IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: 167/2014

Reportable

In the matter between:

LUCAS MOEKETSI MOLEHE **Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **First Respondent**

ABRAHAM NTHAKO N.O. **Second Respondent**

HEAD: DEPARTMENT OF SOCIAL DEVELOPMENT

FREE STATE PROVINCE **Third Respondent**

Date heard: 30 May 2019

Delivered: 2 August 2019

Summary: Application to review an award and substitute it with a finding that the dismissal of the applicant was substantively unfair; applicant having been found guilty of bribery and corruption by a criminal court; rigid application of principles such as the distinction between criminal and disciplinary proceedings to be avoided; facts and circumstances of each case must always be taken into account; application dismissed with costs.

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JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review an arbitration award under case number PSHS 350-12/13 which was issued on 17 March 2013. Although a condonation application was made and various points *in limine* raised, the parties have asked the Court to grant condonation and to deal with the review on its merits. The points *in limine* have been withdrawn. I deal with the matter accordingly.

[2] The facts that led to a dispute between the applicant and the third respondent are common cause:

2.1 The applicant was employed by the Department of Social Development Free State Province, as a social auxiliary worker, since 1980.

2.2 On 14 September 2011, the applicant was sentenced to direct imprisonment for charges of bribery and corruption.

2.3 The applicant's term of imprisonment was 4 years.

2.4 The applicant was incarcerated from 14 September 2011 until 2 July 2012 when he was released.

2.5. On 14 March 2012, he was issued with a written notice by the third respondent stating that his services are terminated on the basis of incapacity.

[3] The second respondent (the Arbitrator) found that the applicant's dismissal was procedurally unfair and awarded him three months compensation in the amount of R58,900.50. The basis for this finding, which has not been cross-reviewed by the third respondent, is set out in his award as follows:

"22. The employer consequently decided to terminate his services on the 14th March 2012 due to inability to perform his duties as a result of incapacity. In the light of the fact that the Employee was incarcerated the Employer decided to

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terminate his service. Is indeed so that the Employer did not hold a disciplinary hearing in order for the Employee's side of his story could be heard, with regard to possible termination of services. The Employer was aware that the Employee was incarcerated but their (sic) failed to take necessary steps to ensure that a disciplinary case is held against him. It is indeed so that criminal cases are different from labour matters but having been charged and sentenced to prison does not prevent the Employer to hold a disciplinary hearing. Necessary arrangements should be made to ensure that a hearing is held. By writing a letter to the Employee's union that is definitely not a form of disciplinary inquiry. Necessary arrangements should be made to ensure that a hearing is held. By writing a letter to the Employee's union that is definitely not a form of disciplinary enquiry. I honestly believe that the procedure followed by the Employer was not correct as means should have been done or made to be heard as per code of conduct.

23. On the question of substance, not much has been said or argued about by the employee and in the Samancor Tubatse Ferrochrome v MEIBC [2010] ZALAC 7, the Labour Appeal Court, per Davis JA, found that the dismissal for incapacity of an employee was incarcerated for a considerable period was substantively fair. Before being released, the Employee spent about eight months in prison and that stage he was not performing or providing services. I honestly do not believe that the Employee was expecting to keep his position up until the time of release. More so when the Employer was aware that he has been sentenced for a long period. The reasons for the dismissal of the Employee are unfortunately fair."

[4] The applicant set out the background of his dispute at the arbitration which is contained in the transcript of the enquiry, when he was questioned by his representative Mr Jacobs, as follows:

"MR JACOBS: Mr Molehe just to repeat my question. Can you just indicate to us, what you were charged for in the initial disciplinary – just briefly?

APPLICANT: Actually there was no clear allegation of the charge. They say that I've asked for money from the people.

MR JACOBS: So you were soliciting money out of the people?

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APPLICANT: Yes

MR JACOBS: In the criminal matter, were you charged for similar offences?

APPLICANT: No

MR JACOBS: What were you charged for?

APPLICANT: They said they changed the charge. They said, it's bribery and corruption.

MR JACOBS: Were you found guilty?

APPLICANT: The first case, it was dismissed. I was not found guilty and then the investigating officer, he re-opened the case with other persons. The first case was. Then all of a sudden there comes plus/minus four clients claiming that the same thing.

MR JACOBS: Were you found guilty?

APPLICANT: No, that one they did find me guilty."

[5] The applicant has set out his grounds of review in his founding and supplementary affidavit. The main thrust of these review grounds are that the Arbitrator concluded that his dismissal was substantively fair in a situation in which the employer did not lead evidence. The employer's representative cross-examined the applicant and made submissions. Applicant submits that the Arbitrator simply accepted that the fact that he had been sentenced to imprisonment for a period of four years qualified such absence as incapacity, which warranted dismissal.

[6] The supplementary affidavit emphasizes that given the second respondent did not give viva voce evidence to prove the dismissal was substantively fair, the award stands to be reviewed and substituted.

[7] It is rare to be utterly astounded by the stance of a litigant. This is one of those occasions. The applicant seeks to be reinstated after, on his own version, he was found guilty beyond reasonable doubt, in a court of law, of bribery and corruption in relation to his 'clients' i.e. those people in the community in need of health and social services from the state.

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[8] The applicant has relied on the principle that 'incapacity' in labour law can also arise from imprisonment. However, as the LAC in *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council & others*[1] stated:

"…in principle, it cannot be the case that the law has developed an inflexible rule; that is that incapacity which is outside of the control of the employee cannot be a cause for dismissal."

[9] I note that the above LAC judgment was in fact overturned on appeal because of the way the review test was applied. However, that incapacity outside the control of an employee, can lead to either a fair or unfair dismissal, was reaffirmed. In *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others*[2] the SCA stated as follows:

"[11] It was submitted before us by its counsel that Samancor had not purported to dismiss Mr Maloma for fault on his part (that is, for the disciplinary offence of absenteeism). He was dismissed because he was no longer capable of performing his employment duties (that is, for incapacity). Reminding us of the ordinary consequences for a contract of the inability of one party to perform, counsel submitted that the inability of Mr Maloma to present himself for work in itself entitled Samancor to bring the employment to an end, which is what it had purported to do.

[12] The submission is not altogether correct. While ordinary principles of contract permit a contracting party to terminate the contract if the other party becomes unable to perform, that is not the end of the matter in the case of employment. The question that still remains in such cases whether it was fair in the circumstances for the employer to exercise that election. In making that assessment the fact that the employee is not at fault is clearly a consideration that might and should properly be brought to account. But the fact that Mr Maloma was not at fault was not the sole reason for the arbitrator's decision. Another consideration that he took account of - and it was clearly decisive of his decision - was that there was 'no evidence that [Mr Maloma] was

[1] (2010) 31 ILJ 1838 (LAC)
[2] (2011) 32 ILJ 1618 (SCA)

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occupying such a key position in the company that necessitated his dismissal after ten days of absence'. ….."

[10] As opposed to the facts and circumstances considered by the SCA above, the facts and circumstances leading to the absence from work of the applicant, *on his own evidence*, stand in stark contrast. Given these, a finding that his dismissal was substantively unfair could not have been within the bounds of reasonableness.

[11] I can comprehend that the applicant may have been encouraged in launching this application after reading the remarkable notion enunciated by the Arbitrator: in dealing with procedural fairness, i.e. that the third respondent should have asked its sister department of correctional services to hold a disciplinary hearing in its premises. However, I am able to note this aspect only, given that there was no counter-review in the matter.

[12] This review application underscores the imperative of avoiding rigidity in the application of our labour law. Facts and circumstances of the particular case before an arbitrator or adjudicator must always be taken into account. In this matter the employer did not give evidence at the arbitration choosing to cross – examine and argue only. But the employee's own testimony confirmed that his dismissal was substantively fair. In addition, while there is a distinction between criminal and disciplinary proceedings, in this matter the criminal charges were directly related to the applicant's conduct as a social worker auxiliary, employed by the third respondent.

[13] The application thus stands to be dismissed. I am of the view that this is a case where there are exceptional circumstances that persuade the Court that costs should follow the result. Indeed, this is what the applicant sought in his notice of motion and in the submissions prepared for him. Given the facts and circumstances of the case before the arbitrator, I make the following order:

Order

The application is dismissed with costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: T. Du Preez instructed by Kramer Weihmann Joubert

Third Respondent: S.S. Jonase instructed by State Attorney

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