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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR430/04

2005-03-15 REPORTABLE

In the matter between
MEMBERS OF THE EXECUTIVE COUNCIL
FOR TOURISM AND ENVIRONMENTAL AND

ECONOMIC AFFAIRS: FREE STATE Applicant

and

ZIMASILE NEVILLE NONDUMO 1st Respondent
THAMSANQA GARRY MVUMBI N.O. 2nd Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION 3rd Respondent

JUDGMENT

REVELAS J: This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 ("the act") wherein the applicant seeks to set aside an award made by the second respondent, in favour of the first respondent. The second respondent ("the arbitrator") made the following award:

"1. I find the suspension of the applicant, (Mr Z. Nondumo) to be procedurally and substantively unfair.

2. I therefore order the respondent, to compensate the applicant in an amount of R1 258 852,00 calculated as follows:

- **18 months' outstanding salary and benefits as per section 195; (presumably of the Labour Relations Act,**
- **12 months' compensation as per section 194(4) of the Labour Relations Act number 66 of 1995 as amended at the current salary scale of a chief director, which is R503 541,00 per annum.**

The said amounts should be paid by no later than March 2004.

3. I further order the employer to pay the costs of this arbitration proceedings as per section 138(1) and section 142 of the Labour Relations Act, and the costs of the applicant on an attorney and client scale.
4. The applicant is hereby reinstated and should resume his duties by no later than 1 March 2004 as per section 193(4) of the Labour Relations Act."

The unfairness of the first respondent's suspension, both substantively and procedurally, was conceded by the applicant during the arbitration proceedings.

The applicant objects to the relief granted by the arbitrator on several grounds and seeks substitution of the award with one that is more appropriate with regard to the facts of its case. In its amended notice of motion the applicant suggests the following relief:

"3.1 Nine months of outstanding salary and benefits in terms of section 195 of the Labour Relations Act 66 of 1995;
3.2 12 months compensation as per section 194(4) of the Labour Relations Act."

The facts which gave rise to this application for review are briefly the following. The applicant was appointed as Chief Director: Economic Affairs for a period of five years from 1 June 1998 commencing at an annaul salary of R197 466,00. He was appointed on a contractual basis in terms of section 8(1)(c)(ii) of the Public Service Act, 1994, which provides for a term of service of five years. According to the applicant, the first respondent's services would have, in terms of this section, have terminated on 31 May 2003. Hence the relief suggested by the applicant, being outstanding salary equal to nine months. That would cover the period from the date that he was no longer paid his salary, until 31 May 2003.

The first respondent was also charged criminally for certain offences arising from allegations of misconduct such as fraud, which gave rise to disciplinary charges against the first respondent. The first respondent received the charge sheet for the criminal matter on 6 March 2000 and was suspended on full pay from October 1999 to 2 July 2002, except for a period of two and three quarter years for which he was not remunerated. He was thereafter suspended <u>without pay</u> from July 2002.

In the criminal court he was acquitted on the charge of fraud on 22

October 2002. The first respondent thereafter took no legal action, either by referring the matter to the bargaining council or the CCMA or the High Court, until 5 December 2002 when he brought an urgent application. The first respondent made application to the High Court for his suspension to be uplifted. The first respondent then referred a dispute about the suspension, as an unfair labour practice, to the General Public Service Sector Bargaining Council ("the GPSSBC") on 28 January 2003.

On 16 April 2003 the first respondent received notification from the GPSSBC that the matter had been set down for 19 May 2003 to be heard. On that day the commissioner ruled that the GPSSBC had no jurisdiction and that the matter should have been referred to Commission for Conciliation, Mediation and Arbitration, ("the CCMA") which was subsequently done.

On 27 May 2003 the first respondent referred his dispute about an unfair labour practice to the CCMA, and on 11 July 2003 the first respondent lodged an application for condonation for the late referral of the dispute and the third respondent granted the condonation.

Conciliation took place on 15 December 2003 and there it was argued that the CCMA did not have the necessary jurisdiction as at that time the first respondent was no longer an employee as his employment contract had lapsed. The arbitration was heard on February 2004 and the award was issued on 19 February 2004.

The first ground of review raised by the applicant, was that the first respondent was not an employee after 31 May 2003 and therefore when he referred his dispute to the CCMA, the latter had no jurisdiction to hear or arbitrate the matter. In my view the jurisdiction point raised by the applicant in this regard has no merit. It was not raised before the arbitrator, and the dispute which the first respondent referred to the CCMA was about an alleged unfair labour practice which occurred while he was still an employee.

Whether the arbitrator had exceeded his powers by granting reinstatement, is quite another matter.

The arbitrator clearly misdirected himself when he ordered reinstatement, compensation and arrear payments in one award. He simply did not apply his mind to the provisions of the Act. Section 194(4) of the Act reads as follows:

> **"(4) The compensation awarded to an employee in respect of <u>an unfair labour practice</u> (my underlining) must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration."**

It is clear that in terms of this section, reinstatement does not follow as the proper remedy for an unfair labour practice. There is a clear limit of 12 months' compensation and it may not be awarded simultaneously

with reinstatement.
The first respondent was entitled to his outstanding salary in terms of section 195 of the Act, which provides that an award of compensation made in terms of the chapter on compensation, is in addition to, and not a substitute for, any other amount to which the employee is entitled to in terms of any law, collective agreement or contract of employment.

The first respondent is therefore entitled to his unpaid salary over and above compensation.

I now consider the question of the first respondent's status as an employee and to the question of the reinstatement of the first respondent. The provisions of the Public Service Act, in particular section 8(1)(c)(ii) of that act, is quite clear. The term of service of an employee is five years. Thereafter the employee must be evaluated before reappointment. In this matter where the employee was suspended for a long period, and in the circumstances where disciplinary proceedings were pending, it is most improbable that his contract was to be renewed and he therefore remained an employee.
His contract was bound to come to end on 31 May 2003 by the operation of the relevant statute. In the circumstances, I do not see any obligation on the part of the applicant to re-employ the first respondent.
In the absence of a referral of a dismissal dispute, the arbitrator had misdirected himself by reinstating the applicant. The arbitrator was not entitled to reinstate the first respondent because of two factors:
The arbitrator had to determine a dispute about an unfair labour practice only. Secondly the first respondent's contract of employment had come to an end and he did not refer a dismissal dispute based on his employer's failure to reappoint him.
In a matter where it was conceded that the suspension was both procedurally and substantively unfair, the first respondent would be entitled to 12 months' remuneration. Furthermore the applicant has conceded that the first respondent is entitled to nine months' salary which he was not paid and to which he was entitled to, in terms of his contract of employment.
The arbitrator ordered a punitive cost order against the applicant, which is something which arbitrators do not normally resort to. The fact that the applicant conceded during the arbitration proceedings, that the suspension was procedurally and substantively unfair makes such an order even more surprising.
The arbitrator also referred to the applicant's "ineptitude" and "incompetence". In this regard I wish to caution against such insults. Governmental bodies are part of a large machinery of bureaucracy.

Such institutions are not always run as smoothly and efficiently as profit-seeking businesses. Government bodies are not entitled to any special deference, but unnecessary rebukes are of no value and such language as used in this arbitration award should rather be refrained from. No reasons were given by the arbitrator for the remarks either. There was no reason given for such punitive cost order. I believe that an ordinary costs order party and party scale would have met the case.

In the circumstances the entire award is set aside and substituted with the following:

"1. The suspension of the first respondent was both procedurally and substantively unfair.

2. The applicant is to pay the first respondent compensation in an amount equal to 12 months' remuneration.

3. The applicant is to pay the first respondent an amount equal to nine months' remuneration for salaries not paid in terms of the first respondent's contract of employment.

4. The applicant is to pay the first respondent's costs on a scale as between party and party, and I make no order as to costs in the review application."

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E.REVELAS

DATE OF HEARING: 14 April 2005
DATE OF JUDGMENT: 15 April 2005

ON BEHALF OF THE APPLICANT: Mr I.P. Gough (State Attorney)
On BEHALF OF THE RESPONDENT: Mapitse & Khang Attorneys