Statistics SA v Molebatsi & others (2019) 40 ILJ 2603 (LC)

Citation (2019) 40 ILJ 2603 (LC)

Case No JR943/17

Court Labour Court

Judge Nkutha-Nkontwana J

Heard June19, 2019

Judgment August 21, 2019

Counsel *Attorney D Norton* for the applicant.
Attorney A Hechter for the first respondent.

Annotations No annotations to date

Flynote : Sleutelwoorde

Disciplinary code and procedure—Decision of chairperson—Review—Application to Labour Court to review sanction imposed by chairperson—Public service— Decision reviewable by Labour Court in terms of s 158(1)(h) of LRA 1995—Employer dissatisfied with decision of own disciplinary chairperson automatically approaching court to review decision—Such constituting misuse of court process as 'back-up plan'—Employer rather to ensure that chairpersons presiding over hearings having necessary competence to discharge duties properly.

Labour Court—Powers—Review powers—Section 158(1)(h) of LRA 1995—Public service employer dissatisfied with decision of own disciplinary chairperson automatically approaching court to review decision—Such constituting misuse of court process as 'back-up plan' and placing undue burden on court—Employer rather to ensure that chairpersons presiding over hearings having necessary competence to discharge duties properly.

Headnote : Kopnota

In January 2014 the respondent employee, the district manager of the Springbok office of Stats SA, the applicant, recruited and recommended the appointment of Mr T, a resident of Tshwane, as a lister for the Springbok area. During training it was discovered that Mr T had been appointed in contravention of Stats SA's policy of employing people who lived in the area in which they were employed. Despite being aware of the irregularities in the appointment of Mr T, Stats SA retained him and later extended his contract. In May 2016, about 22 months after the appointment of Mr T, Stats SA charged the employee with dishonesty in that he had interfered with the recruitment of personnel by

appointing Mr T who did not meet Stats SA's requirements. The disciplinary chairperson found that, although Mr T had been recruited irregularly, Stats SA had confirmed and later extended his contract and that he was clearly utilised in the best interests of Stats SA. He found further that there was no evidence showing an irreparable breakdown of the trust relationship, and imposed a sanction of one month's suspension without pay on the employee. Stats SA applied to the Labour Court in terms of s 158(1)*(h)* of the LRA 1995 to review and set aside the sanction imposed by the disciplinary chairperson and substitute it with one of dismissal.

The court found that the disciplinary chairperson had clearly applied his mind to the circumstances, especially the fact that Mr T's appointment was confirmed by and benefited Stats SA and that no reasonable explanation was proffered for the delay of about 22 months in charging the employee. The court agreed with the chairperson's conclusion that the employee's conduct had not been so gross as to impact on the trust relationship and that the sanction of dismissal was not appropriate in the circumstances.

The court expressed its concern at the growing practice of bringing reviews of this nature. Although s 158(1)*(h)* empowers the Labour Court to review any decision taken by the state in its capacity as employer, the court found that this by no means implies that whenever the state is dissatisfied with a decision emanating from its own internal processes, the next automatic step to take is to approach the court on review. The court aligned itself with the sentiments expressed in an earlier judgment that this class of review places an undue burden on the already stretched resources of the court and that state departments, such as Stats SA, should rather ensure that officials tasked to preside over disciplinary hearings possess the necessary competence to discharge their duties properly, instead of using the court as a back-up plan.

The court was satisfied that this was a case of misuse of court processes as a back-up plan by Stats SA. It confirmed that the sanction imposed by the disciplinary chairperson was rational and unassailable, and dismissed the application.

Case information

Application to the Labour Court in terms of s 158(1)*(h)* of the Labour Relations Act 66 of 1995. The facts and further findings appear from the reasons for judgment.

Cases Considered

Annotations:

De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 *ILJ* 1051 (LAC) (considered)

Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) (referred to)

Hendricks v Overstrand Municipality & another (2015) 36 *ILJ* 163 (LAC) (distinguished)

National Commissioner of Police & another v Harri NO & others (2011) 32 *ILJ* 1175 (LC) (distinguished)

Ntshangase v MEC for Finance: KwaZulu-Natal & another 2010 (3) SA 201 (SCA); (2009) 30 *ILJ* 2653 (SCA) (distinguished)

Statutes Considered

Labour Relations Act 66 of 1995 s 158(1)*(h)*

Attorney D Norton for the applicant.

Attorney A Hechter for the first respondent.

Judgment reserved.

Judgment

Nkutha-Nkontwana J:

Introduction

[1] Before me are two applications brought by the applicant, Statistics SA (Stats SA); first is the application for condonation of the delay in bringing the review application and second is the application in terms of s 158(1)*(h)* of the Labour Relations Act [1] (the LRA), to review and set aside the sanction of one month's suspension without pay, handed down by the second respondent, Mr Mzwandile Hlanjwa (Mr Hlanjwa), against the first respondent, Mr Dikgang Molebatsi (Mr Molebatsi), and that it be substituted with one of dismissal. Also, Mr Molebatsi seeks condonation for the delay in filing his answering affidavit. I deal with the condonation applications in turn.

Condonation

[2] It is trite that s 158(1)*(h)* of the LRA does not prescribe time-limits for bringing a review application; however, it is an accepted principle that this must be done within reasonable time and six weeks has been used as a measure of such reasonableness. In the matter at hand, the delay in bringing the application is two weeks and I have considered the explanation for the delay and it is, in my view, reasonable. I am, accordingly, satisfied that Stats SA has made out a case for the grant of condonation and same goes for the late filing of the answering affidavit by Mr Molebatsi. I therefore grant condonation for the late filing of the review application and the late filing of the answering affidavit. The application to review is dealt with in turn.

Failure to file the transcribed record

[3] Before proceeding with the merits of the case, I need to deal with an issue that has concerned the court in this matter. On perusal of the court file, it became apparent that Stats SA did not file the transcribed record of the proceedings which it seeks to review. At the hearing of the matter, I raised this issue with Ms *Norton*, who appeared for Stats SA, and she submitted that the record before the court (pleadings with attachments which include Mr Hlanjwa's reports on the verdicts in relation to the merits and the sanction) is sufficient as the facts are common cause. I disagree, for the reason that, in matters of this nature, the court needs at the very least, a transcribed record of the proceedings to be able to appreciate the nature of proceedings before the presiding officer. This is important, not only to paint a picture of what transpired at the hearing, but to better position the court to be able to perform its constitutional function of review. [2] Notwithstanding, in this instance, the issues are common cause between the parties and I deal with the merits from that podium.

Nkutha-Nkontwana J

Review

Background facts

[4] Mr Molebatsi is employed by the applicant as district manager at the Springbok office of Stats SA. He was found guilty on a charge of dishonesty in that he interfered with the recruitment process of listers, which interference resulted in the appointment of Mr B Tshepe (Mr Tshepe) who did not meet Stats SA's requirements. The genesis of the charge is that Mr Molebatsi allegedly instructed Ms Oppel, the acting district office administrator at the Springbok office, not to contact two people who were on the list of candidates who were due to write a competency test but instead to include Mr Tshepe. According to Stats SA, Mr Molebatsi gave Ms Oppel the contact details of Mr Tshepe and one Mr Morris and arranged that Mr Tshepe write his competency test in the Stats SA's Mabopane district office, Pretoria.

[5] Mr Molebatsi who was on annual leave and in Pretoria at that time, attended the Mabopane district office in order to access his emails as he did not have a 3G card. Whilst in the Mabopane district office he conducted the competency tests of about five candidates, including Mr Tshepe. He then faxed Mr Tshepe's results to the Springbok district office. This action set in motion events that led to the proceedings before this court. According to Stats SA, this role falls within the purview of district office administrators.

[6] Mr Tshepe was appointed as lister and attended training in Cape Town. According to Stats SA it was only during the training that Mr Tshepe's irregular appointment was discovered. It was alleged that the irregularity with his appointment is that it went against Stats SA's objective of employing people who were living in the Springbok area (Mr Tshepe lived in Tshwane), and further that Mr Tshepe was not on the SSA database, and that he had no experience in map reading.

[7] The whole incident happened in January 2014, however it was only on 10 May 2016 that Mr Molebatsi was served with a charge-sheet which recorded the allegation against him as dishonestly interfering with the appointment of Mr Tshepe. This is despite the fact that Stats SA had been aware of the irregularities in the appointment of Mr Tshepe as early as January 2014. Mr Molebatsi was never suspended.

The impugned verdict

[8] Mr Hlanjwa's verdict on the merits was issued on 2 February 2017 and the verdict on the sanction was issued on 17 March 2017.

[9] Dealing with the issue of the sanction, Mr Hlanjwa held that there was no evidence before him to show that there was a breakdown of trust between the employer and employee which could not be repaired by other means. As such, he issued a sanction of a one-month suspension without pay in terms of Regulation 1 of 2003 of the Public Service Coordinating Bargaining Council (PSCBC).

[10] Mr Hlanjwa based his findings on the Labour Appeal Court (LAC)

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decision in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*[3] where it was stated that:

> '[23] It is precisely because dismissal for misconduct is rooted in operational requirements and not in the need for punishment that I consider that the following dicta of Zondo AJP in *Toyota* must be interpreted in context. He said this:
>
> > "I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted *in a particular case* as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction."
>
> I draw attention to the phrase "in a particular case". *The seriousness of dishonesty — ie whether it can be stigmatized as gross or not — depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business.*
>
> [24] *The employees in casu were not dismissed in order to punish them. They were dismissed because the employer was not prepared to run the risk of employing them any longer once they had been shown to be dishonest. Long service is, of course, not entirely irrelevant. It is relevant in determining whether an employee is likely to repeat his misdemeanour.* An employee who has long and faithfully served his employer has shown that he has

little propensity for offending. That historical experience may persuade an employer to accept the risk of continuing to employ him now that it is known that he is not as E honest as had been thought. Depending on the circumstances, long service may be a weighty consideration. *But the risk factor is paramount. If, despite the prima facie impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and the employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed*.' (Emphasis added.) F

[11] Mr Hlanjwa accordingly found that Stats SA's business had not been impacted negatively as Mr Tshepe's appointment was confirmed despite Stats SA's complaint that he had been recruited irregularly and his contract of employment was subsequently extended. He was G of the view that Mr Tshepe was utilised in the best interests of Stats SA.

Evaluation

[12] Stats SA submitted that it has made out a case for the court to interfere H with the sanction meted out by Mr Hlanjwa as it was irrational as Mr Molebatsi instructed his subordinates to carry out his wishes and showed no remorse. Mr Hlanjwa inexplicably found that the relationship had not been broken, so it was further argued. In this regard, Ms *Norton* referred to the dicta in *Hendricks v Overstrand* I *Municipality & another*, [4] *National Commissioner of Police &*

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another v Harri NO & others, [5] and *Ntshangase v MEC for Finance: KwaZulu-Natal & another*. [6]

[13] On the other hand, Mr Molebatsi's attorney, Mr *Hechter*, submitted that the dicta referred to by Stats SA are distinguishable. I concur. In A *Ntshangase*, the appellant employee unsuccessfully appealed against a decision of the LAC that reviewed and set aside a decision taken by the chairperson of a disciplinary enquiry into allegations of misconduct to give the appellant employee a final written warning after he was found guilty of several counts of misconduct involving allegations of wilful or negligent mismanagement of the state's finances and of B abusing his authority. The allegations that were levelled against him included, inter alia, the unauthorised awarding of bursaries to various students amounting to approximately R1m and the unauthorised purchase by the appellant of goods exceeding R500,000 which caused the respondent employer a loss of R200,000. The Supreme C Court of Appeal (SCA) held that:

> 'I agree that Dorkin's [chairperson's] decision, measured against the charges on which he convicted the appellant, appears to be grossly unreasonable. Given the yawning chasm in the sanction imposed by Dorkin and that which a court D would have imposed, the conclusion is inescapable that Dorkin did not apply his mind properly or at all to the issue of an appropriate sanction. Manifestly, Dorkin's decision is patently unfair to the second respondent. To my mind, it fails to pass the test of rationality or reasonableness.' [7]

[14] In the present case, it would seem that Mr Hlanjwa clearly applied E his mind to the prevailing circumstances. He considered the delay in charging Mr Molebatsi and the fact that Mr Tshepe's appointment did benefit Stats SA. Furthermore, not only was his appointment confirmed, but his contract of employment was extended. Stats SA's explanation for the delay proffered in its replying affidavit clearly F shows that it was made aware of the transgression as early as 20 January 2014 and the investigation report was concluded on 7 July 2014. Mr Molebatsi was only charged on 10 May 2016. There is no reasonable explanation proffered for the delay of about 22 months before charging Mr Molebatsi. G

[15] Mr Hlanjwa also considered the fact that Mr Molebatsi was not placed on suspension and that there was no evidence before him that showed any further indiscretions on his part. In the final analysis, he was of the view that Mr Molebatsi's misconduct was not so gross as to impact on the trust relationship. As such, the dictum in *Hendricks*[8] equally finds no application. H

[16] It is clear from the dictum in *De Beer*[9] that misconduct that involves dishonesty does not automatically attract a sanction of dismissal. Tritely, each case must be adjudicated on its own particular merits. I

Nkutha-Nkontwana J

In this instance, there is no evidence that Mr Molebatsi did not heed the corrective measure or that he was incorrigible.

Conclusion

[17] Before I conclude, I need to add my voice to the chorus against the A growing practice of bringing reviews of this nature before this court. Although s 158(1)*(h)* empowers this court to review any decision taken by the state in its capacity as employer, this by no means implies that whenever an instance occurs that the state is dissatisfied with a decision emanating from its own internal processes, the next B automatic step to take is to approach this court on review. The undue burden placed on this court by this class of reviews is objectionable. I align myself with the sentiments of this court in the matter of *SA Police Service & another v Seswike NO & another*[10] where the following was said: C

> 'The problem I have with these kinds of applications is that it in essence turns the Labour Court into some kind of appeals body where it comes to disciplinary proceedings conducted against officers of the applicant. This places an undue burden on the already stretched resources of the Labour Court, and state departments such as the applicant should rather ensure that officials D tasked to preside over disciplinary hearings possess the necessary competence to discharge their duties properly, instead of using this court as some kind of a back-up plan.'

[18] This is a typical case of misuse of court processes as a back-up plan and caution should be thrown at the path of Stats SA. E

[19] Having said the above, in all the circumstances, I am satisfied that Mr Hlanjwa's verdict on the sanction is rational and accordingly unassailable.

Costs F

[20] The parties did not pursue the issue of costs. Nonetheless, I have considered the circumstances of this matter and do not believe that it would accord with the interest of justice to award costs.

[21] In the circumstances, I make the following order: G

Order

1 The application for condonation of the late filing of the review is granted.

2 The application for condonation of the late filing of the answering affidavit is granted. H

3 The application to review and set aside the sanction issued against the first respondent is dismissed.

4 There is no order as to costs.

Applicant's Attorneys: *Mkhabela Huntley Attorneys.* I

First Respondent's Attorneys: *Adrie Hechter Attorneys.*

1 66 of 1995 as amended.
2 See *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at paras 13-15.
3 (JA68/99) [2000] ZALAC 10; (2000) 21 *ILJ* 1051 (LAC)
4 (2015) 36 *ILJ* 163 (LAC); [2014] 12 BLLR 1170 (LAC);
5 (2011) 32 *ILJ* 1175 (LC).
6 2010 (3) SA 201 (SCA); (2009) 30 *ILJ* 2653 (SCA); [2009] 12 BLLR 1170 (SCA);
7 *Ntshangase* at para 20.

8 n 4 above.
9 n 3 above.
10 Unreported case no JR2395/14 at para 2.