

SOUTH AFRICA / JUDGMENT

South African Broadcasting Corporation SOC Ltd v Phasha (JA 36/2019) [2020] ZALAC 50; [2021] 3 BLLR 270 (LAC); (2021) 42 ILJ 816 (LAC) (27 November 2020) [2020] ZALAC 50

COURT

Labour Appeal Court

BEFORE

Phatshoane, Davis, Savage

CASE / FILE NUMBER

JA 36/2019

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 36/2019

SOUTH AFRICAN
BROADCASTING
CORPORATION SOC
LTD

Appellant

and

NOMPUMELELO PETUNIA
PHASHA

Respondent

Heard: 28 May 2020

Delivered: 27 November 2020

Summary: Dismissal----Parties consenting to a pre-dismissal arbitration in terms of s 188A of the LRA----Employer summarily dismissing employee because of recusal applications lodged by employee----Employer construing the recusal applications as misconduct justifying summary dismissal----Court finding that recusal applications inextricably linked to the pre-dismissal proceeding in terms of s 188A----Employer breaching contractual agreement----Employee entitled to specific performance of reinstatement.
Coram: Phatshoane
ADJP, Davis JA and Savage AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This appeal requires an answer to an important question regarding the manner in which an employer can terminate a contract where it is alleged that the employer had breached the terms thereof; in particular, whether the termination can take place without the convening of a formal hearing. Simultaneously it raises a further question: whether a party charged with gross misconduct in terms of which the dispute is to be resolved by way of a disciplinary hearing adjudicated materially by the Commission for Conciliation Mediation and Arbitration (CCMA) in terms of s 188 A of the Labour Relations Act 66 of 1995 (LRA) can be dismissed, prior to the completion of that hearing, for conduct which could be found to be inextricably linked to the dispute before the disciplinary hearing.
- [2] Respondent was employed by appellant in 2012 in terms of a written contract of employment. At the time of her dismissal, she was employed as General Manager: Commercial Services. She was charged with gross misconduct on 7 August 2018. On 13 September 2018, the parties agreed to hold a disciplinary hearing adjudicated by the CCMA in terms of s 188 A of LRA.
- [3] The hearing was set down before Commissioner Phala on 1 and 2 October 2018. Prior thereto respondent brought an application to postpone the hearing which was granted. Thereafter she brought an application on 22 October 2018 seeking the recusal of Commissioner Phala. According to the founding affidavit deposed to by respondent, she was concerned that Commissioner Phala had been the chairperson of a range of internal disciplinary proceedings involving staff of the appellant, all of which had been conducted in the offices of appellant's attorneys Werkmans. She alleged that it was not coincidental that Mr Phala, who had chaired so many of these disciplinary proceedings would again be appointed as the arbitrator in her dispute with appellant. She stated that she was suspicious

of the long-standing relationship between Mr Phala and Werkmans Attorneys. In her view, there was a reasonable apprehension that she would not benefit from an impartial hearing. She contended that the matter should proceed before a senior commissioner who had not dealt previously with employment disputes involving appellant.

[4] The hearing was rescheduled for 11 December

2018. The notice of set down generated by the CCMA identified Mr Terry Moodley as the Commissioner who was now to conduct the s 188 A enquiry. According to the respondent, 'it then dawned on me that he had been the same Commissioner who had rendered an award of dismissal against Mr Hlaudi Motsoeneng'. She thus launched another recusal application, this time for the recusal of Commissioner Moodley.

[5] On 27 December 2018, Commissioner Moodley issued a ruling in which he found that respondent's perception of bias was unreasonable and without factual foundation. He accordingly dismissed her application.

[6] Prior to this decision by Commissioner Moodley with regard to his recusal, respondent received a letter from the appellant on 18 December 2018 requesting that she makes representations as to why she should not be dismissed for bringing the recusal applications. It was alleged that she had engaged in improper conduct which 'has negatively affected the trust (nucleus of the employment relationship) between yourself and the company'. In particular, it was alleged that respondent had proffered malicious, false and egregious accusations regarding the relationship between appellant and Commissioner Phala and CCMA in her application for his recusal. Further, she raised scandalous false accusations regarding the relationship between the SABC, CCMA and Commissioner Moodley in the application for his recusal. Further, she had made a series of serious allegations concerning collusion between appellant and the CCMA and two of its Commissioners without tendering any evidence to justify these accusations. In appellant's view,

she had brought recusal applications on the basis of unsubstantiated egregious and false claims.

[7] In summary, appellant wrote, 'you have therefore failed to comply with the implied term of the contract of employment which necessitates that, as an employee, you will act [in] good faith towards the company and serve the company honestly and faithfully.' Respondent's attorney replied on 28 December 2018:

'Our response to your letter should not be interpreted as acquiescing to the law which you have embarked upon but rather to sound the clarion call in asserting our client's rights in this regard.'

[8] Respondent's attorney warned that were the appellant to 'unlawfully dismiss our client notwithstanding the pending s 188 A inquiry, respondent would seek a personal costs order against the appellant'. The letter then went on to discuss the importance of the s 188 A inquiry, in particular, that this was the process that had to be followed with regard to any decision which might be adverse to respondent's employment. The letter proved of no avail

in persuading appellant to continue with the s188A hearing. It purported to dismiss respondent with effect from 31 December 2018. In the letter in which respondent was informed of this decision, the appellant noted: ‘Your failure to show cause why your employment with the company should not

be terminated for the reasons articulated in our letter 18 December 2018.’ Significantly, the letter went on to say:

‘Please note that the termination of your employment has nothing to do with the allegations of misconduct, which are a subject matter of the s 188 A pre-dismissal arbitration proceeding at the CCMA. The termination has everything to do with the subsequent breach of trust demonstrated in your recusal applications. Further, whilst the company appreciates and values the vindication of your rights, it cannot allow your vexatious and scandalous attack on it as demonstrated by your conduct in your recusal applications. You continue using word like “treacherous” in your correspondence, which is further demonstration of the irretrievable

break-down of the employment relationship.’

[9] Respondent then brought an urgent application before the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act, 75 of 1997, in which she contended that her summary dismissal was unlawful and constituted a breach of the appellant’s contractual obligations to address the allegations of misconduct in the pre-dismissal arbitration in terms of s 188A of the LRA.

The judgment of the Labour Court

[10] Sitting in the Labour Court, Cele J found that the relationship between the appellant and respondent was governed by the contract of employment which had been concluded between the parties together with the Disciplinary Code of the appellant which ‘supplements the SABC’s personnel regulations and together with the regulations they form part of all employees contract of employment.’ Referring to clauses 4.5 – 4.6 of the Disciplinary Code, the learned judge found that a formal disciplinary enquiry to be presided over by a chairperson or disciplinary panel was required in any case which warrants its strongest disciplinary measures than a mere verbal warning. In short, ‘for any serious acts of misconduct allegedly perpetrated by its employees, the SABC has bound itself to the conduct of a disciplinary hearing with the exception of offence of participation in procedural collective industrial action.’

[11] By failing to hold an inquiry before terminating the employment of contract the court found that the appellant had unlawfully terminated the contract. The respondent was entitled to uphold the terms of the contract and to seek restitution. Accordingly, the court found that the summary dismissal of the respondent constituted a breach of the appellant’s contractual obligation to address allegations of misconduct by way of the process set down in s 188 A of the LRA. Consequently, the respondent’s contract of employment had been unlawfully terminated and she had to be reinstated into her employment with the appellant with

retrospective effect from 31 December 2018 without any loss of remuneration and benefits. Furthermore, an interdict was granted restraining the appellant from taking any disciplinary action against the respondent, save for the inquiry in terms of s 188A of the LRA. The court also ordered that the respondent was entitled to a punitive costs order in her favour.

[12] With leave of this court, the appellant appealed this order.

Appellant's case

[13] Mr Cassim, who appeared together with Ms Tulk on behalf of the appellant, submitted that the Disciplinary Code had not been incorporated into the contract of employment but even if it were, the provisions of the contract prevailed. These provisions allowed for summary dismissal for a material breach and this had to be considered to be a separate process from the hearing which had been convened in terms of s 188A of the LRA.

[14] In particular, Mr Cassim placed considerable emphasis on clause 20 of the contract of employment between the parties. Clause 20.1.1 provided that either party had a right to terminate the contract on one month's notice. Clause 20.1.2 empowered the appellant 'summarily (or in such other basis as it considers appropriate) and without the payment of compensation to the General Manager if the General Manager; commits any breach of a material obligation of his employment or in terms of 20.1.2.5 the appellant lose confidence and/or trust in the General Manager.

In addition, Mr Cassim referred to clause 25.2 which provides:

'The 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 the agreement and any written policies, procedures, regulations, terms or the like, the provisions of this agreement shall prevail.'

[15] Within this contractual context, Mr Cassim placed a great deal of emphasis on a judgment of the Labour Court in *Vakalisa v South African Weather Services and others* [2017] 7 BLLR 729 (LC). In that case, the court found that the contract of employment did not incorporate the disciplinary policy of the company. The words of the contractual clause which are relevant read: 'you are expected to be conversant with the SAWS policies and procedures as amended from time to time. The policies and procedures are available in the Human Capital Management Department.' Rabkin-Naicker J reasoned as follows at para 11: 'In my view, the interpretation of the clause in casu advocated by the applicant, i.e. that it incorporates by reference the disciplinary policy, must also mean that it incorporates by reference all SAWS policies and procedures as amended from time to time - given that no one policy is specifically mentioned. Can this be the sensible meaning to attribute to the clause given that 'conversant with' means 'having knowledge or experience with'? I do not believe that it is. '

[16] By contrast, Clause 25.2 of the contract in the present dispute reads thus:

‘The 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 the agreement and any written policies, procedures, regulations, terms or the like, the provisions of this agreement shall prevail.’

[17] At best for the appellant’s case, it may be argued that the final words of clause 25.2 namely that ‘the provisions of this agreement prevail’ over the aforementioned policies, procedures and regulations come to the aid of the appellant. This would mean, as Mr Cassim urged, that the contractual provisions trumped any additional requirements that were contained in the disciplinary code, notwithstanding their incorporation into the legal relationship between the parties. For Mr Cassim, the concept of summary dismissal in a contract can be read to mean dismissal without any process in terms of which the affected employee has an opportunity to respond.

[18] The reading of clause 21.2 clearly dictates a contrary conclusion. Take for example clause 20.2.8 which, on the logic of Mr Cassim’s argument also falls under the category of summary dismissal. It provides for summary dismissal if the General Manager ‘does or admits to do anything which would justify the SABC terminating the General Manager’s appointment summarily.’ The consequence of appellant’s argument is that this vague provision would justify summary dismissal without any form of hearing being offered to the employee whom the employer has decided to summarily dismiss.

[19] To the extent that there can be any doubt about this issue, a court must bear in mind that in terms of s 39(2) of the Constitution[1] the court, when developing the common law, must promote the spirit, purport and objects of the Bill of Rights. Were the law of contract with regard to employment to be in the situation that summary dismissal can take place without any form of hearing, this part of the law of contract would clearly be in need of renovation for the right to fair labour practices as enshrined in s 23 of the Constitution would then be at war with this contractual position where simply by action of an employer’s prerogative, an employee can be summarily dismissed on the basis of a vague provision as is contained in clause 20 of the employment contract.

[20] It is not, however, necessary to have to apply s 39(2) of the Constitution to this interpretive process within the context of this case. As Lewis ADP said in *Theron v Premier of the Western Cape Province* and another

[2019] ZASCA 6 at para 19:

‘[19] It is as well at this stage to refer to the principles dealing with the interpretation of contracts. It is now clear that interpretation

is a unitary exercise, which starts with the text to be interpreted, and considers it within the contract as a whole, and in context. As put most pithily by Unterhalter AJ in *Betterbridge (Pty) Ltd v Masilo & others* NNO 2015

- (2) SA 396 (GNP) para 8 (referring to the decision of this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)): ‘the interpretation of language, including statutory language, is a unitary endeavour requiring the consideration of text, context and purpose’.
- [21] In engaging in this unitary exercise, parties in negotiating a contract of employment within the context of the South African legal dispensation including the protection afforded to employees in terms of the Constitution, would, unless there is a clear and express use of language to the contrary, have? intended that the contract would be predicated on fair as opposed to unfair labour practices. In turn, this would impact upon the procedure to be adopted in the case of a summary dismissal. In short, the protections afforded by the appellant’s Disciplinary Code would, objectively, have been contemplated by parties negotiating a contract of employment at arms length and within the current legal dispensation. It is within this frame that the court is required to interpret the contract between the parties.
- [22] Mr Cassim argued in the alternative that, were this Court to find that a summary dismissal could not take place without recourse to a hearing, then in the present case the respondent had been given the requisite hearing in that, on 18 December 2018, she was called upon to make representations as to why she should not be dismissed. Respondent rejected the opportunity to make such representations on 28 December 2018 by simply denying that the appellant was entitled to summarily terminate her contract appellant as of right. It was only after the consideration of the contents of the letter of 28 December 2018 that appellant terminated the contract for material breach.
- [23] This submission requires evaluation in the context of the disciplinary process which was simultaneously proceeding in terms of s 188 A of the LRA. Section 188A(1) provides that an employer may with the consent of the employee request the Commission to conduct an arbitration into allegations of the conduct or capacity of that employee.

Discussion

- [24] The essence of s 188A is to provide for a pre-dismissal arbitration which substitutes arbitration before an independent arbitrator for a disciplinary inquiry. It is a voluntary procedure and both the employer and the employee must consent thereto. So much is clear from s 188 A which provides, inter alia, that an employer may with the consent of the employee request the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.

- [25] In this case, s 188 A inquiry was agreed between the parties to determine the veracity of charges which had been levelled against the respondent as set out in a letter of 7 August 2018. In essence, as was set out in that letter ‘you committed acts of serious misconduct in a form of Gross Negligence and/or Contravention of the Supply Chain Management Policy and/or the Legal Services Policy and/or the Information Security Policy and/or the Information Security Framework of Standards Information Security Policy.’
- [26] The inquiry never got underway as a result of the two recusal applications which were brought by the respondent. The appellant’s case is that the recusal applications constituted a totally separate form of gross misconduct entitling the appellant to ignore the s 188A process and proceed separately to a decision to summarily dismiss the respondent after the exchange of correspondence to which I have made reference.
- [27] It is, in my view, possible to conceive of a situation where entirely separate conduct on the part of an employee could justify a separate process of dismissal so that it may be divorced from a prior initiation of proceedings in terms of s 188A(1) LRA. But in the present case, whatever the merits of the two recusal applications, these applications were directed at the very hearing that was designed to adjudicate upon the charges of misconduct brought by the appellant. To the extent that the claims in such applications raised further allegations of misconduct, given the nexus between the applications and the s188A process, there was no bar on the appellant seeking to include the determination of that misconduct within the ambit of the agreed s 188 A process.
- [28] This was clearly a case where the appellant relies upon form over substance in that, clearly frustrated by the in limine objections brought by respondent and ignoring the nexus between these objections and the s 188A process, it classified these objections as an entirely separate form of misconduct, unrelated to the substance of the s 188A process. It did so in order to justify summary dismissal and thereby circumvent the process which had already begun in terms of s 188A of the LRA. Were this conduct to be sanctioned by this Court, it could undermine the very idea behind recourse to an independent inquiry pursuant to s 188A of the LRA; more so where the impugned conduct is inextricably linked. In other words, since the s188A inquiry has been initiated, it should have proceeded to finality.
- [29] In summary, there is no justification for an attempt to classify the recusal applications as separate from and unrelated to the s 188A process so as to support an argument regarding two separate processes and by so doing circumvent the agreed s 188A process to summarily dismiss the employee.
- [30] It is common cause that two sets of allegations of misconduct were presented to the pre-dismissal arbitration in terms of s 188 A. The first set of allegations to which reference has already been made was dated 7 August 2018. On 5 November 2018, three further charges were laid against the respondent dealing with breaches of good faith, trust, confidence and duties of fidelity to which charges were set out a series of events to justify the three new charges which were brought against respondent in terms of this second letter. Given that the

recusal applications were inextricably linked to the pre-dismissal arbitration; the option was thus always available to the appellant to add an additional charge relating to the allegations made in the recusal applications as had

been done on 5 November 2018. In the event that the respondent had refused to allow this additional complaint to form part of a

pre-dismissal arbitration, a separate process might then have been justified.

[31] There was no suggestion on the papers that the respondent was not prepared to proceed with the pre-dismissal arbitration, notwithstanding her lack of success with regard to the second recusal application. As I have indicated, this finding should not be construed as to prevent an employer from proceeding with separate disciplinary measures in circumstances where a discrete case clearly unconnected to the initial dispute which has given rise to the pre-dismissal arbitration has taken place. Had these been the facts in the present appeal, a different conclusion might well have been reached.

The appropriate order

[32] It should follow that a finding to the effect that the appellant has acted in a manner which has subverted the pre-dismissal arbitration to which it had consented in terms of s 188A would give rise to an order of specific performance. Since the judgment in *National Union of Textile Workers and others v Stag Packings (Pty) Ltd and another* 1982

(4) SA 151 (T) (*Stag Packings*), our law has affirmed that the general rule is that a party to a contract which has been wrongfully rescinded by the other party could hold the other party to the contract if he or she so elected. What is significant about the *Stag Packings* case was that the court held that the practice of allowing only the remedy of damages to the wrongfully dismissed employee could not be elevated to a rule of law to the effect that such a contract could be unilaterally terminated and that under no circumstances could specific performance be granted.

[33] A Full Bench in *Santos Professional Football Club (Pty) Ltd v Igesund and another*

(2002) 23 ILJ 2001 (C) took the point further. In that case, the court found that it had a discretion to refuse specific

performance if it would operate ‘unreasonably hardly on the defendant or whether the agreement giving rise to the claim was

unreasonable or where the decree would produce injustice or it would be inequitable under all the circumstances.’ In this case, the court held that the employee was bound to the contract and that if the employer so chose, the employee, in this case a football coach who had accepted a better offer from a rival club, was compelled to continue to discharge his contractual obligations, that is that an order of specific performance against an employee was, in this case, justified (see Tjatie Naudé: “Specific Performance against an Employee Santos Professional Football Club (Pty) Ltd v Igesund” 2003 SALJ 269-281)

[34] The argument on behalf of the appellant was that if there was a case of wrongful dismissal, it had to be grounded in the concept of fairness. But under the reasoning employed in this judgment, the ultimate finding is that by attempting to circumvent the process in terms of s 188A of the LRA, the appellant acted unlawfully. The distinction between fairness and unlawfulness was emphasised by the Constitutional Court in *Steenkamp and others v Edcon Ltd (National Union of Metal Workers of SA intervening)* (2016) 37 ILJ 564 (CC) paras 189 and 192 where the court said that:

‘An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means that the employee remains in his or her position in the employ of the employer...

It is an employee whose dismissal is unfair that requires an order of reinstatement. An employee whose dismissal is invalid does not need an order of reinstatement if an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purpose of performing his or her duties. However it cannot order the reinstatement of the employees.’ (para 192)

[35] That must be the position in this case given the finding to which this court has arrived; that unlawfulness renders the initial decision void. And that means that the respondent is entitled to be put back into a position from which she was unlawfully removed. This finding, of course, has nothing to say about the merits of the allegations that were to be determined by the s188A process until it was subverted by appellant’s action to dismiss on an ostensibly separate ground. That dispute will doubtless still

await determination.

Costs

[36] The court a quo made an order of costs de bonis propriis with no justification offered for such an order. Given that such a cost order is an extraordinary order clear justification has to be provided before such an order can be granted. There was nothing to suggest that this order was justified in the present case.

The order

[37] For the reasons set out, the following order is made:

1. The appeal is dismissed with costs.
2. The order of the court a quo is upheld only to this extent:
 - 2.1 by confirming paras 1 to 7 of the order.

2.2 by setting aside paras 8 and 9 of the order and substituting para 9 as follows:

“The South African Broadcasting Corporation SOC Limited, the first respondent, is to pay the costs of the application on party and party scale.”

Davis JA

Phatshoane ADJP and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv. Nazeer Cassim SC with Adv. Reghana Tulk

Instructed by Werksmans Attorneys

FOR THE RESPONDENT: Adv Macgregor Kufa, Adv Ngoako Moropene, Adv Tshifaro Munyai

Instructed by Machaba Attorneys

[1] Constitution of the Republic of South Africa, 1996.

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