



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 585/2018

In the matter between:

NTSIELENI EMMANUEL NETSHITOMBENI

Applicant

and

NATIONAL CONSUMER COMMISSION

First

Respondent

EBRAHIM MOHAMED N.O.

Second

Respondent

Application heard: 2 March 2018

Judgment delivered: 5 March 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an urgent application in which the applicant seeks final orders to the effect that the summary termination of his employment be declared unlawful *ab initio* and set aside, and that he be reinstated into his post. The applicant further seeks an order interdicting the first respondent from dismissing him without following its disciplinary code and procedure, and costs on a punitive scale.
- [2] The material facts are not in dispute and can be briefly stated as follows. The applicant was employed by the first respondent in 2011. At the time that his employment was terminated (14 February 2018), he was engaged as a senior manager: information technology. The first respondent is a statutory commission established in terms of s 85 of the Consumer Protection Act, 68 of 2008, and the second respondent is the commissioner.
- [3] The applicant's termination of employment had its origins in a meeting of the first respondent's management committee held on 13 February 2018. The applicant was called on to address the committee in relation to matters of performance within his department. The applicant avers that during the course of the presentation, while he was in the process of answering questions and clarifying queries, various arguments ensued, with the result that he was unable to continue with his presentation in a competent and coherent manner. In particular, the applicant avers that his line manager and the second respondent interrupted his presentation, and that it became clear to him that he was not being given a

fair opportunity to make his presentation. The applicant indicated his intention to leave the meeting. It is not disputed that the second respondent advised the applicant that if he left the venue of the presentation, he would be acting contrary to his instructions and committing an act of insubordination. The applicant nonetheless left the venue and returned to his office, where he composed a letter of grievance and then went home, despite an express instruction to the contrary from his line manager. The next day, 14 February 2018, the applicant delivered the grievance letter to the second respondent.

- [4] Shortly afterward, the applicant was called to the office of the second respondent where he was handed a letter advising him of his dismissal with immediate effect. The letter of dismissal records that the applicant's employment is terminated, effective from time of receipt of the letter, on account of gross insubordination displayed by the applicant to the second respondent during the course of the meeting on 13 February 2017. Further, the letter indicated that according to records at the disposal of the second respondent, the applicant had on various occasions either left work early, arrived late without permission or had been absent from work without leave.
- [5] In his founding affidavit, the applicant avers that this court has jurisdiction '*to hear matters concerning unlawful summary dismissal, dismissal in violation of company policy and dismissal in violation of the right to disciplinary procedures. Secondly, the court has jurisdiction because both bodies carry on business within its area of jurisdiction*'. Of course, the second of these averments does not confer jurisdiction on this court. The applicant's precise cause of action (and thus the basis on which he contends that the court has jurisdiction to entertain his claim) is not entirely apparent from the founding affidavit. The applicant refers to s 23 of the Constitution, and specifically to the right to fair labour practices. He submits that dismissal from employment with immediate effect does not constitute a fair labour practice. Further, the applicant avers that s 185 of the LRA provides that an employee may not be unfairly dismissed or subjected to an unfair labour practice. He submits that his dismissal amounts to an unfair dismissal, as well as

an unfair labour practice. The applicant also relies on s 85(1) of the Consumer Protection Act and in particular, an obligation on the first respondent to exercise its powers fairly and with due regard to due process and the precepts of the Constitution. The applicant also relies on the first respondent's own disciplinary code and procedure, which establishes processes that must be followed prior to the dismissal of an employee. He contends that to the extent that his employment was terminated by reason of gross insubordination, there is no reference to this form of misconduct in the first respondent's disciplinary code and procedure. To the extent that his employment was terminated on account of an act of misconduct, the applicant submits that the first respondent failed to comply with its own policies and procedures. Finally, in the high water mark of the founding affidavit, the applicant submits the following:

22.6 I am also advised that this honourable court recently dealt with the case of an unlawful summary dismissal in the matter of *solidarity and others v South African Broadcasting Corporation* (J 1343/16 [2016] ZALCJ 273; 2016 (6) SA 73 (LC); (2016) 37 ILJ 2888 (LC); [2017] 1 BLLR 60 (LC). I am advised that my matter falls within that judgment, both on urgency and facts.

- [6] The first issue to be determined is whether the court has jurisdiction to entertain the applicant's claim. As reflected above, he appears to rely on six discrete grounds. The first is s 23 of the Constitution. While it is correct that s 23, guarantees the right to fair labour practices, the principle of subsidiarity precludes a litigant from the direct invocation of a constitutional remedy and requires that the claim be brought in terms of the legislation that gives expression to the constitutional right. In *South African Defence Union v Minister of Defence & others* 2007 (5) SA 400 (CC), the court stated:

[A] litigant who seeks to assert [a constitutional right] should in the first place base his or her case on any legislation enacted to regulate the right, not on [the section of the Final Constitution]. If the legislation is wanting in its protection of the ... right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task

conferred on the legislature by the constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.

- [7] Similarly, in *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at paragraph [73], O'Regan J reiterated:

This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the constitution.

- [8] Secondly, to the extent that the applicant relies on the LRA and in particular, s 185, this court has no general jurisdiction over unfair dismissals or unfair labour practice disputes. Where a dismissal has as its basis an act of alleged misconduct, the LRA makes clear that the CCMA or a bargaining council within whose registered scope of the parties fall has jurisdiction to arbitrate the dispute. Section 157 (5) provides that this court does not have jurisdiction to adjudicate an unresolved dispute if the Act requires the dispute to be resolved through arbitration.
- [9] Thirdly, and to the extent that the applicant relies on s 85(1) of the Consumer Protection Act and the assertion that the commission is designated as an organ of state and that the first respondent is accordingly required to exercise its powers fairly and with due regard to due process and the precepts of the Constitution, this court has jurisdiction if and only if the pleaded case is one that falls within the ambit of s 157 (2) of the LRA. That section confers concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the Minister of Labour is responsible. Again, none of these circumstances are referred to in the pleadings.

- [10] To the extent that the applicant contends that the first respondent's disciplinary code and procedure makes no reference to gross insubordination and that the first respondent did not comply with the procedures established by code, again, to the extent that this amounts to no more than an assertion of procedural fairness in the context of a reason for dismissal that is clearly misconduct-related, the dispute is one that falls within the jurisdiction of either the CCMA or a bargaining council.
- [11] During argument, counsel for the applicant relied primarily on the sixth ground referred to above, and on the judgment of this court in *Solidarity & others v South African Broadcasting Corporation (supra)*, to contend that the reference to that authority amounted to an assertion of the fact of a breach of the applicant's contract of employment by the first respondent (in the form of a failure to comply with its own disciplinary code) and of an election by the applicant to claim specific performance of the contract. The court was referred to the replying affidavit to which the applicant annexed a pro-forma contract of employment which he avers is utilised by the first respondent. Clause 12.2 of that contract provides, amongst other things, that the employer shall be entitled to terminate an employee's contract after due disciplinary process in accordance with the disciplinary code for any reason recognised by law.
- [12] To the extent that the applicant asserts that this court has jurisdiction by virtue of a prior authority that concerned similar principles of law and facts, this cryptic cross-reference is manifestly inadequate. A cursory glance at the *Solidarity v SABC* judgment makes clear that the applicants had pleaded their case as one of a breach of a specific term of their employment contract by the employer (the disciplinary code was expressly incorporated into the contract), and invoked s 77(3) of the BCEA (which affords this court jurisdiction in respect of dispute about contracts of employment) as the basis on which they asserted that the court was empowered to entertain their claim.
- [13] In the present instance, to establish jurisdiction by virtue of s 77 (3), it was incumbent on the applicant in his founding affidavit at least to assert the

existence of a contractual term entitling him to the right to a hearing prior to any termination of employment, a breach of that term by his employer and the circumstances in which he avers that he is entitled to the remedy of specific performance. For example, in the *Solidarity v SABC* case, as I have mentioned, the applicants specifically pleaded and introduced evidence to the effect that the right to a hearing prior to dismissal had been expressly incorporated into their contracts. In the present instance, the applicant is not even gone so far as to make that assertion in unambiguous terms. However, for present purposes, I will accept in the applicant's favour that the nature of the applicant's claim is one in which he asserts that the first respondent has acted in breach of his employment contract by failing to afford a hearing prior to terminating his employment, and that the remedy he seeks is that of specific performance.

- [14] For the above reasons, by virtue of s 77 (3) of the BCEA, this court has jurisdiction to entertain the applicant's claim. That being so, the first hurdle that the applicant must overcome is that of urgency. In this regard, the applicant avers that his continued absence from work legitimises an unlawful decision, that the respondent's suggestion that he was entitled to approach the CCMA was intended to frustrate his immediate resumption of duties, that his attempts to reason with the respondents' attorneys have failed, that he cannot wait for the matter to be resolved in the normal course on account of the unlawfulness which he contends is being perpetrated, that his continued absence from his office will prejudice his ability to defend himself should he be called to face a disciplinary enquiry, that he has no other remedy available to him under the circumstances and that his only lawful option is to approach this court in the manner in which he did. In reply, the applicant makes a case for financial hardship and makes sweeping terms, unaccompanied by any documentation to provide evidence of the nature and extent of the financial hardship that he alleges, or the demands by creditors to which he refers.
- [15] Even if the applicant's termination of employment was unlawful and unfair, that does not make the matter urgent. In *Solidarity v SABC* at paragraph 67 of the

judgment, the court observed that the mere fact that the applicants had been dismissed in breach of the contract of employment '*might not in and of itself warrant urgent relief*'. The court went on to consider a number of factors independent of the allegation of unlawfulness (all of which had been properly pleaded by the applicants) and concluded that in the light of those factors (which included the nature of the applicants' occupation and the public role of the SABC, the employer) that the case was not one where damages for wrongful dismissal would be an appropriate alternative remedy in due course.

- [16] In short, an averment of a breach of procedure, however egregious that breach might alleged to be, is not in itself a basis on which an applicant is entitled to have an application heard as a matter of urgency. Ultimately, considerations of financial hardship and prejudice aside, it is incumbent on an applicant to establish that he or she will not be able to secure adequate relief in due course. It may well be the case that the termination of the applicant's employment has had or will have all of the consequences to which he refers. His difficulty is that these are consequences that inevitably flow from any termination of employment. Were the impairment of dignity and financial hardship to be the applicable criteria, any employee contending to have been unlawfully (or even unfairly) dismissed would inevitably be entitled to urgent relief. That is manifestly not the case; urgent relief is available to dismissed employees only in truly exceptional circumstances.
- [17] The applicant's averments in relation to financial hardship are no more than generalised, sweeping statements. He has made no specific, factual averments in relation to the nature and extent of any immediate or short-term financial loss or hardship that he says he will suffer, nor has he provided any particularity in this regard. All of these averments are raised in reply and strictly, ought properly to be disregarded. But even if I were to have regard to them, in my view, the applicant has failed to adduce sufficient evidence to establish that the degree of financial hardship is so exceptional that his case falls into the category of the exceptional.

- [18] In these circumstances, it is not necessary for me to consider the merits of the applicant's claim regarding the procedure that he contends ought properly have been followed. Those are matters that can be dealt with in the ordinary course, in the appropriate forum.
- [19] Finally, in relation to costs, the applicant sought a punitive order for costs against the respondents, and has gone so far as to seek an order against the second respondent that he be held personally liable for the costs of the application. The respondents seek an order for costs on the ordinary scale against the applicant. Section 162 of the LRA confirms a broad discretion on this court to make also costs in accordance with the requirements of the law and fairness. This court traditionally does not make orders for costs where genuinely aggrieved but misguided employees seek recourse, in good faith, against their employers. I see no reason to depart from that convention and in my view, the requirements of the law and fairness are best satisfied by each party paying its own costs.

I make the following order:

1. The application is struck from the roll for lack of urgency.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. O Mooki, instructed by Selebogo Attorneys

For the respondent: Adv. R Beaton SC, instructed by Erasmus Scheepers

Labour Court