

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 2075/19

In the matter between:

SASBO THE FINANCE UNION obo

RAPULA MODIBANE

Applicant

And

NEDBANK LIMITED

First Respondent

Heard: 25 October 2019

Judgment delivered: 28 October 2019

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks an order interdicting and restraining the respondent (the bank) from dismissing the applicant prior to complying with a fair procedure.
- [2] On 3 October 2019 the bank addressed a notice of termination of employment to the applicant. The next day, 4 October 2019, unaware of the notice of termination of employment, Mabaso AJ delivered a judgment in respect of an application argued on 11 September 2019. In those proceedings (which involved the same parties), the applicant contended that the bank had acted unfairly in issuing a letter dated 26 July 2019 without first issuing a notice in terms of s 189 (3) of the LRA. The letter referred to in the order advised the applicant that he would be placed in what was termed an 'operational redeployment pool' on the basis that if he was not placed in a role within two months from 1 August 2019, he would be given one months' notice of termination of employment, being the month of October 2019.
- [3] Mabaso AJ issued the following order:
- ...
2. The respondent acted in a procedurally unfair manner when it proceeded to issue Mr Madibane with a letter dated 26 July 2019, without issuing a written notice in terms of s 189(3) of the LRA, inviting the applicant to consult on the information recorded therein;
 3. The respondent acted in a procedurally unfair manner when it proceeded to issue Mr Modibane with the letter dated 26 July 2019, without issuing a written notice prescribed in the Nedbank retrenchment policy;
 4. The respondent acted in a procedurally unfair manner by failing to appoint a facilitator as prescribed by the Nedbank retrenchment policy;
 5. The respondent must comply with the prescribed 60 days period, as recorded in the Nedbank retrenchment policy; and more particularly, that the 60 day period shall commence on the issue of a section 189 (3) notice to the

applicant/ Mr Modibane; alternatively that the respondent comply with 60 day period as prescribed by section 189A of the LRA;

6. The respondent is ordered to initiate and then continue with the meaningful joint consensus seeking process as envisaged by sections 189 and 189A of the LRA

- [4] On 18 October 2019, the bank applied for leave to appeal against the judgment of Mabaso AJ. That application remains pending. The effect of the application for leave to appeal is that the operation and execution of the order is suspended pending the outcome of the application (s 3 of the Superior Courts Act). At the hearing of the present application, the court was advised that an application in terms of s 18 (3) of the Superior Courts Act had been enrolled for hearing in this court on 29 October 2019, in which the applicant seeks a ruling that the order not be suspended.
- [5] The applicant has filed the present application on account of what he terms 'new facts'; in particular, the notice of termination of employment issued to him on 3 October 2019.
- [6] The bank accepts that the effect of the order granted by Mabaso AJ is that it will not be able to terminate the applicant's employment, and that if any appeal against the order fails, the applicant will be reinstated and the consultation process will have to take place as ordered. Mr Boda SC, on behalf of the bank, submitted that the applicant does not require a new order to achieve this effect and further, that it will not be possible in these proceedings for the court to find in favour of the bank without finding that Mabaso AJ had erred in making the ruling that he did. This is a matter, he submitted, more properly to be determined in any appeal hearing.
- [7] I agree. It is clear from the papers that served before him that Mabaso AJ did not expressly grant an interdict preventing the bank from issuing the notice of termination of employment. This was not the specific relief sought in the application that served before him. However, the order requiring the bank to implement a consultation process after issuing a s189 (3) notice effectively

amounts to an interdict against a termination of employment with effect from 31 October 2019. The basis of the attack on the notice of termination in these proceedings is thus the same as the attack that underpinned the first application – primarily, the bank’s failure to issue a s 189 (3) notice.¹ The fact that the order remains suspended (at least pending the outcome of the s 18 application) does not mean that the applicant is entitled to ask this court for the same relief, relief which in effect, he has already obtained. In *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd* (2015) 36 ILJ 1261 (LAC), the Labour Appeal Court followed *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA), where the court applied the three requirements for *res judicata* - the same parties, the same cause of action, and the same relief. The purpose of *res judicata* is to prevent the repetition of lawsuits between the same parties and the possibility of conflicting decisions by different courts on the same issue. In the present instance, all three requirements are present, and the application stands to be dismissed on this basis.

- [8] In so far as costs are concerned, my view, the interests of the law and fairness referred to in s 162 of the LRA are best met by an order to the effect that costs follow the result. The union was forewarned of the bank’s intention to raise the point of *res judicata*, yet it persisted with the present application. This borders on an abuse of the process of this court.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

APPEARANCES

¹ The same issue was raised and decided in respect of another employee retrenched in the same circumstances - see J 2011/19 *SASBO obo Fourie v Nedbank*, judgment delivered 28 October 2019.

For the applicant: Adv. C Goosen, instructed by BJ Erasmus Pieterse Attorneys

For the respondent: Adv. F Boda SC, instructed by Norton Rose Inc.

Labour Court