REPUBLIC OF SOUTH AFRICA

Not reportable

# THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

## JUDGMENT

Case no: C 16/2012

In the matter between:

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|---|---|
| **Johan BEAURAIN** | **Applicant** |
| and | |
| **COMMISSIONER LESLIE MARTIN N.O.** | **First Respondent** |
| **PHSSBC** | **Second Respondent** |
| **DEPARTMENT OF HEALTH, WESTERN CAPE** | **Third Respondent** |
| **MEC FOR THE DEPT OF HEALTH, WESTERN CAPE** | **Fourth Respondent** |

**Delivered**: **27 May 2014**

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**JUDGMENT**

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STEENKAMP J

Introduction

[1] The applicant seeks leave to appeal against my judgment of 16 April 2014.

[2] The Court held that Mr Beaurain had not made a protected disclosure and that his dismissal was fair. He seeks leave to appeal against the whole of the judgment.

Evaluation

[3] In considering this application, I am mindful of the cautionary note recently sounded by Davis JA in *Martin and East (Pty) Ltd v NUMSA & others*[1]:

> "Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo,* need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.
>
> There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal "no-man's-land" and have to wait years for an appeal (or two) to be prosecuted.
>
> This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.
>
> I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes."

[1] CA 23/2012, unreported 10 March 2013.

[4] It is against that background that I consider this application. The matter does raise interesting points about the application of the Protected Disclosures Act, but it is not novel. The dispute then had to be considered on its facts. In order to decide the application for leave to appeal in the context of those factual findings, I'll consider each of the grounds of appeal that Mr Beaurain raises.

Contradiction?

[5] Mr Beaurain says there is a contradiction between information being 'notorious', and the notion that disclosing that information brings an employer into disrepute. This submission fails to grasp that the two concepts are legally relevant to two separate enquiries:

5.1 the question of notoriety goes to whether or not there has been a 'disclosure' for the purposes of the PDA,[2] whereas

5.2 the question of disrepute goes to whether or not there is a fair reason for dismissal for misconduct, for the purposes of s188(a)(i) of the LRA.

[6] This ground does not raise an appealable ground of appeal in the sense that the Court erred or misdirected itself. There is no reasonable prospect that another court will come to a different conclusion.

Reasonableness of belief

[7] The applicant complains that the Court was wrong when it held that his belief that dirty toilets endangered health was unreasonable. He reiterates his reasons for disbelieving Dr Antonissen's assurances. But these submissions only go to re-confirm the Court's impression that the applicant was *bona fide*. The Court held on the evidence before it that the applicant's belief, whilst *bona fide*, was objectively not reasonable. The Court heard and evaluated the factual evidence. There is no reasonable prospect that an appeal court will overturn this finding: it will respect the Court as the trier of fact. In the words of Davis JA in *Martin & East*, the case stood to be resolved on its own facts.

[2] With reference to the authority Xakaza cited at footnote 16 of the judgment.

The interfloor toilets

[8] The applicant takes issue with the finding that unsanitary conditions in the interfloor toilets were not 'disclosed' because the information was notorious. He explains that those toilets were locked and inaccessible to the public; therefore nobody knew about them (so it was not 'notorious'). However, the authority relied upon, *Xakaza*, is concerned with whether the information disclosed was known to the employer, as opposed to the general public. The evidence before the Court was that the employer had taken note of the unsanitary conditions in the toilets (including the interfloor toilets) and was taking steps to rectify it through the quality assurance manager and the SEAT committee.

[9] In any event, given that the interfloor toilets were not accessible to the public, the only public interest in them would be if fumes emanating from them indeed endangered the health of the hospital's patients. On the evidence before the Court, there was in fact no health hazard. There is no reasonable prospect that another court will come to a different conclusion.

Distinction between the health concern and the quality concern

[10] The applicant takes issue with paragraph 26 of the judgment where the Court points out that under-performance of quality management systems does not come within the ambit of the PDA. The distinction between under-performance and impropriety is a useful one, which was established in the Van Alphen matter.3 The distinction is roughly equivalent to that between negligence and intention: poor performance is unintentional and requires management, whereas impropriety is in bad faith and requires sanction. Management falls within the competence and prerogative of the employer. Sanction falls within the competence and prerogative of the various persons and institutions to whom a protected disclosure may be made.

[3] Referred to at paragraph 26 and footnote 17 of the judgment.

Dr Antonissen's evidence

[11] The applicant claims that the court erred in accepting the evidence of Dr Antonissen.[4] It is unlikely that another court would reject her evidence, which was authoritative and coherent. There was no incorrect finding on or application of her evidence.

Harsh sanction?

[12] The applicant states that the Court erred in upholding the sanction of dismissal for misconduct, arguing that it was unduly harsh. In giving consideration to whether his dismissal was for a fair reason the Court identified the known rules which the applicant had contravened. I concluded that he was guilty of gross insubordination. That conclusion is based on the facts. He deliberately and persistently refused to obey two written instructions to desist. There is no reasonable prospect that an appeal court will come to a different conclusion on the fairness of the misconduct dismissal.

Applicant not charged with offences in judgment?

[13] Lastly, the applicant complains that he was 'never even charged for some of the alleged offences that the trial court outlined in its judgment'. The evidence before the Court was that the Department charged the applicant with gross insubordination in that he failed to obey a lawful instruction to stop publishing allegations. Although the applicant asserted that the matter was confined to allegations about toilets, this was never established in evidence. The charge was a wide one encompassing all the 'allegations' the applicant published. As those allegations tended to bring the Department into disrepute, the Department as his employer was within its rights to instruct him to stop. His refusal to obey this instruction gave the Department a fair reason to dismiss him. There is no reasonable prospect that an appeal court will overturn the judgment on this basis.

[4] At para 8 of applicant's submissions.

Conclusion

[14] There is no reasonable prospect of success on appeal. Based on the considerations set out by the LAC in *Martin & East*, this is a matter that should stop here.

[15] I did not order costs *a quo* out of sympathy for Mr Beaurain. That is where he should have left the matter. But he has chosen to put the Department to further costs by bringing a further application with no prospects of success. He should bear those costs, in law and fairness.

Order

The application for leave to appeal is dismissed with costs.

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Steenkamp J