

SOUTH AFRICA / JUDGMENT

Maroleng v South African Broadcasting Corporation SOC Limited (J 1520/2019) [2022] ZALCJHB 319 (18 November 2022) [2022] ZALCJHB 319

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 1520/2019

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: J 1520/2019

In

the matter between:

BANDLALENKOSI
CHRIS MAROLENG

Applicant

And

SOUTH AFRICAN
BROADCASTING CORPORATION
SOC
LIMITED

Respondent

Heard: 16 November
2022

Delivered: 18 November
2022

(This

judgement was handed down electronically by circulation to the parties' legal representatives, by email, publication on the

Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 18 November 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to have the termination of his contract of employment set aside on the basis that the termination was unlawful, that unlawfulness arising from the fact that he was denied the opportunity to appeal the decision to dismiss him. During argument, the dispute between the parties was reduced to the single issue of the applicant's right to seek enforcement of what he contends to be a contractual right to an appeal hearing.
- [2] The applicant was employed by the respondent as its chief operating officer. He was dismissed after being found guilty at a disciplinary hearing conducted by an independent counsel on a number of charges of misconduct. On 23 April 2019, at a special board meeting, the chairperson's recommendation that the applicant be dismissed was accepted and the applicant notified accordingly. On 26 April 2019, the applicant addressed a letter to the chairperson of the respondent's board noting his intention to lodge an appeal against the outcome of the disciplinary hearing. On 29 April 2019, the chairperson of the respondent's board notified the applicant that 'there is no internal appeal for dismissed Executive Directors, as the dismissal is effected by the Accounting Authority of the company. You are urged to contact your legal representative(s) for legal advice on how to pursue your rights in this regard.'
- [3] It is not in dispute that after the termination of his employment, the applicant referred an unfair dismissal dispute to the CCMA. One of the averments made by the applicant was that his dismissal was procedurally unfair, because he was not permitted to lodge an appeal against the decision to dismiss him. After a failure to resolve the dispute during conciliation, the matter was referred to arbitration, which proceedings have since been withdrawn by the applicant.
- [4] These proceedings are brought in terms of section 77 (3) of the Basic Conditions of Employment Act, which extends jurisdiction to this court to hear and determine any matter concerning a contract of employment. In essence, the applicant contends that clause 5.1 of the respondent's disciplinary code procedure was expressly incorporated in his contract of employment as a contractual term, and that the clause entitles him to an appeal against the decision to dismiss it. The clause reads as follows:

5.1 Should an employee feel that a disciplinary measure has, for any reason, been unfairly issued or that he has, for any reason, been unfairly dismissed, he shall be entitled to appeal to the next level of management higher than that involved in the hearing...

5.3 The next level of line management higher than that involved in the hearing shall consider the appeal in consultation with Group Labour Relations within ten (10) weekdays after of (sic) the appeal has been lodged.

- [5] The respondent submits that a disciplinary code procedure has no contractual effect unless expressly incorporated into the terms and conditions of the employment contract. In the present instance, the respondent contends that there is no express incorporation and thus no grounds on which the applicant may assert a right of appeal against his dismissal as a term of the contract.
- [6] The respondent relies on *Vakalisa v South African Weather Services and others* [2017] 7 BLLR 729 (LC), where this court was concerned with an application to set aside a decision to terminate the employment of the applicant and to reinstate a disciplinary hearing. The application, similar to the present, was one in which an order for specific performance was sought. The term of the contract on which reliance was placed was to the effect that the employee was expected to be conversant with the employer's policies and procedures as amended from time to time, and the policies and procedures being available from the human resources department. The court held that the sensible construction of the closing question was to the effect that the employee was expected to be familiar with the policies and procedures, and to keep abreast of any amendments to them. The court

held that a proper reading of the rules thus did not disclose any agreement to be bound by reciprocal obligations arising from each and every policy issued by the employer. In those circumstances, there was no incorporation of the disciplinary policy by reference, and a claim for specific performance was thus not sustainable.

- [7] In the present instance, clause 26 of the applicant's contract of employment states the following:

The SABC has various rules, regulations, policies and procedures in place, including, without limitation, the code of ethics, ('the Policies') which may be amended from time to time in the sole discretion of the SABC. The Policies may be accessed by the SABC's intranet, alternatively copies may be requested from the SABC's human resources department. It is the Executive's obligation to familiarise himself with all of the Policies and ensure that he complies therewith. When there is a doubt on the interpretation of this contract against any policy, regulation, etc., this contract will take precedence.

- [8] Clause 28.2 of the contract reads:

This Agreement read with any applicable written policies, procedures or the like as amended, from time to time, constitutes the whole agreement between the Parties and no warranties or representations whether express or implied have been given or made by the SABC to the Executive. Where a dispute arises between the provisions of this agreement and any written policies, procedures, regulations, terms or the like, the provisions of this agreement shall prevail.

- [9] While I accept the principle in *Vakalisa*, the present case is distinguishable on the facts. The terms of the applicant's contract extend beyond an obligation to familiarise himself with the disciplinary code and procedure; clause 28.2 expressly incorporates the code and procedure, written policies as they are, into the contract.
- [10] But that is not the end of the enquiry. Even if I accept that clause 5.1 of the disciplinary code is a term of the applicant's contract of employment, and one capable of surviving the termination of the applicant's employment, specific performance remains a discretionary remedy. Relevant factors or grounds to be taken into account include a situation where damages would adequately compensate the plaintiff, where the order would create injustice or would be inequitable or where performance of the obligation is impossible or would produce undue hardship to the defendant (see *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A)). Ultimately, each case must be judged in the light of its own circumstances (see *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T)).
- [11] In the present instance, I must necessarily take into account the long delay between the date of termination of the contract, and the date on which the applicant sought by way of the institution of these proceedings to enforce the term of the contract that he contends entitles him to an appeal hearing. The applicant was dismissed in April 2019, some three and a half years ago. The applicant sought an appeal hearing, which was declined two days later on the basis that he had been dismissed by the board of directors, and that there was no higher level to which any appeal could be directed. On 23 May 2019, the applicant then referred an unfair dismissal dispute to the CCMA, seeking compensation for a dismissal that he alleged was unfair. The present application was filed only on 10 September 2019, almost five months after the date on which the applicant's contract of employment had been terminated. It is almost as if the remedy of specific performance was an afterthought. Further, there is the long period of delay between the applicant's termination of employment and the date of hearing – as I have noted, a period of some three and a half years. The prejudice to the respondent should it now be required to convene an appeal hearing is obvious. Next, there is the fact that the applicant's contract of employment was terminated by decision of the respondent's board, the highest level of decision-making authority. It is difficult to imagine in these circumstances to whom an appeal could be corrected, or who would hear the appeal. To the extent that the applicant's counsel submitted that an independent party could be appointed to conduct such a hearing, there is no provision in clause 5 of the disciplinary code to that effect and in any event, as was the case with regard to the applicant's disciplinary hearing, the independent chairperson's realm was confined to the making of the recommendation, which was ultimately adopted by the board. Impossibility of performance aside, I must necessarily take into account that the applicant referred a dispute to the CCMA about what he contended was his unfair dismissal, in which he appears to have acquiesced in the decision to dismiss him, but for the issues of substantive and procedural fairness raised in the referral form. Indeed, the applicant specifically avers in the referral that his dismissal was procedurally unfair because no appeal was allowed. For reasons that are not

apparent, those proceedings were withdrawn. While the referral of a dispute to the CCMA in these circumstances, and in particular, a dispute concerning procedural unfairness, may not necessarily satisfy the requirements of waiver of any contractual right, it is certainly an indication that the applicant at the time of the referral acquiesced in the position that no appeal was going to be afforded to him. Indeed, the applicant sought compensation on that basis.

- [12] In summary, although the applicant's right to an appeal hearing was the subject of a contractual term it is not a term that ought properly, having regard to all of the circumstances, to be the subject of an order for specific performance.
- [13] Finally, in relation to costs, the LAC has held that when this court exercises jurisdiction under section 77(3) of the Basic Conditions of Employment Act, as it does in this instance, the rule established by section 162 of the LRA to the effect that costs do not follow the result and must be determined by reference to the requirements of the law and fairness, does not apply (see *Baise v Mianzo Asset Management* (2019) 42 ILJ 1987 (LAC)). The rule to be applied in proceedings such as the present is that costs follow the result, save in exceptional circumstances. There are no exceptional circumstances in the present instance. To the extent that the applicant's counsel completed that the matter raises constitutional issues and thus warrants a different approach to costs, it should be recalled that the applicant has based his claim squarely in contractual terms, invoking section 77 (3) of the BCEA to found this court's jurisdiction. The constitutional component of the applicant's claim is more apparent than real. Further, I must necessarily take into account the conduct of this litigation. Some five months after the filing of the answering affidavit, and despite the failure to file a replying affidavit, the applicant filed an application for leave to amend the notice of motion and submitted a supplementary affidavit. In the supplementary affidavit, the applicant sought to introduce new factual material and indeed, a new cause of action, including a claim in the alternative for the payment of R16 million in contractual damages. Although it was not necessary in relation to the merits of the application to make any ruling in regard to the filing of these papers, in relation to costs, the applicant's conduct amounts to nothing less than an abuse of the process of this court. The supplementary papers filed by the applicant are replete with invective and irrelevant material, and do not advance the cause of action on which the applicant ultimately relied. There being no exceptional circumstances (on the contrary, the circumstances being aggravating) the ordinary approach i.e. that

costs follow the result, should apply.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M. T Kufa, M Tshiyhase and P. Sila

Instructed by:

Nyachowe Attorneys

For the respondents:

S Tom, Werkmans Attorneys

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Prepared on 10 October 2026 · Esheria