

11 June 2010

Case No. SADCT: 02/2009

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL

BOOKIE MONICA KETHUSEGILE-JURU
v.
THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
PARLIAMENTARY FORUM

JUDGMENT

BEFORE: PRESIDENT: A. G. Pillay
JUDGES: I. J. Mtambo; Dr. R. Kambovo

PermaLink: http://www.worldcourts.com/sadct/eng/decisions/2010.06.11_Kethusegile-Juru_v_SADC_Parliamentary_Forum.htm

Citation: Kethusegile-Juru v. SADC Parliamentary Forum, Judgment, Case No. SADCT: 02/2009 (SADC, June 11, 2010)

Represented APPLICANTS' AGENTS: D. Obbes and Mrs. S. Nambinga

By: RESPONDENT'S AGENTS: G. Coleman

JUDGMENT

**DELIVERED BY THE PRESIDENT OF THE TRIBUNAL H.E. JUSTICE
ARIRANGA G. PILLAY**

[1] The Applicant was appointed as Assistant Secretary General/Coordinator of Parliamentary Leadership Centre by the Respondent on a contract of determinable duration which ran from 5 September 2005 to 4 September 2009 (Doc. BK5). The Applicant had also, pursuant to clause 22 of Doc. BK5, an option to renew her contract, subject to satisfactory performance on her part. In June 2007 the Applicant was confirmed in her post which was upgraded and became the deputy to the then Secretary General of the Respondent (Doc. BK7). The Applicant was summarily dismissed on 1 August 2008.

[2] The Applicant claims that her contract of employment with the Respondent was unlawfully and unprocedurally terminated by the Respondent and is consequently seeking reinstatement and/or damages.

[3] In an earlier ruling delivered in February 2010, the Tribunal dismissed the

preliminary objections taken by the Respondent and held that it has jurisdiction to consider the claim of the Applicant – vide *Bookie Monica Kethusegile-Juru v The Southern African Development Community Parliamentary Forum* – Case No. SADC (T) 02/2009. The Tribunal reserved its ruling about whether the Applicant had exhausted internal remedies in that she had not lodged an appeal in accordance with her conditions of employment since this was a matter which should be decided on the merits of the case.

[4] However, the Respondent did not press this issue when the case was heard on its merits. Rightly so, too, in our opinion, since the Applicant had written various letters of protest about her dismissal to the Chairman of the Executive Committee of the Respondent which had remained unanswered. Moreover, it is significant that the Applicant's contract of employment had been terminated with the knowledge and support of the Executive Committee of the Respondent. Consequently, it would have served, in our opinion, no useful purpose in the circumstances for the Applicant to have filed an appeal, the more so as there is no clear and express procedure relating to appeals made by officers of the rank and status of the Applicant in Rule 17 of the Administration Rules and Procedures Handbook of the SADC Parliamentary Forum (the Handbook), as rightly submitted by learned Counsel of the Applicant – vide *Mike Campbell (PVT) Ltd and Others v The Republic of Zimbabwe SADC (T) Case No. 2/2007* at page 21.

[5] The contract of employment of the Applicant (Doc. BK5) could be terminated before its expiry "subject to three (3) months' written notice in the event of any unforeseeable circumstances as detailed" in the Handbook (Clause 19 of Doc. BK5). However, there is no mention at all in the Handbook of such "unforeseeable circumstances". Indeed in the letter of dismissal (Doc. BK9) addressed to her by the then Secretary General of the Respondent, no mention is made of any unforeseeable circumstances. Reliance, however, was placed on the authority granted to the Secretary General under Rule 15.2.1 of the Handbook to terminate the Applicant's contract of employment since her conduct was prejudicial to the interests and/or image of the Respondent in terms of that Rule in that she had "expressed disparaging views about the Respondent, its management and operations".

[6] The Applicant was also informed that she had been summarily dismissed, but would be paid compensation in lieu of the required three months' notice, pursuant to Rule 15.2.1 of the Handbook. Rule 15.2.3 makes it quite clear, however, that "no employee's services shall be terminated summarily unless in compliance with the disciplinary procedures established in the Discipline section of this Handbook" (the underlining is ours).

[7] Rule 16 deals with matters of discipline. Rule 16.1.1 states that "all SADC employees shall conduct themselves in a manner which preserves the good image of SADC at all times." Rule 16.1.4 specifies that "continued employment by SADC shall be conditional on rendering satisfactory service." Rule 16.2.3 provides that the Head of Institution shall be the disciplinary authority in the case of employees in regional posts. Rule 16.3.2 states that serious offences include, inter alia, "behaviour likely to bring SADC into disrepute", a charge similar to the one levelled against the Applicant. Rule 16.3.3 refers to dismissal offences which, significantly, do not include "behaviour likely to bring SADC into disrepute" or conduct prejudicial to the interests and/or

image of the Respondent. Rule 16.4.2, however, stipulates that “employees who commit serious offences shall receive a written warning for the first offence, and thereafter the offence may be considered as grounds for dismissal”. We pause here to note that there is no indication in the Applicant’s letter of dismissal that she had repeatedly committed such a serious offence, namely, behaving in a manner prejudicial to the interests and/or image of the Respondent.

[8] Rule 16.5 details the procedure to be followed in a case where an employee in a regional post has allegedly committed a serious offence: the employee is given first an opportunity to exculpate himself or herself in writing (Rule 16.5.3) and it is then for the Head of the Institution i.e. the Secretary General to decide whether or not to institute an investigation into the allegation or drop the charges (Rule 16.5.4). If the Head of Institution decides that an investigation is called for, he appoints a committee to carry out the investigation and submit a report (Rule 16.5.5). Upon receipt of the report, the Head of Institution studies the report and informs the employee of his conclusions. If convinced that a serious or dismissal offence has been committed, the Head of Institution shall charge the employee in writing, giving the details of the charge (Rule 16.5.6). The employee then has ten days to respond in writing to the Head of Institution to exculpate himself or herself (Rule 16.5.7). Upon a written response from the employee, the Head of Institution shall inform the employee in writing of his decision (Rule 16.5.8). Upon receiving written notice from the Head of Institution that the employee has been found guilty, the latter has 10 days to appeal against the decision (Rule 16.5.9). Similar provisions exist for local staff.

[9] We are of the considered view that, although there is no specific disciplinary process in the Rules of the Handbook dealing with officers of the rank and status of the Applicant, Rule 16.5 applies, as appropriate, to the Applicant, especially in the light of Rule 15.2.3, already mentioned above. Finally, mention must be made of Rule 16.7.1 which provides as follows:

“A person whose actions are being investigated, or against whom action is being taken for having committed a serious offence shall be suspended from duty with full pay” (the emphasis is ours).

[10] It is abundantly clear that the Respondent, through its former Secretary General, acted in utter disregard of the relevant Rules of its Handbook, highlighted above. We, therefore, have no hesitation in holding that the Applicant’s employment had been unlawfully and unprocedurally terminated by the Respondent on 1 August 2008. Moreover, the summary dismissal of the Applicant by the Respondent violated the rules of natural justice, namely, the right to be heard and the rule against bias or the rule that no man shall be a judge in his own cause, since the Applicant was not given any opportunity to make representations before an independent and impartial body before the decision was taken by the Respondent, through its former Secretary General, who had acted as both party and judge in the circumstances to sack her, in spite of evidence adduced before us to the effect that there was bad blood between the Applicant and the former Secretary General of the Respondent – vide Attorney General of the Commonwealth of the Bahamas v Ryan (1980) AC 718 quoted in the Mike Campbell case, cited already, and Luke Munyandu Tembani v The Republic of Zimbabwe SADC (T) Case No. 07/2008 at page 19.

[11] The reinstatement of the Applicant cannot be seriously envisaged for the simple reason that her contract of employment had already come to its lawful expiry on 4 September 2009. As for the Applicant's claim to have had a legitimate expectation that her contract of employment would be renewed for another term of four years, we reject it as untenable since, as rightly contended by learned Counsel for the Respondent, she was only confirmed in her post in June 2007 and the then Secretary General and Head of the Respondent had strong reservations about the performance of her work and her alleged improper conduct. Such reservations were apparently shared by the Executive Committee of the Respondent.

[12] We turn now to the issue of damages. We consider that the Applicant is entitled to the salary and all the allowances and benefits accruing to her from her date of dismissal on 1 August 2008 until the lawful expiry of her contract on 4 September 2009. From that amount should be deducted, however, the sum of N\$398,221.92 already paid to the Applicant by the Respondent. We also award her the sum of N\$100,000.00 for the trouble, annoyance and prejudice suffered by her.

[13] We, therefore, declare that the Applicant's contract of employment had been unlawfully and unprocedurally terminated by the Respondent.

We also order that:

- (a) the Respondent should pay the salary and all the allowances and benefits accruing to the Applicant from her date of dismissal on 1 August 2008 until the lawful expiry of her contract on 4 September 2009. From that amount should be subtracted the sum of N\$398,221.92 already paid to the Applicant by the Respondent; and
- (b) the Respondent should pay to the Applicant moral damages amounting to N\$100,000.00.

[14] We would also recommend to the Respondent to consider amending the Rules of the Handbook in order to provide for a specific disciplinary and appeal process in relation to officers of the rank and status of the Applicant since the Rules are not clear about such process.

[15] With regard to the issue of costs, we shall first refer to Rule 78 of the Rules of Procedure of SADC Tribunal (The Rules). Rule 78 provides as follows:

- “1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.”

[16] In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

[17] We take the view that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the Applicant in the interests of justice. We have taken into account, in this regard, especially the fact that the Applicant, who was a high ranking officer of the Respondent, and the deputy to the Head of Institution, has had to suffer prejudice, trouble and annoyance when she was summarily dismissed and her contract unlawfully and unprocedurally terminated by the Respondent which acted in flagrant breach of the Rules of its Handbook, in the

circumstances mentioned already. We accordingly award costs to the Applicant under Rule 78(2) of the Rules. The costs are to be determined by the Registrar in case of disagreement between the parties.

Delivered in open court this 11th day of June 2010, at Windhoek in the Republic of Namibia.

H.E. Justice Ariranga Govindasamy Pillay
PRESIDENT

H. E. Justice Isaac Jamu Mtambo, SC
MEMBER

H.E. Justice Dr Rigoberto Kambovo
MEMBER