



- (1) Reportable: No
- (2) Of interest to other Judges: Yes
- (3) Revised

Signature

02 July 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2026-140169

In the matter between:

SOMISA VALENCIA MAWELA

Applicant

and

**DEPARTMENT OF CORRECTIONAL
SERVICES**

1st Respondent

**NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

2nd Respondent

Heard: 26 June 2026

Delivered: 02 July 2026

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an opposed application for urgent final relief. The applicant, Ms S Malewa, a director of the respondent ('the department') wishes to protect her eligibility to apply for early retirement, under the General Public Service Dispensation, first announced in October 2025. At the time of considering the application the applicant must not be the subject matter of an active investigation into alleged misconduct nor be subject to pending disciplinary proceedings. She seeks final interdictory relief preventing the Respondent from excluding her from participation in the Government's Incentivised Early Retirement Programme ("ERP") solely on the basis of a disciplinary process that has remained unresolved for an excessive period due to the Respondent's own failure to prosecute the matter diligently.

[2] The specific relief sought, apart from asking that the matter be heard as one of urgency and seeking costs, is for an order that:

'3. The Respondents' decision to exclude or disqualify the Applicant from consideration for the Incentivised Early Retirement Programme on the basis of the unresolved disciplinary process is unlawful and unfair.

4. The Respondents are directed to process and consider the Applicant's application for the Incentivised Early Retirement Programme without regard to the said disciplinary process pending the final determination of this application.'

(emphasis added)

[3] At present and at the time of launching this urgent application, the applicant is facing disciplinary charges, although the disciplinary inquiry has not made much progress since it commenced last year. Both parties blame the other for the delay.

[4] In any event, before the cutoff date of 30 June 2026 for the submission of applications for consideration for early retirement, the applicant filed her application. It appears she had done this by 4 May 2026. An annotation on her application forms dated 14 May 2026 made by an official dealing with the

application stated that "*The application cannot be considered at this stage as the Director has a pending disciplinary case*". The applicant was notified of this internal communication and interpreted it as a violation of her constitutional right to fair labour practices under Section 23(1) of the Constitution and asserts that she has a clear right to have her application processed rationally without regard to her being subject to a disciplinary inquiry.

- [5] The department contends that she cannot claim such a clear right when there is no guarantee that, even if she was not facing disciplinary charges, her application would be approved.

Evaluation

- [6] Although the parties argued the matter fully, argument on the merits was heard provisionally, depending on the determination of the questions of urgency and jurisdiction, which obviously might determine the application without consideration of the merits.
- [7] The applicant is seeking final relief on an urgent basis and accordingly must satisfy the test set out in *Setlogelo v Setlogelo*¹, and confirmed by the Constitutional Court, namely she must establish (a) the existence a clear right, (b) an injury actually committed or reasonably apprehended, and (c) the absence of an adequate alternative remedy.²
- [8] The applicant asserts that her constitutional right to fair labour practices provides her with a clear right not to be excluded from the early retirement dispensation, on account of her pending disciplinary enquiry. The department argues that there is no obligation on the department to grant every eligible applicant early retirement. In terms of paragraph 5 of DPSA Circular 38 of 2025 dated 13 October 2025, the authority to grant the Incentivised ERP is vested with the Executive Authority of the relevant department, in accordance with section 16(6) of the Public Service Act, which means, the decision maker is the

¹ *Setlogelo v Setlogelo* 1914 AD 221.

² *Setlogelo* above at 227; *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) in para 8.

Minister of the department. He is required to consider ERP requests based on '*reasonable criteria set by the department*'. When signing the application form the applicant also accepted the following express acknowledgment:

'I acknowledge that my application is subject to approval by the executive authority or his/her delegate and should my application be approved, I must exit from the public service as agreed.'

- [9] The applicant argues that the internal communication of 14 May 2026 stating that the application "*will not be processed at this stage*" is nonetheless an operative, prejudicial bar that creates immediate harm because given the prolonged and inconclusive disciplinary inquiry it is highly unlikely that the inquiry would be concluded before the end of June, which indeed is the case, she will to all intents and purposes be excluded from participating in the scheme. The department points out, correctly, that 30 June was merely the deadline for applying for the ERP. In terms of clause 2.3, of the policy, departments have until the end of July to consolidate applications for submission to the Treasury and accordingly no decision has been taken on the applicant's application.
- [10] The department points out that it has also established a multi-tiered governance structure to manage the ERP. Nonetheless, it defends the interrupted processing of the applicant's application on account of her pending disciplinary action, on the basis that it '*falls within the broader category of reasonable and rational exclusions*'.
- [11] Given the prolonged lack of concrete progress in the pace of the enquiry, it does seem to be a virtual certainty that it will not be concluded by the end of July either, irrespective of who is to blame for this. Therefore, there is a strong likelihood the applicant will effectively be excluded from consideration from the ERP, which is plainly prejudicial *vis-à-vis*, other applicants not under investigation or facing disciplinary action.
- [12] The critical question is whether it would be considered unfair to discriminate against the applicant on the basis of disciplinary measures which have not been concluded and could notionally end in her acquittal, just because they

happened to be underway at the time the ERP was being implemented. Further, assuming that can be construed as unfair, what is the legal remedy to rectify matters? The applicant herself specifically asserts that the objectionable exclusion is a breach of her right to fair labour practices. It is notionally possible, even if it might be rather difficult, to formulate her exclusion from the ERP as a punitive measure amounting to some kind of disciplinary sanction short of dismissal under s 186(2)(b) of the Labour Relations Act, 66 of 1995 ('the LRA'). Alternatively, it might conceivably be construed as an unfair deprivation of a benefit under s 186(2)(a) of the Act.

- [13] Similarly, though she does not expressly plead that her exclusion from consideration is a breach of the principle of legality, it is implied from her attack on the lawfulness and rationality of the objectionable exclusion in the ERP. She also did not expressly indicate if her application is based on s 157(2)(b) of the LRA, in order to attack the constitutionality of the ERP.
- [14] In passing, I should add that it is not plainly obvious that the exclusion based on unresolved disciplinary matter is inherently without any rational basis and I am not persuaded the applicant has a clear right to relief based on irrationality.
- [15] However, merely articulating the existence of these remedies pertinently raises the question why the court should address them on an urgent basis. Firstly, any unfair labour practice dispute under s 186 of the LRA is adjudicated by way of arbitration under the auspices of a bargaining council or the CCMA. This court has no jurisdiction to entertain a claim of final relief for an unfair labour practice. This application was not launched to stay any decision to exclude the applicant from consideration under the scheme pending the outcome of unfair labour practice proceedings but to obtain a final declaration from this court, which lacks the jurisdiction to do so.
- [16] Further, if she believes she would be entitled to set aside the objectionable provision on grounds of illegality, she could likewise have applied to stay a decision on her exclusion from consideration, pending such review. She may still pursue such a cause of action.
- [17] What emerges from this, is that there are alternative remedies available to the applicant, quite apart from this court's lack of jurisdiction to determine any

unfair labour practice claim. She has also not made out a case that none of those remedies could adequately provide restitution for her exclusion from the ERP.

[18] In the circumstances, even if for the sake of argument, I accept that the applicant did not unduly delay in launching this application, she cannot succeed because other requirements of urgency are not met. The Applicant has failed to establish the absence of suitable alternative remedies for the relief she seeks, or that the harm she might face in the short term is irreparable. Accordingly, aside from the jurisdictional question, the application fails for lack of urgency.

[19] On the question of costs, I accept that the application was not frivolous and that it raised serious legal issue. Accordingly, it would not be appropriate considering questions of law and fairness to make a cost award.

Order

1. The court has no jurisdiction to consider the fairness of the Applicant being excluded from consideration for early retirement under the Directive of the Respondent attached to the Applicant's founding affidavit as "SMV1".
2. Insofar as the court has jurisdiction to consider other relief, the remainder of the application is struck off the roll for lack of urgency.
3. No order is made as to costs.

R Lagrange

Judge of the Labour Court

Appearances

For the Applicant: --- Adv. CP Naude
Instructed by: --- Issac Teke Mothibe Attorneys Inc.

For the Respondent: --- Adv. T Modisenyane
Instructed by: --- The State Attorney

LABOUR COURT