



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 346/20

**NATIONAL UNION OF PUBLIC SERVICE AND
ALLIED WORKERS (NUPSAW) obo MEMBERS**

First Applicant

**EXECUTIVE MUKWEVHO AND 1004 OTHERS
(List of members per annexure A)**

Second Applicant

And

**GAUTENG DEPARTMENT OF INFRASTRUCTURE
AND DEVELOPMENT**

First Respondent

**THE MEC FOR THE GAUTENG DEPARTMENT OF
INFRASTRUCTURE AND DEVELOPMENT**

Second Respondent

**THE HEAD OF THE GAUTENG DEPARTMENT OF
INFRASTRUCTURE AND DEVELOPMENT**

Third Respondent

Heard: 28 May 2020

Delivered: 5 June 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties'

representatives by email. The date for hand-down is deemed to be 5 June 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] This application was filed on 25 May 2020 and is opposed by the Respondents.
- [2] The matter was set down for hearing on 28 May 2020 and due to the Covid-19 lockdown measures, the parties presented arguments via Zoom.

Relief sought

- [3] The Applicants approached this Court in terms of the provisions of section 186(1)(b), read with section 198B(5) of the Labour Relations Act¹ (LRA) for relief in a Part A and Part B. The relief set out in Part A is sought on an urgent basis and Part B of the application is to be enrolled for hearing on a date to be determined by the Registrar of this Court.
- [4] The Applicants filed an amended notice of motion and I do not intend to deal with the amendment in much detail. What is apparent from the initial as well as the amended notice of motion is that in Part A thereof, the Applicants effectively seek an order to interdict and restrain the Respondents from terminating their contracts, pending the conclusion and finalisation of the engagement process regarding the transfer or absorption of the Applicants.
- [5] The relief sought in Part B is based on the provisions of sections 198B of the LRA and it is not relevant for purposes of this judgment.

Urgency

¹ Act 66 of 1995, as amended.

- [6] The Respondents took issue with urgency and as this application is brought on an urgent basis, urgency is the first hurdle that the Applicants have to overcome.

Legal principles

- [7] Before I deal with the question whether this application should be heard as one of urgency, I deem it prudent to set out the legal framework and principles within which a question of urgency is to be considered and decided.
- [8] The relevant portion of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court provides that:
- ‘(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;’
- [9] An applicant that approaches the court on an urgent basis essentially seeks an indulgence and to be afforded preference in order to prevent the prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has in the founding affidavit, set forth explicitly, the circumstances which render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary².
- [10] What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and*

²*Transport and Allied Workers Union of SA vs Algoa Bus Company (Pty) Ltd* (2015) 36 ILJ 2148 (LC).

*Others*³ the court referred with approval to the following dictum from *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁴:

'An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[11] In deciding whether a matter is urgent, two considerations are involved. The first is whether the reasons that make the matter urgent have been set out 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.

[12] In *Vermaak v Taung Local Municipality*⁵ this Court has held that:

'The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.'

[13] The principles around urgency had been developed and considered by the courts and on numerous occasions have the courts made it clear that self-created urgency is not to be entertained by an urgent Court.

[14] In considering Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*⁶ held that:

³ (2015) 36 ILJ 1331 (LC) at para 17.

⁴ [2011] ZAGPJHC 196; [2012] JOL 28244 (GSJ) at para 6.

⁵ (JR315/13) [2013] ZALCJHB 43 (12 March 2013) at para 12.

'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.'

[15] In *National Union of Metalworkers of SA v Bumatech Calcium Aluminates*⁷ the Court held that:

'Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency. In *Collins t/a Waterkloof Farm v Bernickow NO & another* the court held that:

'if the applicants seeks this court to come to its assistance it must come to the court at the very first opportunity, it cannot stand back and do nothing and some days later seek the court's assistance as a matter of urgency'.

[16] In *National Police Services Union and others v National Negotiating Forum and Others*⁸ this Court held the view that the latitude extended to parties to dispense with the Rules of the court in circumstances of urgency is not available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief.

[17] Emanating from the provisions of Rule 8 and the principles set out in the authorities referred to, it is evident that urgency is not there for the taking, and an applicant seeking urgent relief must adequately and in detail, set out in the founding affidavit, the reasons of which the matter before the court should be treated with urgency.

⁶ (2010) 31 ILJ 112 (LC) at para 18.

⁷ (2016) 37 ILJ 2862 (LC).

⁸ (1999) 20 ILJ 1081 (LC).

- [18] In order for any arguments on urgency to be sustained, the applicant must have acted with due haste, when knowledge of the respondent's prejudicial behaviour or actions is gained. It is trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the Rules⁹.

Material facts:

- [19] The explanation for urgency tendered by the Applicant has to be considered with due consideration of the Respondent's challenge to urgency.
- [20] In my view, the chronological sequence of events relevant to this application is a factor to be considered in deciding the issue of urgency.
- [21] The First Respondent (the Department) is engaged in the Expanded Public Works Programme (EPWP), which terms are governed by the relevant Ministerial Determination. The EPWP is a poverty alleviation programme, intended to provide public or community assets or services through a labour intensive programme, initiated by government and funded from public resources.
- [22] The Applicants were participants in the Zivuseni Poverty Alleviation / National Youth Service Programme for a period of one year, commencing on 1 April 2019 and terminating on 31 March 2020. They accepted the terms of reference for the aforesaid period, which regulated the terms and conditions of participation in this programme.
- [23] The Applicants rendered various services at different provincial and local government sites throughout Gauteng. The Applicants' case is that on or about 6 March 2020, they received SMS notifications from the Department stating that their contracts would terminate on 31 March 2020 and that they would not be renewed.
- [24] The Applicants made an attempt to engage with the Department pursuant to the notification they received, which the Respondents initially refused, but

⁹ See: *Jiba v Minister: Department of Justice and Constitutional Development and others* (2010) 31 ILJ 112 (LC).

after a sit-in was staged at the Department's premises, the Department was compelled to engage. A meeting was initially scheduled for 14 March 2020, which was rescheduled to 16 March 2020 and again rescheduled to 27 and 30 March 2020. Due to the national lockdown that commenced on 27 March 2020, the intended meeting with the Department never materialised.

- [25] On 25 March 2020, the Applicants' attorney, Mr Voyi, addressed a letter to the Respondents, requesting that a written undertaking be provided that the Department would not proceed with the intended termination of the Applicants' contracts on 31 March 2020, pending the finalisation of the engagement processes. It was made clear that if no undertaking was received by 12:00 on 26 March 2020, the Applicants would approach this Court on an urgent basis to restrain the Department from proceeding with the aforesaid termination.
- [26] No response was received and on 27 April 2020, Mr Voyi addressed another letter to the Respondents, demanding the payment of the Applicants' salaries for April, May and June 2020 and a written undertaking that the demanded salaries be paid by no later than 28 April 2020, failing which the Applicants would approach this Court for relief on an urgent basis.
- [27] Mr Voyi approached the Registrar for allocation of a case number and he was informed that the matter could be enrolled post the lockdown.
- [28] The Respondents' version is that the application is not urgent as the Applicants were informed in the various roadshows that were held during November and December 2019 and they knew from then that their contracts would come to an end on 31 March 2020 and that the Department would not be extending their contracts when they expire by effluxion of time. Subsequent thereto, the Applicants were once again informed in a meeting held on 7 February 2020 that their contracts would come to an end on 31 March 2020 and would not be extended. The Applicants were finally informed on 6 March 2020 that their contracts would be ending on 31 March 2020 and it is not explained why they did not take any action much sooner.

- [29] I take note of the fact that when the Respondents were put on terms, the intention to approach this Court on an urgent basis was expressed for the first time on 25 March 2020, the intention was repeated on 27 April 2020, yet the application was only filed on 25 May 2020.
- [30] Level 5 of the national lockdown was lifted on 30 April 2020 and the country moved to level 4 alert with effect from 1 May 2020. The Applicants submitted that when the lockdown level was eased to level 4 alert, the Labour Court had not started operating until 19 May 2020. This statement is factually incorrect as the Court commenced with the adjudication of matters set down in the normal course as from 4 May 2020 and the urgent Court sitting operated throughout.
- [31] There is no doubt merit in the Respondents' arguments on the issue of urgency and in the ordinary course, and applying the principles set out *supra*, the Applicants would not have crossed the hurdle of urgency. However, I am inclined to exercise my discretion and deal with this matter notwithstanding the obvious lack of urgency. This matter was enrolled for hearing on 28 May 2020, when it was fully argued and received judicial attention. If it is struck off the roll for lack of urgency, as it should, it will in all probability be enrolled in the normal course, meaning that another judge would have to spend time on this matter and another Court day will be allocated for it.
- [32] Judicial resources are scarce and limited and in my view, this matter lacks merit to the extent that it should be put out of its misery sooner rather than later and it should not make its way back to Court in the ordinary course. No other Court should be burdened with dealing with it, therefore I will deal with Part A of this application, despite the lack of urgency.

Part A

- [33] In Part A, the Applicants seek an order to interdict and restrain the Respondents from terminating their contracts, pending the conclusion and finalisation of the engagement process regarding the transfer or absorption of the Applicants.

- [34] It is trite than in order to succeed in obtaining an interim interdict, the Applicants have to satisfy the following requirements: they must demonstrate a *prima facie* right, a well-grounded apprehension of irreparable harm, that the balance of convenience favours the granting of the relief sought and the absence of any alternative remedy.
- [35] In their heads of argument, the Applicants framed the relief they seek *inter alia*, as interim relief that will reverse the unlawful termination if their contracts.

Prima facie right

- [36] Whether or not the Applicants have a right is a matter of substantive law and the onus is on them to establish on the facts and evidence placed before this Court that they have a *prima facie* right in terms of the substantive law. The Applicants also have to prove that the right is a legal right which can be protected¹⁰.
- [37] For purposes of Part A, the Applicant's case is that they have been engaged for more than six years rendering services under the EPWP and as such a legitimate expectation to a continued engagement has been established over the years. The right which the Applicants seek to enforce and protect, as is apparent from their pleaded case, is to be found in section 186(1)(b) of the LRA.
- [38] The Applicants' case is that they are entitled to remain engaged as employees based on a legitimate expectation of a renewal of their contracts in terms of section 186(1)(b) of the LRA. As already alluded to the relief sought in terms of section 198(B) of the LRA is to be dealt with Part B and is not relevant for purposes of this judgment.
- [39] It is evident from the facts placed before me that the gist of the Applicants' case is their concern about the lawfulness of the termination of their contracts in circumstances where they had a legitimate expectation to continued and undisturbed job security.

¹⁰ The Civil Practice of the High Courts of South Africa, Herbstein & Van Winsen, 5th edition, page 1457– 1463.

- [40] The question thus is whether the Applicants have a legal right in terms of section 186(1)(b) of the LRA. This question calls for a closer consideration of the provisions of section 186(1)(b) of the LRA.
- [41] In my view, there are multiple difficulties in the Applicants' case.
- [42] Firstly, section 186(1) of the LRA does no more than to set out the meaning of 'dismissal'. Section 186(1)(b) simply extends the definition of dismissal to include the non-renewal of a fixed term contract or the non-retention of an employee when there was a reasonable expectation that the employer would do so.
- [43] The Applicants' reliance on section 186(1)(b) of the LRA as their *prima facie* right is misplaced as it does not bestow any rights or 'protection' upon employees.
- [44] Whether the Applicants indeed had a reasonable expectation as provided for in section 186(1)(b) of the LRA or whether the termination of their contracts constituted a dismissal, is not for this Court to decide.
- [45] The Applicants failed to identify the right which entitles them to the relief in the form of an interdict that they seek. At best, they placed reliance on a section of the LRA that does not bestow any rights and as such they dismally failed to cross the first hurdle for an interim interdict.
- [46] Secondly, the golden thread that runs through the Applicants' pleaded case is that their contracts were unlawfully terminated and that the Respondents' conduct in that regard is unreasonable and unlawful. In fact, it is specifically pleaded that urgency is established on the basis of the unlawful termination of the Applicants' contracts.
- [47] It is evident from the founding affidavit that apart from a single averment that no fair procedure was followed in the termination of the Applicants' contracts, the Applicants' pleaded case is premised on unlawfulness and not unfairness. It is further evident that relief is sought in terms of the provisions of the LRA.

[48] It is doubtful that the Applicants' lawyers had any regard to the relevant authorities when the founding affidavit was drafted as it is by now trite that unlawfulness cannot be sustained in respect of a cause of action that is found in the provisions of the LRA.

[49] As far back as 2016, the Constitutional Court held in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*¹¹ (*Steenkamp*) as follows:

'Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: "Unfair dismissal and unfair labour practice". Under the heading appears an indication of which sections fall under the chapter. ...

Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA.

This indication is reinforced when one has regard to the definition of "dismissal" in s 186(1). ... Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if the dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA.'

[50] In *Smith and Another v Office of the Chief Justice and Others*¹² this Court adopted the same approach where the applicants also alleged a legitimate expectation and held as follows:

¹¹ 2016 (3) SA 251 (CC); (2016) 37 ILJ 564 (CC) at paras 106 and 107.

¹² (2018) 39 ILJ 1357 (LC) at para 24 and 25.

'I deal first with the applicants' submissions regarding the alleged unlawfulness of the OCJ's failure to appoint them. In *Steenkamp*, the Constitutional Court held that there is no provision in the LRA for a right not to be dismissed unlawfully and no provision is made for any dispute procedures or processes for the enforcement of such a right. If the LRA contemplated such a right in regard to dismissals, it would have made provision for it and for a dispute procedure to be followed in disputes concerning its infringement. Nowhere in the entire LRA is there mention of the words 'dismissal' and 'unlawful' or 'invalid' in the same sentence. Yet there are many sentences in the LRA in which the words 'dismissal' and 'unfair' appear. The LRA does not contemplate a right not to be unlawfully dismissed nor does it contemplate invalid dismissals or orders declaring dismissals invalid and of no force and effect.

Specifically, the majority of the court held that:

'The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed which is provided for in s 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. The requirement for the referral of dismissal disputes to conciliation is one of the processes created by the LRA. The CCMA, bargaining councils and the Labour Court are some of the fora. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA. Indeed, the LRA even provides for special remedies for the enforcement of those rights and obligations. The special remedies include interdicts, reinstatement and the award of compensation in appropriate cases. These special rights, obligations, principles, processes, procedures, fora and remedies constitute a special LRA dispensation.'

[51] In *DEMAWUSA and Others v City of Johannesburg*¹³, the Court confirmed that the effect of *Steenkamp*¹⁴ is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), that applicant has no remedy under the LRA and this Court has no jurisdiction to make any determination of

¹³ (2020) 41 ILJ 912 (LC).

¹⁴ *Id* n 11.

unlawfulness. If a remedy is sought under the LRA, the applicant must categorise the alleged unlawfulness as unfairness.

[52] It is well established that jurisdiction is to be determined from the pleadings. In motion proceedings, the pleadings comprise the affidavits filed by the parties. As already alluded to above, in the founding affidavit, the Applicants did not place any reliance on fairness as the basis of their cause of action. They clearly framed their case on the basis of what they allege to be an unlawful termination of their contracts in circumstances where they allege that they had a legitimate expectation of continued employment.

[53] In summary: The Applicants approached this Court for relief in terms of the LRA and the cause of action as pleaded by the Applicants is one of unlawfulness, based on the alleged unlawful conduct by the Department. The Applicants' claim of unlawful termination of their contracts is not a claim contemplated by the LRA and the LRA does not confer jurisdiction on this Court to grant relief on the Applicants' pleaded case. There is no remedy that this Court can afford the Applicants to the extent that they claim that the termination of their contracts was unlawful.

[54] In view of my conclusion that this Court lacks jurisdiction to grant the relief sought, it is not necessary for me to consider whether the Applicants have met all the requirements for an interim interdict.

Costs

[55] The last issue to be decided is the issue of costs.

[56] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[57] In *Zungu v Premier of Kwa Zulu-Natal and Others*¹⁵ the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging

¹⁵ (2018) 39 ILJ 523 (CC) at para 24.

parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

- [58] Mr Ramaepadi for the Respondents submitted that costs should follow the result as this is a meritless application.
- [59] Mr Mkhize for the Applicants submitted that there should be no order as to costs as the Applicants are the most vulnerable members of society and they would be unduly burdened with a cost order. The First Applicant subsists on subscriptions from its vulnerable members and it is not a union that is financially well-off and it faces uncertainty as to its future.
- [60] In my view, this is a matter where a cost order would be appropriate. This application was drafted without due consideration of the applicable principles, the provisions of the LRA and the Constitutional Court *dicta* of *Steenkamp*¹⁶. However, the Applicants cannot be blamed for this. Their legal representatives are solely to be blamed for the manner in which their case was pleaded and presented. The Respondents however did not ask for a cost order *de bonis propriis*.
- [61] The Applicants are fighting to retain their livelihood and in doing so, they opted to approach this Court, albeit incorrectly so. In view of the position that the Applicants find themselves in, the interest of justice would be best served by making no cost order.
- [62] In the premises, I make the following order:

Order:

¹⁶ *Supra* n 11.

1. The urgent application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicants: Advocate B M Mkize

Instructed by: Ndomiso Voyi Inc Attorneys

Respondents: Advocate Ramaepadi

Instructed by: State Attorney, Johannesburg