



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case NO: J2074/17

In the matter between

PUBLIC SERVANTS ASSOCIATION

OF SOUTH AFRICA

PORTIA CHUENE AND 55 OTHERS

and

STATISTICS SOUTH AFRICA

STATISTICIAN-GENERAL:

STATISTICS SOUTH AFRICA

MINISTER OF PUBLIC SERVICE AND

ADMINISTRATION

THE MINISTER OF FINANCE

First Applicant

Second Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Heard: 20 September 2017

Ex-tempore judgment: 20 September 2017

Date Edited: 16 April 2018

EX-TEMPORE JUDGMENT

VAN NIEKERK J:

- [1] This is an application brought on an urgent basis in which the applicants seek a declaratory order that the first applicant's members listed in annexure "A" be declared to be permanent employees, In the alternative, that the first respondent, Stats SA, be interdicted and restrained from dismissing those persons, pending the outcome of the dispute referred to the General Public Service Sectoral Bargaining Council. The facts that give rise to the application are recorded in the founding affidavit and I do not intend to burden this judgment with their repetition. It is sufficient for present purposes to note that the individual applicants, i.e. the second to further applicants, were employed by Stats SA on a series of fixed-term contracts. The persons concerned were first engaged as survey officers and/or administrative assistants. Some were employed as administrative clerks and others, as I have indicated, survey officers.
- [2] The founding affidavit indicates that most or all of the employees have been employed since mid-2015 on a series of fixed-term contracts varying in duration from two months to, it would seem, six months. The contracts have been extended on

each occasion on account of the Stats SA's operational needs.

- [3] During the course of the period in which the individual applicants were engaged, there was a dispute concerning their remuneration that was resolved by way of a settlement agreement, which is not relevant to these proceedings. What is relevant is the notice given to them that during the course of July, in fact on 31 July 2017 that the contracts concerned would not be renewed and would terminate on 30 September 2017, as per the provisions of the contracts signed during the course of March and April of this year.
- [4] The applicants in essence contend that, given all of the circumstances, they have a legitimate expectation that their contracts will be renewed and that an unfair dismissal dispute has been referred to the bargaining council. The court was advised during argument that the conciliation meeting pursuant to the referral has been arranged for a date later this month.
- [5] During the course of the hearing counsel for the applicants abandoned the prayer for a declaratory order that the individual applicants are employed by Stats SA for an indefinite duration and are as such permanent employees entitled to all benefits that accrue to permanent employment. That concession was based on an acknowledgement that, despite what is averred in the founding papers, the presumption contained in section 198B of the Labour Relations Act does not apply to the individual applicants since their earnings are above the threshold established by that section. In other words, the contention that in terms of section 198B of the Act, that employees are in effect or became permanent employees of Stats SA, is no longer pursued. From the papers it seems to me that the concession is well made, given the rate of the individual applicants' remuneration.

- [6] That leaves the alternative relief sought which, in effect is interim order in terms of which the applicants seek to restrain the Stats SA from terminating the contracts at the end of September, the end of this month, pending the outcome of the dispute referred to the bargaining council.
- [7] The requirements for interim relief are well-known. It is incumbent on an applicant to establish a *prima facie* right to establish the absence of an adequate alternative remedy to establish that the balance of convenience lies in their favour and also to establish that some prospects of success exist in the main application. Now, insofar as the jurisdiction of this court to issue an interim order of the nature sought is concerned, this court clearly does not have the jurisdiction in respect of any unfair dismissal dispute that has been referred by the applicants to the bargaining council, but this court has long held that it has the power to grant interim relief in appropriate circumstances where a dispute has been referred to the proper forum in terms of the statutory dispute resolution mechanisms and the dispute remains pending.
- [8] The *prima facie* right on which the applicants rely is obviously their assertion that they have a reasonable expectation to a renewal of the contract on the same or similar terms. Well, that is a matter for the bargaining council ultimately to decide. And even if I were to take the view that the applicants had established a *prima facie* right on the papers before me; that is not sufficient.
- [9] It seems to me that this case turns on the question of the availability of an adequate alternative remedy. The applicants have available to them a claim of unfair dismissal should they be able to establish first the existence of a dismissal by establishing a legitimate or a reasonable expectation of the

further renewal of the contract and then to establish that any dismissal found to exist; i.e. substantively and/or procedurally unfair.

- [10] The statutory dispute resolution process, as I have indicated, has already been invoked and a conciliation meeting is pending. If that meeting is unable to resolve the dispute to the satisfaction of the applicants, they have the right to refer the matter to arbitration. If they succeed at arbitration, then the Act provides that the primary remedy is one of reinstatement, and that reinstatement is capable of being granted with retrospective effect. In other words, if the applicants succeed in the bargaining council, in all likelihood they will be reinstated with retrospective effect and therefore suffer no prejudice.
- [11] The prejudice, as their counsel has pointed out, is short term. It is prejudice that will be caused by a period of unemployment between the date of termination of the contract and the date of any arbitration award. But in my view, given the fact that the statutory process is already underway, that is not prejudice that cannot be cured by a retrospective award of reinstatement. Against that I must balance the prejudice to Stats SA. It is not disputed that Stats SA is in a position where it is simply unable to fund these posts beyond 30 September. It would seem to me in those circumstances that the alternative remedy available to the applicants is one that is sufficiently adequate. It seems to me, for the same reasons, that the balance of convenience in the present instance must favour Stats SA.
- [12] The applicants will have the opportunity to state and argue their case and, as I have indicated, the primacy of the remedy of reinstatement would operate in their favour. Now, it seems to me, therefore, that the applicants have failed to make out a case for urgent interim relief and that the application ought therefore

to be dismissed.

- [13] That leaves the question of costs. This court has a broad discretion in terms of section 162 of the Labour Relations Act to make orders for costs according to the requirements of the law and fairness. This court ordinarily takes into account a number of factors; one of those being the existence of a collective bargaining relationship which indirectly exists between the first applicant and Stats SA in this matter. However, that consideration applies where it appears to the court that the effect of a cost order would be to prejudice that relationship. A case to that effect has not been made out in the present instance.
- [14] What I must necessarily bear in mind is that the primary relief sought, i.e. the declaratory order based on the provisions of section 198B, was in the present instance entirely misguided, since it is clear that that section was never of any application to the individual applicants.
- [15] The court then is left with the consideration that in the ordinary course costs ought to follow the result. For those brief reasons, it seems to me that the first applicant representing the second to further applicants ought to pay the costs of the present proceedings.

I make the following order:

1. The application is dismissed with costs; such costs to be paid by the first applicant.

Van Niekerk J
Judge of the Labour court



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PSA OBO MEMBERS v STATISTICS SA

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