



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J4379/2018

In the matter between:

SAOU obo STEENKAMP & 3 OTHERS

Applicants

and

SILVERTON HIGH SCHOOL

First Respondent

SCHOOL GOVERNING BODY,

SILVERTON HIGH SCHOOL

Second Respondent

Heard: 18 & 19 December 2018

Delivered: 11 January 2019

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicants approached this Court on urgent basis to seek an order reinstating them in the employ of the second respondent (the SGB). Their contention is that the termination of their contracts of employment was unlawful and wrongful by virtue of the provisions of section 77(3) of the Basic Conditions of Employment Act (BCEA)¹.

¹ Act 75 of 1997, as amended

- [2] The first respondent (School) is a public school under the South African Schools Act². The individual applicants, viz, Salome Steenkamp, Mauritz M Lourens, Bonita Stander and Tamlynn K Thompson are educators and this application was brought on their behalf by their union, SAOU. They were informed on 26 September 2018 by the School's then Principal, TJ Schoeman, that their contracts of employment would be terminated effective from 31 December 2018.
- [3] Upon receipt of the notices, correspondence was then addressed to the SGB on 8 October 2018 by the applicants' representatives, wherein it was advised that there was no rational basis for the renewal or non-renewal of their contracts as they were employed on a permanent basis as stipulated in clause 1.2 of their contracts of employment, and that there was no reference to any fixed term period or duration specified in their contracts.
- [4] The SGB's response on 12 October 2018 was that the matter has since been referred to the Department of Education (Department) for investigation and determination, since it was decided that all contracts of employees not employed by the Department should be terminated.
- [5] The applicants' contention however was that the Department was not a party to their contracts of employment and had no right to interfere with those contracts, nor was it entitled to investigate and/or determine any dispute pertaining to those contracts. In this regard, reference was made to section 20 (10) of the Schools Act, which provides that the State, including the Department was not responsible for the personnel employed by the second respondent.
- [6] The SGB's contention is that the Department funds the School, and that the majority of its educators are paid by the Department. The current SGB commenced its three year term on 1 April 2018 and had identified irregularities and/or possible fraud with regard to the educators' contracts of employment. In this regard, it was pointed out that there were fixed-term contracts of employment concluded with educators, whilst the same educators

² Act 84 of 1996

also concluded contracts on a permanent basis. The matter having been referred by the SGB to the Department, the latter appointed a firm of forensic investigators to look into these contracts. Flowing from the initiation of these investigations, the School's Principal, Schoeman, was then placed on precautionary transfer to the district office of the Department.

- [7] In regards to the appointments of educators, it was the SGB's contention that only the chairperson or his/her deputy had the authority to enter into and sign contracts of employment between the educators and the SGB, and that in terms of the School's Act, the Principal's role did not extend to the conclusion of contracts of employment with educators on behalf of the SGB. Since in this case, the Principal had directly entered into and signed the individual applicants' contracts of employment, he had usurped the powers of the SGB's Chairperson or his deputy, as he did not at any stage have the authority to enter into and sign such contracts on behalf of the SGB, and to bind the latter to these contracts.
- [8] It was further common cause that when the applicants' demands to have the termination of their contracts of employment nullified, they had then approached the Commission for Conciliation Mediation and Arbitration (CCMA) with a referral of a dispute on 31 October 2018. The dispute was set down for conciliation on 15 November 2018 resulting in a certificate of non-resolution being issued on the same date. The applicants subsequently referred the dispute for arbitration on 23 November 2018, and as at the hearing of this application, the CCMA still had to set the matter down for arbitration.

Preliminary points:

- [9] In opposing this application, the respondents further raised various preliminary points which it contended were dispositive of the matter. Central to the preliminary points raised is whether this application should be treated as urgent. The provisions of Rule 8 of the Rules of this Court³ pertaining to

³ **8 Urgent relief**

(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

urgent applications were explained in *Jiba v Minister: Department of Justice and Constitutional Development and Others*⁴ as follows;

‘Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules.’

[10] Whether a matter is urgent involves considerations of whether the reasons that make the matter urgent have been set out succinctly in the founding affidavit, and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent.⁵

[11] It is further trite that where the applicants, such as in this case, seeks final relief, they bear an even greater burden to establish their right to urgent relief, as opposed to applicants seeking *interim* relief⁶. Equally important is that the applicant seeking urgent relief must not rely on self-created urgency, and must demonstrate that the Court was approached with the necessary haste to obtain the relief sought.

[12] In seeking urgent relief in this case, it was *inter alia* averred on behalf of the applicants that;

12.1 The termination of their contracts of employment was wrongful and unlawful, causing them to suffer severe prejudice as they had financial obligations.

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- (2) The affidavit in support of the application must also contain-
- (a) the reasons for urgency and why urgent relief is necessary
 - (b) the reasons why the requirements of the rules were not complied with, if that is the case; and
 - (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

⁴ (2010) 31 ILJ 112 (LC) at para 18.

⁵ *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32.

⁶ *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11.

- 12.2 The decision to terminate the contracts was due to no fault of their own, and further that they had exhausted their immediate available remedies.
- 12.3 The exercise of the remedial relief would only be realised in March 2019, at which point the 2019 academic year would already have commenced, and further since the arbitration proceedings launched would only proceed in March 2019.
- 12.4 The decision to terminate their contracts of employment was not in the best interests of the School, nor of the performance of the professional functions to be rendered to the School.
- 12.5 The decision to terminate the contracts was not supported by the School's Principal, and was unlawful, unfounded, and without merit.
- [13] The respondent however contend that the matter is not urgent given the timeline of the events. I am in agreement with the respondents' contentions that indeed the urgency claimed in this case was clearly self-created, and that the applicants took longer than necessary to approach the court with a view of obtaining relief. The above conclusions in this regard are based on the following;
- 13.1 The notice of termination of the contracts of employment was issued on 26 September 2018, and this application was only launched on 3 December 2018, some two months (68 days) after the notices of termination were issued.
- 13.2 Prior to approaching this Court, the applicants had referred a dispute pertaining to an alleged '*unilateral changes to their terms and conditions of employment*', and a certificate of outcome related to '*Mutual Interest*' dispute was issued on 15 November 2018.
- 13.3 Flowing from the issuing of the certificate of outcome, the applicants had then referred a dispute for arbitration, related to '*Unilateral*

changes to conditions of employment which will result in unfair dismissal'.

13.4 In the light of the above referral, it is not clear from the applicants' averments as to when the termination of their services had morphed from '*unilateral changes to terms and conditions of employment/unfair dismissal*', into '*wrongful/unlawful termination*' for the purposes of jurisdiction of this Court. In my view, there is merit in the respondents' contentions that the applicants are clearly forum shopping, and it should thus be concluded that the Court lacks jurisdiction to determine this application, particularly in the light of the nature of disputes referred to the CCMA.

13.5 As at the hearing of this application, the referral before the CCMA had not been withdrawn, and to the extent that the CCMA still had to set the matter down for arbitration, it cannot, for the purposes of urgency, be concluded that the applicants do not have an alternative remedy. That remedy remains available to them at the CCMA, and as it was correctly pointed out on behalf of the respondents, there was nothing that prevented the applicants from requesting an expedited arbitration date from the CCMA.

13.6 The submissions made on behalf of the applicants therefore that the dispute was erroneously referred to the CCMA is clearly without merit. The mere fact that the dispute had not as at the date of these proceedings not been withdrawn casts doubts on any contention that the referral was made in error.

13.7 The other grounds upon which urgency was relied upon are equally without merit. It is trite that urgency cannot be grounded on mere financial inconvenience or hardship to the applicants. Any such allegation must equally demonstrate exceptional circumstances necessitating the urgent intervention of the Court.

[14] Other than the manifest self-created urgency, which on its own ought to be dispositive of the matter, the respondents further pointed out to various

difficulties faced by the applicants with this application. These *inter alia* included that;

- 14.1 There were disputed facts arising from the pleadings, which they contend the applicants ought to have foreseen prior to persisting with this application. These related to whether the individual applicants were permanently employed as they had alleged; and whether their contracts were valid in the light of the School Principal's lack of authority to enter into such contracts.
- 14.2 The matter was removed from the urgent court roll by agreement on 11 December 2018 to enable the applicants to file a replying affidavit. However, the replying affidavit was filed outside of the time frames agreed upon, and no attempt was made to seek condonation in that regard.
- 14.3 The non-joinder of the National and Gauteng Departments of Education, and the Principal of the School at the time, as these parties had an interest in the matter. To this end, it was contended that the failure to join these parties was fatal and that the application ought to be accordingly dismissed on that ground alone.
- 14.4 The failure by the individual applicants to attach confirmatory affidavits to the founding affidavit deposed to by a union official on their behalf.

Conclusions:

- [15] The applicants have failed to establish facts which requires the Court to give this application its urgent attention. Ordinarily, the application ought to be struck off the roll. However, in the light of the clear alternative remedies which the applicants have invoked, and other inherent difficulties as pointed out elsewhere in this judgment, it is my view that no purpose would be served by merely striking the matter from the roll, and the appropriate order to be made is to dismiss the the application.

- [16] The respondent sought an order of costs based on a variety of grounds, including the manner with which this application was prosecuted, the failure to adhere to time frames agreed to in regards to the filing of a replying affidavit when the matter was initially removed from the roll, and further costs associated with the adjournment of the matter on 18 December 2018 in the light of an indexed bundle not being properly placed before the Court.
- [17] It has however since transpired that the indexed bundle was filed with the Court on 13 December 2018 and for some reason, the bundle had not found its way into the Court's file. Accordingly, no blame can be apportioned to the applicants in regards to any wasted costs occasioned by the adjournment of proceedings on 18 December 2018. I am further of the view that no costs order should be made in regards to the removal of the matter from the Court's urgent roll on 11 December 2018.
- [18] In the light of the conclusions reached however in regards to the application itself, it is my view that a consideration of the requirements of law and fairness dictates that the applicants, and in particular, SAUO, should be burdened with its costs.
- [19] Accordingly, the following order is made;

Order:

1. The applicants' urgent application is dismissed.
2. SAOU is ordered to pay the costs of this application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

M. Meyer

Instructed by:

Erasmus INC Attorneys

For the Respondent:

A. Makka

Instructed by:

Cliffe Dekker Hofmeyr INC

LABOUR COURT