THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case no: 128/2014

In the matter between:

SITHEMBISO SIPHELELE MKHIZE **Appellant**

and

DEPARTMENT OF CORRECTIONAL SERVICES **First Respondent**

SILAS RAMUSHOWANA N.O. **Second Respondent**

GENERAL PUBLIC SERVICES SECTORAL BARGAINING COUNCIL **Third Respondent**

Neutral citation: *Mkhize v Department of Correctional Services* [2015] ZASCA 7 (11 March 2015)

Coram: NAVSA ADP, LEWIS, WALLIS AND PILLAY JJA and MAYAT AJA .

Heard: 6 March 2015

Delivered: 11 March 2015

Summary: Dismissal – upheld by Sectoral Bargaining Council – Labour Court dismissing review and Labour Appeal Court refusing leave to appeal – limited scope for interference by Supreme Court of Appeal – new material evidence tendered on appeal – need to be presented and tested – remittal to Sectoral Bargaining Council

ORDER

On appeal from: Labour Court (Rabkin-Naicker J sitting as court of first instance, leave to appeal having been refused by the Labour Appeal Court):

1 The appeal is upheld and the order of the Labour Appeal Court refusing leave to appeal, the order of the Labour Court dismissing the review and the decision by the arbitrator given on 30 October 2008, are all set aside.

2 There will be no order in regard to the costs of the proceedings in the Labour Court and the Labour Appeal Court.

3 The dispute concerning Mr Mkhize's dismissal is remitted to the General Public Services Sectoral Bargaining Council to continue the arbitration before the second respondent or, if he is unable to continue with the arbitration, another arbitrator appointed by the Council, on the sole question whether Mr Mkhize's dismissal was substantively unfair.

4 In the resumed hearing the evidence heard to date will remain as evidence on the record and the arbitrator will hear the evidence of Mr G Sibiya, such further evidence as may be tendered by either party in the light of that evidence and further evidence from or, if requested, cross-examination of, any witness who has already testified in the arbitration.

5 In the event of Mr Mkhize obtaining an order for his reinstatement or an order for compensation in excess of that permitted by s 194(1) of the Labour Relations Act, 66 of 1995, as amended, and such order becomes final and binding on the Department of Correctional Services, the Department shall pay Mr Mkhize's costs of this appeal.

6 Apart from the circumstances in para 5 of this order there will be no order for costs in this appeal.

JUDGMENT

Wallis JA (Navsa DP, Lewis and Pillay JJA and Mayat AJA concurring)

[1] Mr S S Mkhize, the appellant, was formerly employed by the first respondent, the Department of Correctional Services (the Department) as a warder at the Johannesburg correctional centre. In January 2008, after a disciplinary enquiry, most of which he had refused to attend, he was found guilty on a charge of bringing dagga into the prison and was dismissed. He challenged his dismissal in terms of the Labour Relations Act 66 of 1995 (the LRA), but on 30 October 2008, after a hearing, the second respondent, sitting as an arbitrator in the General Public Services Sectoral Bargaining Council, held that it had been both procedurally and substantively fair. Mr Mkhize reviewed the award in terms of the LRA, but, on 21 June 2012, Rabkin-Naicker J in the Labour Court dismissed the review application. The Labour Appeal Court dismissed a petition for leave to appeal on 28 February 2013. This further appeal is with the special leave of this court.

[2] In this appeal Mr Mkhize asked us to revisit the arguments that failed before the arbitrator and in the Labour Court and Labour Appeal Court. In addition he sought leave to introduce new evidence in the form of an affidavit sworn on 1 October 2012 by one Gilbert Sibiya, who was also employed as a warder at the time of the incident leading to Mr Mkhize's dismissal. It was Mr Sibiya who had first made a report that led

to the investigation of Mr Mkhize, his suspension from duty and his eventual dismissal. Mr Sibiya furnished a statement to the investigators who compiled an investigation report and gave evidence at both the disciplinary enquiry and the arbitration. In his affidavit he confessed that, out of personal antagonism towards Mr Mkhize, he had given false evidence against him at the disciplinary hearing and arbitration. He said that a prisoner, one Zola, had planted the dagga seeds found in a bag thought to belong to Mr Mkhize, which contained his windbreaker and newspaper. He had seen Zola doing this and instead of taking steps to deal with Zola's misconduct he had made a report to Mr Dlamini, the assistant head of the prison, that there was dagga in Mr Mkhize's bag. This had led to the investigation that in turn had the consequences already described.

[3] Apart from the introduction of new evidence, Mr Mkhize wanted this court to revisit the two issues that had been ventilated before the arbitrator, the Labour Court and the Labour Appeal Court. These were that there was a procedural time bar that prohibited the institution of disciplinary proceedings against him in terms of the Department's disciplinary code and that the arbitrator had erred on the evidence in holding that his dismissal was both procedurally and substantively fair. On the established jurisprudence of this court[1] neither argument raised any special circumstance warranting interference by this court with the decisions of the specialised labour tribunals. Accordingly, and counsel on his behalf accepted this, the only questions for decision in this appeal revolved around the attempt to introduce the evidence of Mr Sibiya.

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[1] *National Union of Mineworkers and another v Samancor Ltd (Tubatse Ferrochrome) and others* (2011) 32 ILJ 1618 (SCA) para 14; *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* 2013 (6) SA 224 (SCA) para 6.

[4] It must be accepted that if Mr Sibiya is now telling the truth – and on any basis he is a self-confessed liar – and he had said to the arbitrator what is said in his affidavit, that may possibly have affected the outcome of the arbitration. The evidence is material and indicates the possibility of there having been a miscarriage of justice, although courts are with good reason reluctant to place much reliance on the evidence of a recanting witness.[2] However, the affidavit cannot simply be accepted at face value.[3] Its contents must be tested if it is still feasible to do so. In that regard not only will Mr Sibiya need to give evidence and be cross-examined, but witnesses who gave evidence before the commissioner might need to be recalled to give further evidence or to be cross-examined in the light of his evidence. In addition, the alleged perpetrator, the prisoner called Zola, will need to be identified and will also have to give evidence. The circumstances in which Mr Sibiya's affidavit was prepared and by whom,[4] as well as the circumstances in which it came to the attention of Mr Mkhize's lawyers will also have to be explored

[5] The need to test Mr Sibiya's evidence raises problems in the disposition of this appeal. But the powers conferred on this court by s 22 of the Supreme Court Act 59 of 1959 (under which this matter must be disposed of because it was pending in this court before the repeal of that Act)) are extremely broad. In the ordinary case where a court of appeal is

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[2] *R v Van Heerden and Another* 1956 (1) SA 366 (A) at 372H-373A; *S v N* 1988 (3) SA 450 (A) at 464E-H.

[3] The order granting special leave to appeal to this court included a provision that if the contents of Mr Sibiya's affidavit was not objected to within 21 days leave would be given to Mr Mkhize to adduce this evidence on appeal. However, that order, added *mero motu* by the judges dealing with the application, was clearly incompetent in the light of the provisions of s 22*(a)* of the Supreme Court Act 59 of 1959 (*Shein v Excess Insurance Co Ltd* 1912 AD 418 at 429) and the parties accepted that it could be disregarded.

[4] A consideration of its terms suggests that someone other than Mr Sibiya and possibly someone with a modicum of legal training may have drafted it.

faced with a similar situation it sets aside the decisions of the courts below it and remits the hearing of such evidence to the trial court. The trial court then hears the evidence and such further evidence as may arise therefrom, including further evidence from witnesses who gave evidence at the original trial, and determines the case *de novo*.[5] That is in my view the only proper way to address the present case, subject only to the qualification that the remittal is limited to a *de novo* determination of whether Mr Mkhize's dismissal was substantively unfair. It does not extend to permitting him to re-argue the technical point that the disciplinary proceedings were instituted out of time.

[6] Accordingly the appeal must succeed and the orders by the Labour Appeal Court and Labour Court, as well as the decision of the arbitrator, must be set aside. Normally that would carry with it an order for costs, but in this case that would not be appropriate. On the evidence before the arbitrator the decision he reached was a proper one and the Labour Court was correct not to set it aside on review. The Labour Appeal Court was likewise correct not to grant leave to appeal from the Labour Court's judgment. The only reason why the proceedings below are to be set aside is because of the possibility that the new evidence might result in a different conclusion.

[7] In those circumstances Mr Mkhize has not at this stage achieved substantial success. Even if the evidence is admitted and found to be reliable his success may be limited. Given the lapse of time since his dismissal it is improbable that reinstatement would be ordered as a

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[5] *R v Mhlongo and Another* 1935 AD 133 at 134; *R v Kanyile and Others* 1944 AD 293 at 295; *R v Jantjies* 1958 (2) SA 273 (A) at 279F-H.

remedy for any procedural or substantive unfairness and any compensation would be limited to twelve months' remuneration.[6] If he pursues reinstatement but only obtains limited compensation, the game will not have been worth the candle and the pursuit of reinstatement will have been unreasonable. It is perfectly possible that the fairness of the Department's treatment of Mr Mkhize may be reiterated.

[8] In addition, Mr Sibiya's dishonest implication of Mr Mkhize in misconduct cannot be laid at the door of the Department. It had no reason to believe that he was being duplicitous and protecting the misconduct of the prisoner, Zola. Accordingly, it was entitled to defend the proceedings before the arbitrator and to resist the review and the appeal from the Labour Court.

[9] In those circumstances, I do not think that Mr Mkhize should recover his costs in respect of the proceedings in the Labour Court and the Labour Appeal Court. As to his costs in this court I propose to make the recovery of those costs dependent upon his obtaining substantial success in the resumed arbitration going beyond the limited compensation that is recoverable in terms of s 194(1) of the LRA. In other words, if he recovers no more than the statutory maximum compensation that will not count as substantial success. If he achieves such success an order that he recover his costs in this court will be appropriate. On the other hand, the need for the remittal to the arbitrator is, in part, because of the failure of the Department to deal with the affidavit of Mr Sibiya. It did not oppose the application for special leave to appeal to this court nor did it seek to place any evidence before us, either in regard to its contents, or the

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[6] Section 194(1) of the Labour Relations Act 66 of 1995.

appropriateness of it being admitted at this late stage of matters. Accordingly there will be no order in its favour in regard to any of the costs incurred thus far. In any event it is the general practice in labour disputes arising from individual dismissals, not to make an order for costs in favour of the successful employer.

[10] I make the following order:

1 The appeal is upheld and the order of the Labour Appeal Court refusing leave to appeal, the order of the Labour Court dismissing the review and the decision by the arbitrator given on 30 October 2008, are all set aside.

2 There will be no order in regard to the costs of the proceedings in the Labour Court and the Labour Appeal Court.

3 The dispute concerning Mr Mkhize's dismissal is remitted to the General Public Services Sectoral Bargaining Council to continue the arbitration before the second respondent, or if he is unable to continue with the arbitration another arbitrator appointed by the Council, on the sole question whether Mr Mkhize's dismissal was substantively unfair.

4 In the resumed hearing the evidence heard to date will remain as evidence on the record and the arbitrator will hear the evidence of Mr G Sibiya, such further evidence as may be tendered by either party in the light of that evidence and further evidence from or, if requested, cross-examination of, any witness who has already testified in the arbitration.

5 In the event of Mr Mkhize obtaining an order for his reinstatement or an order for compensation in excess of that permitted by s 194(1) of the Labour Relations Act, 66 of 1995, as amended, and such order

becomes final and binding on the Department of Correctional Services, the Department shall pay Mr Mkhize's costs of this appeal.

6 Apart from the circumstances in para 5 of this order there will be no order for costs in this appeal.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: D Z Kela
Instructed by:
Ndumiso Voyi Inc, Midrand
Webbers, Bloemfontein

For respondent: S Hassim SC (with her M B Matlejoane)
Instructed by:
The State Attorney, Pretoria and Bloemfontein.