

SOUTH AFRICA / JUDGMENT

Sekwati v Safety and Security Sectoral Bargaining Council and Others (JR160/13) [2016] ZALCJHB 116 (24 March 2016)

[2016] ZALCJHB 116

COURT

Labour Court Johannesburg

BEFORE

D H Gush

CASE / FILE NUMBER

JR160/13

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THE

LABOUR COURT OF SOUTH AFRICA, BRAAMFONTEIN

Not

Reportable

Case no: JR 160/13

In

the matter between:

DINKWANYANE SIMON

SEKWATI

Applicant

and

THE SAFTEY AND

SECURITY SECTORAL

BARGAINING

COUNCIL

First Respondent

E

TLHOTLALEMAJE

Second Respondent

THE SOUTH AFRICAN

POLICE SERVICE

Third respondent

Heard:

2 December 2015

Delivered:

24 March 2016

Summary:

review. Application dismissed

JUDGMENT

GUSH J

[1] This is an application by the applicant to review, correct and set aside the arbitration award issued by the second respondent under the auspices of the first respondent in which the second respondent concluded that the applicant's employment had terminated by virtue of the application of regulation 18(5)(a)(ii) of the South African Police Services Regulations 2006.

[2] Having so concluded the second respondent ruled that the applicant had failed to discharge the onus of proving the existence of a dismissal as contemplated in section 192(1) of the Labour Relations Act 66 of 1995 (LRA). As the

applicant's services were terminated by operation of law accordingly the second respondent found that the first respondent did not have jurisdiction to determine the dispute referred by the applicant.

[3] The applicant's cause of action arises from having referred a dispute concerning what he alleges was an unfair dismissal to the first respondent that in turn appointed the second respondent to arbitrate the dispute.

[4] The applicant in his notice of motion specifically applies for the award to be reviewed in terms of section 145 of the LRA alternatively section 158 of the LRA alternatively the common law and that the conclusion reached by the arbitrator that the applicant was not dismissed be set aside.

[5] The applicant in addition seeks an order from the court directing the further conduct of the proceedings; specifically, either a determination of the unfair dismissal dispute or referral of the dispute to another Commissioner for rehearing.

[6] The third prayer is for a declarator that the applicant was not "dismissed" by operation of law or at all and accordingly for an order that the applicant was at all times and remains an employee of the third respondent.

[7] Before even considering the merits of the application, it is necessary to deal with these various prayers contained in the notice of motion.

[8] To reiterate, the applicant primarily applies to set aside the award and to all intents and purposes, substitute it with an order that the applicant was dismissed and that the first respondent had jurisdiction to hear the dispute. This is the applicant's cause of action. The prayer that the court should declare the applicant not to have been dismissed ignores the fact that this matter is before this Court by virtue of the applicant's own referral of a dismissal dispute to the first respondent.

- [9] If the applicant seeks an order that he was not dismissed or that the application of the statutory provisions of regulation 18(5)(a)(ii) of the SAPS Regulations 2006 was unlawful, that is not a matter before this Court.
- [10] The first prayer in the applicant's notice of motion is specifically related to the award the applicant seeks to review and the second prayer is dependent upon the court reviewing and setting aside the arbitration award to the extent that it requires an order that the applicant has discharged the onus set out in section 192(1) of the LRA by proving that he was dismissed.
- [11] The applicant's third prayer is not in the alternative and is in direct contradiction to the relief sought in prayers 1 and 2.
- [12] At the commencement of the "Analysis Of The Evidence And Submissions" in the award, the second respondent records the following:

'As per the parties pre-arbitration minute, it was common cause that the applicant was "dismissed" in terms of regulation 18 (5)

(a) (ii) of this SAPS Regulations 2006. These provide that:

in the event that the employee fails to appear at the disciplinary hearing on any date to which the disciplinary hearing has been postponed, or a date to which it was postponed in terms of sub-regulation (3) :

(i) the employee shall, from the date of such failure to appear remained in attendance, be deemed to be suspended without remuneration; and

(ii) the chairperson has postponed the disciplinary hearing indefinitely, and the disciplinary hearing shall only reconvene at the instance of the employee concerned, after liaising with the employer representative, as contemplated in subregulation (i)

(b) provided that in the event that the employee fails to take steps to reconvene the hearing within two (2) months of such date, the chairperson must record such failure on the record of the disciplinary hearing, and the employee shall forthwith be deemed to be discharged from the service in terms of regulation 15(l) (e).'

[13] That being so the second respondent proceeded to determine whether the applicant had been dismissed as is provided for in the LRA. The second respondent concluded, in line with a number of decisions of this Court, that the application of such a deeming provision does not constitute a dismissal and that accordingly the first respondent did not have jurisdiction to entertain the matter.

[14] What the applicant ignores is that at no stage during the arbitration did the applicant ever aver that he had not been dismissed. Had he done so the issue of jurisdiction would have been resolved at the outset.

- [15] In the application, the applicant sets in his founding affidavit the grounds upon which he avers the award should be reviewed. All of which are premised on the averment that he was dismissed.
- [16] If it is the applicant's contention that he was not dismissed by virtue of the application of regulation 18(5)(a)(ii) of this SAPS Regulations 2006, there is no purpose served in reviewing the award. The course of action opens to the applicant is surely then to challenge the validity of the application of the regulations with the relevant authority.
- [17] As far as the merits of the applicant's grounds of review are concerned, I am not persuaded that the award of the second respondent is wrong and that it falls to be reviewed. In any event, even if the award is reviewable, the applicant now avers that he was not dismissed and therefore the first respondent still would not have jurisdiction to determine the dispute.
- [18] In the circumstances, and for the reasons set out above, I make the following order:

The applicant's application is dismissed with no order as to costs.

D H Gush

Judge of the Labour Court of South Africa Johannesburg

APPEARANCES:

FOR THE APPLICANT:

S Lancaster of Crafford Attorneys

FOR THE THIRD RESPONDENT: Adv Mosam

Instructed by the State Attorneys

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