

NOT REPORTABLE

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO: D818/00

IN THE MATTER BETWEEN

APPLICANT

AND

RESPONDENT

JUDGMENT

[1] In this matter the applicant filed an application in which he seeks the following relief:

(a) An interdict restraining the respondent from terminating his employment pending the outcome of the arbitration hearings between Mitusa v Portnet under case no. KN 52445.

(b) An order reinstating the applicant in the employ of the respondent with immediate effect, and thereafter interdicted and restrained from terminating the employment of the applicant pending the outcome of the proceedings under case no. KN52445 pending at the CCMA.

[2] The application is being opposed by the respondent who also took three points in limine being the locus standi of the applicant to bring the present application in the light of the fact that he belongs to a union and that the union had to institute the present proceedings. The second point was that there is a similar matter pending at the CCMA instituted by the applicant. The third point is that at the time the present application was launched the applicant's services had not been terminated and for that reason this action is premature.

[3] There were other preliminary issues the court had to deal with. Those were in regard to the late filing of the replying affidavit by the applicant and the late filing of the heads of argument. I will return to this later.

[4] The applicant was employed by the SADF as a Naval officer. On 24th March 1999 an advert appeared in the Sunday Times for the recruitment of Navy personnel to join the respondent as tugmasters. One of the requirements was a Naval Watch Keeping certificate. The applicant held this certificate. It was also stated that opportunities for self-realization and career advancement existed within the respondent.

[5] On the 24th April 1997 the chief directorate-shipping of the department of transport published a marine circular No. 10 of 1997. I now set out the important parts of this circular:

“1. In the continued development of its policy to allow the employment of naval officers on commercial vessels and in discussions with Portnet, the department has agreed to their employment on Portnet tugs subject to the following conditions:

(a) The employment is permitted on exemption in terms of section 83 of the Merchant Shipping Act

(b)

(c) because the officer does not hold a STCW equivalent certificate, The exemption is for port limits only and not for voyages to sea

(d)

(e) the application for exemption is to come from Portnet.

2. The above is an interim measure. Portnet is developing a training programme and plan to take officers through from rating to master. There will be a programme for certificates limited to port operations and another to enable the officers to obtain an STCW endorsement to his or her certificate of competency.

3. It is the aim of the programme to slot naval officers into these training programmes and

in so doing, dispense with the need for exemption. Should a Naval Officer want to obtain a Deck Officer certificate of competency with STCW endorsement, the current system and practice calls for him or her to show proof for the issue of a Deck Officer Class 3 certificate of competency.”

[6] The applicant and other naval officers were employed as tug masters by the respondent. The applicant worked under a temporary exemption issued in terms of section 83 of the Merchant Shipping Act. The exemption was issued by the Department of transport. These exemptions were a temporary measure to enable the officers to obtain the necessary qualification to become tug masters for the purpose of operating commercial vessels. The exemptions enabled the officers to operate within the port limits. The officer had to obtain the STCW certificate. In terms of circular NO 10/1997 a programme for this certificate would be available within the respondent

[7] The respondent developed an internal qualification which was accredited by SAMSA. This qualification did not qualify the officers to obtain the STCW certificate. The officers saw this as a unilateral change of employment conditions as contained in the contract of employment. A dispute was declared and the matter was conciliated. It went on arbitration in Port Elizabeth under the CCMA cas NO. EC 16971. The Commissioner found that the employer (Respondent) had committed unfair labour practice by not allowing the employees to gain training to obtain the STCW certificate.

[8] I will not deal with other issues raised and decided at the arbitration for the purpose of this application.

[9] The applicant was given notice of termination of employment for operational reasons on the grounds that respondent had been notified that SAMSA, the controlling body of the marine industry had decided to withdraw the exemption.

[10] The applicant approached this court for an interdict preventing the respondent from

dismissing him pending the outcome of an arbitration hearing between his union MITUSA v Portnet under case No. EC 16971. This application was brought before the award was issued in case No. EC 16971. The award was issued in favour of the UNION on 4th July 2000.

[11] Applicant has sought amendment to have the respondent interdicted and restrained from terminating his employment pending the outcome of the arbitration hearing in case No KN 52445. In addition to this applicant is seeking an order of reinstatement pending the outcome of the arbitration hearing. I must mention that the award in EC 16971 went in favour of the Union.

[12] I will now deal with the points raised in limine. The first point is that the applicant has no locus standi to bring these proceedings as he belongs to the union. It was submitted that in terms of the Recognition Agreement the Union should be the party instituting these proceedings: I have been provided with the collective agreement between the respondent and MITUSA the trade union of which applicant is a member. Clause 3.1 of the agreement provides that the company (Respondent) recognises the union as the collective bargaining representative to negotiate terms and conditions of employment for employees. It thus sets out the categories of employees covered by the agreement. Clause 9.2.1 provides that the union may declare a dispute regarding the fairness of termination of employment by the company.

[13] I was not referred to any specific clause of the agreement preventing the applicant from instituting these proceedings. I am not surprised that this was not done because there is none. There is no waiver in the agreement prohibiting the steps taken by the applicant. I am not aware of any provision in any law prohibiting a party to institute an action on his own if he is a member of a trade union. This ground of opposition has no merits in law and I reject it. Unless there is a clear waiver by a party it cannot be said by mere becoming a member of a union he cannot act on his own.

[14] The second point in limine is that of *Lis alibi pendens* in that the applicant had launched an application in the CCMA under case number KN 48982. The applicant admits this but alleges that the said action was to declare the respondent's action to force the applicant to take the accumulated leave pay as an act of constructive dismissals.

[15] The onus is upon the respondent to prove this defence. The respondent has to prove not only that the action at the CCMA is between applicant and respondent but that the cause of action is the same. See *Van As v Appollus* EN 'n Andere 1993 (10) SA 606 at 609 F-G. In this regard, see also *Mtshali v Mtambo and Another* 1962 (3) 469 at 475 where De Vos Hugo J stated " This is an *exceptio declinatoria* which is available only when the *lis alibi pendens* is between the same parties, raises the same issue and arises from the same cause of action". In that case the learned judge also raised a question whether such a plea can be raised in interdict proceedings. The court is not called upon to decide that question in the present proceedings. The present case is an interdict. There is nothing before me indicating that the case pending at the CCMA related to the same cause of action as the one presently before the court. Be that as it may, the CCMA would not have jurisdiction to interdict the actions of the respondent . This defence must also fail.

[16] the third defence in limine is that these proceedings are premature as the respondent had not dismissed the applicant. The court accepts that at the time the proceedings were launched the applicant had not been dismissed. I fail to understand this submission as the very nature of the interdict is to prohibit the threatening action. Support for this can be found in *Herbstein and Van Winson: The Civil Practice of the Supreme Court of South Africa*, 4th Edition on page 1063 where the learned authors state "An interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm. Most interdicts are prohibitory in nature, ordering the respondent to desist or refrain from doing a particular act". This defence must also fail for the reason that a party does not have to wait until the threat materialises before approaching the court for an interdict. That will serve no purpose.

[17] It was submitted on behalf of the respondent that the applicant had failed to file the heads of argument in time. I then wanted to know if the respondent wanted the matter to be postponed. I was then advised by counsel for the respondent that if the court is prepared to grant condonation for the late filing of the heads of argument, respondent was prepared to proceed with the case. The respondent's heads of argument did not deal with the merits of the application. I granted condonation for the late filing of the heads of argument. The matter was then argued on the merits. At the end of the argument by both counsel I requested further information relating to the CCMA proceedings to enable the court to make a decision. These documents were later provided as they were not available when the matter was argued.

[18] Section 158 (1) (a) (ii) of the Labour Relations Act provides that the Labour Court may make an appropriate order, including an interdict. This court accordingly has jurisdiction to hear this matter. For the applicant to succeed in the application he must prove that (a) he has a prima facie right (b) apprehension of irreparable harm (c) balance of convenience favours the granting of the interim relief and (d) that he has no other satisfactory remedy.

[19] The applicant has submitted that he has a right not to be dismissed on the ground which the respondent threatens to do so. It was submitted that the respondent frustrated the applicant from obtaining the necessary qualification and therefore could not dismiss the applicant on operational reasons. The respondent has countered this argument by submitting that the applicant failed to take the port operations certificate provided by the respondent. It was further submitted that other officers did the course provided by the respondent. The applicant submitted in his papers that the respondent was in fact changing the contract of employment. The CCMA in Port Elizabeth has already ruled that the respondent should allow the employees to gain the training for the purpose of obtaining a STCW endorsement certificate. The commissioner further ruled that should such training result in absence on leave, respondent shall pay such employee his full remuneration and benefits during the period of absence. It is therefore not open to the respondent to dismiss the applicant. The

applicant has accordingly succeeded in proving that he has a prima facie right. I find that it is the failure of the respondent to afford the applicant an opportunity to obtain the STCW qualification which has directly resulted in the applicant's being unable to obtain the necessary qualification and be able to be a tug master.

[20] The applicant has submitted in his papers that he would be financially harmed if the dismissal proceeds. He has further submitted that he can be gainfully employed by the respondent in several marine fields in which he has experience. It was submitted on behalf of the respondent that the applicant should have considered the consequences of his actions prior to breaching the conditions of his employment. It was further submitted that the respondent cannot pay an individual who cannot perform his job description. I must indicate again that these proceedings were instituted before the award was made by the CCMA in Port Elizabeth. At the time the matter was argued, the court was in possession of the arbitration award which favoured the applicant's union. The applicant had not been dismissed at the time of the commencement of these proceedings and felt that his rights were threatened and needed protection. The applicant would in my view suffer irreparable harm if the respondent is allowed to dismiss him. In any event the applicant seeks an interim order pending the resolution of the dispute at the CCMA. I accept that the applicant has not been offered any alternative employment. The respondent submitted that the applicant rejected the respondent's offer. In the same breath it was submitted that there is a material managerial directive that no vacancies are to be filled pending the restructuring. This leaves a question as to how the respondent would make an offer of the alternative employment in the light of this allegation. If applicant loses employment in the manner the respondent intends terminating it, applicant is likely to lose his possessions. I am satisfied that the applicant has proved that he will suffer irreparable harm.

[21] The respondent has submitted that it will suffer prejudice in the event of its decision to dismiss applicant being found to be fair in that it would be unable to recover the remuneration paid to the applicant. The applicant submitted that the balance of convenience was in his favour. We are here dealing with an individual as opposed to a corporate body.

The applicant only wants an interim order reinstating him pending the determination of the dispute referred to the CCMA.

[22] The purpose of the interdict is to prevent the harm from happening. What I am asked to do is to extend the life of the employment contract. There will be prejudice on the part of the applicant if the interim order is not granted. The applicant has already been dismissed. The court is generally reluctant to grant reinstatement orders where employees have been dismissed. See in this regard *S.A. Chemicals Workers Union and Others v Sentrachem* (1999) 20 ILJ 159 (LC). The applicant was dismissed when these proceedings had been instituted.

[23] The applicant did not have to wait for the threat to materialise before approaching the court. In my view when the employee feels his employment is being threatened by the unfair actions of the employer, he is entitled to approach the court for the relief. There is no other remedy available to the applicant to protect his employment.

[24] In my view, the court is entitled to make an order reinstating the applicant pending the final determination of the dispute instituted at the CCMA notwithstanding the fact that the applicant has been dismissed. What the court has to be satisfied with is that at the time of the institution of the proceedings his rights were threatened. I am satisfied that the applicant has proved that. I am also satisfied that there is no other alternative available to the applicant.

[25] Where the employment has already been terminated the court cannot make an order restraining the termination of employment. Such order will serve no purpose. I am of the view that the court is entitled to make an interim order of reinstatement.

[26] I am satisfied that the applicant has proved that he is entitled to the order prayed. The order I make is as follows:

(a) The respondent is ordered to reinstate the applicant in his employ with immediate effect

pending the outcome of the proceedings under case number KN 52445.

(b) Respondent is to pay the costs.

NGCAMU AJ

FOR THE APPLICANT: G J PIENAAR & ASSOCIATES

FOR THE RESPONDENTS: KRUGER, NGCOBO INC.