



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 4 October 2021

Case No: 2021/4397

In the matter between:

VUSUMUZI MNTAMBO

Applicant

and

PIOTRANS (PTY) LTD

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

WILSON AJ:

- 1 The applicant (“Mr. Mntambo”) seeks leave to appeal against my judgment of 2 August 2021, in which I declared that the respondent (“Piotrans”) had terminated his employment in breach of contract. Exercising my well-established discretion to decline to order specific performance, however, I refused to order Piotrans to reinstate Mr. Mntambo.

- 2 Piotrans had alleged that it was not, in the circumstances, required to tolerate Mr. Mntambo's reinstatement. It alleged that Mr. Mntambo had committed a breach of trust in signing an affidavit tendered against the company in litigation between Piotrans and a group of shareholders. Piotrans was seeking to restrain from unlawfully removing various directors from its board ("the shareholder litigation"). On the basis of that alleged breach, Piotrans made out the case that the confidence it was entitled to place in Mr. Mntambo had evaporated, and that the employment relationship was impossible to restore.
- 3 Mr. Mntambo's response to this allegation was little more than a bald denial that there was any breach of trust, or breakdown in confidence. It was submitted on his behalf that he had acted perfectly properly, in his capacity as an indirect shareholder in Piotrans, when he deposed to an affidavit in the shareholder litigation. Critically, however, he made no effort to explain how his conduct in signing the affidavit could be reconciled with his role as a senior manager in the company that the affidavit was tendered against.
- 4 It was on that basis that I concluded that Piotrans' allegation that Mr. Mntambo could no longer reasonably expect to command its confidence was essentially uncontested, and that I was bound to exercise my discretion against ordering Mr. Mntambo's reinstatement.
- 5 Mr. Mkwibiso, who appeared for Mr. Mntambo, made a series of well-structured and careful submissions. He motivated the application for leave to appeal on two broad bases.

The *Steenkamp* submission

- 6 The first depended on a very particular reading of paragraphs 118 and 119 of the decision of the Constitutional Court in *Steenkamp v Edcon* 2016 (3) 251 (CC). There, the majority of the court drew a distinction between “unfair” and “unlawful” dismissals. An “unfair” dismissal is a dismissal in breach of the requirement of fairness set out in the Labour Relations Act 66 of 1995 (“the Act”). In the event that a dismissal is found to have been unfair, the Act itself provides for a discretion not to order reinstatement if it would be inappropriate on the facts to do so. An “unlawful” dismissal, however, takes place in total disregard of the requirements of the Act, and is for that reason a nullity. A court accordingly has no discretion but to reinstate an employee “unlawfully” dismissed.
- 7 Mr. Mkwibiso submitted that Mr. Mntambo had been “unlawfully” dismissed in breach of his contract, and, for that reason, I had no discretion to decline to reinstate him.
- 8 As innovative as this argument is, I do not think it stands any prospects of success on appeal. In *Steenkamp*, the Constitutional Court did not purport to interfere with the well-established principles applicable to the adjudication of a claim of dismissal in breach of contract. I dealt fully with those principles in my judgment on the main application. Mr. Mkwibiso did not seriously contend that I had been mistaken about those principles. I do not think that there is anything in *Steenkamp* that can reasonably be interpreted to call them into question. Indeed, the distinction drawn in the two paragraphs Mr. Mkwibiso relied upon were not directly germane to the principal issue in *Steenkamp*,

which involved the consequences of non-compliance with section 189 of the Act. That is something very different from the issue that arises in this application.

- 9 In law, there are two routes available to a dismissed employee: a claim under the Act, or a claim in breach of contract. These claims are governed by different jurisdictional and normative regimes. If, in dealing with a dismissal claim under the Act, the Constitutional Court had meant to substantially alter the principles applicable to a dismissal claim in contract, it surely would have made that very clear. There is no indication that the majority in *Steenkamp* had any such intention.
- 10 Moreover, the concept of an “unlawful” dismissal in *Steenkamp* was deployed in the context of unlawfulness resulting from a breach of statute. It is well-established that acts in breach of statute are generally considered to be nullities. Mr. Mntambo’s dismissal, however, took place in breach of contract. Conduct in breach of contract is not automatically void, which is precisely why there is a discretion not to order specific performance as a remedy on breach.
- 11 Accordingly, *Steenkamp* does not assist Mr. Mntambo.

The equity ground

- 12 The second ground Mr. Mkwibiso pursued was that Mr. Mntambo’s reinstatement would not be “inequitable in all the circumstances”, which is the test articulated in *National Union of Textile Works v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) (“*Stag Packings*”) at 155H to 156A. As Mr. Mkwibiso parsed this test, it follows that if there are any conceivable circumstances in

which reinstatement would be equitable, then reinstatement is the required order.

- 13 On the basis of this interpretation of the *Stag Packings* case, Mr. Mkwibiso argued that a perfectly equitable outcome that would cause no prejudice to Piotrans, and that would vindicate Mr. Mntambo's rights, would be to reinstate Mr. Mntambo in the knowledge that Piotrans could, if it so chose, suspend and discipline Mr. Mntambo consistently with the contract. Mr. Mkwibiso placed heavy emphasis on Mr. Mntambo's right to face a properly run disciplinary inquiry and to answer any charges that are proffered against him. Mr. Mkwibiso argued that the balance of equity in these circumstances favoured reinstatement.
- 14 I am not sure that *Stag Packing* yields the interpretation that Mr. Mkwibiso contends for. However, even if it did, it would render superfluous a court's discretion to decline to order specific performance by way of reinstatement in cases like this one. There would, in other words, never be any reason not to order reinstatement if the employer could suspend and discipline the employee again.
- 15 For better or worse, there is a discretion to refuse to order reinstatement after a dismissal in breach of contract. Despite Mr. Mkwibiso's creative arguments, I do not think that there is any prospect that an appeal court will hobble that discretion by directing that Mr. Mntambo – and by implication employees in all like cases – ought to be reinstated, only then to be suspended pending a further disciplinary inquiry.

- 16 The fundamental difficulty Mr. Mntambo faces in this case is that he left Piotrans' allegations of a loss of confidence in him as a senior manager almost completely unanswered. In those circumstances, unless Piotrans' allegations of a loss of confidence were unsustainable on their face, I was bound to accept its case that reinstatement was not a suitable remedy.
- 17 This does not leave Mr. Mntambo without recourse. He has an action for damages, and the possibility of pursuing a case in the Labour Court. He may well be entitled to remedies in those proceedings. But I do not think that there is any prospect of him convincing a court of appeal, on the papers before me, that he has a right to specific performance of his contract, by way of reinstatement.
- 18 For all these reasons, the application for leave to appeal must fail. However, I am not inclined to order Mr. Mntambo to bear the costs of the application. The fact remains that Piotrans has acted in breach of its contract with him. Mr. Mntambo's efforts to secure a remedy for that breach were substantially successful in the main case. Mr. Mntambo was merely refused the particular remedy he wanted. I do not think that I should penalise him for seeking to challenge my decision on appeal in these circumstances.

Order

- 19 The application for leave to appeal is dismissed, with each party paying their own costs.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 4 October 2021.

HEARD ON: 30 September 2021

DECIDED ON: 4 October 2021

For the Applicant:

V Mkwibiso

Instructed by Mathopo Moshimamne
Mulangaphuma Inc

For the Respondent:

R Tshetlo

Instructed by Ningiza Horner Inc