

SOUTH AFRICA / JUDGMENT

Ubuntu Education Fund v Paulsen N.O and Others (PA12/17) [2019] ZALAC 56; [2019] 11 BLLR 1252 (LAC); (2019) 40 ILJ 2524 (LAC) (15 August 2019) [2019] ZALAC 56

COURT

Labour Appeal Court

BEFORE

Tlaletsi, Murphy, Savage

CASE / FILE NUMBER

PA12/17

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IN THE LABOUR APPEAL
COURT OF SOUTH AFRICA, PORT ELIZABETH
Reportable
Case no: PA 12/17

In the matter between:

UBUNTU EDUCATION FUND Appellant and PAULSEN N.O First Respondent COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION Third Respondent ZANDILE SONYAYA Fourth Respondent
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Heard: 14 February 2019

Delivered:	15 August 2019 Summary: Employee on probation dismissed for poor work performance – commissioner finding that dismissal substantively unfair as employee made permanent after successfully completing the probationary period. Court finding that evidence showing that probation period implicitly extended to allow performance appraisal and that employee underperforming – Appeal upheld and Labour Court’s judgment set aside.
Coram:	Tlaletsi JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

- [1] The appellant appeals against the judgment of the Labour Court (Mahosi AJ) dismissing its application to review and set aside the award of the first respondent (“the commissioner”) reinstating the fourth respondent (“Sonyaya”) in its employ.
- [2] The appellant is a non-profit organisation engaged in various programs aimed at assisting children with the long term goal of eradicating poverty. Sonyaya was employed as a supply chain coordinator with effect from 18 August 2014. The position involved management of the procurement function.
- [3] Sonyaya’s employment was subject to a six-month probationary period. The offer of employment dated 4 July 2014 stated:
- ‘The first six (6) months of your appointment will be a probationary period. Upon the successful completion of your probationary period, you will receive confirmation of your appointment as a permanent staff. Performance appraisals will be conducted during this 6 month period by your supervisor’.
- [4] Clause 1.2 of the contract of employment provided:
- ‘The employee is appointed for a probationary period of 6 (six) months during which period the Employee will be assessed for confirmation of his suitability of employment...’
- [5] Sonyaya reported to Taryn Mthimkulu (“Mthimkulu”), the chief financial officer.
- [6] Sonyaya was appointed to achieve four primary Key Performance Areas (“KPA’s”). It is difficult to ascertain from the record precisely what these four KPA’s entailed. However, it is common cause that Sonyaya was unable to achieve the four KPA’s and therefore it was agreed to reduce her KPA’s from four to one with effect from 8 October 2014 in order to allow her to concentrate on the administrative tasks of the job. Mthimkulu then hired a temporary administrator (Loyce) to do the procurement while Sonyaya familiarised herself with the

administration systems. This was intended to be a temporary arrangement aimed at giving her the opportunity to find her feet.

- [7] Nomfundu Mapuma (“Mapuma”), the quality assurance manager was tasked to supervise Sonyaya and Sheldon Van Heerden (“Van Heerden”), the financial accountant, provided her with technical support.
- [8] At a meeting on 5 December 2015, Sonyaya was apprised of concerns about her performance and it was agreed that the four KPA’s would be reinstated with effect from 11 December 2014. The minutes of the meeting give some insight into the apparent difficulties: The relevant part of the minutes reads:

‘Zandi had experienced difficulty in balancing her duties which included going out to purchase goods and doing her admin. At the time she did not have a clear understanding of what other roles are in the finance team, as a result, the admin duties suffered....Loyce started assisting Zandi with the purchasing; going out to procure while Zandi would do the paperwork and get a better understanding of the processes and/or procedures and the roles of the finance team... There have been some complaints within the team that Zandi does not capture PO’s (purchasing orders) on time or when requested in order for payments to be made, and this has resulted in delays.’

- [9] On 11 December 2014, Sonyaya attended a meeting with Mthimkulu, Mapuma and Craig Pannell (“Pannell”), the human resources manager, where Sonyaya was again apprised of concerns about her performance and given guidance and assistance to improve. The relevant part of the minutes of this meeting reads:

‘It has been four months into the probation period since 18 August 2014. The six months of probation will be ending in February 2015. The job description was reduced to one KPA to assist Zandi to cope with the demands of the position. In the next two months Zandi needs to perform the work at the level that it is required. There needs to be improvement on Zandi’s performance and ability to manage the pressure that comes with the position. The position requires that Zandi performs both tasks of procuring goods and services and the administration that comes with procurement.’

- [10] The minutes then set out precisely the areas requiring improvement. They included: i) ensuring that procurement processes were followed and that purchase orders were done before the actual procurement took place; ii) weekly reports of outstanding requests to be submitted on time with full explanation of any delays; iii) dealing with other departments in a more positive and pleasant manner; iv) not to become involved in the delivery of goods; v) the preparation of weekly, monthly and quarterly plans to ensure effective time management; vi) capturing of purchase orders to be done weekly and communicated to the financial accountant; and vii) communicate more efficiently by responding to e-mails, getting more details or clarity on requests in order to speed up the process and deliver on time.

[11] A follow-up meeting was held on 16 January 2015, with the same parties in attendance as in the meeting held on 11 December 2015. The concerns about performance were once again highlighted. The minutes stated:

‘This is a follow up meeting from the meeting of the 11 December 2014. It is crucial to continue having these meetings to ensure that Zandi performs the job as required’

[12] Other areas of concern were raised, pointing to some incapacity in performance. These were: i) the need to engage suppliers more effectively and to evaluate their performance, quality of goods/services, time of delivery etc.; ii) when buying in bulk, to check on the expiry date of the batches of goods that she procures; and iii) work off a checklist when communicating with suppliers. The minutes also record that Sonyaya still faced challenges in reporting properly. The weekly report was not being submitted on time for review; and the reports were not of the required standard. She was directed to check her work and spelling; and most importantly to provide a detailed explanation for requests that were not delivered on the required date. It was further agreed that Mapuma would do weekly performance reviews to evaluate Sonyaya’s performance.

[13] The appellant conducted five performance appraisals of Sonyaya between 27 January 2015 and 3 March 2015. The appraisals consisted of a comprehensive evaluation in which her performance was measured and scored against fixed criteria by Mapuma. Sonyaya scored 33%, 33%, 43%, 47% and 40%, respectively, in her five performance appraisals.

[14] Performance appraisals were done in respect of every employee employed by the appellant over the same period. A comparative analysis done in March 2015 revealed that Sonyaya was on average the worst performer in the company by a significant margin – scoring an average of 43.3%

[15] The appellant accordingly decided to convene a Poor Work Performance (“PWP”) hearing. On 6 March 2015, the appellant issued Sonyaya with a notice to attend a PWP hearing. The relevant part of the notice read:

‘Please be advised that you are required to attend an investigation into your work performance in your current job functions, due to the following: Your performance has been well below the required standards for tasks to be completed and for required outputs. This has been dealt with through measurement of your performance and constant coaching over the past 6.5 months since you started with Ubuntu. You are thus not reaching the required performance standards.’

[16] The minutes of the hearing reflect that Mapuma, Van Heerden and Mthimkhulu made presentations regarding Sonyaya’s performance. They concluded that Sonyaya lacked the understanding and ability to carry out her assigned tasks despite having been given assistance and a reasonable opportunity to improve. The minutes reflect that Sonyaya conceded that she had been struggling with the job and complained that she “got very tired from driving and spending time getting the requested items”. She disagreed with the first two performance appraisal scores of 33% but accepted the other three scores of 43%, 40%

and 47%. Sonyaya did not challenge the validity of these scores when questioned on them during her evidence in chief at the arbitration. Nor did she take issue with the accuracy of the minutes of the various performance meetings.

- [17] The appellant dismissed Sonyaya for poor work performance on 13 March 2015.
- [18] Sonyaya referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [19] Mthimkulu and Van Heerden testified on behalf of the appellant at the hearing. Mthimkulu emphasised the fact that Sonyaya was not capable of meeting the four KPA's, despite efforts to accommodate her, while her replacement had done so with relative ease. She focused on Sonyaya's failure to follow the correct procedures in relation to purchase orders. Mthimkulu admitted that Sonyaya had to perform functions that had previously been separated into two posts – buyer and supply chain co-ordinator. However, she also testified that subsequent to the dismissal, the appellant appointed another person
- as its supply chain coordinator. This person achieved the required performance standards within two weeks.
- [20] Van Heerden testified to the fact that Sonyaya's failure to complete financial reports and to capture invoice data timeously affected his own performance. He referred also to an occasion on which authorisation was not given for a purchase order and an issue concerning the non-delivery of certain goods from Daku Spar, which the appellant paid for. He also affirmed that driving duties were part of Sonyaya's procurement functions.
- [21] In her testimony, Sonyaya confirmed that she had been released from three of her KPA's shortly after her appointment as she was not coping. She explained that the reason she captured data late was that the suppliers were late in sending the invoices. She denied that she had ever made an unauthorised purchase and testified that the responsibility to ensure that invoiced goods were delivered by Daku Spar rested with the storeman, who had, in fact, noted the non-delivery of such goods and hence the appellant should not have paid for them. She admitted that she could not cope with her workload, but maintained that the demands on her were unreasonable.
- [22] The commissioner held that Sonyaya's dismissal was substantively unfair. He concluded that Sonyaya had become a permanent employee when her probation ended on 18 February 2015 and that this amounted to an indication that the appellant was satisfied with her performance and that she had satisfactorily completed her probation period. He accepted though that Sonyaya had not been able to perform her four KPA's and required assistance from Loyce to perform the functions of her job description.
- [23] Although the commissioner referred to the evidence of Sonyaya which described how the performance appraisals consisted of self-assessments completed in consultation with her supervisor, he rejected the performance appraisal evidence on the basis that there was no evidence before him of how the allocation of points was done. Unfortunately, it is not

entirely clear from the record whether the comprehensive performance appraisals annexed as Annexures CP 10 to CP 14 to the founding affidavit were part of the documentary record before the commissioner. He nevertheless referred to the scores and the comparison of all the employees, which suggests he had sight of them. However, the appraisals were not dealt with in testimony in a meaningful way and Mapuma (the supervisor) did not give evidence in relation to them at the arbitration.

- [24] The commissioner accepted the version of Sonyaya in relation to the late capturing of data, the alleged unauthorised purchase and the goods not delivered from Daku Spar but paid for, and noted that she had not been disciplined for any of these alleged infractions.
- [25] The commissioner concluded by questioning why Sonyaya had been made permanent if the appellant was dissatisfied with her performance and held that the appellant had not properly considered sanctions or remedies other than dismissal. He believed that Sonyaya should have been re-trained and her driving responsibilities removed from her job description. He, accordingly, reinstated her retrospectively to the date of her dismissal.
- [26] The Labour Court refused to set aside the award on the grounds of unreasonableness. It accepted that Sonyaya was no longer a probationary employee and that the commissioner had dealt properly with the evidence.
- [27] The appellant contends that the commissioner and the Labour Court erred in finding that Sonyaya had successfully completed her probation period.
- [28] The purpose of the probationary period was to provide the appellant time to evaluate whether Sonyaya was suitable for permanent employment. The original intention of the contract was that the probation period would end on 18 February 2015, six months after the commencement of employment. However, it is clear from the evidence that when the probation period came to an end, the appellant was engaged in an ongoing review and evaluation process. The minutes of the meeting of 16 January 2015 stated that Sonyaya would be subject to “informal weekly review...to score on her performance to enforce progress”. The evaluation process was not completed by 18 February 2015 but continued until 6 March 2015. It may reasonably be inferred from this, as well as the subsequent events, that the appellant intended to extend the probation period until the review and evaluation process was completed. It would have been unfair in the circumstances not to have extended the probation period.
- [29] Item 8 of the Code of Good Practice: Dismissal[1] entitles employers to require new employees to serve a probationary period “before the appointment of the employee is confirmed”.

In terms item 8(1)(e), the employer must use the period of probation to assess performance and give the employee reasonable assistance,

training and guidance. It envisages that the appointment normally will only be confirmed after the employee had completed the probationary period, and not before then. Items 8(1)(f), read with items 8(1)(g) – (h), makes it clear that an employer is

entitled to extend the probationary period in order to complete any performance appraisal.

[30] Moreover, clause 1.2 of the contract of employment provides that the employee will be assessed during the probation period “for confirmation of his suitability” for permanent employment. In light of the ongoing review and the obvious problems concerning performance, an inference that the appellant impliedly confirmed Sonyaya’s permanent employment is neither plausible nor consistent with the proven facts.

[31] The commissioner and the Labour Court therefore erred in concluding that Sonyaya was automatically confirmed as a permanent employee simply on the basis that she remained in employment after 18 February 2015.

[32] Furthermore, the finding of the commissioner that Sonyaya’s continued employment after 18 February 2015 indicated that her performance was considered to be satisfactory is irrational in that it completely ignores the undisputed evidence of the ongoing difficulties Sonyaya was having in meeting her KPAs.

[33] It is trite that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of “fit” – aspects of demeanour, diligence, compatibility and character.[2] Nevertheless, an employee on probation is still entitled to substantive and procedural fairness. However, Item 8(1)(j) of the Code of Good Practice: Dismissal permits a lower standard of substantive fairness. It provides:

‘Any person making a decision about the fairness of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.’

[34] The provision is a clear indicator that arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.[3]

[35] The commissioner’s erroneous conclusion that Sonyaya was a permanent employee, as opposed to a probationary employee, impacted on his findings in respect of substantive fairness.

[36] It is common cause that the appellant regularly conducted performance assessment meetings and evaluated Sonyaya’s performance during her probationary period. She quite evidently failed to reach the required performance standard on each occasion.

- [37] As stated, the probationary period was extended impliedly or by quasi mutual assent for just over two weeks, during which time Sonyaya was given a last opportunity to improve. She clearly understood this and, in fact, at the hearing on 6 March 2015, asked for her probationary period to be extended for another six months.
- [38] A number of undisputed facts indicate that Sonyaya was not meeting the required standard. Her KPA's were reduced from four to one because of poor performance. An administrator then had to be appointed to assist her to achieve the one KPA. She attended no less than eight performance meetings and appraisals between 5 December 2015 and 3 March 2015, where she was consistently made aware that her performance was not up to standard. As mentioned earlier, she scored below 50% in all five performance appraisals.
- [39] The three specific issues referred to by Van Heerden, namely: the late capturing of invoices, the non-delivery of the Daku Spar goods, and the unauthorised purchase order issue can be seen as illustrative examples in respect of non-performance in respect of one of four KPA's considered in the performance appraisal process. These issues were not the sum total of the criteria against which Sonyaya's performance was measured or the only reasons why she was found to have performed below the required performance standard, as her counsel would have us accept. The evidence in its totality reveals a performance problem that sufficiently justified the appellant's decision, after extensive evaluation, counselling and guidance, not to confirm Sonyaya's suitability for permanent appointment. Whatever the deficiencies in the evidence regarding the appraisal scoring, Sonyaya conceded the accuracy of at least three of the scores. These were consistent with the recorded weaknesses in performance that preceded the appraisals.
- [40] It was argued on behalf of Sonyaya that the appellant should have considered alternative employment for Sonyaya as dismissal is a last resort, especially since it seemed that the workload might have been onerous. The evidence that Sonyaya's replacement was able to cope with the workload of the position was not challenged. The job was advertised with specified KPA's and the appellant had no obligation to re-write the job description. It reasonably set the criteria for the position to suit its particular needs. It is a non-profit organisation with relatively limited resources. It cannot be expected to amend the requirements of an advertised position to accommodate the limitations of a probationary employee who proves unsuitable. The commissioner hence erred in assuming in effect that he was entitled to redefine the eligibility criteria for the position.
- [41] In the premises, the commissioner misdirected himself in relation to the applicable standard of substantive fairness in relation to the dismissal of probationary employees. He failed to apply the provisions of Item 8(1)(j) of the Code of Good Practice: Dismissal and to observe due deference, with the result that he misconceived the nature of the enquiry and arrived at an unreasonable result. The Labour Court accordingly erred in upholding the award.
- [42] Fairness dictates that costs should not be awarded in this case.

[43] In the premises, the appeal succeeds and the following order is made:

‘The award issued by the first respondent dated 8 October 2015 is reviewed and set aside and is substituted with an order that the dismissal of the fourth respondent was substantively and procedurally fair.’

JR Murphy

Acting Judge of Appeal

I agree

P Tlaletsi

Judge of Appeal

K Savage

APPEARANCES:

FOR THE APPELLANT:

RJC Orton

Instructed by Snyman Attorneys

FOR THE THIRD AND FOURTH RESPONDENTS: Adv TMG Euijen SC

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[1] Schedule 8 of the Labour Relations Act 66 of 1995 (“the LRA”).

[2] Le Roux and Van Niekerk: The South African Law of Unfair Dismissal (Juta 1994) 71-71

[3] J Grogan: Workplace Law (10 ed Juta 2009) 258

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