

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)
JUDGMENT**

Of interest to other Judges

CASE NO: J 539/2020

In the matter between:

**BOITUMELO GAOPALELEWE VALERIE
JANUARY (KAPARI)**

First Applicant

**THE APPLICANTS LISTED IN ANNEXURE A
TO THE NOTICE OF MOTION**

Second to further Applicant

and

OFFICE OF THE CHIEF JUSTICE

First Respondent

MEMME SEJOSENGWE N.O.

Second Respondent

Heard: 29 June 2020 (via Zoom)

Judgment delivered: The judgment was handed down electronically by circulation to the parties' legal representatives and the registrar by email on 29 June 2020 at 17h30.

JUDGMENT

VAN NIEKERK J

[1] This is the third time in as many years that the issue of the work security of Judge's secretaries has come before this court. The applicants are all employed in that capacity, on fixed term contracts that expire tomorrow, 30 June 2020. All of the

applicants have been employed on a series of fixed term contracts of one or three years' duration, some of them for a cumulative period more than 10 continuous years. In these proceedings, instituted on an urgent basis, the applicants seek an order declaring the first respondent (the OCJ) to have committed an unfair labour practice by advertising their current positions; declaring them to be permanent employees in their current positions; alternatively, declaring them to be appointed on fixed term contracts on the same terms and conditions. In the alternative to these prayers, the applicants seek an interim interdict staying the interview and placement of candidates for their current positions pending the outcome of a grievance escalated by the applicants to the second respondent on 26 March 2020.

[2] The material facts are not in dispute. As I have indicated, the applicants are all Judges' secretaries, employed by the first respondent at different times at the High Court, Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg. Ever since their engagement, they have been employed on the basis of fixed term contracts. The applicants' current contracts expire on 30 June 2020. On 22 May 2020, the OCJ advertised as vacant the positions currently filled by the applicants, and invited suitable applicants to apply for appointment. The applicants in these proceedings are not barred from applying for the positions concerned, but they would rank with any other applicants for the position.

[3] The applicants' concern about their security of employment was raised as long ago as January 2019, when they wrote a letter to the office manager enquiring about their employment status. On 29 March 2019, they wrote a letter to the OCJ's HR manager with the same request. The matter ultimately resulted in a CCMA hearing on 31 October 2019, when the applicants were told by the presiding commissioner that their referral was premature, since the internal grievance procedure had not been exhausted.

[4] On 5 December 2019, the applicants sent letters to the court manager requesting permanent appointment. The court manager requested them to lodge a formal grievance, which she agreed to escalate to the OCJ's Gauteng provincial service

centre. That process was initiated on 11 December 2019. In their grievance forms, the applicants sought to be declared permanent employees of the OCJ. Receipt of the grievance was acknowledged on 18 December 2019.

[5] On 14 February 2020, almost two months later, the applicants received an acknowledgment of receipt and confirmation that *'the Human Resources section is dealing with the matter...'*

[6] On 20 March 2020, the provincial head: services centre Gauteng, Ms. MJ Mokoena, wrote a letter to the applicants in which she stated that 'the Department is of the view that your grievance had been properly addressed and that you must indicate within five (5) working days whether you consider your grievance resolved on this level or should you wish to refer the matter to the next level'. The terms on which the grievance was addressed was no more than an assertion that the applicants had applied for and been appointed to fixed term contract posts, which they had accepted.

[7] The applicants then sought to escalate their grievance to the second respondent. They did so in a letter dated 26 March 2020. They heard no more until 22 May 2020, when one of the applicants noticed that his post and those of the other applicants had been advertised. On 26 May 2020, the first applicant addressed an email to the second respondent noting that no response had been received to the letter of 26 March 2020, and requesting an urgent response. The second respondent did not respond. On 5 June 2020, the applicants' attorney of record sent an email to the second respondent requesting that the recruitment of new candidates be cancelled and that the applicants be permanently appointed or re-appointed on the same terms. There was no response to this letter. On 10 June 2020, the applicants' attorney telephoned the second respondent's office several times, without any one answering his call. The present application was filed on 12 June 2020.

[8] First, I accept that the application is urgent. To the extent that the respondents contend that any urgency is self-created, it should be recalled that the applicants had been attempting for some time to resolve their grievance through means other than

litigation, and that it was in essence the OCJ's decision to advertise their positions that precipitated the current proceedings. During the course of the latter half of May 2020 and well into June 2020, the applicants sought a response from the OCJ to the grievance that they had lodged. Regrettably, as I have noted, correspondence went unanswered, as did efforts by the applicant's attorney to make telephonic contact. The last such effort was made on 10 June 2020. The present application was filed two days later. I fail to appreciate how the applicants can be held culpable in circumstances where they have attempted to pursue their grievance through the prescribed channels and avoid the cost of court proceedings, only to have their attempts met with resolute silence from their employer. In any event, the applicants' contracts expire tomorrow, and given the backlog in this court's opposed motion roll, any relief in the ordinary course would not be available to them within the next 12 months. For me to find that the application is not urgent and that it should be heard in the ordinary course would defeat the purpose of the application. I am satisfied that the application should be heard as a matter of urgency.

[9] The applicants rely on s 23 of the Constitution (specifically, the right to fair labour practices), in support both of the declaratory order they seek that the OCJ committed an unfair labour practice by advertising their positions, and the declaratory order to the effect that they are permanent employees in their current positions; alternatively, that they be appointed on a further fixed term contract, on the same terms and conditions. The submission made on behalf of the applicants is that the Labour Relations Act (LRA) does not afford them a remedy since the definition of 'unfair labour practice' in the LRA makes no mention of advertising already-occupied positions, and that in these circumstances, they are entitled to rely directly on s 23. The respondents submit that an order to this effect would infringe on the principle of subsidiarity.

[10] The principle of subsidiarity requires that where legislation is enacted to give effect to a constitutional right, reliance must be placed, in the first place at least, on the provisions of the specific legislation (see *Baron and others v Claytile (Pty) Ltd & another* 2017 (5) SA 329 (CC)). In *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight*

and Dock Workers [2012] 12 BLLR 1267 (LAC), Murphy AJA said the following, at paragraph 18 of the judgment:

‘In my view, the Labour Court erred in declaring the award of increased remuneration inconsistent with section 9 (equality) and section 23 (fair labour practices) of the Constitution. Where legislation has been enacted to give effect to a constitutional right, a party may not bypass that legislation and rely directly on ... the general provisions of constitutional right to fair labour [practices in section 23 or the equality clause in section 9 of the Constitution.]’

[11] This is a principle recognized and applied by the Constitutional Court in *Minister of Health v New Clicks SA (Pty) Ltd and others (Treatment Action Campaign as amicus curiae* 2006 (2) SA 311 (CC) and *SA National Defence Union v Minister of Defence & others* [2007] 9 BLLR 785 (CC) at paragraphs 50-51; see also *NAPTOSA and others v Minister of Education, Western Cape, and others* 2001 (2) SA 112 (C).

[12] To the extent that the applicants rely on *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA) to claim direct reliance on s 23 (1), it should be recalled that that case dealt with a member of the SANDF. Members of the SANDF are expressly excluded from the application of the LRA (see s 2). The court's finding that Murray was entitled to rely directly on his constitutional right to fair labour practices was expressly predicated on his exclusion from the LRA. The applicants in the present instance are not excluded from LRA; they enjoy full protection of the rights that the Act confers.

[13] In a recent judgment delivered by the High Court (*Moake & another v Telkom Soc Ltd & another*, 15246/2019, Movshovich AJ, 6 May 2020) the court was prepared to entertain a claim where the applicant relied directly on s 23 (1) of the Constitution. (See PAK le Roux ‘Fairness outside the Labour Relations Act – Widening the scope for the direct approach on Constitutional Rights’ *Contemporary Labour Law* vol 29 No 6 June 2020.) The court said the following about the principle of subsidiarity, referring to *Pretorius v Transnet Pension Fund* [2018] 7 BLLR 633 (CC):

[34] I think that, if the principle of subsidiarity is to develop in future, there may indeed be a distinction which will need to be drawn between an alleged unfair labour practice arising from conduct connected with the implementation of LRA processes and procedures, and an alleged unfair labour practice in the context of conduct not thus connected. It seems to me that the case for the application of the principle of subsidiarity in the former is more compelling than the latter. On the face of it, certain elements of the applicants' case may tend towards the former scenario rather than the latter.

[35] Nevertheless, given the Constitutional Court's most recent judgment on the topic, in *Pretorius*, the supple nature of the subsidiarity principle and the fact that the applicants in their pleadings situated their complaint in the context of the VERP/VSP process, I am prepared to accept that the applicants' claim under section 23(1) is not proscribed by subsidiarity.

[14] The dictum in *Pretorius* did no more than express the view that the subsidiarity principle was not a 'hard rule' (see *My Vote Counts v Speaker of the National Assembly* 2015 (1) SA 132 (CC)) and that in the context of an exception, an unfair labour practice claim against a pension fund should be permitted. This finding does not expressly displace the principle of subsidiarity as it finds expression in the *New Clicks*, *SANDU* and *NAPTOSA* judgments. I remain bound by those authorities. *Pretorius* might open the door to direct reliance on s 23 (1) where the LRA (and the definition of unfair labour practice in particular) fall short of a full expression of the constitutional right, but it does no more.

[15] To disregard the principle of subsidiarity and grant access to this (and other superior courts) on the basis of a direct application of the constitutional right to fair labour practices raises significant issues of principle. Halton Cheadle, who was instrumental in drafting both the LRA and the Constitution, observes that a right to fair labour practices is '*an odd right to include in a Bill of Rights*' and that its insertion into the interim Constitution was part of a package of provisions to secure the support of the public service for the new constitutional dispensation, and in particular, the restructuring

and transformation of the public sector (Davis, Cheadle and Haysom *Fundamental Rights in the Constitution: Commentary and Cases* at 212). Should the constitutional right to fair labour practices be held to extend beyond the traditional triad (i.e. to test the validity of legislation that gives effect to the right, to interpret that legislation and to develop the common law), and should it become the basis for the development of new, substantive rights, there is a clear danger that the finely balanced agreement that the LRA represents may be unraveled by well-meaning but enthusiastic judges. This is especially so where persons covered by the legislation concerned seek to develop a definition of unfair labour practice beyond that which already exists. Not least, there is the prospect of a 'two stream' development of labour law, an issue that the LRA sought to eliminate and address by establishing a specialist labour court.

[16] In short, it seems to me that to seek relief based on the direct application of s 23 (1) of the Constitution is not an option open to the applicants. Should the applicants contend that the provisions of the LRA fail adequately to give expression to their constitutional right to fair labour practices, their remedy is to challenge the constitutionality of that Act.

[17] The applicants also relied on the judgment in *Luvuyo Nowalaza and others v Office of the Chief Justice and another* (J1177/2017, 15 June 2017, Coetzee AJ) to submit that this court is empowered to grant an order declaring them to be permanently employed by the first respondent. That case also concerned Judges' secretaries, employed on fixed term contracts. The court found that the applicants had a reasonable expectation of permanent employment and declared them to be permanent employees of the OCJ. In response to the defence raised by the OCJ that it was obliged in terms of the relevant regulations and policies to advertise vacant posts (even those rendered vacant on account of the expiry of a fixed term contract entered into with the incumbent employee) and interview suitable applicants for the post, the court held that there was nothing in law that prevented the applicants from harbouring a reasonable expectation of further employment without having to comply with the provisions of the Public Service Act (PSA) and its regulations (see paragraph 97 of the judgment). To the extent that

there was a conflict between s 186 (1) (b) (i) of the LRA and the PSA, the court held that the LRA trumped.

[18] While I have no difficulty with the conclusion that in circumstances such as the present, the rights of an employee engaged in terms of a fixed term contract trump any prescribed recruitment and selection processes where the incumbent employee has a reasonable expectation of renewal of the contract or of indefinite employment, the legal basis on which the court declared the applicants to be indefinitely employed is less clear. I share the reservation expressed by my colleague Prinsloo J in *Smith & another v Office of the Chief Justice & others* (2018) 39 ILJ 1357 (LC) that to the extent that the court in *Nowalaza* based its finding on s 186 (1), that section does no more than define a 'dismissal' for the purposes of the LRA. It certainly does not establish any substantive right to continued employment (at paragraph 21 of the judgment in *Smith*).

[18] The dilemma that the applicants face of course, is that their clearest recourse against the first respondent arises only once they are dismissed. In the present circumstances, that would require a termination of their fixed-term contracts, a reasonable expectation of renewal of the contract or of indefinite employment. Section 191 defines the date of dismissal, generally the trigger for the exercise of any right against unfair dismissal. This is the date on which the contract terminated or, in the case of the failure to renew a fixed term contract, the date on which the employer notified the employee of the intention not to renew the contract.

[19] Section 198B of the LRA regulates the rights of employees engaged on fixed term contracts and in general terms, provides that an employer may employ an employee on a fixed term contract or successive contracts for longer than three months of employment only if the nature of the work is of a limited or indefinite duration, or the employer can demonstrate any other justifiable reason for fixing the terms of the contract. Employment in terms of a fixed term contract in contravention of this provision is deemed to be of indefinite duration (see s 198B (5)). The application of this section is limited to those employees earning below a prescribed threshold (see s 198B (2) (a)). The court was advised that the applicants' earnings exceed the threshold, and that the

remedy of a declaration of indefinite employment in terms of s 198B is not available to them.

[20] In any event, it is not open to the applicants to seek a final order based on any of the above provisions in this court. Section 157 (5) is clear – this court does not have jurisdiction to adjudicate an unresolved dispute if the LRA or any other employment law requires the dispute to be resolved through arbitration. Unfair labour practice disputes ordinarily are required to be resolved through arbitration, as are dismissal disputes where the employee claims to have a reasonable expectation of the renewal of a fixed term contract, or of indefinite employment. The applicants no doubt appreciated that they may find themselves without a substantive remedy on the day and for this reason, filed an amended notice of motion in terms of which they sought interim relief. In their amended notice of motion, the applicants seek what amounts to an interim order staying the interviewing and placement of candidates as Judges’ secretaries pending the outcome of the grievance escalated to the second respondent on 26 March 2020.

[21] This court has the power to grant interim relief, even if the applicant’s final remedy lies elsewhere (see, for example, *Jiba v Minister of Justice and Constitutional Development* [2009] 10 BLLR 989 (LC)). The requirements for interim relief in this court are no different to those that apply in the High Court - a clear right or a right *prima facie* established though open to some doubt, a well-grounded apprehension of irreparable if the interim relief is not granted and the ultimate relief sought is granted, a balance of convenience in favour of granting interim relief, and the absence of an any other satisfactory remedy (see *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C)).

[22] It is not in dispute that the applicants have lodged a grievance in which they seek permanent employment, alternatively, the extension of the fixed-term contracts. This grievance has been escalated to the OCJ without success. The applicable procedure provides for the grievance to be forwarded to the Public Service Commission (where the grievance is currently lodged) for a recommendation, and thereafter to the relevant sectoral council. I was informed that because the applicants are contract workers, the

appropriate dispute resolution agency is the CCMA. Be that as it may, the fact remains that there is a live, legitimate grievance to be dealt with in terms of the applicable procedure. If the applicants are not granted interim relief, they will cease to be employees within the next 48 hours and the grievance process will be rendered nugatory. The only alternative available to the applicants is to accept a termination of their contracts, and claim unfair dismissal. This is not a viable alternative – it will deprive them of employment in circumstances where they have been continuously employed for years (some of them for more than a decade) It is also a consequence that they have sought to avoid for more than a year by engaging with their employer, who has been less than diligent in any attempt at joint problem-solving. In my view, the applicants have established that they are entitled to an interim order. The order is limited to those applicants who are the original parties to the present application. The applicants filed an application for joinder shortly before the hearing. I make no ruling in this application. It is not clear to me that the circumstances of those sought to be joined are similar to those of the applicants. IF they are, I trust that the OCJ will treat those affected on the same basis as the present applicants in terms of the order recorded below, and that it will not be necessary for those cited as the third to thirtieth respondents in the joinder application to file an application in their own right.

[23] Finally in relation to costs, I must take into account the fact that the applicants' have substantially succeeded in their application, but also the fact that the filing of the present application is by and large the consequence of a failure by the relevant officials of the OCJ to respond to the applicants' grievance within a reasonable time, and to respond to their attorney's attempts to contact them by email and telephonically. This matter ought never to have reached the point of litigation - the application of prudent human resources management would have avoided this consequence entirely. As I indicated at the outset, this is the third application before this court of which I am aware where Judges' secretaries employed by the OCJ have had to resort to litigation to advance their interests. In the answering affidavit, much of the explanation for the unresolved issues relating to the terms of appointment of Judges' secretaries concerns practices inherited from the Department of Justice, the need to establish policies and

procedures when the OCJ was established in April 2013, and the like. The OCJ was established more than seven years ago. That is more than sufficient time to address what is the manifest inequity of requiring long-serving employees to continuously re-apply for their jobs, and the affront to their dignity that is the inevitable consequence. The regrettable response by the OCJ's management has been to hide behind the terms of the fixed term contract and ignore the reality of loyal and long-serving employees with a legitimate interest in the security of their employment.

[23] Having regard to all of the relevant facts and circumstances, and in the exercise of the broad discretion conferred by s 162 of the LRA, the interests of the law and fairness are in my view best satisfied by an order that the first respondent pays the applicant's costs.

I make the following order:

1. Pending the final outcome in a dispute resolution agency with jurisdiction of the grievance lodged by the applicants on 26 March 2020:
 - a. the applicants are to remain in the employ of the first respondent, on the same substantive terms and conditions of employment; and
 - b. the respondents are interdicted and restrained from interviewing and/or placing any candidates into any of the positions advertised by the first respondent on 22 May 2020 and which are currently occupied by any of the applicants.
2. The first respondent is ordered to pay the costs of the application.

André van Niekerk
Judge of the Labour Court

APPEARANCES

For the applicants: Adv. E van Graan SC, with him Adv. P Kirsten, instructed Molebaloa Attorneys (pro bono)

For the respondents: Adv. M Rantho, instructed by the state attorney

