



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 3745/18

**POLICE AND PRISONS CIVIL RIGHTS UNION
(POPCRU) ON BEHALF OF MEMBERS (LISTED
IN ANNEXURE A TO THE NOTICE OF MOTION)**

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

**NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

Second Respondent

DEPARTMENT OF CORRECTIONAL SERVICES

THE CITY OF TSHWANE MUNICIPALITY

Third Respondent

**PUBLIC SERVANTS ASSOCIATION OF
SOUTH AFRICA**

Fourth Respondent

Fifth Respondent

Heard: 25 October 2018

Delivered: 2 November 2018

Summary: Application to declare termination of contracts of employment null and void and to restore the contracts.

JUDGMENT

Introduction:

- [1] The Applicant acting on behalf of 16 of its members (the employees) filed an urgent application wherein relief was sought to the effect that the termination of the employees' contracts of employment be declared null and void and their contracts of employment be restored.
- [2] The application is opposed by the First, Second and Third Respondents (collectively referred to as the employer).

Background facts:

- [3] The employees are stationed at the Poyntons building, the Third Respondent's head office. Some of the employees have entered into fixed term contracts in terms of which they were appointed in terms of section 9 of the Public Service Act¹ (PSA) and others were employed in terms of the Correctional Services Act² (CSA). In the papers before this Court the parties did not indicate which of the employees were appointed in terms of the PSA and which in terms of the CSA. It is however common cause that the employees are appointed in terms of either the PSA or the CSA.
- [4] A dispute arose between the employees and the employer, emanating from various complaints regarding the alleged unsafe features of the Poyntons building. This led to an urgent application that was filed in terms of the provisions of the Occupational Health and Safety Act³ on 4 October 2018. The said application was filed under case number J 3473/18 and sought to declare the Poyntons building unsafe for human occupation. The application was dismissed as the Applicant had to approach the Magistrate's Court instead of the Labour Court.
- [5] The Applicant's case is that the employer is well aware that there are some risks involved in the occupation of the Poyntons building, but is of the view that the occupancy of the said building is relatively safe as the risks are insignificant and well mitigated by the actions taken by the owner of the building. Since 18 September 2018, the employees present themselves at the

¹ Act 105 of 1994 as amended.

² Act 111 of 1998.

³ Act 85 of 1993.

workplace between 08:00 and 16:00, however they remain outside the Poyntons building as they refuse to enter into the building they regard as unsafe.

- [6] On 19 October 2018, the employees received ultimatum letters dated 18 October 2018. The letters were titled '*Participation in unlawful strike action and refusal to return to work*' and in the letters it was recorded that pursuant to ultimata issued by the employer on 19 September 2018 for the employees to return to their posts at the Poyntons building, they failed to respond to a lawful instruction to return to their respective posts and on 21 September 2018 the employees were invited to provide written reasons as to why they should not be summarily dismissed for taking part in an unlawful strike action and for failing to adhere to a lawful instruction to return to their posts. Despite not making submissions as per the employer's invitation, the employee's services were not terminated as the employer indicated as far back as 21 September 2018. No action was taken in respect of the ultimata issued on 19 September 2018.
- [7] On 5 October 2018, the employer indicated that it would not take any disciplinary action flowing from the urgent application launched on 4 October 2018, but that it reserved its rights with specific reference to section 96(2)(b) of the CSA.
- [8] On 19 October 2018, the employees were afforded one hour from the time the ultimatum letter was communicated to them to return to their posts and should they fail to adhere to the instruction, they should regard themselves as having been summarily dismissed and they have five working days to appeal such summary dismissal.
- [9] The employees did not return to work and instead the Applicant's attorneys despatched two letters to the employer requesting that the ultimatum issued to the employees be retracted. It was made clear that should there be no withdrawal of the ultimatum, the Applicant would approach this Court for urgent relief. It is evident from the said letters that the Applicant recorded that the instruction to occupy an unsafe building is unlawful and that the intended subsequent dismissal would also be unlawful. The employer has not responded to those letters.

- [10] The Applicant consulted with counsel on 20 October 2018 and this application was served on 22 October 2018.

Points in limine

- [11] The employer raised three points *in limine*. The first is that this Court does not have jurisdiction.

Jurisdiction

- [12] In support of the jurisdictional challenge, the Respondents made reference to the previous urgent application brought in terms of the provisions of the Occupational Health and Safety Act. The employer further raised the fact that the Applicant's attempts to utilise the Basic Conditions of Employment Act⁴ (BCEA) when its relief should have been couched in terms of the LRA and that this is an attempt to circumvent the jurisdictional prerequisite that a dismissal dispute should be referred to the bargaining council. The Department supplies essential services and the employees are not entitled to strike or withhold their labour under any circumstances. The employees were issued with an ultimatum which they ignored and in terms of the provisions of section 96(2)(b) of the CSA, an official who participates in industrial action, is subject to immediate dismissal.

- [13] Section 96(2) (a) and (b) of the CSA provide as follows:

- '(2) (a) Subject to the provisions of subsection (1), the relationship between the Department as employer and every correctional official in the service of the Department is regulated by the provisions of the Labour Relations Act and the Public Service Act.
- (b) Notwithstanding item 6 (2) of Schedule 8 to the Labour Relations Act, where a service of the Department is designated as an essential service in terms of section 71 of that Act, and an official who provides such service participates in a strike that does not comply with the provisions of chapter IV of that Act and the strike constitutes a threat to the safety of inmates, officials or the public, the official in question may be summarily dismissed, if such dismissal is substantively fair, as contemplated in item 6 (1) of that Schedule.'

⁴ Act 75 of 1997.

- [14] The Applicant disputed that section 96(2) of the CSA applies as it provides for summary dismissal in the event that an official who provides an essential service participates in a strike action that does not comply with the provisions of chapter IV of the Labour Relations Act⁵ (LRA). The Applicant's case is that the employees do not render an essential service. It is furthermore disputed that the employees are participating in any strike action as they present themselves at the workplace between 08:00 and 16:00, but remain outside the Poyntons building as they refuse to enter into the building.
- [15] In my view these averments and issues are not material to the questions this Court has to decide, for reasons fully dealt with *infra*.
- [16] There is no merit in the jurisdictional challenge. Firstly, this application is clearly not similar to the previous application brought in terms of the Occupational Health and Safety Act and any reference to that application is *in casu*, irrelevant and has no bearing on the question whether the Court has jurisdiction to adjudicate this dispute.
- [17] Secondly, in considering whether this Court has jurisdiction, the pleadings placed before Court have to be evaluated. This is based on *Gcaba v Minister for Safety and Security and Others*⁶ where it was held that:

'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the content of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.'

⁵ Act 66 of 1995 as amended.

⁶ (2009) 30 ILJ 2623 (CC) at para 75.

[18] Having regard to the Applicant's case before this Court and the affidavits filed in support thereof, it is evident that the Applicant is not challenging the fairness of the employees' dismissal, but what it is challenging is the validity and lawfulness of the termination, relying on the contractual terms and the provisions of section 77 of the BCEA.

[19] This Court's jurisdiction is to be determined by the pleadings and *in casu*, the Applicant made it clear that the application is brought in terms of the provisions of section 77 of the BCEA.

[20] This Court has jurisdiction to adjudicate a dispute in terms of section 77 of the BCEA and the first point *in limine* has no merit

Urgency

[21] The Respondents submitted that the matter is not urgent. I do not intend to set out in detail the attack on urgency as I am of the view that the application should be heard on an urgent basis.

Premature application

[22] The employer's case is that the notices of termination of service were served on the employees on 19 October 2018 and in the said notices, they were afforded a period of five days to lodge an appeal against their dismissal. The administrative processes of the employer provide that an employee who has been dismissed is effectively not removed from employment until the five-day period allowed for the appeal has expired.

[23] This application was served before the expiry of the five-day period, wherefore the application is premature. This point *in limine* is misplaced and disconnected from the relief sought by the Applicant. The Applicant seeks an order declaring the termination of the employees' contracts of employment null and void and for the said contracts to be restored.

[24] It is evident that the employees' contracts of employment were terminated with effect from 19 October 2018 and allowing a five-day period within which an appeal may be filed, does not detract from the fact that they were dismissed. Even where the employees would file an appeal within five days, the filing of an appeal in itself does not change the fact that the employees have been dismissed.

[25] There is no merit in this point *in limine*.

The relief sought

[26] I had great difficulty with the papers filed by the parties in this matter. In respect of the Applicant, this Court had to undertake a search and find exercise to find the gist of the employees' case as the Applicant's papers made reference to all possibly relevant issues, even those that were not material for the adjudication of this application and the relief sought. The opposing affidavit on the other hand was bereft of any meaningful factual detail and the Respondents provided no or very little assistance to this Court in the task of determining the merits of the employees' case.

[27] Be that as it may, the Applicant places reliance on clause 3.1.2 of the contract of employment which provides for termination of employment in accordance with section 17 of the PSA, read with the CSA and relevant collective agreements on misconduct and incapacity.

[28] Section 17(1) of the PSA provides for the termination of employment in accordance with the LRA.

[29] The Applicant's reliance on clause 3.3 of the contract of employment to the extent that the employer breached the terms of the contract by terminating the contract without notice as provided for in section 37 of the BCEA is misplaced as the said clause provides for termination after consultation and upon agreement, which is not the case where a contract is terminated for reasons related to misconduct.

[30] In essence the Applicant's case is premised on the provisions of section 77 of the BCEA. The employees claim that the summary termination of their contracts of employment is unlawful as no procedure was followed as contemplated in their contracts of employment and they seek specific performance.

[31] The Applicant's case is that the disciplinary code and procedure (the Code) as contained in Resolution 1 of 2006 has been incorporated as a term of the employees' contract of employment. Clause 4.1.4 of the contract stipulates that the employee shall comply with the prescribed Code.

- [32] The Code prescribes proper procedures for the termination of employment, which the employer flagrantly disregarded prior to the employees' dismissal. Instead of following a due process, the employees were afforded the right to appeal, as provided for in clause 8 of the Code.
- [33] The Applicant's case is that clause 8.2 of the Code specifically provides for an employee to, within five working days of receipt of the notice of the final outcome of a hearing or other disciplinary procedure, submit the appeal form. It is evident that the appeal has to be preceded by a hearing or other disciplinary procedures, which are provided for in clauses 5, 6 and 7 of the Code.
- [34] The employer's answer to this is that the employees are not entitled to a contractual remedy in circumstances where they refuse to perform their contractual duties and unless they immediately return to work, they cannot approach the court on the basis of contract.
- [35] This answer is without merit and would have bizarre results if it were to be accepted *in casu*. This is not a case where there is a reciprocal obligation such as when employees claim for the payment of remuneration where they have not rendered their services. The entitlement to a contractual remedy such as payment of remuneration goes hand in hand with an employee's obligation to perform his or her duties and the reciprocal nature of the obligation is obvious. Entitlement to remuneration would only arise in circumstances where the employees tendered and provided their services in accordance with their contracts of employment. It is common cause that the employer is applying the 'no work no pay' principle and there is nothing before this Court to challenge the said dispensation.
- [36] This is a case where the employer terminated the employees' services and there is nothing reciprocal in that. The nature of the relief sought by the employees is not dependent on them rendering their services and to deprive them of contractual remedies unless they immediately return to work, would, in a case like this, be absurd.

[37] It is evident from the papers placed before this Court that the following facts are undisputed:

- 37.1. The employees have valid and existing contracts of employment with the employer;
- 37.2. Some employees concluded contracts in terms of the PSA and others in terms of the CSA;
- 37.3. A fixed term contract entered into by some of the employees contains a clause 3.1.2 which provides for the termination of employment by way of discharge in terms of section 17 of the PSA read with the CSA and in accordance with the relevant collective agreements on misconduct and incapacity;
- 37.4. The Code forms part of the employees' contracts of employment and it prescribes procedures to be followed in the event of disciplining and dismissing an employee and there ought to have been a fair process in terminating the contracts;
- 37.5. The employer disregarded the prescribed procedures when terminating the employees' contracts of employment;
- 37.6. The employer afforded the employees an opportunity to file an appeal within five days, as contemplated in clause 8 of the Code, thus the employer is selective in observation of and compliance with the Code. The right to appeal is afforded after the dismissal of the employees has taken place;

[38] The Applicant's case is that the employer's purported termination of the employees' contracts of employment is in breach of their employment contracts and it is unlawful. The terms of the contracts of employment incorporated the disciplinary code and procedure and the employer embarked on a process to terminate their services not provided for in the Code.

[39] Clauses 5 – 7 of the Code provide specifically for disciplinary action procedures and hearings and the manner in which such hearings should be conducted. The gist of the Applicant's case is that the manner in which the employees' services were terminated, is not provided for in the Code and what is provided for in the Code, was ignored by the employer when it terminated

their contracts. The employees were deprived of their rights, as per the terms of the employment contracts and effectively the terms of their contracts of employment were breached. The employees' contracts provide for a disciplinary process or hearing prior to dismissal and the employer has the obligation to follow the fair and proper procedure set out in the Code.

[40] The employer does not deny that the Code has been incorporated into the contract of employment and that the employees are subject to the Code, nor is it denied that they have the right to a disciplinary process as envisaged by the Code. The employer's case however, as set out in the opposing affidavit, is that the termination of the employees' contracts of employment took place in accordance with legislation, with specific reference to section 17(3) of the PSA and section 37 of the CSA, which provide for the termination of service of an employee who was absent without permission for a period of 30 days.

[41] The employer's reference to and reliance upon section 17(3) of the PSA is irrelevant and misdirected for three reasons. Firstly, section 17(3)(a)(i) specifically excludes 'a member of the services', which is defined as a member of the Department of Correctional Services appointed in terms of the CSA. Thus insofar as the employees (or some of them) have been appointed in terms of the CSA, section 17(3)(a)(i) would not be applicable to them.

[42] Secondly, the employer did not advance section 17(3)(a)(i) of the PSA as the reason for the employees' dismissal. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*⁷ the Labour Appeal Court (LAC) held that:

'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal...'

[43] Thirdly, a discharge in terms of the provisions of section 17(3)(a)(i) of the PSA constitutes a termination of employment by operation of law and therefore no dismissal exists that could be challenged. The ultimatum letter made it clear that the employees are dismissed for reasons relating to partaking in an unlawful strike and failure to adhere to a lawful instruction. Therefore, on the

⁷ (2008) 29 ILJ 964 (LAC) at para 32.

employer's own version, the employees were dismissed for reasons related to misconduct.

- [44] Reference to section 37 of the CSA is equally misdirected. Section 37 of the CSA provides that a correctional official who absents himself or herself for 30 consecutive calendar days without permission or without notifying the National Commissioner shall be summarily dismissed but before dismissing such an employee, the National Commissioner must endeavour to establish the whereabouts of the official. *In casu*, the employer is well aware of the employees' whereabouts and it is for that reason that the employer did not invoke the provisions of section 37 of the CSA, but instead issued an ultimatum for reasons related to participation in an unlawful strike and failure to adhere to a lawful instruction.
- [45] To the extent that the employer persists with the view that it is entitled to terminate the employees' contracts of employment because of their refusal to return to work, it is evident that the employer failed to grasp the Applicant's case and the relief sought. The employer may be entitled to terminate the services of an employee who participates in unlawful strike action or who refuses to obey a lawful instruction, the employer is however not entitled to do so without following a process that the parties contractually agreed to.
- [46] I cannot but find that the termination of the employees' contracts of employment is in breach of the terms of their contracts and in the result the termination of the employees' contracts is void *ab initio*.
- [47] The Applicant seeks specific performance of the employees' contracts and seeks to enforce their contractual right to a disciplinary process in accordance with the Code before there could be any decision taken on the termination of their services.
- [48] In essence the Applicant seeks an order restoring their contracts of employment in order for a disciplinary process to be followed in respect of the allegations of misconduct levelled against them.
- [49] The employer submitted that the Applicant has various options if it wants to dispute the lawfulness of the termination of the employees' contracts and that approaching this Court is not one of the available options. The employer has not indicated what the various options are. The question of relief has been

considered in *Ngubeni v The National Youth Development Agency and Another*⁸ where the Court has held that:

'Insofar as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages. The balance of convenience dictates that the order sought should be granted - there is little inconvenience to the NYDA should it continue with and complete the disciplinary hearing; the result may well be the same. For Ngubeni, the effect of the NYDA's decision to terminate his employment at this stage is to deprive him of his employment and livelihood. Similarly, I am satisfied that Ngubeni will suffer irreparable harm should the application not be granted.'

[50] Whether the employees have a valid reason not to enter the building to report for duty, is not an issue for this Court to decide. It can only be decided after oral evidence has been adduced and would be best decided by the chairperson of the disciplinary enquiry.

Costs

[51] This Court has a broad discretion to make orders for costs according to the requirements of the law and fairness. Considering that the parties are in a collective bargaining relationship, the interest of justice and fairness will, at this point of the litigation, be best served by making no order as to costs.

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

Order

1. The termination of the employees' contracts of employment is declared null and void;
2. The termination of the employees' contracts of employment is set aside and the employees contracts of employment are restored;
3. There is no order as to costs.

⁸ (2014) 35 ILJ 1356 (LC) at para 21.

Connie Prinsloo

Judge of the Labour Court of South Africa

LABOUR COURT

For the Applicant: Advocate E Mokutu with Advocate D M Madiba

Instructed by: Majang Inc Attorneys

For the First, Second and

Third Respondents: Advocate T P Kruger with advocate T Carstens

Instructed by: State Attorney

LABOUR COURT