



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P236/15

In the matter between

MASISI MOSES MOKAE

First Applicant

CHRISTINE VAN HEERDEN

Second Applicant

KELOAPERRE DORCAS PUTSOA

Third Applicant

and

DEPARTMENT OF ECONOMIC, SMALL

BUSINESS DEVELOPMENT, TOURISM

AND ENVIRONMENTAL AFFAIRS

Respondent

Heard: 19 November 2015

Delivered: 2 December 2015

Summary: Applicants whose contracts of employment have been terminated in terms of section 17 (3) of the Public Service Act of 1994 are required to refer unfair dismissal disputes to conciliation before approaching the Labour Court for relief. Absent the referral to conciliation the Labour Court lacks jurisdiction to reinstate applicants whose contracts of employment have been

terminated in terms section 17 (3) of the Public Service Act pending finalisation of an application for leave to appeal against a judgment which is of no relevance to the respondent.

JUDGMENT

LALLIE, J

[1] This application was originally launched on an urgent basis. It was, however, struck off the roll on 31 July 2015 for lack of urgency. When it was argued on 19 November 2015, the applicant sought an order in the following terms:

- '3.1 Reviewing and/or setting aside alternatively, declaring the decision of the Respondent to transfer and/or absorb the applicant to or into different posts and/or position while the dispute in respect of same is pending at the Labour Court under Case Number P272/2013, unlawful and/or invalid.
- 3.2 Reviewing and/or setting aside, alternatively, declaring as the respondent's decision to dismiss the Applicants in terms of Section 17 (3) (a) of the Public Service Act, hereinafter referred to as the Act, while the matter in relation to same is pending at the Labour Court under Case Number P272/2013, unlawful and/or invalid;
- 3.3 That the Respondent be interdicted and prohibited from transferring and/or absorbing and/or dismissing the Applicants and/or preventing them from entering their workplace and/or acting in any manner against the Applicants in relation to the matter until the finalization of their pending Application under Case Number P 272/2013.'

[2] The application is opposed by the respondent. The factual background of this matter is that the applicants were employed by the respondent. Their core function was to inspect liquor outlets and to ensure compliance with liquor licence requirements. In 2008, they were seconded to an entity called the Liquor Authority. In June 2010, the respondent merged the Liquor Authority

with the then Free State Gambling and Racing Board ("FSGRB") and formed the Free State Gambling and Liquor Authority ("FSGLA"). A dispute ensued about the absorption of employees into the FSGLA. In an effort to resolve the dispute, an agreement regulating placement of employees in the FSGLA was concluded between the FSGLA and trade unions representing employees performing duties at the FSGLA. The latter failed to comply with the terms of the agreement and the unions referred the dispute to the CCMA. The dispute was resolved by the parties reaching an agreement which was made an arbitration award. The respondent sought to place the applicants in positions in its department.

- [3] The trade unions launched an application under case number P272/2013 to make the arbitration award an order of court and for the respondent and the FSGLA to transfer the applicants to the FSGLA in terms of section 197 of the Labour Relations Act 66 of 1995 ("the LRA") and agreements entered into between the parties. The application was dismissed and on 15 June 2015, the applicants filed an application for leave to appeal against the judgment dismissing their application. While that application was pending, the applicants filed the application at hand.
- [4] On 26 May 2015, the respondent addressed letters to the applicants reminding them of the posts that were identified for them subsequent to the decision of the Provincial Executive Committee [EXCO] to have former employees appointed in the Liquor Affairs Sub-directorate absorbed within the respondent. It gave them a final opportunity to immediately report for duty at the posts identified for them failing which it would invoke provisions of section 17 (3) (a) (i) of the Public Service Act of 1994 ("the PSA") and freeze their salaries. The applicants responded by requesting that all processes and proceedings against them be put in abeyance pending the outcome of the application for leave to appeal. Further correspondence was exchanged between the parties and on 6 July 2015, the applicants received letters of termination of their services in terms of section 17 (3)(a)(i) of the PSA. The applicants requested the respondent to restore the *status quo ante* until the finalisation of the application for leave to appeal. Their request was not

granted. On 8 July 2015, the applicants went to work with the intention of holding a meeting with or making submissions to management of the respondent to resolve the issue but were refused entry and shown a letter confirming their dismissal. On 10 July 2015, they filed an urgent application. After the urgent application was struck off the roll, the applicants made presentations to the MEC in terms of section 17 (b) of the PSA. The MEC refused to overturn the decision to have their contracts of employment terminated and they referred an unfair dismissal dispute to the Bargaining Council.

- [5] The respondent's grounds for opposing the application are that this court lacks jurisdiction to review the decision terminating the applicants' contracts of employment in terms of section 17 (3) (a) of the PSA as their unfair dismissal dispute has not been arbitrated by the Bargaining Council. It further submitted that the applicant's application to this court under case number P272/2013, the judgment flowing there from as well as the application for leave to appeal are of no relevance to the contracts of employment between the applicants and the respondent. The reason being that those proceedings seek to enforce an agreement between the new liquor authority and trade unions by transferring the applicants from the respondent to the new liquor authority. As the applicants are and have always been employees of the respondent, the judgment and the application for leave to appeal against it are not of any relevance to the applicant's placement and absorption by the respondent which had control, authority over and paid their salaries as their employer.
- [6] The relief sought by the applicants is an order interdicting and prohibiting the respondent from transferring and/or absorbing and/or dismissing them and/preventing them from entering the workplace and/or acting in any manner against the applicants in relation to the matter until the finalisation of the application for leave to appeal under case number P272/2013. The applicants conceded that the respondent is not a party to the agreement and arbitration award that it sought to enforce in the application under case number case number P272/2013. Having made the concession, they failed to establish the relevance of the application for leave to appeal to the respondent. There is,

therefore, no basis to interdict the respondent from taking any step against the applicants based on the filing of the application for leave to appeal under case number P272/2013. In addition, when the application at hand was filed, steps had already been taken as the applicant's contracts of employment had already been terminated.

- [7] With regard to the order the applicants seek for the reviewing and setting aside, alternatively, declaring unlawful and/or invalid the respondent's decision dismissing them in terms of section 17 (3) of the PSA, it must be noted that when the applicants launched the application at hand, they had already been dismissed by operation of section 17 (3) of the PSA. They seek an order of reinstatement pending the finalisation of their application under case number P272/2013. The respondent's submission that this court lacks jurisdiction to pronounce on the lawfulness of validity of the applicant's dismissal is correct. Section 191 of the LRA bestowed on the CCMA and bargaining councils jurisdiction to determine unfair dismissal disputes. The following *dictum* in *De Beer v Minister of Safety and Security/Police and Another*¹ is apposite:

'[38] In order for the appellant to be "reinstated forthwith to his full salary, benefits and emoluments", as he claims, he would have to be reinstated in his employment. The court would, as a matter of necessity, have to decide on the fairness of the termination of his employment. The appellant cannot be reinstated in his employment, unless the court finds that his dismissal was substantively unfair.

[39] In the circumstances, the court *a quo* ought to have found that it had no jurisdiction to effectively adjudicate the termination of the appellant's employment with SAPS in the circumstances where there has been no compliance with the jurisdictional requirements provided for in section 191 and section 24 of the Act.'

- [8] In *National Union of Metalworkers v Intervolve (Pty) Ltd and Others*,² the court found that unfair dismissal disputes have to be referred to conciliation at the

¹ [2013] 10 BLLR 953 (LAC) at paras 38-39.

² (2015) 36 ILJ 363 (CC) at paras 112-113.

CCMA or bargaining council in terms of section 191(5) of the LRA before their referral to the Labour Court for adjudication. Without the referral to conciliation, the Labour Court lacks jurisdiction over unfair dismissal disputes. As the applicants seek reinstatement, they had to fulfil the jurisdictional requirement which is the referral of their unfair dismissal dispute to the bargaining council in terms of section 191 of the LRA. As this application was not preceded by the referral, this court lacks jurisdiction to adjudicate the matter.

[9] The respondent sought a costs order against the applicants. I am not convinced that the applicants acted unreasonably in bringing this application. Considerations of both the law and fairness do not justify the order. In considering costs orders, this court needs to be mindful of the reality that they have the unintended consequence of acting as a deterrent to employees seeking to assert their rights.

[10] In the premises, the following order is made:

10.1 The application is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Mr Khang of Mphafi Khang Inc

For the Respondent: Advocate Skhosana SC

Instructed by: State Attorney

LABOUR COURT