REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, IN JOHANNESBURG

JUDGMENT

CASE NO: J 1238/14

In the matter between:

RENEILWE MMATLI	**First Applicant**
THULISILE THIPE	**Second Applicant**
OTHUSITSE PHEKONYANE	**Third Applicant**
REUBEN RAMPHISHA	**Fourth Applicant**
MARLYN MAKAMU	**Fifth Applicant**
MNCEDISI JULY	**Sixth Applicant**
PRUDENCE MOLELE	**Seventh Applicant**
JEAN RONOTI	**Eight Applicant**
KENEILWE MOGALE	**Ninth Applicant**
TINTSWALO CHAUKE	**Tenth Applicant**
MILLICENT CHAUKE	**Eleventh Applicant**

LUCAS PHORA	**Twelfth Applicant**
SIMON RAMAPEPE	**Thirteenth Applicant**
MATLAKALA SEKOTO	**Fourteenth Applicant**
MARIA PHASHA	**Fifteenth Applicant**
KNOX MOKOTO	**Sixteenth Applicant**
GOSIAME MOSIANE	**Seventeenth Applicant**
ZODWA MOHLALA	**Eighteenth Applicant**
MMATHABO NAKEDI	**Nineteenth Applicant**
PATRICK MOTHUPI	**Twentieth Applicant**

and

DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT (GAUTENG PROVINCE)	**Respondent**

Heard: 29 May 2014

Delivered: 06 June 2014

Summary: (Urgent – Interim declaratory and interdictory relief to prevent dismissals for not agreeing to amend existing monthly contracts with retrospective effect – prima facie case that dismissal not for a recognised fair reason established – given circumstances of applicants employment status unfair dismissal claim in due course is a suitable alternative remedy - no costs awarded to either party in circumstances).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application brought on an urgent basis. The applicants are employees of the respondent who are currently employed on month-to-month contracts. Previously they had been employed by an entity known as Impophoma Infrastructure Support Entity ('Impophoma') within the Gauteng Department of Public Transport, Roads and Works, which was dissolved sometime in October 2009 following which they were transferred to the respondent. During their employment by Impophoma they had been engaged on fixed term contracts which had been renewed a number of times. This changed when they were transferred to the respondent.

[2] In June 2012 the applicant's were issued with backdated fixed term contracts for the period 1 November 2011 to 30 September 2012, which they refused to sign.

[3] The relief sought by the applicants in this matter was interim relief, pending the determination of a final order, in the following terms:

3.1 declaring that their employment with the respondent was of an indefinite

3.2 preventing the respondent from dismissing them, and

3.3 compelling the respondent to follow a fair and lawful procedure in the event it wished to terminate their employment for a valid and fair reason.

[4] At the hearing of the matter the applicants abandoned their first claim for declaratory relief. The claim for this relief should never have been brought in the first place, as it was the subject matter of a previous judgement of this court in the case of ***Reneilwe Mmatli & 30 others v Department of infrastructure development, Gauteng Province*** (**case number J1602/12 dated 28 March 2014**). In that matter the applicants had also applied for declaratory relief that their employment relationship with the respondent was that of permanent employees. The Honourable Mr Justice Zondo, AJ found that the real nature of the dispute was that, on the

strength of previous renewals of the contracts, the applicant's believed they had a reasonable expectation that their contracts would assume a permanent status. Zondo, AJ held that a dispute about the failure to renew or renew contracts on less favourable terms thereby constituting the dismissal was a matter governed by section 186 (b) of the LRA and the applicants should have referred a dispute to the CCMA or the relevant bargaining Council.[1]

[5] It is common cause that all the applicants are currently employed on a contract containing the following term:

> *"The employer hereby undertakes to engage the employee, and the employee hereby undertakes to serve the employer on a monthly basis reckoned from* ***<u>01 May 2010 to month on month basis</u>*** *at the Department of Infrastructure Development."*

(*sic*- original emphasis)

[6] The respondent states that it embarked on a project to absorb the contract employees into permanent jobs by affording them opportunities for permanent positions as and when they became available. By May this year, the number of contract employees had been reduced to about 87. Some of the applicants who were party to the previous application have since been absorbed into permanent posts, but the applicants in this matter had refused to apply for permanent positions when they became available.

[7] On 12 May 2014 the applicants were given letters asking them to sign contracts agreeing to the termination of their contracts by 30 June 2014. The respondent explains that "... the DID has received unfavourable audit outcomes over the years because of payments made to these employees who are not on the establishment and who are refusing to avail themselves for permanent jobs and are insisting that their jobs are permanent. The DID does not have a budget continued to pay for these employees." The letter of 12 May read:

> *"**<u>RE: EMPLOYMENT CONTRACT</u>***

---

[1] At paras [7] – [8] of the judgment.

> 1. *We are pleased to inform you that your contract with the department has been renewed effectively from* ***<u>01 April 2011</u>*** *until* ***<u>30 June 2014</u>****.*
>
> 2. *You are required to sign and submit the attached contract to the human resources Department ("HR") by no later than the* ***15th May 2014****.*
>
> 3. *Failure to submit a signed contract HR by* ***15th May 2014*** *will be construed as a rejection of the renewal of your contract. Accordingly your services will be terminated in line with such rejection."*

[8] On 15 May 2014, the applicant's attorney submitted an urgent letter of demand to the respondent calling upon it to give an undertaking it would not dismiss the applicants if they refused to sign the backdated fixed term contracts, and threatening to bring an urgent application if such an undertaking was not given.

[9] On 19 May 2014, the respondent's attorney of record replied asking the applicant's to keep the matter in abeyance until the respondent had given them instructions. The following day the respondent gave its answer stating, amongst other things, the following:

> *"1. On numerous occasions in the past, our client has been pleading with your clients to sign employment contracts without any success;*
>
> *2. The recent letter that was sent by a client to your clients is therefore not a "threat" but a way of ensuring that it addresses the audit queries that have been raised by the auditor general on such contracts of employment. Therefore, there is no basis in law for labelling our clients letter as "unlawful, unfair and infringes on our client's right not to be subjected to fair labour practices";*
>
> *3. Our client has terminated the employment contracts of those employees who have refused to abide to our clients letter of 8 May 2014. Letters confirming that the employment contracts had been*

> *terminated will be handed over to clients during the course of this week;*
>
> *4. With regard to those employees who had signed a contract of employment, their employment with our client will not be renewed post 30 June 2014;*
>
> *5. Your clients have at all times been employed by our client on a contract basis and not on an "indefinite period";...*

[10] The applicants submit that because there is no lawful reason for their dismissal, even though they have the right to refer a dispute to the CCMA if they are dismissed, they should not have to incur the costs of consequent litigation in the Labour Court pursuing a claim after their dismissal for an automatically unfair dismissal. They contest their dismissal would be automatically unfair based on the fact that they were dismissed for failing to agree to sign the backdated contract of employment.

In *limine* objections

[11] The respondent claims firstly that the matter is *res judicata* in view of the previous judgement of Zondo, AJ. As mentioned, the applicants withdrew their claim for declaratory relief when the matter was heard. No doubt this was done because they realised they could not succeed in obtaining this relief once the applicant raised the *res judicata* point. It should not have been necessary for the respondent to raise this point, and the applicants ought to have disclosed in their founding papers that they had effectively sought the same declaratory relief. The only reference they made to it in their founding papers was one they could not avoid because it appeared in the letter from the respondent's attorneys dated 15 May 2014. Although the withdrawal of the prayer for declaratory relief obviates the need to consider the *res judicata* objection, the conduct of the applicants in this regard is a matter which will be addressed in dealing with costs.

[12] The second preliminary objection raised by the respondent is whether the court has jurisdiction to entertain the application. The respondent argues

that the applicants' claims that it has no right to dismiss them and that the fairness of the procedure followed by it in doing so is unfair, essentially amounts to a claim of alleged dismissal under section 186 (1) of the LRA and should be dealt with as an unfair dismissal claim. Exactly what the nature of the applicants claim is debated below.

[13] In exceptional circumstances the labour court may intervene on an urgent basis to interdict an unfair dismissal.[2] Thus, there is no inherent jurisdictional obstacle to obtaining such relief. As the Labour Appeal Court observed in the *Booysen* decision there is no closed list of factors to consider, but in my view employees should not even consider seeking this extraordinary relief if the unfairness is not glaringly obvious and of a very fundamental nature which can be easily redressed.

The right the applicants seek to enforce

[14] The applicants seek to assert a right not to be dismissed on account of their failure to agree to sign the backdated fixed term contract. They claim that such a dismissal would not be for a lawful reason and would be automatically unfair. In their founding affidavit the applicants' did not state specifically which one of the illegitimate reasons for dismissal set out in section 187 they rely on. It was only in oral argument (there were no written heads filed by the applicants) that the applicants' counsel, *Mr Van Graan*, identified section 187 (1) (d) as the ground on which the dismissal would necessarily be automatically unfair. That section provides that a dismissal will be automatically unfair if the reason for the dismissal is:

> *"(d) that the employee took action, or indicated an intention to take action, against the employer by-*
>
> *(i) exercising any right conferred by this Act; or*
>
> *(ii) participating in any proceedings in terms of this Act..."*

---

[2] See ***Booysen v The Minister of Safety and Security & others* [2011] 1 BLLR 83 (LAC)** at 99 , para [5]: *"....[T]he Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive."*

(emphasis added)

[15] On the basis of the founding papers, I have difficulty understanding what rights the applicants had exercised or intended to exercise, for which the respondent decided, or threatened, to dismiss them. Thus, even if I assume that the court might intervene where it is manifestly clear that an automatically unfair dismissal is about to occur, the factual basis for a claim under section 187(1)(d) is simply not set out in the founding affidavit.

[16] As an alternative, the applicants suggested, again only in oral argument, that there was a basis for the court to intervene given that it would seem the respondent is relying on financial considerations arising from the auditor general's report. The lines of this argument are that if that is the reason for the intended dismissals, then the respondent ought to have acted in accordance with the provisions of section 189 of the LRA since the ostensible reason for the intended termination is an operational one. Where an employer is intending to terminate an employee’s services for operational reasons and has made absolutely no attempt to comply with section 189, the court might be prepared to order the employer to consult in terms of the provision before retrenching the employee.[3] Such relief is aimed at trying to ensure that consultation as prescribed by the section at least does take place before a final decision is made. But a claim of this nature is not set out in the founding affidavit, and cannot simply be entertained on submissions from the bar.

[17] It was submitted in the founding affidavit, without express reference to s187(1)(c) of the LRA, that the imminent dismissals would be plainly invalid because the reason for the dismissal was the applicants’ failure to sign the fixed term contracts ending on 30 June 2014. Even if the applicants’ had argued that s 187(1)(c) which prohibits a dismissal if the reason for the dismissal is to compel an employee to accept a demand on a matter of mutual interest, in this case the employer announced its

---

[3] See, for example ***National Union of Metalworkers of SA & others v Comark Holdings (Pty) Ltd*** **(1997) 18 *ILJ* 516 (LC);*Vela & others v Savo & others*** **(1998) 19 *ILJ* 916 (LC)** ***National Union of Metalworkers of SA v Nissan SA Manufacturing (Pty) Ltd*** **(1999) 20 *ILJ* 1097 (LC)** and ***National Union Of Metalworkers Of Sa & Others v Dzima Manufacturing (PTY) Ltd*** **(1999) 20 *ILJ* 2904 (LC)**, but none of these concerned retrenchments of employees on short term contracts.

intention to dismiss them, and indeed purported to be taking steps to give effect to the dismissal once the applicants' did not comply with its request. On the interpretation of this section in the judgment in ***National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd*** **2005 (5) SA 433 (SCA);(2005) 26 *ILJ* 689 (SCA)** such dismissal would not be construed as a threat to compel compliance with the employer's demand and would not be in breach of the section.[4]

[18] The only explanation given by the employer for terminating the contracts is that the employees are on a month to month contract and cannot insist on being indefinitely employed. But this is not the reason it gave in its letter of 12 May 2014 for wanting to terminate their contracts. The reason advanced there is that they have not agreed to the contrived long term fixed term contract. It might be true that this cannot constitute a fair reason for dismissal because it does not fall within the classes of recognised reasons for a fair dismissal set out in s 188 of the LRA. In so far as the Auditor General's observations may have motivated the respondent to take steps to bring the applicants' employment to an end, that does not explain why the employer simply did not rely on that and proceed on the basis that it did not intend to renew the applicant's contracts for operational reasons. The roundabout approach of trying to impose a retrospective fixed term contract on the applicants is not explained by the employer. In consequence I am satisfied that there is no basis for concluding that the applicants' dismissal for the reasons stated in the employer's letter of 12 May 2014 is one falling within the class of valid reasons in s 188 of the LRA

---

[4] At 708, viz:

"[56] The LAC's solution to the conundrum of the statutory concepts was thus to assign a distinctive meaning to 'dismissal' in s 187(1)(c), and then to restrict this category of automatically unfair dismissals to those effected for the purpose of inducing employees to change their minds regarding the employer's demand. On this approach, only conditional dismissals can fall under s 187(1)(c), and it is this that distinguishes them from the broader category of dismissals where the employer - irreversibly - 'has terminated' the employment contract. Dismissals intended to be and operating as final - not, in other words, reversible on acceptance of the demand - can thus never have as their reason 'to compel the employee to accept' that demand. They will therefore not be automatically unfair."

[19] Accordingly, I am satisfied that the applicants have established a *prima facie* reason, even if open to doubt, why the termination would be unlawful. However, when it comes to the question of alternative remedies I am not persuaded that the applicant's remedies under the LRA for an unfair dismissal would not provide adequate recompense, particularly in a situation where the employees are not in permanent employment and where granting of this relief would not alter their precarious employment status.

[20] It must be mentioned that the ultimate fairness of the terminations in terms of s 188 of the LRA is not at issue here.

<u>Costs</u>

[21] As mentioned the applicants should never have sought the declarator which is a repeat of the declaration previously sought and dismissed, even if the applicants were attempting to stop the present attempt of the employer to dismiss them for not agreeing to amend their contracts. I have reason to doubt the applicants were aware of the principle of *res judicata* in circumstances where they were defending themselves against a new threat of imminent dismissal, but their attorney of record, who was also on record in the first application, should have known better. Had the respondent sought a punitive cost award against him, it might have obtained one.

[22] As the declaratory relief was only abandoned at the hearing, I would be inclined to order the applicants to pay at least half the respondents costs. On the other hand, the way the employer has conducted itself leaves much to be desired. Dismissing the applicants for not entering into a contract which plainly distorts the actual history of their past employment relationship with it for reasons the respondent does not disclose either to them or to the court demonstrates a lack of candour which must be deprecated. The allusion to the Auditor-General's concerns in no way explains the distinctly odd way the respondent is going about dealing with the problem and the dismissals would seem to be prima facie unfair for the reasons stated above

[23] Accordingly, it is just and equitable in my view that all parties should bear their own costs.

<u>Order</u>

[24] The application is dismissed.

[25] The parties must pay their own costs.

____

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	S E Van Graan SC instructed by Rudolf Kuhn Attorney
RESPONDENT:	M K Mathipa instructed by Mncedisi Ndlovu & Sedumedi Attorneys Inc.