



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 3745/18

KEABETSWE ELIZABETH MPANE

Applicant

And

**THE PASSENGER RAIL AGENCY OF SOUTH
AFRICA (PRASA)**

First Respondent

BONGISIZWE MPONDO (ADMINISTRATOR)

Second Respondent

THE MINISTER OF TRANSPORT

Third Respondent

Heard: 29 May 2020

Delivered: 9 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 9 June 2020.

JUDGMENT

Introduction:

- [1] The Applicant filed an urgent application wherein the gist of the relief sought is to the effect that the termination of her contract of employment be interdicted.

- [2] The application is opposed by the First (PRASA) and the Second (the administrator) Respondents. The Third Respondent (the Minister) filed a notice to abide by the Court's decision.
- [3] The matter was set down for hearing on 29 May 2020 and due to the Covid-19 lockdown measures, the parties presented argument via Zoom.

Background facts:

- [4] The Applicant is employed by PRASA as Group: Chief Procurement Officer in terms of a fixed term contract that is effective from 1 October 2019 until 30 September 2024.
- [5] On 5 December 2019, the PRASA Board of Control (the Board) was dissolved and on 9 December 2019, the Minister announced that he had placed PRASA under administration. The role of Group CEO (GCEO) was integrated into the role of the administrator, who was appointed to run the affairs of PRASA as a *de facto* Board of Control for a period of twelve months.
- [6] The decision to appoint the administrator is the subject of a review application that was launched by #UniteBehind in the Western Cape High Court. In the application, #UniteBehind seeks to *inter alia*, review and set aside the Minister's appointment of the administrator in *lieu* of a Board of Control and for it to be declared unlawful.
- [7] The matter between #UniteBehind and the Minister, concerning the legality of the Minister's appointment of Mr Mpondo as PRASA's administrator was argued on 26 May 2020 in the Western Cape High Court. Judgment in that matter was reserved, however the parties were encouraged to settle the matter and to revert to the presiding Judge on the issue of settlement by 2 June 2020. The outcome of the aforesaid litigation is unknown.
- [8] On 26 May 2020, the administrator issued an invitation to make representations to the Applicant. The administrator referred to previous correspondence regarding the Applicant's performance and mentioned that he had considered her response and the document that she submitted. He further referred to a recent debacle surrounding an application to the National Treasury to deviate from procurement processes, which the administrator viewed as indicative of performance failures on the Applicant's part.

- [9] The Applicant was invited to submit written submissions as to why her employment should not be terminated as a result of her unacceptable performance, which is way below and short of what is expected of an employee in her position. The Applicant's submissions were to reach the administrator by no later than 18:00 on 27 May 2020, failing which a final decision would be made without the Applicant's input.
- [10] Instead of making submissions, the Applicant approached this Court on an urgent basis for relief.
- [11] The Respondents took issue with urgency. I have considered the Applicant's submissions in support of urgency and the Respondents' averments as to why the matter should not be dealt with on an urgent basis. I do not intend to deal with the attack on urgency in detail as I am of the view that this matter deserves the Court's urgent attention. I therefore exercise my discretion to deal with the merits of this matter on an urgent basis.

The relief sought

- [12] The Applicant approached this Court for relief in the following terms:
1. That the Respondents be interdicted and restrained from issuing the Applicant with a termination letter or otherwise purporting to terminate the Applicant's employment with PRASA;
 2. Declaring that the administrator lacks the authority to terminate the Applicant's employment with PRASA;
 3. That the Respondents be ordered to refrain from harassing or threatening the Applicant with termination of her contract of employment.
 4. That PRASA and the administrator be ordered not to take any action against the Applicant pending the finalisation of the application under case number 2058/20, Western Cape Division of the High Court, Cape Town;
 5. Alternatively, that the Respondents be ordered to follow the procedures as prescribed in the Applicant's employment contract and other processes governing the relationship between the Applicant and the Respondents.

- [13] I will deal with the specific relief sought in turn.

The administrator's authority

- [14] One part of the relief sought relates to the position of the administrator and his authority to terminate the Applicant's employment.
- [15] In the founding affidavit, the Applicant submitted that the administrator has no authority to appoint and dismiss PRASA executives as his appointment as administrator is invalid.
- [16] In support of her case the Applicant explains that the appointment of the administrator is currently challenged in the Western Cape High Court under case number 2058/2020. The Applicant provided a summary of the facts in the aforesaid matter. The Applicant is not a party to the matter pending before the High Court.
- [17] The Applicant submitted that she has a clear right that the administrator lacks authority to dismiss her. She seeks an order from this Court to declare that the administrator lacks authority to terminate her employment with PRASA.
- [18] It is evident that the relief sought in this regard and the right which the Applicant seeks to protect is not to be found in her contract of employment and did not arise as a result of any breach of contract.
- [19] There are a number of difficulties with the relief that the Applicant seeks.
- [20] The first difficulty is that the Applicant seeks an order declaring that the administrator lacks authority, but in the application before this Court the Applicant failed to set out any grounds to substantiate the relief she seeks. The Applicant merely referred to the fact that the administrator's appointment is challenged in the Western Cape High Court and at best, she provided a summary of facts in the aforesaid application.
- [21] The second difficulty is whether, absent any finding or order that the administrator's appointment was invalid or unlawful, that this Court would have jurisdiction to determine or declare that the administrator lacks authority to terminate the Applicant's employment.
- [22] The proper forum to adjudicate and decide on the validity and legality of the administrator's appointment, is indeed the High Court and as alluded to, such an application is pending in the Western Cape High Court.

- [23] The Applicant failed to make out a case before this Court to show that the administrator has no authority and that this Court indeed has jurisdiction to make such a determination. The Applicant placed no facts before this Court, independent from a reference to the application pending in the Western Cape High Court, to support her case.
- [24] The Applicant has not established that she has a clear right that the administrator lacks authority to dismiss her and as such she is not entitled to such relief.

Interdicting the termination of the Applicant's contract of employment

- [25] The Applicant seeks a number of orders to the effect that the Respondents be interdicted and restrained from issuing her with a termination letter or otherwise purporting to terminate the Applicant's employment with PRASA, or from threatening to do so.
- [26] Whether or not the Applicant has a right is a matter of substantive law and the onus is on the Applicant to establish on the facts and evidence placed before this Court that she has a *prima facie* right in terms of the substantive law. The Applicant also has to prove that the right is a legal right and a right which can be protected¹.
- [27] The Applicant submitted that she has a clearly established right to be employed and to remain employed in terms of her signed contract of employment.
- [28] The question is whether the Applicant has a right to remain employed and not to have her contract of employment terminated.
- [29] The answer to this question is to be found in the terms of the Applicant's contract of employment. It is evident from a perusal of the terms of the contract that there is indeed a clause that provides for the termination of the Applicant's contract of employment.
- [30] As there is a contractual clause which provides for the termination of the contract, the Applicant has not established that she has a right not to have her

¹ The Civil Practice of the High Courts of South Africa, Herbstein & Van Winsen, 5th edition, page 1457– 1463.

contract of employment terminated and it follows that she is not entitled to the relief she seeks.

Contractual claim

- [31] The alternative relief sought by the Applicant is that the Respondents be ordered to follow the procedures as prescribed in the Applicant's contract of employment and other processes governing the relationship between the Applicant and the Respondents.
- [32] The Applicant's case is premised on the provisions of section 77(3) of the Basic Conditions of Employment Act² (BCEA).
- [33] The Applicant's case is that the Respondents must comply with all the policies and procedures before purporting to terminate her employment, as those are incorporated into the terms of her contract of employment.
- [34] The sequence of relevant events is as follows:
- [35] The administrator wrote to the Applicant on 30 March 2020 and set out his concerns about her performance and she responded to this on 31 March 2020. Another letter followed on 16 April 2020, when the administrator extended the Applicant's probationary period until 31 July 2020 due to his concerns about her performance and he had indicated that he would be monitoring her performance during the extended probationary period. To this the Applicant responded on 18 and 24 April 2020 and disputed that her contract of employment was subject to a probationary period.
- [36] On 24 April 2020, the Applicant furnished the administrator with draft performance targets to be discussed in a meeting that was proposed to take place between the parties. The administrator responded to this on 6 May 2020, stating that he was in the process of considering the documents submitted by the Applicant and that he would revert to her within 10 working days.
- [37] On 21 May 2020, the administrator asked the Applicant about Transnet's supply of stock items to PRASA, a matter that was unrelated to the previous correspondence. To this, the Applicant responded on 22 May 2020.

² Act 75 of 1997.

- [38] On 26 May 2020, the Applicant was invited to make representations as to why her employment should not be terminated as a result of her unacceptable performance.
- [39] The Applicant's version was that she was still expecting a reply from the administrator, when she received the letter of 26 May 2020, inviting her to make representations as to why her contract of employment should not be terminated as a result of her unacceptable performance. She was shocked to receive this letter as she was still awaiting a meeting to be set up to discuss her performance issues.
- [40] The administrator submitted in his opposing affidavit that he had not taken a decision to dismiss the Applicant, but that he invited the Applicant to make representations as to why he should not take such a decision, which approach he stated is in line with the requirements of the Code of Good Practice: Dismissal (Incapacity).

Analysis

- [41] Clause 2.3.1 of the Applicant's contract of employment provides for the agreement to mean the employment agreement and its annexures and any policies of PRASA which may apply in terms thereof. Clause 9.2 provides that during the currency of the agreement, the parties shall have the right to terminate the employment relationship, provided that the parties shall in all respect have complied with PRASA's internal policies and procedures, prior to such termination.
- [42] Thus for the Applicant to succeed with her contractual claim, she has to show that a policy that was incorporated in terms of her contract of employment and which is indeed applicable, was not complied with.
- [43] In the founding affidavit, the Applicant referred to her contract of employment and she set out the salient terms of her contract. She specifically referred to the terms of PRASA's disciplinary code and grievance procedure, which was attached and referred to as annexure "KEM2". The Applicant alleged that the Respondents failed to follow the rules of natural justice and to comply with the aforesaid disciplinary code when she was issued with an invitation to make representations as to why her contract of employment should not be terminated as a result of her unacceptable performance.

- [44] The Respondents' answer to this is that the Applicant has not been subjected to any disciplinary action as contemplated by PRASA's disciplinary code. The administrator's attitude is that the employer can set time periods by which an employee should respond to allegations of poor work performance and where her dismissal is contemplated, the date and time by when representations should be made. The administrator does not tell this Court as to which policy entitles him to set time periods and require representations as a method of dealing with poor work performance, more so where dismissal is contemplated.
- [45] The gist of the administrator's response is that he had informed the Applicant that he would be monitoring her performance and if a matter came to his attention that she still failed to perform, he cannot ignore it because it had happened before and it was for the Applicant to demonstrate her competency and fitness for the position she holds.
- [46] In essence the Applicant's case is the Respondent be ordered not to take any action against her without following the procedures prescribed in her contract of employment and for the Respondents to comply with the policies, incorporated into her contract of employment, before terminating her employment.
- [47] The Applicant referred specifically to clause 1.7 of the disciplinary code, wherein the objectives of the PRASA disciplinary code are set out as *inter alia*, to 'correct and eliminate unacceptable behaviour or inadequate performance when corrective discipline has failed or where no alternative corrective action can be considered'. It is evident that mention of 'inadequate performance' is made in the disciplinary code and that to the extent that poor or inadequate work performance is regarded as misconduct, the employer is bound by the disciplinary code and its provisions would apply.
- [48] To the extent that the Respondents' case is that this is not a case of misconduct, the Applicant has attached the PRASA policy on performance management and development, which provides for performance management. The performance management policy also provides for a disciplinary process to be invoked in order to address misconduct or persistent poor work performance, including issues which may have been dealt with via the formal counselling procedure. Performance issues are to be identified through the

assessment process of the performance management system. The policy further provides that 'disciplinary action is intended to encourage a poor performing employee to improve'.

- [49] It is evident from the papers placed before this Court that it is undisputed that the Applicant has a valid and existing contract of employment with PRASA and that such contract incorporates all PRASA's policies and that the termination of employment is contractually agreed to, provided that the parties shall in all respects have complied with the PRASA policies and procedures prior to termination.
- [50] The disciplinary code as well as the performance management policies form part of the Applicant's contract of employment and it prescribes procedures to be followed in the event of poor or inadequate work performance and in dismissing an employee, there ought to have been a fair process in terminating the contract of employment.
- [51] The Applicant's case is that the Respondent's invitation to make representations as to why her contract of employment should not be terminated and in all probability the termination that would follow, is in breach of her employment contract and thus unlawful. The terms of the contract of employment incorporated the disciplinary code and procedure and all other applicable PRASA policies and the administrator embarked on a process to terminate her employment against the provisions of the PRASA policies.
- [52] In my view, there is merit in the Applicant's case in so far as her cause of action is based on breach of contract.
- [53] I cannot but find that the invitation to make representations as to why her services should not be terminated and the administrator's conduct in contemplating the Applicant's dismissal, is in breach of the terms of her contract of employment.
- [54] *In casu*, the administrator displayed a wholesale disregard of the contractual terms that are binding and the policies that are incorporated therein, which in itself is an internal safeguard against an arbitrary, capricious or unprocedural dismissal. By disregarding the prescripts of the policies in the process contemplating the Applicant's dismissal, the Respondents' conduct amounted

to a breach of the Applicant's contract of employment and she is entitled to seek to enforce her contractual remedies following that breach.

- [55] The administrator acted in a high-handed manner when he adopted his own version of what he regarded to be a proper process in circumstances where he was of the view that the Applicant failed to perform adequately. In the approach he adopted, he had no regard for the contractual terms or the PRASA policies that had to be respected and complied with.
- [56] In summary: the Applicant is entitled to relief insofar as she seeks specific performance in order to enforce her contractual rights in terms of the applicable policies, before there could be any decision taken on the termination of her services. I have slightly modified the relief sought by the Applicant as a case was made out for the relief, but the prayer in which the relief sought, was not properly drafted.
- [57] To the extent that the Respondents' submitted that the Applicant has the right to refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), should her employment be terminated, and that she has sufficient alternative remedies available to her, I am inclined to follow *Ngubeni v The National Youth Development Agency and Another*³ where the question of relief has been considered and 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'.

³ (2014) 35 ILJ 1356 (LC) at para 21.

[58] In *Wereley v Productivity SA and Another*⁴ the Court confirmed that it is trite that the non-compliance with prescribed procedures might lead to a finding that a dismissal was procedurally unfair, but that the power of an arbitrator is limited to awarding compensation. The CCMA is not empowered to determine the contractual lawfulness of a decision to dismiss an employee. The contractual remedies for non-compliance with an obligatory procedure are not equivalent to the remedy for unfair dismissal under the Labour Relations Act⁵ (LRA). The Court held that it was a conceptual mistake to collapse the two causes of action simply because both concerned issues of procedural non-compliance.

[59] Let it be clear: PRASA is entitled to terminate the Applicant's employment on grounds of poor work performance, it is however not entitled to do so without following a process provided for in a policy that the parties contractually agreed to. Whether there are valid grounds relating to poor or inadequate work performance to justify the termination of the Applicant's contract of employment, is not an issue for this Court to decide.

Costs

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

[61] The Applicant seeks a cost order against the Respondents and the Respondents in turn, seeks the dismissal of the application with costs. Effectively both parties are seeking an order where costs should follow the result.

[62] I can see no reason not to follow the rule of practice in circumstances where this application was brought not in terms of the provisions of the LRA, but purely on a contractual basis where 'fairness' finds no application in deciding the issue of costs.

[63] In the premises, I make the following order:

Order

1. Prior to taking any decision to terminate the Applicant's employment, the Respondents are ordered to comply with the terms of the Applicant's contract

⁴ (2020) 41 ILJ 997 (LC) at para 41.

⁵ Act 66 of 1995 as amended.

of employment, such terms to include any applicable policies and procedures incorporated into the contract.

2. The First and the Second Respondents are ordered to pay the Applicant's costs jointly and severally, the one paying the other to be absolved.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M Meyerowitz

Instructed by: Maponya Ledwaba Inc Attorneys

For the First and Second

Respondents: Mr P Maserumule of Maserumule Inc
Attorneys