
SOUTH AFRICA / JUDGMENT

Mabunda v Thelane and Others (J1547/2015) [2016] ZALCJHB 411 (28 October 2016)

[2016] ZALCJHB 411

COURT

Labour Court Johannesburg

BEFORE

Bekker

CASE / FILE NUMBER

J1547/2015

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1547/2015

In the matter between:

AUKNEY MABUNDA

Applicant

and

GOODLUCK PHUMZILE TSHELANE

First Respondent

SOUTH AFRICAN NUCLEAR ENERGY

CORPORATION (SOC) LIMITED

Second Respondent

M SEEKOE Third Respondent

N MXAKATO-DISEKO / J KELLERMAN

Fourth Respondent

N SHAIK-PEREMANOV

Fifth Respondent

MM MUKUENA

Sixth Respondent

Z ZIBI / ELSIE MONALE

Seventh Respondent

Heard: 15 December 2015

Delivered: 28 October 2016

BEKKER AJ

Introduction

- [1] This matter concerns an application brought initially by the Applicant on an urgent basis seeking to declare his suspension from duty at the Second Respondent (NECSA) to be unlawful and null and void.
- [2] The Applicant furthermore sought an order setting aside his suspension from duty and for him to resume his duties with NECSA with immediate effect, coupled with a relief pertaining to ordering the First and Third Respondents to desist from victimising and "persecuting" the Applicant by, inter alia, "... arrogating unto themselves powers to discipline the Applicant, which powers repose within the Second Respondent's board".[1]
- [3] The Applicant (NECSA's Group Company Secretary and Head of Legal Services) was suspended from NECSA's duty on 29 July 2015.
- [4] The Applicant then proceeded to bring an urgent application to nullify his suspension from duty in this Court. The matter was heard on 7 August 2015 by Myburgh AJ who struck the application from the roll for lack of urgency and ordered the Applicant to pay half of the First and Second Respondents' costs.
- [5] It deserves mention that the Applicant has amended his Notice of Motion shortly before the matter was heard by Myburgh AJ on 7 August 2015, by the inclusion of a new prayer pertaining to the First and Third Respondents (and for them to be ordered to desist from victimising the Applicant etc.).
- [6] This amendment to the Notice of Motion followed on NECSA's lifting of the Applicant's suspension and informing him thereof on 4 August 2015.
- [7] This was done in the form of a letter authored by the First and Second Respondents' legal representatives, ENS Africa.[2]
- [8] Undeterred by the lifting of his suspension, the Applicant's attorneys (Denga Incorporated) replied to that letter on 4 August

2015 stating that, in the absence of a power of attorney from the board of directors of NECSA, ENS Africa is a "third party"

and not an agent duly appointed to represent any of the Respondents.

- [9] The Applicant's attorneys furthermore attacked the validity of the instruction relayed by ENS Africa, i.e. the lifting of the suspension since the Applicant was of the view that there was no board of directors' resolution to this effect, nor any "round robin resolution process".
- [10] The Applicant's attorneys remained adamant that NECSA was not in a position to lift an unlawful suspension since the suspension was, in any event, a legal nullity. According to the Applicant's attorneys, the Applicant would accede to the correction of a legal nullity should he heed to the lifting of his suspension.
- [11] The Applicant's attorneys conclude in the letter in response to the lifting of the suspension by stating that they "...are not prepared to accede to anything you have proposed, since in fact and law, you have no leg to stand on, and your proposals are also rather absurd on account of being truly wanting in legality".

The Applicant's complaints

- [12] The Applicant states that he was appointed as NECSA's board of directors' Group Company Secretary. He also served as the head of legal services at NECSA.
- [13] The gist of the matter (without venturing into unnecessary detail for purposes of the current application) is that the Applicant is of the view that NECSA and its board of directors acted without any legal foundation in attempting to discipline him for various allegations of misconduct, coupled with his suspension from duty during July 2015.
- [14] The Applicant specifically alleges that the First Respondent (the chief executive officer of NECSA) was the author of the Applicant's

misfortune and specifically the "trumped-up" disciplinary charges brought against him.

- [15] The Applicant further alleges that his suspension from duty (and the subsequent lifting of the suspension) was unlawful, inter alia, in the following respects:

15.1 In suspending the Applicant, NECSA contravened the disciplinary code and procedure, the provisions of the Labour Relations Act, principles pertaining to good governance and the Companies Act;

15.2 The First Respondent contravened the Applicant's constitutional rights, specifically Sections 32, 33, 34 and 36 of the Constitution of the Republic of South Africa, 1996;

15.3 The Applicant was not afforded an opportunity to make representations prior to him being suspended;

15.4 That it was the First Respondent who suspended him and, by doing so, attempted to prevent the Applicant from doing his work;

15.5 Since the Applicant alleges that he was appointed by NECSA's Board of Directors, only the board of directors can suspend him and this is not the prerogative of the Chief Executive Officer (CEO) (the First Respondent);

15.6 That the First Respondent did not possess the necessary authority by the board of directors of NECSA to depose to an affidavit in the current application and therefore it should not be considered by this Court;

15.7 That there is no proof that ENS Africa (acting on behalf of the First and Second Respondents) was appointed lawfully.

[16] It should be noted that the Applicant has also filed a further supplementary affidavit prior to the application being adjudicated.

The contents thereof are largely academic for purposes of the current exercise. The same holds true for the contents of the Applicant's

replying affidavit.

The First and Second Respondents' defence

[17] The gist of the First and Second Respondents' defence is that the current application is an exercise in academia. Since the Applicant's suspension was lifted on 4 August 2015 (in a letter dated 3 August 2015) the Applicant's refusal to withdraw the application as per the letter from ENS Africa renders the relief sought by the Applicant academic, superfluous and an abuse of this Court's process. The First and Second Respondents contend that the application is moot.

[18] Since there is no live dispute between the parties, the application should be dismissed with costs.

[19] In argument, it became apparent that the Applicant indeed returned to active duty at NECSA on 10 August 2015.

[20] The First and Second Respondents contend that the board of directors of NECSA may, by special resolution, delegate its powers or functions or duties to the First Respondent (the CEO) in terms of the provisions of the Nuclear Energy Act. The day-to-day business

operations of NECSA are under the First Respondent's general management, subject to general or specific directions from the board

of directors from time to time.

[21] The CEO may also appoint staff at NECSA, subject to special or general directions from the board in terms of Section 25 of the Nuclear Energy Act.

- [22] With effect from 1 October 2008, the Applicant was promoted to the position of Chief Legal Advisor and Group Secretary. He thus retained his position as Chief Legal Advisor, but also became the Company Secretary in addition to the role that he fulfilled at NECSA.
- [23] Although the Applicant thus served as the Group Secretary on the Board of Directors, he was and remained an employee of NECSA.
- [24] The First and Second Respondents contend that, even if there is any merit in the Applicant's contention that the Board of Directors did not act lawfully in suspending and disciplining him, there was in any event no legal requirement for the Board of Directors to do so since the Applicant is an employee and it is in line with the power of the CEO to discipline NECSA's employees.

ENS Africa's authority:

- [25] The Applicant makes much about the allegation that the First and Second Respondents' legal representative did not possess the

necessary authority to act on their behalf. In answer thereto, the First and Second Respondents contend that, even in the absence of valid authority being granted by the Board of Directors of NECSA to oppose the current application, the First Respondent is at the very least also a party to the process and was cited as the First Respondent. The First Respondent in his personal capacity surely then does not need the permission of the Board of Directors of NECSA to join issue with the relief sought by the Applicant.

- [26] This issue of authority was, however, only raised by the Applicant in his Heads of Argument when the matter was adjudicated.

- [27] The First Respondent (in his capacity as the CEO of NECSA) granted a general power of attorney on 9 December 2015 nominating and appointing ENS Africa to do and cause to be done whatever shall be necessary to defend and bring to finality the current application for and on behalf of the First and Second Respondents.

- [28] This power was also granted retrospectively and the Second Respondent (by means of the general power of attorney) ratified anything so done in the past.

- [29] Apart from the fact that this issue was not raised by the Applicant in his founding affidavit (or in his supplementary or replying

affidavits for that matter), this argument does not assist him. It is improper to only raise this issue in the Heads of Argument. Even if this issue was raised properly, there is no substance in the allegation that the First and Second Respondents are improperly

before court since their representatives allegedly lack the necessary authorisation. The Board of Directors ratified all actions taken by the First Respondent and ENS Africa retrospectively.

The authority to discipline

- [30] The Applicant argues that it was not within the power of the First Respondent to suspend him from duty or to initiate disciplinary proceedings against him in his capacity as Chief Executive Officer of NECSA.
- [31] The argument goes that since the Applicant is NECSA's Group Company Secretary, only a valid decision by the Board of Directors of NECSA could authorise his suspension and validate disciplinary processes being taken against him.
- [32] The Applicant relies on a lengthy, technical analysis of the powers of the Board of Directors, the interpretation of the Nuclear Energy Act[3] (containing specific directions as to the composition of the Board of Directors, inter alia, holding that no fewer than five and not more than seven directors must be appointed by the Minister), the power of the First Respondent to suspend employees and to discipline them etc.
- [33] It appears that this technical argument by the Applicant is raised in support of the additional prayer as contained in the Applicant's amended notice of motion.
- [34] The sudden amendment of the notice of motion at the eleventh hour (and shortly before the matter was considered initially on this Court's urgent roll by Myburgh AJ on 7 August 2015) amounts to an abuse of this Court's process. I say that since it is evidently clear that the basis for the application fell away in toto on 4 August 2013 when the Applicant was advised by the First and Second Respondents' attorneys that the Applicant's suspension is lifted with immediate effect and that he should return to duty.
- [35] The original notice of motion in the urgent application sought relief declaring the suspension of the Applicant unlawful and furthermore directing that the Applicant should resume his duties with the Second Respondent with immediate effect.
- [36] Undeterred by the lifting of the suspension (and for all practical purposes then the very foundation for the relief sought by the Applicant falling away), the Applicant elected to attempt to keep the matter within the jurisdiction of this Court by amending his original notice of motion by including the additional prayer in order to resuscitate the matter.
- [37] There were other avenues available to the Applicant if he is of the view that he was being victimised or persecuted by the CEO of NECSA and the Third Respondent. The provisions of the LRA cater for the adjudication of any alleged unfairness pertaining to the suspension of employees and furthermore to adjudicate on allegations of unfair disciplinary measures short of dismissal.
- [38] The Applicant was and is naturally also at liberty to invoke the provisions of the Employment Equity Act[4] should he be of the view that he was the victim of discrimination or victimisation by the First and Third Respondents in their capacity as representatives of the employer, NECSA.

- [39] Although the Applicant argues that only the Board of Directors may discipline him, this argument is without basis. The Applicant is employed as NECSA's Chief Legal Advisor. The CEO of the organisation has the power to discipline the Applicant. The Applicant ultimately reports to the CEO, who in turn reports to the Board of Directors.
- [40] The mere fact that the Applicant is also NECSA's Group Company Secretary does not change the fact that he is principally an employee of NECSA. The disciplinary process initiated against the Applicant by NECSA was addressed to him in his position as an employee and as stated on the notice of suspension in his position as "Chief Legal Advisor".
- [41] Section 23 of the Nuclear Energy Act makes it plain that the day-to-day business operations of NECSA are under the First Respondent's general management.
- [42] The Applicant can thus certainly be described as a member of staff of NECSA as contemplated in Section 25 of the Nuclear Energy Act.
- [43] This Court is not the forum of first instance to deal with employees' complaints regarding alleged unfair labour practices as set out hereinabove. There is no basis for the Applicant jumping the proverbial litigation queue by approaching this Court directly (in terms of the additional prayer contained in the amended notice of motion) relating to a complaint that is, in essence, an alleged

unfair labour practice.

- [44] It must also be said that the technical argument advanced by the Applicant pertaining to who may and who may not suspend him has little basis. The Applicant relies directly on certain sections of the Constitution as a basis for his contention of an implied right to fairness in the employment context. The general right to fair labour practices as found in Section 23(1) of the Constitution cannot be so relied upon. The following was stated in *Sandu v Minister of Defence and Others*:^[5]

‘Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.’

The Labour Court is not the forum to determine whether disciplinary processes (or a suspension from duty for that matter) are fair or unfair. The Commission for Conciliation, Mediation and Arbitration or Bargaining Councils are to pronounce on these aspects since they were specifically designed and created to deal with such issues.

- [45] The determination of whether a disciplinary process or suspension for that matter was fair or unfair would be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances (which the current case was not).

The Court in *Member of the Executive Council for Education, Northwest Provincial Government v Gradwell*[6] held that the right for employees not to be subjected to unfair labour practices by their employers is a statutory right for which

statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights.

Mootness

[46] What remains is the order sought by the Applicant declaring his suspension unlawful and that he be allowed to resume duties with the Second Respondent. I agree with the argument advanced by Mr Kennedy for the First and Second Respondents that the relief sought by the Applicant in that form is moot. Mr Kennedy argued that engaging in legal debate and argument on whether the First Respondent was indeed authorised to suspend the Applicant is pointless in circumstances where there is no longer a suspension in place, resulting in a situation that the court's resources are abused.

[47] Since there was no live dispute between the parties at the time of the adjudication of this matter (as the Applicant's suspension was lifted and he returned to duty), the Applicant is acting in a vexatious fashion in persisting with the relief sought whilst the exact same relief was already acceded to by the Second Respondent on 4 August 2013, i.e. the lifting of his suspension.

[48] What the Applicant is effectively seeking is for this Court to lift his suspension again and to allow him to return to active duty, whereas these events have already taken place.

[49] Exceptional circumstances should be present for a judgment to be given on the merits of a matter when such a matter is patently moot. It is the exercising of a discretion in the service of the interests of justice whether to do so.[7]

[50] The current legal issue (if any) is not of public importance and would certainly not affect matters in the future on which the adjudication of this Court was required. The application concerns an alleged unlawful suspension, which suspension was lifted. There is nothing extraordinary and no specific legal principle that is deserving of scrutiny by this Court that would be of public

importance.

[51] It is trite that a case is viewed as moot (and therefore not justiciable) if it no longer presents an existing or live controversy, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.[8]

[52] The issue is thus moot and there is no justification for the Applicant having proceeded with the matter in the fashion that he did, also viewed in light of the fact that he certainly ought to have known better since he is legally qualified.

Costs

- [53] The Applicant seeks a costs order against the First Respondent on the attorney and own client scale and costs against the Third and further Respondents in the event of opposition.
- [54] The First and Second Respondents (in turn) sought a punitive costs order against the Applicant, specifically on the basis that the relief sought was superfluous in the circumstances and constituted an abuse of this Honourable Court's process.
- [55] The actions of the Applicant and the manner in which he brought the current application indeed constitute an abuse of this Court's process. There were patently no prospects of success, yet the Applicant persisted with the relief sought. I see no reason in law or otherwise why costs should not follow the result, and then on the punitive scale as requested by both parties.

Order

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

1. The application is dismissed.
2. The Applicant is to pay the First and Second Respondents' costs on the attorney and own client scale.

Wilhelm Bekker

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv PW Makhambeni

Instructed by Denga Incorporated Attorneys

FOR THE FIRST AND SECOND

RESPONDENTS:

Adv P Kennedy SC

Instructed by ENS Africa

- [1] Prayer 4, Amended Notice of Motion.
- [2] The salient portions of the letter read as follows: "1.1 NECSA has completed its investigations and will proceed to issue charges against your client in anticipation of the impending disciplinary inquiry. 1.2 Without in any way admitting that the suspension of your client is unlawful as alleged in the urgent application and in order to curtail unnecessary litigation in relation thereto, including having to incur legal costs and time consumption in doing so, the suspension is hereby lifted with immediate effect. 1.3 In light thereof, kindly confirm in

writing that your client withdraws the urgent application by delivering a notice of withdrawal by no later than 12:00 on Tuesday, 4 August 2015 on the basis that each party shall be responsible for its/his own legal costs."

[2] The salient portions of the letter read as follows:

"1.1 NECSA has completed its investigations and will proceed to issue charges against your client in anticipation of the impending disciplinary inquiry.

1.2 Without in any way admitting that the suspension of your client is unlawful as alleged in the urgent application and in order to curtail unnecessary litigation in relation thereto, including having to incur legal costs and time consumption in doing so, the suspension is hereby lifted with immediate effect.

1.3 In light thereof, kindly confirm in writing that your client withdraws the urgent application by delivering a notice of withdrawal by no later than 12:00 on Tuesday, 4 August 2015 on the basis that each party shall be responsible for its/his own legal costs."

[3] No 46 of 1999.

[4] No 55 of 1998.

[5] 2007 (28) ILJ 1909 (CC) at para 51.

[6] 2012 (33) ILJ 2033 (LAC) at para 45.

[7] Qoboshiyane N.O. v Avusa Publishing Eastern Cape and Others 2013

(3) SA 315 (SCA) at para 7

[8] Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000

(2) SA 1 (CC) at para 18, footnote 18.

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