THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J991/15

MTHEMBU QINISO CHRISTOCENTRIC **Applicant**

and

MPUMALANGA ECONOMIC GROWTH AGENCY **Respondent**

Heard: **11 June 2015**

Delivered: **17 June 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicant approached the Court on an urgent basis to seek an order declaring the agreement of employment concluded between her and the respondent on 20 December 2013 to be extant, and further ordering the respondent to abide by the terms of that agreement. The application is opposed.

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Background to the dispute:

[2] The respondent was established in terms of section 2 of the Mpumalanga Economic Growth Agency Act, 2010, a provincial act assented to by the Mpumalanga Provincial Legislature on 29 March 2010. The applicant was appointed as its Manager: Operations in terms of a letter of appointment and contract of employment signed on 20 December 2013. She started her employment on 6 January 2014. The appointment was subject to a positive verification of her qualifications and a six months probationary period. On 19 August 2014, Advocate Boyce Mkhize, the then Chief Executive Officer of the respondent had confirmed her successful completion of the probation period and her position with effect from 1 July 2014.

[3] In or about June or July 2014, the appointments of senior employees within the respondent, including that of the applicant received media attention. Mkhize who had contacted the applicant and invited her to apply for the position and confirmed her appointment, had in the face of these enquiries left his position by mutual agreement with the respondent. Thulani Nobela took over from Mkhize in August 2014.

[4] On 22 October 2014, Nobela had sent the applicant a letter informing her that in the light of media enquiries about her and other employees' appointment, the respondent's board had commissioned a 'special audit' into allegations that her appointment was irregular. These irregularities pertained to the fact that the applicant's highest qualification was grade 12 whereas the position she occupied required a Bachelor's degree or equivalent; that the advertisement for the position closed on 30 July 2013 and there was no proof that she had submitted her application for the position prior to the closing date; and further that although the advertisement envisaged the position would be for a fixed period of five years, she was nevertheless appointed on a permanent basis.

[5] In his letter, Nobela had invited the applicant to confirm or object to the allegations, and to show cause why action should not be instituted against her. The applicant had responded on 24 October 2014, informing Nobela that

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it was the respondent that had made a determination that she was fit for the position following the consideration of her CV and her interview.

[6] A new Chief Executive Officer, Sithole, was appointed in January 2015. The applicant met with Sithole on 14 April 2015. She was had handed a letter stating that following an enquiry into the circumstances of her appointment and further having considered her response to Nobela's letter of October 2014, the respondent had concluded that her appointment was irregular, flawed in law, invalid, and stood to be rescinded. The applicant was invited to provide reasons within five days as to why the employment agreement should not be rescinded.

[7] On 24 April 2015, the applicant had sent a letter to the respondent and disputed that there was a legal basis to terminate her contract of employment. Her attorneys of record also sent correspondence to the respondent, reiterating her position and further requested an undertaking that no steps would be taken to rescind the contract.

[8] In the light of a response not forthcoming, the applicant's attorneys of record had on 8 May 2015 followed up on the letter of 24 April 2015. Still no response was forthcoming, and on 15 May 2015, the applicant was called to Sithole's office where she was handed a letter informing her of the rescission of her contract of employment. The correspondence of 18 May 2015 by the applicant's attorneys of record to the respondent demanding that the contract not be rescinded received no response.

Urgency:

[9] The main basis of the respondent's opposition to this application is that it ought to be dismissed solely on account of lack of urgency. The applicant set out the grounds of urgency in paragraphs 58 to 71 of her founding affidavit which can be summarised as follows;

9.1 On 15 May 2015 her attorneys of record requested an undertaking from the respondent by 18 May 2015 that it would continue to abide by the terms of the contract of employment;

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9.2 Further correspondence was sent by her attorneys on 18 May 2015 reminding the respondent that it sought an undertaking by 17h00 on that day;

9.3 The termination of her employment will result in severe irreparable financial harm in the context of her living arrangements; her ability to financially support her extended family; future career opportunities and future financial commitments;

9.4 The loss of employment will have extreme adverse effects on her and her family as she was the sole breadwinner; she owned property subject to a loan; had relocated to Nelspruit from Johannesburg after her appointment and had bills to pay;

9.5 She did not have suitable job prospects in Nelspruit and would thus have to urgently sell her property and relocate to Johannesburg. Furthermore, the termination of her contract will harm her reputation.

[10] In further contending that the application is urgent, it was submitted on the applicant's behalf that her employment was summarily terminated without notice, that the termination of her contract in the light of the media interest suggests misconduct and the respondent's unlawful conduct harmed her reputation. It was further added that the harm she had set out in her founding affidavit necessitates urgent intervention by the court; that she had acted with reasonable expedition when it became clear that the respondent was not willing to reconsider the rescission of her employment, and that the time limits imposed on the respondent occasioned it no prejudice.

[11] Submissions made on behalf of the respondent were that being placed in an adverse financial position was not a basis of urgency; that financial hardship or loss of income was not regarded as a ground of urgency[1]; that on her own version, the applicant was aware of the fact that there were considerations to have the contract rescinded, and that a notice was issued to her on 14 April 2015. It was contended that she took no steps to challenge the decision until

[1] Hultzer v Standard Bank of South Africa [1999] 8 BLLR 809 (LC) at para [13; Malatji v University of the North [2003] ZALC 32 (LC)

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on the eve of her financial expectations being affected, and that she had simply set out circumstances that would befall any employee or person who suffers the consequences of the termination of a contract or dismissal. Essentially, the respondent's contention is therefore that the urgency alleged is self-created.

Evaluation: Urgency:

[12] Rule 8 of the Rules of this Court[2] deals with urgent applications, and requires an applicant to provide cogent reasons why the matter is urgent and why the rules of this Court have not been complied with[3]. Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out, and secondly whether the Applicant seeking relief will not obtain substantial relief at a later stage.

[13] It is equally trite that an Applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules[4]. In *National Police Service Union and others v National Negotiating Forum and others*[5], this court held the view that the latitude extended to parties to dispense with the rules of the court in circumstances of urgency is not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely on to seek relief.

[14] From the above, it follows that an applicant should be struck off the roll for want of urgency if no convincing material has been placed before the court as to why it should intervene. The basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an

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[2] Which provide that;
"(2) The affidavit in support of the application must also contain-
(a) the reasons for urgency and why urgent relief is necessary;
(b) the reasons why the requirements of the rules were not complied with, if that is the case ..."

[3] Clause 12.5 of the Practice manual of the Labour Court equally obliges an Applicant to set out explicitly the circumstances which render the matter urgent

[4] Jiba v Minister: Department of Justice and Constitutional Development and Others (2010) 31 ILJ 112 (LC) at para 18.

[5] (1999) 20 ILJ 1081 (LC) para [39]

injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court[6].

[15] In this case, it was common cause that as at 14 April 2015, the applicant was informed of irregularities surrounding her appointment. From that date, there were engagement between the parties, including from the applicant's attorneys of record as to the reason the respondent should not rescind the employment contract. The contract was ultimately rescinded with immediate effect on 15 May 2015, and the applicant had approached this court some ten days later on 25 May 2015. This was also after the applicant's attorneys of record's correspondence of 18 May 2015 to the respondent to request certain documentation remained unanswered.

[16] The question whether financial hardship and loss of income as a consequence of a termination of employment contract can constitute a ground of urgency was considered and determined in the negative by this court in a number of decisions[7]. The Court in *Democratic Nursing Organisation of South Africa*, however appreciated that there may be circumstances where financial hardship may be a consideration and held that:

> *"In order to succeed when reliance is based on financial hardship, exceptional circumstances must be shown before an urgent interim relief can be granted."*

[17] In *Garry Harley v Bacarac Trading 39 (Pty) Limited*[8], the Court rejected the approach that financial hardship and loss of income can never constitute grounds for urgency, and held that;

> "The principle established in these cases is one that inclines this court to avoid granting what amounts to status quo relief in unfair dismissal disputes pending a final determination of the dispute by the appropriate dispute resolution body. None of these cases, it seems to me, establishes that financial hardship and loss of income can never be grounds for urgency. If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an

[6] National Police Services Union and Others v National Negotiating Forum and Others (1999) 20 ILJ 1081 (LC)

[7] Democratic Nursing Organisation of South Africa and Others v The MEC for Health: North Cape (case number: J2386/08; Hultzer v Standard Bank of South Africa (Pty) Ltd [1999] 8 BLLR 809 (LC), at para [13]; Malatji v University of the North [2003] ZALC 32 (LC); and National Sorghjum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO & Ander (1990) 11 ILJ 971 (T); Jonker v Wireless Payments Systems CC (2010) 31 ILJ 381 (LC)

[8] (2009) 30 ILJ 2085 (LC)

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> applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits"[9]

[18] It is accepted that the loss of income and financial hardship are natural consequences of a termination of any contract of employment. After all, an employee enters into an employment relationship in return for or expectation of remuneration. It is further accepted that it would be untenable for this court to willy-nilly accept a loss of income or financial hardship as a basis for granting urgency in every given circumstances, as all employees dismissed for whatever reason can then jump the proverbial litigation queue and run to court on an urgent basis.

[19] I nevertheless align myself with the view that the court should not as a rule of thumb, throw out urgent applications brought mainly on the grounds of financial hardship or loss of income, and should rather look at the merits of each case, ascertain whether compelling or exceptional circumstances exist for it to intervene on an urgent basis, and then exercise its discretion accordingly. In line with this approach, I further accept that an employee should be entitled to urgent relief if she can demonstrate detrimental consequences that may not be capable of being addressed in due course and if she is able to show that she will suffer irreparable hardship if the Court did not intervene on an urgent basis.

[20] The starting point in my view is section 23 (1) of the Constitution[10], which affords everyone a right to fair labour practices, and section 33 (1) of the Constitution which affords everyone the right to administrative action that is lawful, reasonable and procedurally fair. These provisions are amplified further by those of section 185 of the LRA in terms of which every employee has a right not to be unfairly dismissed or subjected to unfair labour practices. It therefore follows that if the employer in circumstances that appear grossly

[9] At para [8] See also UTATU SARWHU v Autopax Passenger Services (SOC) LTD (Case no: J 1931 / 2013
[10] The Constitution of the Republic of South Africa, 1996

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unfair or unlawful infringes these rights, the subsequent consequences of financial hardship and loss of income are factors that ordinarily arise from the infringement of these rights, and these factors should persuade the court to intervene on an urgent basis.

[21] In this case, it may be argued that the applicant may not have been diligent in her efforts to file the application as soon as the decision to rescind her contract was taken, in the light of the ten days it took her to approach this court. It is however my view that the applicant's dilatoriness cannot be said to have been to the point where it can be said that it was the main cause of the harm on which she rely on to seek relief. The harm was essentially caused by the rescission of her contract of employment. The detrimental consequences of that decision are such that the application should be heard on an urgent basis.

[22] As already indicated, it is not always that this court should regard financial hardship and loss of income as grounds for urgency, but in this case the applicant has adduced sufficient evidence to support these grounds, which invariably extends beyond pure financial considerations. In conclusion on this issue, I am willing to further accept that the lack of diligence was not unreasonable given the circumstances of this case, and even if a contrary view was to be held, there are other factors in this case that are indeed compelling and exceptional to call for the court's intervention as illustrated below.

[23] Notwithstanding the respondent's contention that there are material disputes of facts in this case, I have no hesitation in concluding that the applicant is an innocent party in this case. On her version, she was invited to apply for the position by Mkhize who has since jumped ship. This was despite it being apparent that her qualifications did not clearly meet the requirements of the post. She had submitted her CV *albeit* after the closing date, was interviewed and appointed. This was all done under the watch of Mkhize, whose confirmatory affidavit was filed to confirm the applicant's allegations. The wheels started coming off the cart when her appointment and that of other

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senior employees came under media spotlight, and her case was not made less onerous by the departing of Mkhize.

[24] The circumstances of this case brings into question whether an employer such as the respondent (which is a statutory creation), having found that certain appointments were invalid or unlawful for whatever reason, can at a stroke of a pen, set aside those appointments, in the absence of legal steps having been taken as contemplated in section 158 (1) (h) of the LRA[11]. This is said bearing in mind the principles set out in *Edcon v Steenkamp and Others*[12] .

[25] The nature of our polity is such that there is a constant change in guard in our state institutions and structures. It would thus be untenable that each time there is a change in guard, current employees are removed at a stroke of a pen, without regard to due processes and their rights as alluded to above, simply on the basis that the new guard is of the opinion that those appointments may be invalid. This is so even if there is a basis on the principles of illegality to remove those employees. In my view, to simply rescind such appointments is *prima facie* unfair, especially in circumstances where the appointee is an innocent party as in this case, and there is no evidence or suggestion that she may have prompted or solicited the invalid or unlawful appointment complained of. We are a constitutional democracy, and even if appointments made are invalid or unlawful for whatever reason, it is expected that due process should be followed in setting them aside. In this

[11] Which provides that the Labour Court may
"review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

[12] (JS648/13, JS51/14, JS350/14) [2015] ZALAC 2 (3 March 2015) at para [41] where the LAC held that;
"The definition of dismissal is thus wide enough to include a wrongful or "invalid" termination in violation of contractual or statutory notice periods within its ambit. The word "terminated" in section 186(1)(a) of the LRA should be given its ordinary meaning of "bringing to an end". The ordinary meaning is not coloured by the lawfulness, fairness or otherwise of the action. The fact that a remedy may exist to redress any wrongfulness or unfairness does not per se alter the consequence of an ending brought about by the employer's action. As a rule, a wrongful or unfair termination will only be reversed (and the contractual rights and obligations restored) by the grant of the remedy of specific performance or an award of retrospective reinstatement at the discretion of the court. The resultant legal position is not unlike that prevailing in administrative law where a declaration of illegality will not have the inevitable consequence that wrongful action will be declared invalid and set aside."

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case therefore, there is nothing to gainsay the applicant's contention that she was invited by Mkhize to apply for the position, notwithstanding the flaws that the respondent had subsequently discovered in relation to her and others' appointments.

[26] A further consideration in this case is that the termination of the applicant's contract was effected unilaterally and immediately on 15 May 2015 without notice. The respondent does not in any manner dispute the financial hardship visited upon her as a result of the rescission of the contract other than to contend that they are not a ground for urgency. As a result of her appointment she had relocated to Mpumalanga from Johannesburg, and other than this consideration, there are other financial hardships and consequences that follow from the rescission of her contract, which it would be remiss of this court to ignore.

[27] It is accepted that the rescission of the contract may have been foreseen as far as April 2015. Nevertheless, I am not convinced however that this was justification to effect the rescission with immediate effect on 15 May 2015, and without due regard to the applicant's fundamental rights. In these circumstances, I am satisfied that in this case, compelling and exceptional factors have been placed before the court for its urgent intervention. That urgency is in my view real and not self-created, and there is no reason to believe that by this application, the applicant is abusing the processes of this court.

The merits:

[28] With this application, the applicant seeks specific performance, i.e. to enforce the terms of the employment contract concluded between the parties. In the light of the finding that the application is urgent, the matter will be dealt with on the basis of the pleadings before the Court. In the answering affidavit, the respondent had indicated that there are material disputes of fact, which the applicant ought to have foreseen.

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[29] It however needs to be stated that having considered the respondent's answering affidavit, no material disputes of fact arise therein as there is nothing to refute the applicant's allegations pertaining to the circumstances of her appointment and the rescission of her contract of employment. A confirmatory affidavit from Mkhize was also attached to the applicant's replying affidavit and there is nothing to gainsay her contentions. There is therefore no basis upon which the principles set out in *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Limited*[13] can find application in this case as any material disputes of fact (if there are) have not been placed before the Court.

[30] Since the applicant seeks specific performance, which by its nature is a status quo order if granted, I am in agreement with the submissions made on her behalf that issues surrounding balance of convenience do not play a role in this case. Furthermore, on the respondent's own version, the rescission of the contract took place on the basis of invalidity or unlawfulness. The issue of whether the applicant has an alternative remedy further in my view becomes moot, in that she was entitled to approach the court in the light of her election not to accept the repudiation of her contract.

[31] In her replying affidavit, the applicant had correctly pointed out that a party loses its right to file further affidavits in the event that its challenge to urgency fails. Thus if in an urgent application the only opposition is on the grounds of urgency, that is a risk that the respondent party takes. The respondent had a period of nine days (11 days in the light of the indulgence granted by the applicant) within which to file a comprehensive answering affidavit, and the risks should have been foreseen. In the answering affidavit, the basis for rescinding the agreement was that the respondent had every right to do so as there was a material error, and that the applicant was appointed in breach of specified prescripts. However, these material errors or specified prescripts are not addressed with any particularity.

[13] 1984 (3) SA 623(A)

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[32] In contending that the applicant is entitled to specific performance, it was submitted on her behalf that the respondent's purported rescission of the agreement amounted to repudiation, and that since she had not accepted the repudiation, she was entitled to enforce the terms of that agreement. The respondent had unilaterally decided to rescind the agreement in circumstances where there is no basis to do so other than that the agreement may have been invalidly or unlawfully entered into. At the same time, there is nothing to indicate that the applicant did anything wrong, other than accepting an offer of employment by the then CEO. No attempt was made to subject her to any due process to establish whether she may have been party to any wrong doing, and it is apparent the rescinding of the agreement was influenced by other considerations other than the applicant's conduct.

[33] In the letter of 15 May 2015, the respondent provides its reasons as being that the contract was invalid from inception. Even if this was the case, more than merely requiring of the applicant to make written submissions as to the reason the contract should not have been rescinded fell short of expected due processes under the circumstances, and in particular, since it could not be pointed out that she was at fault.

[34] The court finds jurisdiction to consider the applicant's claim for specific performance by virtue of the provisions of section 77 of the Basic Conditions of Employment Act. In *Edcon*, the Labour Appeal Court had held that;

> "The failure by an employer to give proper or valid notice of termination to an employee can be construed as a breach of contract and if material may result in a wrongful or unfair termination of employment, entitling the employee to invoke the remedies either of specific performance or damages for wrongful termination; or reinstatement, re-employment or compensation (in terms of section 193 of the LRA) for unfair dismissal."[14]

I accept that courts in general should be 'slow and cautious' in not enforcing contracts, and that performance should be refused only where a recognised

[14] At para [37]

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hardship to the defaulting party is proved.[15] The respondent in this case has not placed anything before the Court to indicate any hardship that may befall it should specific performance be ordered. The rescission of the contract having constituted a repudiation, the applicant elected not to accept it and elected to seek specific performance, which is a permissible step in terms of section 77 of the BCEA and as confirmed in *Edcon*. It is further accepted that in contract law, an innocent party complaining of a breach of contract is entitled as of right to claim specific performance. If she is not granted the relief she seeks, she will continue to suffer harm for consequences which are not of her own making. To this end, nothing has been placed before the court to indicate any sustainable reason why it should not exercise its discretion in favour of the applicant.

Costs

[35] The applicant sought a cost order, including the costs of two counsel. It has already been indicated that the rescission of the contract of employment found no basis on the papers before the court. The applicant was compelled to approach to defend her rights to fair labour practices or fair administrative actions. All that the respondent could muster was an unsustainable approach that the application was not urgent, and in the process failed to address the substantive allegations made by the applicant. It is trite that this court has a wide discretion in terms of the provisions section 162 (1) of the LRA to make orders for costs according to the requirements of the law and fairness. Having regard to all of the relevant facts and circumstances of this case, it is my view that the respondent should be burdened with the costs of this application.

Order:

i. The agreement of employment entered into between the applicant and the respondent on 20 December 2013 is declared to be extant.
ii. The respondent is ordered to abide by the terms of that agreement.

[15] Santos Professional Football Club (Pty) Ltd v Igesund & another 2003 (5) SA 73 (C), as referred to with approval in Ngubeni v The National Youth Development Agency and Another (J 2322/13) [2013] ZALCJHB 269 (21 October 2013) at para [19].

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iii. The respondent is ordered to pay the costs of this application.

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

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APPEARANCES:

On behalf of the Applicant:	Adv HM Viljoen with Adv J MacDonald
Instructed by:	Cowan –Harper Attorneys
On behalf of the respondent:	Adv. B Ford
Instructed by:	MV Gwala & Associates INC

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