

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 2023-091028

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
----- SIGNATURE 2023-10-10 DATE	

In the matter between:

**MATOME JOSEPH MAKWELA
SHADRACK SIMPHIWE MACHABAWA**

**1ST APPLICANT
2ND APPLICANT**

And

**DARIO INVESTMENTS
T/A TEMBISA SUPERSPAR**

RESPONDENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 10 October 2023.

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

[1] The applicants launched an urgent application seeking an order in the following terms:

" 1. that condonation be granted to the applicant for non-compliance with the time limits as provided for in Rule 6 and that the matter be heard as one of urgency in terms of Rule 6(12).

2. The decision of the respondent to terminate the applicants' employment contracts with effect from 26 August 2023 be declared to be unlawful.

3. The applicants be reinstated to their employment with effect from the date of the termination of their employment contracts with backpay and all the benefits.

4. The respondents be prohibited from terminating the applicants' employment contracts without complying with its internal policy procedures.

5. The applicants be interdicted from terminating the applicants' employment contracts on the averments made in the urgent applications served before Justice Phehane on the 25th and 27th, of August 2023, respectively-unless, the court orders are successfully appealed.

6. The respondent to pay the costs, including counsel on attorney and client scale.

7. Any further alternative relief.

8. costs against the respondent on attorney and client scale."

[2] The application is opposed on the basis that the applicants failed to comply with the rules of urgency and that the matter lacks urgency. The respondent further contends that this court lacks jurisdiction.

[3] The applicants were employed by the respondent until there was a labour dispute prior to the 26th of August 2023. It is common cause that the applicants embarked on an industrial action which culminated in their contracts of employment being terminated by the respondent.

[4] The reasons and the procedure followed by the respondent before termination of the applicants' contracts of employment is at issue because that applicants aver that their

contracts of employment were unlawfully terminated by the respondent while the respondent contends that the applicants were dismissed after a fair disciplinary hearing and therefore their case is that of unfair dismissal not the termination of employment contracts.

JURISDICTION

[5] The respondent has an issue with the jurisdiction of this court. It is therefore proper to start with the aspect of jurisdiction because if I find that this Court lacks jurisdiction that will be the end of these proceedings.

[6] The respondent contends that the applicants are relying on a breach of their contracts of employment as well as Policies of the respondent described as "policy procedure", which were not annexed to the founding affidavit and which do not exist. The respondent further argues that in an application brought in terms of Section 77(3) of the BCEA where the applicants allege a breach of contract, the contractual terms sought to be vindicated must be plainly pleaded, which the applicants failed to do.

[7] The respondent submitted that the applicants will be accorded substantial redress at a hearing in due course by approaching the CCMA because the applicants are bringing a case of unfair dismissal before this court.

[8] I cannot agree with the respondent that this court lacks jurisdiction because this court has concurrent jurisdiction with the Labour Court in terms of Section 77(3) of the BCEA . The respondent has admitted that this court has concurrent jurisdiction with the Labour Court and further admitted that the applicants' dismissal resulted in the termination of their contracts of employment.

[9] The respondent, however, contends that the applicants are not entitled to an order for specific performance. The respondent argued that the applicants did not aver any contracts in their founding affidavit that were allegedly breached by the respondent. However, the respondent admitted that the applicants were the employees of the respondent, but contend that the provisions of the BCEA only requires the respondent to furnish the employees with particulars of employment.

[10] The respondent relied on **Gcaba v Minister of Safety and Security & Others**¹ to advance the argument that where the respondent availed itself to its contractual right to terminate the contract of employment, a breach of contract claimed by the employees is

¹ (CCT64/08) [2009] ZACC 26

not justiciable under Section 77(3) of the BCEA. The respondent admits that it has contractual rights but omitted to appreciate that there are also contractual obligations.

[11] In *Gcaba* the Constitutional Court held that jurisdiction is determined on the basis of the pleadings and not the substantial merits of the case. The Constitutional Court went further to hold that it is not for the Court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. The Constitutional Court in *Gcaba* also held that it is clear from the pleadings that the applicant's case is only based on fairness, while sparsely interposed by unadorned reference to Section 77(3) of the BCEA.

[12] Clearly *Gcaba* is distinguishable from the current proceedings because in this case the pleadings are clear that the applicants are complaining about the breach of a contractual obligation by the respondent. The respondent also referred to a Labour Court judgment by Moshwana J in **SAMWU v TSWAING LOCAL MUNICIPALITY**².

[13] The applicants contend that their contracts of employment have been unlawfully terminated by the respondent without consideration to the internal policy and therefore a result the respondent committed a breach of employment contract. Reliance is placed on the judgment of **Letsholonyane v Minister of Human Settlement**.³

[14] I agree with the respondent's argument that there is no legal obligation to enter into contracts of employment with employees. However, if the employer enters into a contract of employment with an employee that contract becomes binding. The employer cannot simply ignore the terms of the contract merely because the BCEA only requires the employer to furnish the employee with the particulars of employment. That, in my view, will be a wrong interpretation of the law.

[15] Consequently, I am of the view that the argument that this court lacks jurisdiction is misplaced and thus cannot be sustained.

URGENCY

[16] *Rules 6(12)(b)* prescribes two extremely important requirements for urgency, namely that the applicant must, in the founding affidavit set out explicitly the circumstances which the applicant avers render the matter urgent and the reasons why the applicant claims that he or she will not be accorded substantial redress at a hearing in due course.

² (JA 1221) [2022] ZALAC 107

³ (J616/23) [2023] ZALCJHB 147

[17] The applicants content that they will suffer hardships if the matter is not heard on an urgent basis. They content that they stand to suffer, and will continue to suffer, immediate, grave and irreparable harm. Many will quite simply be evicted and deprived of a shelter, extending to their immediate family and children. The applicants are relying on the Constitutional Court judgment of **Mtolo & Others v Lombard**⁴ to advance the argument that the applicants will suffer hardships if this application is not heard on an urgent basis. The respondent admits that the applicants will suffer hardships but argue that these hardships are self-created.

[18] To support their argument that this application is urgent, Counsel for the applicants further referred me to the judgment of the **Constitutional Court in the South African Informal Traders Forum and Others v City of Johannesburg**⁵ where *Moseneke ACJ* emphasised that the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they face humiliation and degradation.

[19] On the other hand, the respondent argues that the applicants have not complied with the Rules and the directives for urgent applications. The respondent contends that the application was brought on *Monday, 11 September 2023* and, in terms of the notice of motion, the respondent was allowed an opportunity to file an answering affidavit before 10:30 on *Wednesday, 13 September 2023*, thereby allowing approximately one and a half days for opposing the matter. The respondent referenced to **Republikasie Publikasie (Edma) Bpk v Afrikaanse Pers Publikasie (Edms) Pbk**⁶ and **Luna Meubelvervaardigers (Edems) Pbk v Makin & Another**⁷ to enhance its argument that urgent applications must be brought in accordance with *Rule 6* of the *Uniform Rules* and the guidelines and precedents set out in those cases.

[20] Urgency ought not be self-created and therefore, in view of the fact that the applicants have served the application only six days after they were dismissed, I am satisfied that this matter must be heard with urgency.

ISSUES FOR DETERMINATION

⁴ [2021] ZACC 39

⁵ 2014(4) SA 371 (CC)

⁶ 1972(1) SA 773 (A) at 782 A-G

⁷ 1977(4) SA 135 W

[21] The issue for determination is whether the respondent's act of terminating the employment contracts of the applicants is a breach and in contrast with the policy procedure of the respondent.

BRIEF BACKGROUND FACTS

[22] The respondent and the applicants had a labour dispute which resulted in the applicants embarking on a legal strike after the CCMA issued them with a certificate. Aggrieved by the applicants's actions the respondent approached the Labour Court on the 25th of August 2023 on an urgent basis seeking an order interdicting all persons acting on the instructions of JAWSA and its General Secretary from "partaking" in the threatened illegal strike or preventing access to and from the respondent's premises situated at 1632 Andrew Mapheto Street, Birch Acre, Kempton Park, Gauteng, and generally causing a nuisance in the vicinity of the respondent's premises. The application was dismissed with costs.

[23] On the 27th of August 2023 the respondent approached the Labour Court again on an urgent basis seeking an order, among others, in the following terms:

" 29.1. That the matters is extremely urgent;

29.2. that the second to forty seven respondents and its members and all other persons acting on their instructions, orders, with immediate effect to;

29.2.1 commence and continue their strike but within 200-metre radius of the entrance of the applicant's store;

29.2.2 the matter is dealt with as one of urgency in terms of Rule 8 of the Rules of this Court;

29.2.3 interdicting the first respondent from intimidating and interfering in the applicant's business including threats against its employees."

The application was opposed and it was struck from the roll for lack of urgency.

[24] On 29 August 2023 the respondent issued another urgent application in the Gauteng division of the high court seeking an order, among others, in the following terms:

' 2. The applicant be restored with its peaceful and undisturbed possession of the premises situated at 1632 Andrew Mapheto Street, Birch Acres Mall, Birch Acres,

Kempton Park, Gauteng Province and known as Tembisa Superspar with immediate effect.

3. The applicant's unfettered peaceful and undisturbed access to the premises situated at 1632 Andrew Mapheto Street, Birch Acres Mall, Birch Acres, Kempton Park, Gauteng Province and known as Tembisa Superspar be restored with immediate effect."

The urgent application to the high court was granted, albeit, in the absence of the applicants in the current proceedings.

[25] On 28 August 2023 the applicants were served with notices for disciplinary hearing. The applicants aver that the notices were dumped on the floor of the vicinity which the applicants were embarking on the strike⁸. The applicants further aver that on the same day, at night⁹, the applicants received notices to attend a mass disciplinary hearing scheduled to take place on Wednesday, 30 August 2023. The respondent only denies that the notices to attend the disciplinary hearing were received by the applicants at night but fails to show in its answering affidavit at what time were those notices received.

[26] The disciplinary hearing proceeded, according to the respondent, in the absence of some of the employees. In fact only three employees participated in the proceedings and the three were found not guilty. The other eighty employees were found guilty and the Chairperson recommended a sanction of dismissal against all of them.

EVALUATION AND THE LEGAL POSITION

[27] As alluded to earlier, the applicants contend that their contracts of employment were unlawfully terminated by the respondent ignoring the respondent's own policy and procedure. The respondent contends that the respondent does not have a policy and procedure and only relied on the BCEA to discipline the applicants. The respondent further argued that the applicants failed to annex the employment contracts as well as the policy and procedure to their application.

[28] The applicants attached an employment contract in their replying affidavit which also refers to policy and procedure. The argument that the respondent does not have policy and procedure is therefore without merit and cannot be sustained.

[29] The respondent contends that this is a disguised unfair dismissal application and therefore the applicants should have approached the CCMA for an appropriate relief. The

⁸ Paragraph 40 Founding Affidavit

⁹ Paragraph 41 Founding Affidavit

respondent further contends that it is not clear what interdict are the applicants seeking because it appears that they are asking for a final interdict. The respondent denies unlawfulness and therefore argues that there is a dispute of fact that must be settled through the Plascon Evans rule¹⁰.

[30] The Plascon-Evans principles are trite in that the Court has to consider the accepted facts alleged by the respondent in its answering affidavit unless those facts are so far fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. In **The National Director of Public Prosecutions v Zuma**¹¹ the Supreme Court of Appeal held that;

"In motion proceedings the question of onus does not arise, and the Plascon-Evans rule governs irrespective of where the legal or eventual onus lies."

[31] Counsel for the respondent argued that the respondent denies that it acted unlawfully. Counsel further argued that the disciplinary hearing is a fairness issue. The respondent also contends that it followed a code of good practice contrary to the applicant's case that the respondent failed to adhere to its code of conduct.

[32] In their replying affidavit the applicants attached an employment contract which also refers to the internal policy and procedure. The argument by the respondent that it does not have an internal policy is not supported by the facts because one of the charges against the applicants is couched as follows:

" 'D' BREACH OF COMPANY POLICY AND BREACH OF TRUST¹² ". The charge reads as follows: *' Your unlawful conduct is contrary to the company policy that has been implemented'*. The respondent now seeks to deny that there exists a company policy when in fact in its answering affidavit it admitted that there is one.

[33] The agreed facts are such that the applicants were formerly employed by the respondent and a labour dispute ensued which culminated in the applicants embarking in a legal strike. The respondent twice tried to interdict the applicants in the Labour Court, to no avail. The respondent obtained an order in the Gauteng High Court in the absence of the applicants.

[34] The urgent applications pursued by the respondent indicate a respondent who was forum shopping with the aim of obtaining a court order against the applicants. The events happened so fast that the respondent in its own answering affidavit admits that the

¹⁰ Plascon Evans Paints(Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623A

¹¹ 2009(2) SA 277 (SCA) Paragraph 26

¹² Caselines page 02-127

applicants were removed from the venue where the disciplinary hearing was held because they were unruly. It appears that the respondent was aggrieved by the actions of the applicants of embarking on a legal strike and instead of following its own internal policy and procedure the respondent hurried the termination of the contracts of employment of the applicants.

[35] In my view, this case deals with a breach of employment contract and it resonates with the judgment of the Labour Court in **Letsholonyane v Minister of Human Settlements and Another**¹³ where *Makhura AJ* referred with approval to the judgment of the Supreme Court of Appeal in **Makhanya v University of Zululand**¹⁴, where *Nugent JA* held as follows:

" When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact, that is the claim. That the claim might be a bad claim, is besides the point."

[36] *In casu*, like in *Letsholonyane*, the applicants have disavowed any reliance on the LRA. They pleaded that the application is based on the breach on employment contract by the respondent and therefore they seek a declaratory order that they be resorted back into their employment. The respondent's contention that the applicants' claim is based on the LRA and that it is bad in law is therefore without merit.

[37] I am satisfied that the applicants' pleaded case was brought in terms of *Section 77(3) of the BCEA*.

CONCLUSION

[38] The pleaded case by the applicants and the admitted facts by respondent do not require that the matter be referred for evidence and therefore my view is that I am perfectly entitled to order an interdict and a declaratory order. I am satisfied that the applicants have made out a compelling case for the relief sought in the notice of motion and therefore their application should succeed.

[39] However, one of the applicants's prayers is that the respondent be prohibited from terminating the applicants' employment contracts on the averments made in the urgent

¹³ *supra*

¹⁴ (218/08) [2009] ZASCA 69

application served before Justice Phehane on the 25th and 27th, August 2023, respectively-unless, the court orders are successfully appealed. The respondent is entitled to follow process and procedure if it wants to institute disciplinary hearings against the applicants and therefore I cannot order that this should be done only after the court orders are successfully appealed.

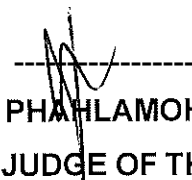
COSTS

[40] I am alive of the triad that costs are within the discretion of the court. However, it is a well established trite that costs should follow the cause. The party who loses must therefore pay costs and in this case the respondent must pay the costs. However, the applicants are seeking costs on attorney and client scale, including costs of counsel. The applicants' counsel has not advanced convincing reasons why the respondent should be ordered to pay costs on a punitive scale. The applicants have not employed counsel and therefore they cannot be entitled to costs of counsel.

ORDER

[41] In the circumstances I make the following order:

- (a) The matter is heard on an urgent basis in terms of *Rule 6(12) of the Uniform Rules of Court*.
- (b) The decision of the respondent to terminate the applicants' employment contracts with effect from 26th August 2023 is hereby declared to be unlawful.
- (c) The applicants be reinstated to their employment with effect from the date of the termination of their employment contracts, with backpay and all the benefits.
- (d) The respondent is prohibited from terminating the applicants' employment contracts without complying with its internal policy procedures.
- (e) The respondent is ordered to pay costs.


 KGANKI PHAHLAMOHLAKA
 ACTING JUDGE OF THE HIGH COURT

JUDGMENT RESERVED ON:

15 SEPTEMBER 2023

DELIVERED ON: 10 OCTOBER 2023

COUNSEL FOR APPLICANTS: MR MW MARWESHE
INSTRUCTED BY: MABU MARWESHE

COUNSEL FOR RESPONDENTS: ADV WP BEKKER
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