

SOUTH AFRICA / JUDGMENT

## Nkosi and Others v MEC for the Department of Economic Development and Planning and Another (16166/2007) [2015] ZAGPPHC 769 (12 November 2015)

[2015] ZAGPPHC 769

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

16166/2007

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE: 12/11/2015

CASE NO: 1666/2007

In the matter between:

MAVELA WILLIAM NKOSI

1st PLAINTIFF

ELIJAH MADODA SHABANGU

2nd PLAINTIFF

MFANAKUPHI MISHACK NKOSI

3rd PLAINTIFF

And

MEC OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT

AND PLANNING

1st DEFENDANT

SIMANGELE SEKGOBELA

2nd DEFENDANT

J U D G M E N T

KUBUSHI, J

- [1] Three cases were to be heard before me, namely, case number 16165/2007, 16166/2007 and 16167/2007. The issues in these cases were the same and the same defendants were being sued. At the commencement of the hearing, the plaintiffs' counsel applied and I granted the application for the consolidation of the three cases. I shall therefore for purposes of this judgment refer to the plaintiff in case number 16165/2007, E M Shabangu, as the first plaintiff; the plaintiff in case number 16166/2007, M W Nkosi, as the second plaintiff; and plaintiff in case number 16167/2007, M M Nkosi, as the third plaintiff.
- [2] The three plaintiffs were employees of the Department of Economic Development and Planning, in Mpumalanga Province, the first defendant herein. During such employment they were convicted of corruption committed at work. The head of the department, second defendant herein, is alleged to have dismissed them without following proper procedure. The plaintiffs are now suing the defendants for damages. Their action is based on breach of contract.
- [3] The plaintiffs were initially charged with misconduct and dismissed. They referred their discharge to the Public Service Sectoral Bargaining Council and were reinstated and compensated in terms of the arbitration award. This was before they were convicted of corruption. Charges of corruption were then preferred against them. They pleaded guilty and offered to pay back the funds they had misappropriated hence they were found guilty of corruption. After conviction, the second defendant summarily dismissed them from their employment. Their case is that, in so dismissing them, the defendants repudiated their agreements of employment.
- [4] When the matter appeared before me, there was no appearance by the defendants. was informed that at roll call the matter stood down for 30 minutes for the plaintiff's counsel to try and locate the defendants or their legal representative without success. The plaintiffs' attorney phoned the State Attorney's office and got no response. The notices of set down of the hearing of this matter in respect of the three cases were properly served on the defendants' legal representative on 24 June 2014 and the index was served on the 29 September 2015, respectively. The matter was thus proceeded with on an undefended basis.

SPECIAL PLEA OF LACK OF JURISDICTION

- [5] In their papers before me, the defendants had raised a special plea of jurisdiction. When addressing me on this issue the plaintiff's

counsel submitted that this court has jurisdiction to hear the matter because the plaintiffs were not claiming fairness of the dismissal but repudiation of their contract of employment by their employer. His argument being that the plaintiffs were entitled to relief on the basis of s 77 (3) of the Basic Conditions of Employment Act, No. 75 of 1997 ("the Act"). Counsel argued that since the matter is concerned with the terms of the contract of employment the plaintiffs have a right to approach the High Court on the basis of s

77 (3) of the Act. In this regard counsel referred me to the judgment in *Fedlife Assurance Limited v H J Wolfaardt* (450/1999) [2001] ZASCA (16 August

2001) para 25 to 26.

- [6] In terms of s 77 (3) of the Act, the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.
- [7] On the reading of the authority provided by counsel read together with the provisions of the Act, it is apparent that the High Court has jurisdiction to hear a matter like the one before me, where the unfairness of the dismissal is not at issue but the terms of the agreement of employment are being challenged.
- [8] The defendant's special plea is therefore dismissed with costs

#### DAMAGES

- [9] In order to prove damages, each plaintiff led evidence to prove the salary earned at the time of dismissal and called an actuary to show how the amount claimed for the damages was calculated.
- [10] The actuary, Mr Johannes Christopher Sauer, tendered evidence as to how he calculated the damages suffered by each plaintiff. In his calculations he capitalised loss of earnings from date of dismissal, 15 December 2007, until retirement. The income was projected with inflationary increases without promotions and he also allowed for mortality and contingency deductions.
- [11] At the time of his dismissal, the first plaintiff earned a salary of RB 243 after deduction which translates to R98 916 per annum. The amount of damages he claims is R3 386 001 as per actuarial calculations.
- [12] The second plaintiff earned a salary of R137 049 per annum at the time of his dismissal. The amount of damages claimed is R3 375 104 as per actuarial calculation.
- [13] Whilst, the third plaintiff earned a salary of R146 685 per annum when he was dismissed and the amount he claims is R5 762 054 as actuarially calculated.
- [14] In terms of s 17 (2) (d) of the Public Service Act, an employee of a department may be dismissed on account of misconduct. Section 17

- (1) (b) provides that the power to so dismiss an employee shall be exercised and provided for in s 168 (1). Section 168 (1) read with s 16A (2) in turn enjoins a head of a department to take disciplinary action against an employee.
- [15] In their own evidence the plaintiffs admit having defrauded the first defendant and were as such found guilty of corruption in the criminal court and ordered by that court to refund the amount so defrauded. It is on this ground that the second defendant dismissed them summarily without any due process.
- [16] Fraud and corruption have always been held to comprise good grounds for dismissal since they constitute a fundamental breach of the employment contract. It has always, therefore, been emphasised, with good reason, that the breach of the relationship of trust that occurs where an employee is found guilty of such a misdemeanour is material and goes to the root of the contract. [1] In this instance, it is even worse because the plaintiffs pleaded guilty and admitted having committed the offence. It is a well-known principle of our law that an employer is entitled to terminate and/or cancel a contract (dismiss the employee) when the employee has committed a material breach of contract. It is thus my view that the dismissal of the plaintiffs in these circumstances was lawful.
- [17] However, the plaintiffs' case is that in dismissing them the second defendant should have followed due process and, in failing to do so, the second defendant rendered the dismissal unlawful, and in fact, the claim is that the employer repudiated the contract.
- [18] To my mind, it is not the employer who repudiated the employment contract in the circumstances of this matter. The plaintiffs, by being found guilty of corruption, are the one who repudiated their contract of employment. The employer had the option either to accept the repudiation or not and by dismissing the plaintiffs the repudiation was accepted. The plaintiffs having approached this court for relief in terms of their contract of employment, there is no duty upon the employer to follow any due process as suggested by the plaintiffs.
- [19] Having concluded that the dismissal was lawful, it follows that the plaintiffs have not proved any breach of contract on the part of their employer and their action falls to be dismissed.
- [20] Consequently, the plaintiffs' claims are dismissed with costs.

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E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE

: 05 OCTOBER 2015

DATE OF JUDGMENT :12 NOVEMBER 2015

APPLICANT'S COUNSEL : ADV. O.C MABASO

APPLICANT'S ATTORNEY : SAMBO-MHLAHLEKI ATTORNEYS

RESPONDANTS' COUNSEL : NO APPEARANCE

RESPONDANTS' ATTORNEY : STATE ATTORNEY PRETORIA

[1] See Toyota South Africa Motors (Pty) Ltd v Radebe & others [2000] 3 BLLR 243 (LAC).

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Prepared on 9 October 2026 · Esheria