with Zondo JP, applied the convention method applied by courts in evaluating evidence for the resolution of the dispute of facts with two conflicting versions.

- [37] It is clear from the above authorities that in disputes in which an employee alleges automatically unfair dismissal in terms of section 187(1), whichever approach the Court prefers, the true reason for dismissal must be established. In casu, the issue is whether Mr. Lukhuleni was dismissed for failing or refusing to do something that an employer may not lawfully permit or require an employee to do.
- [38] The Court ought to determine whether Mr Lukhuleni was dismissed for failing to physically attend to a member, Ms Simba, in her workplace without a permit during the national lockdown. NPSWU contends that as much Mr. Lukhuleni was expected to attend to Ms Simba and all other members, there was neither an instruction nor an expectation for him to travel to Ms. Simba's or other member's workplace. Put differently, to an extent that Mr. Lukhuleni was not issued with the permit, he was expected to assist Ms. Simba telephonically and not physically.
- [39] The first issue for determination is whether there was an instruction or an expectation for Mr. Lukhuleni to travel to members' workplaces for their assistance, and in particular Ms. Simba's workplace, without a permit. On the evidence outlined herein above, there is no indication that there was such an expectation or an instruction. On his own version, Mr. Lukhuleni testified that the message he regarded as an instruction to be on standby was not specific whether the official should assist the members telephonically or physically. This was confirmed by Mr. Khanyeza and NPSWU's witnesses.
- [40] There is further no evidence that Mr. Khanyeza, Mr. Mphela or Mr. Zulu instructed or expected Mr. Lukhuleni to travel without a permit. Instead, Mr. Lukhuleni testified that his need to assist Ms. Simba physically as opposed to telephonically was to satisfy the latter's preference. This was corroborated by Ms. Simba. It is mind-boggling how Mr. Lukhuleni could have regarded this as an instruction from any of his superiors or NPSWU.
- [41] Mr. Lukhuleni does not deny the misconduct with which he was charged. He admitted that as an official, his duties included the investigation of complaints from members regarding their employment, representation of the union and its members in terms of the LRA, promotion of the union and its member's interest and the performance of such duties as the National Secretary may direct.
- [42] In addition, Mr. Lukhuleni admitted that he could attend to members telephonically. Instead of attending to Ms Simba telephonically, he provided her with Mr. Mphela's cell phone number for her to facilitate a permit on his behalf. Although he averred that this was as per Mr. Khanyeza's instruction, this was denied by the latter. In fact, Mr Khanyeza testified that he only advised him to first contact the acting National Secretary to enquire about the permit and that if he did not find any joy from him, he could then contact Mr. Mphela who would ensure that Mr. Zulu attends to the issue of his permit. It was Mr. Lukhuleni's choice to regard what he was told by Mr. Khanyeza to be an instruction, which was to his detriment.

- [43] In addition, Mr. Lukhuleni admitted that his contract required him to report to the National Secretary and not Mr. Khanyeza. Thus, his argument that Mr. Khanyeza was in a position to give him permission or authority to provide Mr. Mphela's cellphone number to Ms. Simba is not supported by the evidence. Although Mr. Mphela testified that his cellphone number was not private per se, he also stated that it was not known to all members and certainly not used by members to call him for assistance at their workplace. In the circumstances, NPSWU had a legitimate basis to subject Mr. Lukhuleni to a disciplinary process.
- [44] In the absence of any unlawful instruction, there could not be an automatically unfair dismissal as envisaged in section 187(1) read with section 5(2)(c)(iv) of the LRA. Thus, Mr. Lukhuleni failed to adduce evidence which was sufficient to raise a credible possibility that an automatically unfair dismissal had taken place. On an objective viewing of the facts of this case, the only conclusion to draw is that the causal link of Mr. Lukhuleni's dismissal was the misconduct with which he was charged. Thus, NPSWU's application for absolution in respect of Mr. Lukhuleni's claim of automatically unfair dismissal ought to be granted.

Costs

- [45] This Court has a wide discretion in awarding costs. The guiding principle is that of equity and fairness. In casu, I am of the view that the principles of equity and fairness dictate that there should be no order as to costs.

- [46] In the premise, the following order is made:

Order

1. The application for absolution in respect of Mr Lukhuleni's claim of automatically unfair dismissal is granted.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Roberto Carratu

For the Respondent: Mr Godfrey Soetmelk, NPSWU's official.

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