IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1921/19

In the matter between:

NOZIPHO JOYCE MXAKATO-DISEKO **Applicant**

and

DIRECTOR GENERAL: DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION **First Respondent**

DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION **Second Respondent**

Heard: **1 October 2019**

Delivered: **15 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The facts of this case are peculiar. It is not every day that this Court is called upon to determine a dispute which has its genesis in the refusal of a senior employee to reinstate a junior employee, following a settlement agreement that resolved a dismissal dispute between the employer and that junior employee.

[2] The applicant approached this Court on urgent basis for an interim interdictory relief, to restrain the respondents from proceeding with any contemplated disciplinary proceedings pending the finalisation of an application (to be instituted within 30 days from the date of the order) to review and set aside a settlement agreement entered into between the Government of the Republic, and an employee who was dismissed pursuant to a disciplinary process initiated by her (the applicant).

[3] The first and the second respondents opposed the application, contending *inter alia* that the applicant has failed to satisfy the requirements for the relief that she seeks, and in particular, had failed to set out sufficient averments to justify this matter being enrolled as one of urgency. Two further preliminary points were raised, *viz*, the non-joinder of the dismissed employee, and the prematurity of the application.

Background:

[4] The applicant takes issue with certain material aspects of the background chronology as set out in the respondents' answering affidavit, contending that it is at odds with the background she had set out in the founding affidavit. Notwithstanding, the background as summarised below is largely common cause;

4.1 The applicant, Ambassador Nosipho Mxakato-Diseko, was appointed by the President as the Permanent representative for the Republic of South Africa (the Republic) to the United Nations and other International organisations in Geneva, Switzerland. She is however officially employed as the Deputy Director General: Global Governance Directorate by the second respondent, the Department of International Relations and Cooperation (DIRCO).

4.2 The first respondent is the Director-General (the DG) and the administrative head of DIRCO. He is responsible for the formulation, coordination, implementation and management of the foreign policies on behalf the Government of the Republic. The applicant remains accountable to the DG as the Accounting Officer of DIRCO.

4.3 The controversy in this proceedings emanates from the dismissal of one Ms Zinhle Nkosi (Nkosi) from the Permanent Mission in Switzerland. Nkosi had commenced her employment on 1 June 2016 in the position of Consular Clerk, Locally Recruited Personnel (LRP) in the Permanent Mission. Her services were terminated as per a letter dated 13 August 2018 and signed by the applicant. The circumstances surrounding the dismissal of Nkosi are not material to the determination of this dispute, except to mention that she is a South African citizen based in Switzerland.

4.4 On 6 September 2018, the Corporate Services Manager in the Permanent Mission received an email from Mr Mahlangu, of the DIRCO's Labour Relations sub-directorate, enquiring about the circumstances surrounding the dismissal of Nkosi. On 10 September 2018, the Manager for Corporate Services intimated that Nkosi was a South African citizen and had been employed by the Permanent Mission as a LRP, and was therefore subject to Swiss law. It was further indicated that if Nkosi was aggrieved with her dismissal, the correct process would have been through the dispute resolution mechanisms prescribed by Swiss law.

4.5 On 15 October 2018, Nkosi approached the Commission for Conciliation Mediation and Arbitration (CCMA) alleging that she was unfairly dismissed by the Permanent Mission, and that the dispute arose in Geneva, Switzerland. On 31 October 2018, Mr Motsisi of DIRCO raised an objection in regards to the jurisdiction of the CCMA to determine the dispute, as the employment contract between Nkosi and the Permanent Mission was concluded in Switzerland, which meant that Swiss law took precedence.

4.6 On 12 February 2019, the CCMA set down the dispute for a hearing on 28 February 2019. On the hearing date, the Commissioner seized with the matter raised the issue of a late referral of the dispute and indicated that condonation should be sought.

4.7 On 8 March 2019, the Deputy Director: Global Governance and Continental Agenda, (Ambassador M Nkosi), indicated that a multidisciplinary team had been established and was to travel to the Permanent Mission with the purposes of investigating various internal issues, including the dismissal of Nkosi. This was necessitated further by certain of these issues having appeared in the local public media. The aim of these investigations was to formulate a report for the DG, and to be implemented by the applicant.

4.8 Part of the recommendations (which copy the applicant avers she did not receive), appears to be that the dismissal of Nkosi was not in accordance with the prescripts of the Foreign Service Code. In a letter dated 9 May 2019, the DG advised that a Mr Scholtz was to provide the applicant with the necessary assistance, in order for settlement discussions to be entered into with Nkosi, which would effectively result in her reinstatement.

4.9 A follow up letter from the DG on 17 May 2019 reiterated that the Permanent Mission was specifically instructed to settle the matter with Nkosi and to reinstate her. The applicant was however averse to such settlement discussions and had sought advice from her own attorneys. She further sought an indulgence from the DG to formulate a proper response.

4.10 On 29 May 2019, the DG sent further correspondence to the applicant, in which he reiterated the instruction to settle the dispute with Nkosi, and advised that DIRCO would make a formal offer of settlement on a *'without prejudice'* basis in terms of which she would be reinstated. The DG further indicated that once a written deed of settlement was prepared to record the agreement with Nkosi, she should be welcomed back to the Permanent Mission to resume her duties.

4.11 In her response, the applicant *inter alia* indicated that Nkosi could be reinstated but only if this was done in accordance with Swiss law with the Swiss Mission which was responsible for such matters. On

8 June 2019, the applicant met with the Director: Labour Relations of DIRCO (Ntombela), and requested that Nkosi not be offered a settlement outside of Swiss law, and for Ntombela to convey her message to the DG. Despite concerns raised by the applicant, a settlement agreement was reached with Nkosi on 10 June 2019.

4.12 The applicant takes issue with the settlement agreement and contends that there is no evidence to suggest that the parties had agreed to settle, or that the dispute was settled at the CCMA. She further contends that even though she was not a party to the agreement, the settlement purports to have been entered into between Nkosi and the Government of the Republic through the Permanent Mission; that the agreement purports to settle the dispute that Nkosi referred to the CCMA, when in fact there was no live dispute at that forum; that the agreement despite being entered into in South Africa refers to Swiss law; and that the agreement was not signed in the presence of any witnesses.

4.13 On 26 June 2019, the DG formally advised the applicant of the existence of the agreement and further advised her that a delegation was to be sent to Geneva to assist with its implementation, which was to take effect from 3 July 2019.

4.14 In a response to the DG on 27 June 2019, which was copied to the Minister and her special advisor, the applicant requested that a delegation not be sent pending an appeal she had made to the Minister, in which she had requested her to mandate the suspension of all activities related to the Nkosi matter.

4.15 Matters came to a head on 2 August 2019 when the applicant lodged a grievance against the DG, in relation to the dispute surrounding Nkosi. On 30 August 2019, the DG sent a letter to the applicant, in which she was given five days to explain why DIRCO should not charge her with insubordination.

4.16 On 2 September 2019, the applicant requested that she be furnished with a copy of the settlement agreement in order to enable her to respond fully to the letter of 30 August 2019. A copy was sent to her as per her request. On 6 September 2019, she requested an extension to respond and was granted until 11 September 2019.

4.17 On 11 September 2019, the applicant's response was to challenge the settlement agreement as being unlawful and advised that she intended to institute legal proceedings to have it reviewed and set aside. On 16 September 2019, she instituted these proceedings.

The submissions and evaluation:

[5] In support of her case, the applicant contends that she has a *prima facie* right to the relief that she seeks, as she had prospects of success in the application to review and set aside the settlement agreement. She further contended that she had a right under the provisions of section 23(1) of the Constitution of the Republic[1] to fair labour practices, which included the right to a fair disciplinary hearing, which was in turn entrenched in the Code of Good Practice in Schedule 8 of the LRA.

[6] She further contended that there was a reasonable apprehension of harm in that should disciplinary proceedings against her commence before she had had an opportunity to test the lawfulness of the settlement agreement in the review proceedings, her right to the relief sought in such proceedings would be rendered nugatory. She averred that she was currently involved in a defamation action against a local newspaper flowing from the publication of two articles in which Nkosi's dismissal featured, and that should she be disciplined, it was likely that news of any such process would be leaked to the media. She further contended that the balance of convenience was in her favour, and that in the end, she had no other satisfactory remedy.

[7] Obviously in such cases, the starting point is that of urgency. The requirements of urgency in this Court as contemplated in Rule 8 of its Rules

[1] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

are well known[2]. The applicant such as in this case is required to set out explicitly the circumstances and objective facts which she contends renders the matter urgent. She is further required to explain in her founding affidavit why she cannot get substantial redress at a hearing in due course[3].

[8] The pertinent question is whether the applicant has set out such objective grounds demonstrating urgency. In her averments under 'urgency', the applicant essentially says nothing as to the reason this matter should be accorded urgency. All she did was to make averments in regards to the timelines in relation to the filing of her papers and notices of intention to oppose, which in themselves do not indicate why the matter is urgent. As it was stated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite and Others*,[4] the fact the applicant wants to have the matter resolved urgently does not render it urgent. The procedures set out in Rule 8 of the Rules of this Court are not for the taking. More than a mere desire to treat a matter as urgent is required.

[9] It was submitted on behalf of the applicant that even though not much was said under the topic of urgency, it was for the Court to read the pleadings as a whole to effectively determine the urgency. In the alternative, it was argued that the replying affidavit deals with the issue of urgency. These submissions lack merit. In an instance where under the rubric of 'urgency' it is not clear on what basis the urgency is alleged, it is not the duty of the Court to trawl through the entire founding affidavit to establish where exactly urgency is claimed, and whether indeed any general averment points to urgency. Second, it is trite that the applicant must make out a case in the founding

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[2] **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).

(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.

[3] See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) (11/33767); [2011] ZAGPJHC 196 (23 September 2011) at para 6.

[4] *Ibid*

affidavit, and not in the replying affidavit or heads of argument. The founding affidavit as Rule 8 requires, must set out explicitly and in detail, why the matter should be accorded urgency. To the extent that no such specific averments were made in this case, the invariable conclusion as submitted on behalf of the respondents, is that the urgency claimed was not established, and/or at worst, is self-created.

[10] If ever there is any doubt about the nature of the self-created urgency in this matter, it is indeed dispelled by its own facts. The reinstatement of Nkosi was to take effect from 3 July 2019. Notwithstanding the applicant's outright and unambiguous resistance to Nkosi's reinstatement, as at the hearing of this matter, no application to review and set aside that agreement had been launched.

[11] As things stand, the applicant is not suspended nor has any formal charges been proffered against her. Despite having furnished a response and reasons why her conduct should not be deemed to be insubordinate, as at the hearing of this matter, the DG had not indicated to her that she will or would not be charged with insubordination. There is therefore merit in the contention that the application is premature.

[12] The applicant has in approaching this Court on an urgent basis, effectively second-guessed and/or pre-empted the decision of the DG, when clearly there is no basis for it. It is not for the Court to grant urgent relief solely based on what or might not happen in the future, as central to the relief sought is the basis upon which a right sought to be protected (even in the future) is predicated. Worst still, even if the Court were to grant pre-emptive interdict, no compelling case has been made out to demonstrate that the applicant is entitled to any pre-emptive protection against any disciplinary processes that may be instituted against her.

[13] It nonetheless gets worse for the applicant insofar as her *prima facie* right to the relief that she seeks is grounded in section 23(1) of the Constitution. It has long been stated that it is impermissible for applicants to rely on a constitutional right in circumstances where the general scheme of the LRA

equally protects that right. Thus the LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, including the State and its organs[5]. To this end, any contention by the applicant that she has no alternative remedy insofar as any disciplinary process may ensue, is without merit, as the dispute resolution mechanisms of the LRA remain at her disposal.

[14] To the extent that the applicant had based her right on her prospects of success in reviewing and setting aside the settlement agreement concluded with Nkosi, it does not serve the purposes of the determination of this dispute to answer the question whether she as an employee, has a right to bring that application, and if so, whether such an application will succeed. These are questions to be answered on another day when that application is eventually launched. To this end, it is not even necessary to determine the preliminary point related to the non-joinder of Nkosi in these proceedings. Be that as it may, to the extent that the relief sought in this case is intrinsically linked to her main concerns about her rights to fair labour practices, that question has been answered.

[15] Insofar as any apprehension of harm is claimed, it can be accepted that the instruction to reinstate Nkosi was issued on numerous times including formally on 23, 27 and 30 August 2019, with the latter correspondence indicating that the failure to carry the instruction was viewed in serious light. As is apparent from her averments in her pleadings, the applicant is clearly not willing to

[5] See *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC) at para [124], where it was held;

> "Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case "for practical considerations". What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution."

reinstate Nkosi. As to how the dismissal of Nkosi came to the attention of the media is not for the Court to speculate, and I fail to appreciate how the applicant's legal squabbles with the media has anything to do with this Court or the relief that she seeks. To the extent however that there were media leaks already about the dismissal of Nkosi, that is a matter that remains in the public domain which cannot be undone by any relief she seeks with this application. Furthermore, to the extent that she is a high profile public figure, any news that may reach the public media surrounding any disciplinary action that may or may not be taken against her is a matter which this Court cannot prevent through an interim order which has no foundation.

[16] The balance of convenience cannot be assessed in a vacuum. The common cause facts however as already indicated are that currently, the applicant does not face any discipline nor has the DG indicated categorically that any such disciplinary measures are to take place. If it turn out otherwise, disciplinary proceedings are within the rights and discretion of an employer, which this court is loath to interfere with. Like any other employee, the applicant, notwithstanding her position and status, is not immune to the discipline of the employer, and clearly the balance of convenience cannot be tilted in her favour in circumstances where the relief that she seeks, would impact on the employer's rights and discretion.

[17] In summary, the applicant has not demonstrated why her application deserves the urgent attention of this Court, and why she cannot obtain substantial relief in due course. She has available alternative remedies to the extent that the DG may decide to institute disciplinary proceedings against her. Furthermore, nothing precludes her from proceedings with her application to review and set aside the settlement agreement if she desires to do so, and to defend her actions in any disciplinary enquiry that may be instituted against her. In the end however, she has not established the basis of a *prima facie* right she relies on, and clearly the balance of convenience favours that the relief she seeks not be granted.

[18] I have further had regard to the requirements of law and fairness insofar as an award of costs is sought by the respondents. This application was clearly ill-

considered and precipitous, and I see no reason why the respondents should be burdened with its costs. Accordingly, the following order is made;

Order:

1. The Applicant's application is dismissed with costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: J Burger with N Njongane (Pupil), Instructed by Motsoeneng Bill Attorneys

For the Respondents: M Rantho, Instructed by State Attorney: Pretoria