



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS87/18

In the matter between:

**INNOCENTIA LEBOGANG MOLEFE & 11
OTHERS**

Applicant

and

SOUTH AFRICAN POLICE SERVICE

Respondent

Heard: 22 April 2024 & 18 June 2024

Delivered: 11 April 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is a referral in terms of Rule 6¹ of this Court's Rules wherein the applicants were dismissed for operational requirements by the respondent. The applicants contended that their dismissal was both substantively and procedurally unfair. There were 12 applicants in these proceedings. Four of the applicants are deceased, namely T. Mekgale L Molefe, M Mogoboya, K Meso. One of the applicants, namely Mpho Masenya, is currently employed elsewhere and does not seek reinstatement but rather compensation. The other applicants seek reinstatement as a relief.

[2] The Respondent is the South African Police Service.

The relevant facts

[3] The applicants were employed by the Respondent under a temporary employment contract to guard trial awaiting prisoners at hospitals. The applicants' employment commenced in 2003 and 2004, respectively. The applicants' contracts were not supposed to have been extended beyond 12 months from the time the contracts started. The applicants were in the service of the respondent until 5 June 2015, when they were verbally dismissed.

[4] In 2008, the respondent issued a national instruction to regulate the employment of temporary employees. The applicants were not considered to be employed on a permanent basis as they did not meet the criteria to be employed on a permanent basis. Furthermore, in 2008, the applicants were employed on special contracts for a duration of 12 months. The special contracts were not supposed to be extended beyond 12 months period without the approval of the National Commissioner of the respondent.

[5] The respondent's Head Office issued a circular dated 6 August 2014 wherein it directed that temporary employees may no longer be utilized as guards at the medical facilities. Despite the circular, the applicants continued rendering their

¹ The repealed Rules.

services and continued guarding awaiting trial prisoners at hospitals until their dismissal.

[6] The respondent conceded that the applicants were dismissed without following the due procedure set out in section 189 of the Labour Relations Act².

Evidence

On behalf of the respondent

[7] Brigadier Kemp, the only witness for the respondent, testified that he has been in the employ of the respondent for thirty-nine (39) years. In 2004, he was employed as a section commander promotion service in the Human Resources Management division of the respondent, and he was based at the National Office. In 2004, his duties included, amongst others, administering all promotions within the service. He held this position from 1 September 1998 until 31 January 2015.

[8] A police reservist is someone appointed in terms of section 48 of the South African Police Service Act³ and performs a voluntary service (not paid a salary). A police reservist is a member of the service if they book on duty and when they are off duty, they are not members of the service. Police reservist perform different categories of duties, including, amongst others, crime prevention support and being a pilot.

[9] Every province has a reservist co-ordinator. Police reservist renders only 16 hours per month. In 2004 the applicants were employed as temporary or casual workers. The applicants will guard prisoners in the hospital, and they will thereafter submit claims for hours and days worked. The applicants were required to compile a written and signed schedule containing the time period worked and to specify the services rendered according to his or her agreed appointment.

² Act 66 of 1995, as amended.

³ Act 68 of 1995.

[10] The purpose of the national instruction 3/2007 was to regulate the appointment, utilization and conditions of service of temporary employees in the service. The national instruction 3/2007 provides that the service of the temporary employee may also be terminated in terms of applicable policies and procedure due to (a) misconduct, (b) poor work performance, (c) incapacity due to ill health or injury, or (d) operational requirements. In terms of the national instruction there are different categories of temporary employment.

[11] The first category is an appointment on a casual basis, wherein a person is appointed on a casual basis (i.e. on a day-to-day basis) to do a once-off task or project provided that he or she works for a period of less than 24 hours per month. The second category is a temporary appointment under a special contract. This applies when a person is appointed under a special contract for a specific task or project for a fixed time or for a specific task for a period of no longer than twelve (12) calendar months (this category excludes a casual employee or an employee to whom a retirement age applies. If circumstances require that an appointment under a special contract be for a period exceeding twelve (12) calendar months, approval must be obtained from the Divisional Commissioner: Personnel Services, who may grant such approval on good cause shown.

[12] The national instruction 3/2007 further states that the continuous reappointment of a temporary employee must be limited to extraordinary circumstances as it may create an expectation of permanence.

[13] The applicants fell into the category of casual workers who have been appointed before or on 29 February 2008 and who have not performed duties on a regular basis (i.e. all or most of the working days and months) since 29 February 2008. The applicants did not work every day of the month.

[14] In 2008, he was tasked to spearhead a team to administer the permanent employment of temporary or casual workers. Employees were invited to apply to be appointed permanently. It was a once-off concession. The criteria used to appoint employees on permanent basis was that a casual worker must have been appointed

as a casual worker before or on 29 February 2008 and must have performed duties on regular basis (i.e. all or most of the working days and months) since 29 February 2008. The other criteria was that the employees had to be suitable to be appointed on permanent basis, no pending criminal cases unless condoned by the National Commissioner and accept employment at salary level 3 as a security officer. The applicants did not meet the criteria as they did not work on a regular basis

[15] Since the introduction of the national instruction 3/2007, it was no longer possible for the station commanders to appoint temporary employees (casual workers). The appointment of temporary employees may only be authorized by the relevant Provincial Commissioner or Divisional Commissioner based on a specific need.

[16] After the applicants failed to be employed on a permanent basis, the applicants were offered a special contract for 12 months as per the national instruction 3/2007. The applicants' special contracts were renewed once with the approval of the respondent's head office.

[17] Deputy National Commissioner: Policing issued a circular dated 6 August 2014. The circular was sent to all Divisional Commissioners, Provincial Commissioners and Section heads. The Deputy National Commissioner: Policing issued an instruction that no person must be appointed on a temporary basis to perform guard duties at hospitals. Only functional members of the service and trained Police reservists are allowed to perform guard duties at hospitals. At the time when the circular was issued, the applicants were employed as temporary employees.

[18] On 5 June 2015, the applicants were verbally informed not to come to work as they were no longer allowed to guard prisoners at hospitals. Brigadier Kemp further testified that the reinstatement of the applicants is impractical in that the applicants were paid as and when required to work. The services of the applicants are no longer required as the temporary employees who were employed on a permanent

basis as security guards are currently employed as administration clerks at Kagiso SAPS.

[19] Under cross-examination, Brigadier Kemp confirmed most of the evidence in chief. Nothing turned on cross-examination of Brigadier Kemp.

On behalf of the applicants

[20] Mr Montoe, the only witness for the applicants, testified under oath that he started working for the respondent in 2000 as a reservist constable, and he was working without pay. In 2004, the Area Commissioner Matshabi opened a guarding unit. He started performing guarding services, and he was posted at Leratong Hospital to guard prisoners. He was offered a 12 months contract working shift A, i.e. four days in and four days out. The contract was renewed in 2005. He continued working as normal from 2005 until 2015, without any new contract.

[21] He confirmed that he was employed as a casual worker. However, from 2005 until 2015, he was employed on a permanent basis. His conditions of service did not change, and he used a form known as SAP 15 to claim for hours and days worked.

[22] During March 2015, they were called by Brigadier Molegae and the station commander of Kagiso police station. They were called into a boardroom and told by the Brigadier that he was stopping the guards. Brigadier Molegae, did not provide them with reasons why he was stopping the guards at the hospital. They continued working until the station commander told them that they are no longer needed at the hospital. He was not aware of the national instruction 3/2007.

Evaluation

[23] On 5 June 2015, the applicants were informed that they were no longer needed as guards at the hospital. The applicants did not commit any misconduct or have poor work performance. What happened on 5 June 2015 to the applicants was a no-fault dismissal. Consequently, the applicants were dismissed for operational

requirements. Operational requirements are defined in the Labour Relations Act as requirements based on the economic, technological, structural or similar needs of an employer.

[24] The Deputy National Commissioner: Policing issued a circular on 2014-08-06 to all divisional commissioners, all Provincial Commissioners, all Commanders (Human Resource Development), all section Heads and to all Deputy National Commissioners, with the subject: "*Prisoner Affairs: Escapes and Other Offences by Prisoners: Guarding of Persons in Custody at Hospitals*". The circular stated:

'B1. It has come to the attention of this office that Station Commanders are employing persons in the Service on a temporary basis, as warders to perform guard duties at hospitals. These temporary employees are not trained in the relevant detention procedures to ensure secure custody of persons at hospitals.

2. In order to ensure the safe custody of persons in custody at hospitals, treatment centers or any other medical facilities, the relevant Station Commander must ensure that the guarding duties are performed according to SO (G) 361.

3. No person must be appointed on temporary basis to perform guard duties at Hospitals. Only functional members of the Service and trained Police Reservists are allowed to perform guard duties at hospitals.'

[25] The applicants were not employed as functional members or Police reservists. The applicants were employed as temporary employees or casual employees at the time when the above-mentioned circular was issued. The applicants, as per the circular, could no longer perform guarding duties at hospitals.

[26] The national instruction 3/2007 recognizes that the applicants as temporary employees/casual employees may be dismissed for operational requirements. Dismissal based on operational requirements is regulated by the Labour Relations, especially section 189. The respondent was expected to follow the procedure laid out in section 189(3) of the Labour Relations Act. The respondent conceded that it

did not follow any procedure in dismissing the applicants for operational requirements.

[27] The respondent's standing order (General) 361 at clause 14 provides that:

Guarding in hospitals

'[1] In order to ensure the safe custody of a person in custody in a hospital, treatment centers or any other medical facility, the relevant station commander must see to it that the respective roles and responsibilities are clearly defined and stated in the job descriptions and Performance Enhancement Process documents of the members performing the transportation, guarding and escort duties of persons in custody. These instructions must fall within the ambit of existing rules, regulations and policy of each hospital or medical facility where a person in custody is to be guarded and must prevent a person in custody from escaping.

[2] If a person in custody has to proceed from one place to another in a hospital or treatment center, (e.g. to the theatre or the toilet), the member who performs the guarding must accompany such a person in custody as far as it is practicably possible and ensure that the person cannot escape.

[3] The member guarding the person in custody must strictly comply with instructions as set out in their job descriptions and do everything in their power to ensure the safe custody of the person in custody by means of utilization of the required restraining measures.'

[28] Section 189(3) of the Labour Relations Act required the respondent to issue a written notice to the applicants inviting them to consult and to disclose all the relevant information, including but not limited to: reasons for proposed dismissals, the alternatives that the employer considered before proposing dismissal, and the reasons for rejecting each of those alternatives, the number of employees likely to be affected and the job categories in which they are employed, the proposed method of selecting which employees to dismiss, the time when or the period which, the dismissals are likely to take effect, the severance pay proposed, any assistance that the employer proposes to offer to the employees likely to be dismissed.

[29] Consultation is an important part of the section 189 process under the Labour Relations Act. A joint consensus-seeking process is required between the applicants and the respondent In *SA Clothing & Textile Workers Union & others v Discreto*⁴- *A Division of Trump & Springbok Holdings (SACTWU)*, the Labour Appeal Court (LAC) held that:

‘The need to consult before a final decision on retrenchment is taken, is said to found its rationale in both pragmatism (the need avoid retrenchment altogether or at least to minimize dismissals and mitigate their consequences) and principle (to give employees a chance to be heard and to avoid or minimize industrial conflict.’

[30] Consultation must take place once a possible need for retrenchment is identified. As soon as the circular dated 2014-08-06 was issued, the respondent ought to have realized that there was a need to retrench the applicants as their services were no longer required to guard prisoners at hospitals. The respondent failed to consult the applicants prior to their dismissals. This renders the dismissal of the applicants procedurally unfair.

[31] Section 188(1) of the Labour Relations Act provides that:

- ‘(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
 - (a) that the reason for dismissal is a fair reason-
 - (i) related to the employee’s conduct or capacity; or
 - (ii) based on the employer’s operational requirements;
 - and
 - (b) that the dismissal was effected in accordance with a fair procedure.’

[32] Was there a fair reason which rationally justified the retrenchment of the applicants. From the evidence of Brigadier Kemp, it is clear that once the circular dated 2014-08-06 was issued, a justified and *bona fide* reason existed to retrench the applicants. This is so because the applicants were employed as temporary or casual employees. They were employed in this manner since 2003 or 2004

⁴ 1998 ILJ 1451 (LAC); [1998] 12 BLLR 1228 (LAC) at para 7.

respectively. The temporary employees were appointed by station commanders or Provincial Commissioners as and when required to do specific work. The applicants, given the circular, could not continue guarding prisoners at the hospital.

[33] The applicants were never employed as permanent employees. The evidence of the applicants that they were employed as permanent employees is rejected. The applicant failed to adduce any proof that they were employed as permanent employees from 2008. The undisputed evidence of Brigadier Kemp was that the applicants were not employed as permanent employees when the once of concession took place in 2008 as they did not meet with the set criteria.

[34] One of the significant indications that the applicants did not meet the set criteria to be employed on a permanent basis was that the applicants did not work regularly prior to 29 February 2008. The applicants failed to challenge the evidence of Brigadier Kemp in this regard.

[35] The test to determine a fair reason for dismissal based on operational requirements was set out in *SACTWU*⁵, the LAC held that:

‘The function of a court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer’s ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges this is to enquire whether the legal requirements for a proper consultation process have been followed and, if so, whether the ultimate decision is operationally and commercially justifiable on rational grounds, having regard to what happened in the consultation process. It is not the court’s function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision, properly taking into account what emerged during the consultation process.’

⁵ 1998 19 ILJ 1451 (LAC); [1998] 12 BLLR 1228 (LAC).

[36] In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*⁶, the LAC held that:

‘... The word ‘fair’ introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.’

[37] Given the fact that the applicants were not permanent employees, they are not functional members and also not police reservists, the applicants were impacted by the circular dated 2014-08-06. The changes to the guarding of prisoners at hospitals were *bona fide* and rationally justified, especially taking into consideration the standing order (General) 361. The ultimate decision to retrench the applicants was, therefore, genuine and not a sham. There was, therefore, a fair reason for retrenching the applicants.

[38] Since the dismissal of the applicants was only procedurally unfair, the applicants are entitled to compensation. Section 194(1) of the Labour Relations Act provides that:

‘The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee’s conduct or capacity or the employer’s operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but

⁶ (2001) 22 ILJ 2264 (LAC); [2001] ZALAC 19 at para 19.

may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[39] In *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk*⁷, the LAC held that: 'The requirement that an award of compensation be 'just and equitable in all the circumstances', envisages that the Labour Court will be informed about all the circumstances which may bear upon justice and equity. The starting point should be the injustice and harm suffered by the employee and the conduct of the parties. Equity requires proper consideration of the interests of both parties.'

[40] The respondent dismissed the applicants without following the proper procedure. No attempt whatsoever was made by the respondent to consult with the applicants, and no attempt was made by the respondent to consider any alternatives, if there were any, before dismissing the applicants.

[41] The conduct of the respondent in dismissing the applicants without an opportunity to be heard is a factor to take into consideration. It was not enough for the respondent to inform the applicants that their services were no longer required at the hospitals. The respondent had more than enough time to consult with the applicants immediately upon issuing of the circular dated 2014- 08-06.

[42] This Court exercises its discretion to award compensation to each applicant equivalent to ten (10) months.

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

Order

1. The dismissal of the applicants for operational requirements was procedurally unfair but substantively fair.
2. The respondent is ordered to pay each applicant ten (10) months of compensation calculated at the rate of their pay at the time of dismissal.

⁷ 2020 41 ILJ 1360 (LAC); [2020] 6 BLLR 549 (LAC) at para 50.

H Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv M Moloi
Instructed by: Kabai Attorneys

For the Respondent: Adv N Mncube
Instructed by: State Attorney