

REPUBLIC OF SOUTH AFRICA



EASTERN CAPE LOCAL DIVISION
MTHATHA

CASE NO. 5293/18

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

DATE

SIGNATURE

In the matter between:

DR SIMPHIWE MICHAELANGELO NGQELENI

Applicant

and

**MEMBER OF THE EXECUTVE COUNCIL
FOR DEPARTMENT OF HEALTH,
EASTERN CAPE**

1st Respondent

**HEAD OF DEPARTMENT, DEPARTMENT,
EASTERN CAPE**

2ND Respondent

JUDGMENT

NOTSHE AJ:

INTRODUCTION

- [1] The applicant, an employee of the respondents, instituted an urgent application for an order in the form of a rule *nisi* and an interim interdict pending the return date. I granted the respondents time to file papers. By the time I heard the matter all sets of papers had been filed by both parties.
- [2] The applicant seeks mandatory and prohibitory interdicts restraining the respondents from stopping payment of his salary and directing them to continue to pay his salary until validly and lawfully terminated.
- [3] The respondents opposed the application on the grounds that:
- 3.1 this Court does not have jurisdiction to adjudicate upon this matter because it is a matter that falls within the exclusive jurisdiction of the Labour Court;
 - 3.2 the matter is not sufficiently urgent to be enrolled and heard as an urgent application; and
 - 3.3 the applicant has not made out a case for the relief that he seeks because he has been discharged from the employment of the respondents.
- [4] After hearing argument the parties agreed that I should consider the final relief because all sets of papers had been filed. I duly did and I granted the relief sought by the applicant but reserved the delivery of the judgment.
- [5] This is the judgment.

THE FACTS

- [6] The following admitted and undisputed facts of this matter answer the defences raised by the respondents.
- [7] The applicant is an adult male and a medical practitioner employed by the respondents. He was employed at Mthatha Regional Hospital, Eastern Cape. He had been so employed since 4 January 2012.
- [8] 04 November 2014 he fell ill and was subsequently admitted at St Marks Hospital.
- [9] On 11 September 2018 his father brought him a letter from the respondents telling him that his application for “[i]ll-health [r]etirement” had been approved. It gave him 31 August 2018 as his last date of employment.
- [10] He learnt from his father that the latter was made to sign some forms on his behalf but without his authority.
- [11] The respondents then stopped his salary.

ANALYSIS

- [12] I now deal with the defences raised by the respondents.
- [13] An applicant is entitled to have his/ her application enrolled and heard as an urgent application if the requirements of rule 6(12) of the Uniform Rules are satisfied. The requirements are to the effect that an applicant for such should set forth explicitly the circumstances which are averred render the matter urgent and the reasons why he/ she claims that he/ she cannot not be afforded substantial redress at a hearing in due course. The decisions are legion.¹

¹ Mangala v Mangala 1967 (2) SA 415 (E); Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd 1967 (2) SA 491 (E) at 493A–B; Sikwe v SA Mutual Fire & General Insurance

- [14] In support of this the applicant avers that unlawful termination of his salary, severely prejudices him. He has fallen into arrears with his creditors, and is on the verge of not only losing his basic requirements such as access to water and electricity but also could get black-listed. Certain stop orders come of his bank account at the beginning of each month. These will lapse unless he salary is reinstated forthwith.
- [15] I am satisfied that the facts averred by the applicant demonstrate that he will not be afforded substantial redress at a hearing in due course. He will be ruined by the time the application is heard in due course.
- [16] In so far as the issue of jurisdiction is concerned the Constitutional Court has stated that the exclusive jurisdiction of the Labour Court is limited to “... *matters that elsewhere in terms of [the Labour Relations Act, 1995] or in terms of any other law are to be determined by the Labour Court.*”²
- [17] In this regard it said the following:
- “Section 157(1) [of the LRA] therefore has the effect of depriving the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Relations Act provides otherwise. Deciding which matters fall within the exclusive jurisdiction of the Labour Court requires an examination of the Labour Relations Act to see which matters fall “to be determined” by the Labour Court. It is*

Co Ltd 1977 (3) SA 438 (W) at 440H; Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin’s Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F; I L & B Marcow Caterers (Pty) Ltd v Gretermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd 1981 (4) SA 108 (C) at 110H–111A; Makhuvha v Lukoto Bus Service (Pty) Ltd 1987 (3) SA 376 (V) at 388I–389D; Salt v Smith 1991 (2) SA 186 (Nm); Cekeshe v Premier, Eastern Cape 1998 (4) SA 935 (Tk) at 948F.

² Fredericks and Others v MEC for Education and Training Eastern Cape and Others [2002] 2 BLLR 119 (CC).

quite clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment."³

[18] In this case the issue raised by the applicant is whether the conduct of the respondents as an organ of state is lawful. That matter does not fall with the exclusive jurisdiction of the Labour Court. The jurisdiction of this Court (the High Court) is therefore not ousted.

[19] The respondents aver that the applicant is not entitled to his salary pending the outcome of the main application because he has been discharged from his employment. They argue that he is no longer an employee of the department.

[20] In my view a dismissed employee is entitled to his emoluments on an interim basis pending the finalisation of the issue of the validity or otherwise of his/ her dismissal as long as the requirements for the granting of an interim interdict are satisfied.

[21] It has been said that the immediate objective of an interim interdict is to obtain an order of court preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of the rights of the parties and does not affect their final determination. Its determination depends upon weighing up of the balance of convenience between the parties where the right relied upon is *prima facie* established though open to some doubt.⁴

[22] The requirements for the granting of an interim interdict are now

³ At para 38.

⁴ C B Prest: Interlocutory Interdicts (Juta) (1993) at 2 -5.

settled and are the following: (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) a balance of convenience in favour of the granting of the interim relief; and (d) the absence of any other satisfactory remedy.⁵

[23] In *Webster v Mitchell*⁶ it was held that a *prima facie* right will have been established if:

“[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is “prima facie established though open to some doubt” that is enough. ...

The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to “some doubt”. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”⁷

⁵ Setlogelo v Setlogelo 1914 AD 221 at 227; National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) at [45].

⁶ 1948 (1) SA 1186 (W) at 1189.

⁷ See also: Simon NO v Air Operations of Europe AB 1999 (1) SA 217 (SCA) at 228G–H.

- [24] The test in regard to requisite of apprehension of irreparable harm is at times confused with the requirement in respect of an urgent application. These are two distinct and separate requirements. In an urgent application what is required is proof that the applicant cannot be able to wait for the periods afforded by the Uniform rules. Whereas this requisite in respect of an interim interdict refers to a situation where applicant says that he/ she will suffer irreparable harm if the rights are not protected pending the finalisation of the main dispute. The same facts can be used to justify either of them or both.
- [25] The requisite of apprehension of irreparable harm is tested objectively.⁸ It depends on the facts presented to the court. The Court must then decide on that objective evidence whether there is any basis for the entertainment of a reasonable apprehension of irreparable injury by the applicant.
- [26] I must emphasize that the harm referred to here is unlawful harm. If the apprehended action is lawful this requisite will not have been satisfied.
- [27] It must be emphasized further that what should be apprehended should not be just any harm but irreparable harm. Any other harm can wait for the ultimate resolution of the dispute between the parties. Again whether the harm is irreparable will depend on the facts of each case.
- [28] In so far as the requisite of the balance of convenience is concerned the Court must weigh the prejudice to the applicant if the interlocutory

⁸ Janit v Motor Industry Fund Administrators (Pty) Ltd 1995 (4) SA 293 (A) at 304H–I.

interdict is refused against the prejudice to the respondent if it is granted.

In an application for an interim relief “... *there will invariably be at least two competing interests. And those interests are inextricably linked to the harm a respondent is likely to suffer in the event of the order being granted and the harm likely to be suffered by an applicant if the relief sought is not granted.*”⁹

- [29] This invariably invites the consideration of the prospects of success as well. An applicant can demonstrate that there are strong prospects of success and therefore it would be inconvenient for him/ her to wait for the finalisation of the main dispute.
- [30] In an employment/ labour matter a dismissed employee can be able to show that the balance of convenience favours the granting of an interim relief in the form of continuation of the payment of salary. This can be done by demonstrating that if the salary is stopped he/ she will be ruined whereas he/she has accumulated so much pension contributions that the employer can have recourse to such if the termination of employment is confirmed as valid. On the other hand the employer can seek to persuade the court that the balance of convenience does not favour the granting of the interim relief because he will have no recourse if employee's termination of employment is confirmed.
- [31] Even under the Labour Relations Act, No. 66 of 1995 regimen a dismissed employee will be entitled to interim wages pending the finalisation of the dismissal dispute if the requirements for the granting

of an interim interdict are satisfied.¹⁰

[32] What should always be kept in mind is that a balance should be kept between leaving an applicant with a hollow victory and prejudging the main matter. As always each case must be decided on its own facts.

[33] The final requisite is that there must be an absence of another adequate ordinary remedy. The emphasis here is that the remedy is the absence of another adequate ordinary remedy. If there is another remedy present but is not adequate the requisite will have been satisfied.

[34] There are two exceptions to this requisite, namely the applications for interdicts pending (i) vindicatory, and (ii) possessory actions.¹¹

[35] Once the requisites for the granting of an interim interdict have been satisfied a Court has no discretion but to grant it. In this regard there has been some confusion regarding the discretion of the Court.¹² The Supreme Court of Appeal¹³ cleared this confusion and said the following:

“Much the same happened in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A). At 691C Holmes JA, who delivered the judgment of the Court, stated that ‘(the) granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court’. He then (at 691D-E) set out the requisites for an interim interdict (on the authority of Setlogelo v

⁹ Per Mogoeng CJ in *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at [62].

¹⁰ See: Section 158(1)(a) of the Labour Relations Act, 1995.

¹¹ *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others* 2003 (3) SA 268 (W) at 278.

¹² Erasmus: *Superior Court Practice*, RS 4, 2017, D6-23.

¹³ *Knox D’Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 361H–362C.

Setlogelo 1914 AD 221 at 227) as follows:

- '(a) a right which, "though prima facie established, is open to some doubt";*
- (b) a well grounded apprehension of irreparable injury;*
- (c) the absence of ordinary remedy'.*

At 691E he reverted to the Court's discretion. In exercising its discretion, he said, a Court weighs, inter alia, the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted (the balance of convenience). He then continued (at 691F):

'The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities. . . .'

Despite the stress placed on the discretionary nature of the Court's function, Holmes JA proceeded to deal with the appeal by giving effect to his own view on the merits of the application for an interdict. His final conclusion (at 696E-F) was that 'the affidavits do not warrant the remedy of an interim interdict' and that the Judge a quo 'was right in discharging the rule nisi'.

See also Cassim and Others v Meman Mosque Trustees 1917 AD 154.

It would seem to follow from the above cases that the word 'discretion'

was not used in a strict sense. That this word is capable of different meanings appears from Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 796H-I and 800C-G. In the present context the statement that a Court has a wide discretion seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision. This is also the sense in which, I take it, Schreiner J used the word 'discretion' in the following oft-quoted passage from Transvaal Property & Investment Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corp Ltd and The Administrator 1938 TPD 512 at 521:

'No doubt the remedy by way of interdict has been said to be unusual, . . . it is also described as discretionary. . . . It seems to me, however, that, apart from cases of interim interdicts, where considerations of prejudice and convenience are of importance, the question of discretion is bound up with the question whether the rights of the party complaining can be protected "by any other ordinary remedy" (Setlogelo's case, 1914 AD 221, at 227).'

The Courts have not defined the considerations which may be taken into account in exercising the so-called discretion, save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the prejudice which may be suffered by the applicant and the availability of other remedies. Whilst this list is not exclusive, it does indicate what the relevant features are in an application of this sort. I find it difficult to imagine that considerations which are entirely unrelated to these

features could be accorded weight in granting or refusing an application for an interim interdict.

Finally, in regard to the so-called discretionary nature of an interdict: if a Court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict and that a Court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (Perskor case at 800D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this Court seem to refute it.”¹⁴

[36] In this case the applicant has not only satisfied the requirements for the granting of an interim interdict but also satisfied the requisites for the granting of a final interdict. As a result the parties agreed that I should consider the issue of a final relief.

[37] The undisputed facts are that the respondents discharged him on the basis of a document signed by his father. It is a fact that he did not authorise his father to do so. The applicant has therefore established a clear right to his employment contract. The respondents infringed that right and there is no other satisfactory remedy except the final interdict. An action for damages will not be a satisfactory remedy. The applicant will be ruined by then.

[38] In the circumstances, although the matter had been brought on an urgent basis for the granting of the interim relief the parties are satisfied that I can consider the final relief.

[39] The applicant has satisfied the requisites for the granting of a final interdict and is therefore entitled to the final relief.

[40] As a result I make the following order:

- (a) the decision of the respondents to terminate the applicant's employment with the Department of Health, Eastern Cape ("the Department"), on account of ill-health be and is hereby declared wrongful, unlawful, unconstitutional and void *ab initio*;
- (b) the respondents are ordered to reinstate the applicant to his employment position on the same terms and conditions that existed before the termination of his employment;
- © the respondents to pay the applicant, forthwith, his remuneration and afford his privileges and/ or benefits attached to his employment with the Department;
- (d) the respondents be and are hereby ordered to pay the costs of this application jointly and severally, the one paying, others to be absolved.

V S Notshe

Acting Judge of the High Court

¹⁴ At 361 – 362.

