



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1499/17

LATOYA SAMANTHA SMITH

First Applicant

CHRISTINAH MOKGADI MAHLANE

Second Applicant

and

OFFICE OF THE CHIEF JUSTICE

First Respondent

MEMME SEJOSENGWE

Second Respondent

ANTOINETTE THERON

Third Respondent

JEANETTE NGOBENI

Fourth Respondent

Heard: 13 December 2017

Delivered: 2 February 2018

JUDGMENT

PRINSLOO. J

Factual background

- [1] The Applicants were employed as 'pool secretaries' and assisted acting judges in the Gauteng Division, Pretoria High Court.

- [2] The First Applicant (Smith) was appointed as a judge's secretary in January 2007 when she signed a fixed term contract of employment with the First Respondent's (OCJ) predecessor, the Department of Justice and Constitutional Development (the Department), which contract terminated on 29 March 2007. The Second Applicant (Mahlane) was appointed as a judge's secretary in April 2013 on a fixed term contract with termination date of 7 June 2013. The Applicants subsequently and respectively concluded further fixed term contracts with the OCJ and their last 12 month's fixed term contracts ended on 31 March 2017.
- [3] On 28 March 2017 the Third Respondent (Theron) indicated in an electronic mail to the Applicants and other judge's secretaries that their extension letters were ready for collection. The said extension letter indicated that the contracts for the judges' secretaries in the Gauteng Division Pretoria had been extended until 30 June 2017 and that they had to sign a contract of employment for the period 1 April – 30 June 2017.
- [4] On 30 March 2017 the Fourth Respondent (Ngobeni) explained the three month contract extension of the judge's secretaries and explained that the Department had previously extended the judge's secretaries' fixed term contracts automatically and without following any recruitment process. That practice had resulted in negative audit findings. Auditors from the office of the Auditor General (AG) had recommended that proper recruitment processes in line with the applicable policies and regulations be followed, and the OCJ was required to implement the recommendations urgently.
- [5] The filling of positions without following a due recruitment process was in contravention of the relevant prescripts and more specifically the Public Service Regulations (PSR). The judge's secretaries' contracts were to be extended for three months to allow for the completion of recruitment processes and to avoid automatic future extensions.
- [6] The Applicants were appointed on this basis and in these circumstances for a further period, from 1 April – 30 June 2017.

- [7] On 3 May 2017, the Applicants and other judge's secretaries received an electronic mail to which was attached the advertisement of 35 positions of judge's secretaries. The positions were advertised on a 3 year fixed term contract basis, extending to 31 March 2020. The advertisement also listed the post requirements, duties and responsibilities of the incumbent and the closing date for applications, being 12 May 2017.
- [8] Each of the Applicants responded to the advertisement and applied for the advertised positions.
- [9] The Respondents followed a shortlisting process and informed the judge's secretaries on 31 May 2017 that the interviews for the advertised positions would be held on 2 and 5 June 2017, and that the candidates to be interviewed would be invited and informed of the exact date and time of their interviews.
- [10] Ms Smith was not shortlisted nor invited to an interview as she did not meet the basic requirements of the post, in that she was unable to provide a matric certificate. Ms Mahlane on the other hand was interviewed but she was unsuccessful.
- [11] On 29 June 2017, the Applicants launched an urgent application in this Court. On 30 June 2017, by agreement between the parties, the matter was postponed to 3 July 2017 to afford the Respondents an opportunity to file an answering affidavit.
- [12] On 3 July 2017 the matter was struck from the roll for lack of urgency. The Applicants' attorney subsequently requested a preferential hearing of the matter and the matter was enrolled for hearing on 13 December 2017.

The relief sought

- [13] The Applicants' case is that the decision to extend their fixed term contracts for a further three months and to follow a recruitment and selection process was informed by the audit findings of the AG that the extension of the

Respondents' contracts without following a recruitment and selection process would amount to a contravention of the PSR.

- [14] PSR 65 and 67 deal with the advertisement of posts and the selection of candidates. The Applicants' case is that the PSR are not applicable to their positions, as they regulate the procedure to be followed in the filling of vacant positions. The Applicants contend that they are the incumbents of their positions, and that those positions are thus not vacant.
- [15] The Applicants submit that they had a reasonable expectation to either become permanent employees of the OCJ, or to be offered three year fixed term contracts of employment. There is no justifiable reason for them not to remain in their positions as there remains a need for pool secretaries.
- [16] Alternatively, and insofar as the PSR 65 and 67 may apply, the Applicants submit that the PSR are in conflict with section 186(1)(b) of the Labour Relations Act¹ (LRA), and the provisions of the LRA prevail over the PSR. The Respondents' failure to employ the Applicants either as permanent or fixed term employees constitutes a dismissal as contemplated in section 186(1)(b) of the LRA.
- [17] In the notice of motion, the Applicants' seek an order declaring them to be permanent employees, alternatively fixed term contract employees, for the period 1 July 2017 – 30 June 2020, alternatively for the period 1 July 2017 – 30 June 2018 on the same terms and conditions of employment as were agreed to for the period 1 April 2017 – 30 June 2017.
- [18] The Applicants also seek an order to interdict and restrain the OCJ from terminating their employment with effect from 30 June 2017.

The arguments

- [19] In argument, Mr Snyman, who appeared on behalf of the Applicants, abandoned the relief sought in respect of permanent employment or employment on a three year fixed term contract and conceded that the only

¹ Act 66 of 1995 as amended.

reasonable expectation the Applicants could have had was for appointment on a one-year fixed term contract.

- [20] Mr Snyman submitted further that the Applicants were entitled to an order declaring them to be fixed term contract employees for the period 1 July 2017 – 30 June 2018. The Applicants rely in this regard on the ‘protection’ of section 186(1)(b) of the LRA and contend that there is a conflict between the provisions of section 186(1)(b)(ii) of the LRA and the PSR, in which event the LRA should apply.
- [21] In my view, this argument is obviously flawed, for a number of reasons. Firstly, the Applicants locate their right to the declaratory relief they seek in section 186(1) of the LRA, but the said section does no more than to set out the meaning of ‘dismissal’. It does not bestow any rights or ‘protection’ upon employees. Secondly, save for stating that they rely on section 186(1)(b) of the LRA (which simply extends the definition of dismissal to include the non-renewal of a fixed term contract or the non-retention of an employee when there was a reasonable expectation that the employer would do so), the Applicants fail to set out in their papers before Court on what basis they are entitled to the declaratory order that they seek. I will fully deal with this issue *infra*. Thirdly, the PSR and specifically PSR 65 and 67 deal with the advertising of positions and the selection process to be followed in the public service and there is no conflict in that with the provisions of section 186(1)(b)(ii) of the LRA specifically.
- [22] Mr Soni, on behalf of the Respondents, argued that the Applicants are not entitled to declaratory relief they seek. The gist of his argument was that the Applicants are not entitled to the said relief where the dismissal has already taken place and that the Applicants’ remedy lies at the bargaining council and not this Court. Mr Soni further relied on the judgment by the Constitutional Court in *Steenkamp and Others v Edcon Limited*² (*Steenkamp*), to submit that this Court was not empowered to make any findings in relation to the alleged unlawfulness of the Applicants’ dismissal. Mr Snyman conceded that should *Steenkamp* be applicable *in casu*, the Applicants are in the wrong forum.

² [2016] 4 BLLR 335 (CC), (2016) 37 ILJ 564 (CC).

Analysis

[23] The declaratory relief that the Applicants seek is predicated on a finding that the Applicants' dismissal was either unlawful or unfair, or both. Assuming in favour of the Applicants that they had a reasonable expectation of indefinite appointment and that they were thus dismissed for the purposes of section 186(1), the crisp issue for decision is whether it can be said that the Applicants' dismissal was unlawful and unfair.

[24] I deal first with the Applicants' submissions regarding the alleged unlawfulness of the OCJ's failure to appoint them. In *Steenkamp*, the Constitutional Court held that there is no provision in the LRA for a right not to be dismissed unlawfully and no provision is made for any dispute procedures or processes for the enforcement of such a right. If the LRA contemplated such a right in regard to dismissals, it would have made provision for it and for a dispute procedure to be followed in disputes concerning its infringement. Nowhere in the entire LRA is there mention of the words 'dismissal' and 'unlawful' or 'invalid' in the same sentence. Yet there are many sentences in the LRA in which the words 'dismissal' and 'unfair' appear. The LRA does not contemplate a right not to be unlawfully dismissed nor does it contemplate invalid dismissals or orders declaring dismissals invalid and of no force and effect.³

[25] Specifically, the majority of the Court held that:

'The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed which is provided for in s 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. The requirement for the referral of dismissal disputes to conciliation is one of the processes created by the LRA. The CCMA, bargaining councils and the Labour Court are some of the fora. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA. Indeed, the LRA even provides for special remedies for the enforcement of those rights and obligations. The special

³ *Steenkamp* at para 132 and 133.

remedies include interdicts, reinstatement and the award of compensation in appropriate cases. These special rights, obligations, principles, processes, procedures, fora and remedies constitute a special LRA dispensation.'

- [26] There is no remedy this Court can afford the Applicants to the extent that they claim that their dismissal was unlawful.
- [27] To the extent that the Applicants contend that their dismissals were unfair, this Court is empowered to adjudicate unfair dismissal claims only in those circumstances contemplated by section 191(5)(b) of the LRA, and only after the dispute has been referred to the relevant statutory body for conciliation.
- [28] Applicants' case is that the appointment of another candidate into one of 'their posts' constitutes a dismissal as contemplated in section 186(1)(b) of the LRA as they reasonably expected to either become permanent employees or to be offered three year fixed term contracts and that this Court has jurisdiction to decide this matter. They rely on *Luvuyo Nowalaza and Others v Office of the Chief Justice and Another*⁴ in support of their submission that the application was not brought prematurely and that this Court has jurisdiction to decide this matter. The Applicants' reliance on *Nowalaza* is misplaced and their argument failed to consider the *dicta* of the Constitutional Court in *Steenkamp*, which this Court is bound by.
- [29] The application of section 186 (1) (b) (ii) of the LRA means no more than that an employee whose contract has not been renewed may assert the existence of a dismissal where he or she reasonably harbours an expectation of indefinite employment. Whether or not the dismissal so established is fair is a separate enquiry.
- [30] In short, in the present instance, the papers do not disclose a reason for dismissal that brings the present dispute within the ambit of this Court's jurisdiction, nor is there any evidence that the dispute has been referred for conciliation. Indeed, it was common cause that the dispute had not been referred to conciliation. That in itself is fatal to any claim of unfair dismissal –

⁴ (J 1177/2017).

see *National Union of Metalworkers of SA v Intervale (Pty) Ltd and Others*⁵ where it was held that absent conciliation, this Court has no jurisdiction. The Applicants should enforce their right not to be unfairly dismissed through the processes and procedures provided for in section 191 of the LRA and they are confined to the remedies provided for in section 193 of the LRA.

- [31] In these circumstances, it is not necessary for me to deal with Mr Soni's submissions regarding the date of dismissal and specifically that the Court is precluded from making an order in terms of the notice of motion where a dismissal had already been effected. The fact remains that the Applicants have not established the existence of any substantive right which this Court may directly enforce. It remains for me to add that nothing in this judgment should be construed as a finding to the effect that the PSR override any of the rights to security of employment established by the LRA. Section 210 makes clear that but for the Constitution and any law amending the LRA, the LRA prevails. My finding amounts to no more than that the Applicants are not entitled, at this point and in this forum, to the relief that they seek.

Costs

- [32] The last issue to be decided is the issue of costs.

- [33] The Labour Appeal Court confirmed that⁶:

'The rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court, and such orders are made in accordance with the requirements of law and fairness. See in this regard *Member of the Executive Council for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*⁷ where Zondo JP explained the rationale for that approach:

[T]he norm ought to be that costs orders are not made unless those requirements [of law and fairness] are met. In making decisions on cost[s] orders this Court should seek to strive to strike a fair balance between, on the

⁵ (2015) 36 ILJ 363 (CC).

⁶ *Lawrence v Mutual and Federal (Pty) Ltd*, Unreported case number JA 77/2014, handed down on 15 September 2016.

⁷ [2008] 6 BLLR 540 (LAC).

one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. This is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes...'⁸

[34] The Applicants are fighting to retain their employment and in doing so opted to approach this Court, albeit incorrectly so. This Court has a wide discretion in awarding costs and Mr Soni did not press for a cost order. In view of the position the Applicants find themselves in, the interest of justice would be best served by making no cost order.

[35] In the premises I make the following order:

Order:

1. The application is dismissed;
2. There is no order as to costs.

C. Prinsloo
Judge of the Labour Court

⁸ At para 17.

Appearances:

Applicants: Advocate M Snyman

Instructed by: Mthembu Sibiya Attorneys

Respondents: Advocate V Soni SC

Advocate T Motloenya

Instructed by: State Attorney, Johannesburg

LABOUR COURT