

SOUTH AFRICA / JUDGMENT

Edebery v National Youth Development Agency (J1453/2020) [2021] ZALCJHB 1 (7 January 2021)

[2021] ZALCJHB 1

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

J1453/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: J1453/2020

In

the matter between:

NOMA

EDEBERY

Applicant

and

THE

NATIONAL YOUTH DEVELOPMENT AGENCY

Respondent

Heard:

05 January 2021 (Due to Covid19 lockdown, this matter was heard via video-conferencing and the applicant agreed thereto)

Delivered:

07 January 2021 (Due to Covid19 lockdown, this judgment is handed down electronically by sending a copy through email and the date of delivery shall be deemed to be 07 January 2021)

Summary:

Urgent application - temporary employment pending the outcome of a CCMA referral alternatively interdicting the making of any permanent appointment to the position of Manager: Learning and Development. There is no connection between the referred dispute and the reliefs sought in the present application. The alleged verbal offer of employment to a restructured position of Manager: Learning and Development was made in May 2019 and the termination of employment allegedly happened in September/October 2020. Applicant approached the urgent Court three months later. The alleged urgency dissipated. The position of Manager: Learning and Development was advertised on 1 December 2020 and the applicant waited too long to stake a claim to the position when she could have done that before it being advertised. The alleged urgency dissipated too. Nonetheless the applicant failed to demonstrate a prima facie right to a temporary employment and or an entitlement to be an incumbent of the advertised post. Despite being timeously warned of lack of urgency, the applicant persisted with the present application. Such conduct smacks of frivolity and vexatiousness and warrants an order as to costs. Held: (1) The application is struck off the roll due to lack of urgency. Held: (2) The applicant to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] In this application, Ms Noma Edebery (Edebery) approaches this Court on an urgent basis seeking a temporary appointment to an advertised position of Manager: Learning and Development and in the alternative an interdict pendente lite, interdicting the making of a permanent appointment into the advertised position. The application is duly opposed by the respondent.

Background

facts

- [2] Ms Edebery commenced employment with the respondent's predecessor- in-law, Umsombovu Youth Fund (Umsombovu) effective 1 September 2007. Her employment was fixed for a period of two years. Upon expiry, Umsombovu extended her employment for a further period of two years. Upon establishment of the respondent, Edebery's employment contract was transferred to the respondent within the contemplation of section 197 of the Labour Relations Act[1] (LRA). On or about 15 September 2011, Edebery was appointed to a permanent position as a Secretary based at the head office of the respondent. Effective 1 January 2015, Edebery was laterally transferred to the position of Manager: Organisational Development.

During 2015, a position of Manage : Talent Management was advertised and Edebery applied for it and was appointed on a fixed term

employment contract. Her employment as a Manager: Talent Management was to endure until 30 November 2020.

- [3] During May 2019, the respondent engaged in a restructuring process, which process saw the demise of the position of Manager: Talent Management. It was intended by the Executive Director: Human Resources and Legal Services (Ms Mafiki Duma) that upon conclusion of the restructuring process, Edebery would be re-deployed and be furnished with an appointment letter. Due to Covid-19 lockdown, the process never eventualized. Edebery alleges that on 28 May 2019, Ms Duma made her a verbal 'offer of appointment to the position of Manager: Learning and Development. She was to obtain a formal appointment letter after the position has been evaluated and graded. Ms Duma vehemently disputes making such a verbal offer. Her intention was to issue Edebery with a formal letter transferring or re-deploying her to the position of Learning and Development Manager once the job profile of the position had been revised. She could only do that after having complied with clause 17 of the respondent's Recruitment and Selection policy, which requires approval of an appointment by the Chief Executive Officer.
- [4] Subsequently, on 1 September 2020, Edebery was notified in writing that her fixed term employment with the respondent is ending on 30 November 2020. This written notification was dated 27 July 2020 and had addressed Edebery as holding the position of Learning and Development Manager. This position holding according to Duma was inserted in error. On 16 September 2020, Edebery's attorneys of record objected to the notice since Edebery was offered the position of Manager Learning and Development. The attorneys demanded the withdrawal of the notice of termination, failing which, an urgent application shall be launched seeking an unspecified urgent relief. On 13 October 2020, the respondent through its attorneys rebuffed the demand. Despite the rebuff, no. urgent application was launched shortly thereafter. On 20 November 2020, another threat to approach the Court for an

appropriate relief was made but not followed up. Instead, on 30 November 2020, a referral to the CCMA was made alleging unfair dismissal within the contemplation of section 186 (1) (b) (i) of the LRA. This referral is still pending at the CCMA.

- [5] On or about 7 December 2020, Edebery launched the present application. As pointed out above, the application is duly opposed.

Evaluation

Lack of urgency

- [6] In opposing the application, the respondent contended that the application lacks any urgency and ought to be struck of the roll as such. In terms of Rule 8 of the Rules of this Court, this Court would only hear a matter as one of urgency if (a) a party demonstrates the need for an urgent relief and (b) that a party shall not obtain adequate and substantial redress in due course. In motion proceedings

a party stands and fall by the allegations made in the founding papers. Reason for that rule is simply that it informs the opposing

party of what case to answer and alerts the Court as to what case to adjudicate. On reading the founding papers it is unclear why an urgent relief is necessary at this stage. The rendition of the facts suggests that on 1 September 2020, Edebery was notified of the impending alleged unfair dismissal. Having been so informed, she waited for a period of about three months before approaching this Court for an urgent relief. A feeble explanation was proffered as to this long wait. It can never be an acceptable explanation, when faced with an alleged unlawful act, to wait for evidence to prove a right - being appointed to the position - before approaching a Court for a relief. Edebery was told that there more she waits, the alleged urgency will dissipate. Her answer was that until she obtains the transcript to prove what Ms Duma said, the urgency shall not be compromised. That answer is wrong in law. A party faced with an unlawful act deserving an urgent attention of a Court of law must act swiftly and with adequate sense of urgency, otherwise any alleged urgency after a lapse of sufficient time period will be one that is self-created[2]. On 13 October 2020, Edebery was told in no uncertain terms that the termination notice shall not be withdrawn. Therefore, there was absolutely no adequate reason why should Edebery wait until 7 December 2020 before challenging the alleged unfair dismissal. There was nothing that could have prevented Edebery to seek a rule nisi at the very least whilst awaiting the transcript.

- [7] There is no connection between the CCMA referred dispute and the relief sought in the present application. At best the two are diametrically opposed to each other. In the referral, Edebery alleged dismissal within the meaning of section 186
- (1) (b) (i) of the LRA. The suggestion being that the fixed term employment contract terminated whilst she had a legitimate expectation of its renewal on same or similar terms. In exact terms, the referral form states the following:

"Employee reasonably expected the employer to renew a fixed term contract on similar terms but it was not renewed. Employee was informed that she will receive formal employment letter for new position of Manager:

Learning and Development as soon as position has been graded but instead her employment was terminated."

- [8] In the present application, Edebery seeks temporary employment on allegations that in May 2019, she was made a verbal offer of employment. In order to succeed at the CCMA, Edebery has to show (a) she was employed on a fixed term contract and
- (b) the respondent failed to renew it upon expiry, when she had a reasonable expectation of renewal. In order to succeed in the present application, Edebery has to demonstrate (a) that she was appointed to the position of Manager: Learning and Development and (b) she was unlawfully terminated. It does seem that the position of Manager: Learning Development is a position higher in grade and status. This implies that staking a claim for the position is nothing but a plea for promotion. In terms of section 186 (2) (a) of the LRA any unfair conduct in relation to promotion amounts to an unfair labour practice justiciable at the CCMA and not the Labour Court (Section 158 (5) of

the LRA). Having delayed in approaching the Labour Court, any urgency allegedly attached to the claim has since dissipated.

- [9] With regard to the alternative relief, Edebery gained knowledge on 1 December 2020 that the position Manager: Learning and Development was advertised. Having launched the present application around 7 December 2020, it can notionally be said that she had not waited long. However, having been, on her version, verbally appointed in May 2019, Edebery should have taken steps to ensure that the appointment is finalised timeously. She cannot wait for a year and couple of months to stake a right to the position. She cannot simply take a supine attitude towards being provided with the promised appointment letter. Accordingly, I take a view that the alleged urgency dissipated as well in this regard.

Lack of prima facie right

- [10] Assuming that the matter was urgent, which assumption I am not making, the applicant would still fail. One of the main and important requirements for an interim relief is the existence of a prima facie right. Edebery alleges that because she established that Ms Duma informed her that her formal appointment was held up by the grading process she has demonstrated a prima facie right. I disagree. A prima facie right is not a right to approach the CCMA but a right which if not protected by an interdict, irreparable harm would ensue. [3] The CCMA does not have powers to prevent a lawful appointment process. Similarly, this Court does not have those powers[4]. As indicated above staking a claim for a higher post is one that falls under the unfair labour practice claim. The claim pending at the CCMA is not one for unfair labour practice in relation to promotion. Edebery seeks re-employment as a Manager: Learning and Development as opposed to promotion, since in her case she was

dismissed on 13 October 2020. It is unclear why that date, but perhaps it is because on 13 October 2020 the respondent refused to withdraw the termination notice.

- [11] The referred claim bears no connection to the relief of being appointed on a temporary basis nor interdicting the making of an appointment. Even if Edebery succeeds with the referral, the relief would be one that the arbitrator is statutorily capable of awarding. If re-employment is awarded it may not be to the advertised position per se but may be to any other reasonably suitable work.
- [12] It may well be so that Edebery might be in a position to show at the CCMA that she had a reasonable expectation for renewal, regard being had to the undisputed evidence that Ms Duma intended to transfer or re-deploy her, but that does not entitle her to any urgent relief at this stage. There is simply no basis in law for such an urgent relief sought. A finding that she was dismissed within the meaning of section 186 (1) (b) (i) of the LRA constitutes an adequate relief in due course. In the interim no irreparable harm is to be suffered by Edebery. Financial harm is not an adequate basis to obtain an urgent relief[5]. There are millions of employees awaiting relief at the CCMA[6]. Perspicuously all of them do suffer financial harm owing to the fact that they remain unemployed in the interim. However that financial harm is reparable in due course. Edebery submitted that her case is exceptional because reinstatement is impracticable for her and she can only lawfully claim re-employment which does not come with a claim for backpay. I disagree with this submission. Any employee who alleges unfair dismissal hopes for three possible remedies, viz; (a) reinstatement; (b) re-employment or (c) compensation. The circumstances that excludes the primary remedies, namely re-instatement and re-employment are spelled out in section 193 (2) of the LRA.
- [13] Accordingly, the power to remedy an unfair dismissal lies with the arbitrator and the Court and not a dismissed employee making a choice of a convenient remedy. The only instance, which may occur at the CCMA through evidence, where the primary remedies may be excluded, is where an employee testifies that he or she does not wish to be re-instated or re-employed. In terms of section 193 (1)
- (b) an arbitrator may order re-employment to any other reasonably suitable work on any terms and from any date not earlier than the date of dismissal. In other words, at the CCMA, an arbitrator may order re-employment of Edebery to the position Manager: Learning and Development effective 1 September 2020 or 13 December 2020. That being a possibility, an argument that Edebery, given her choice of remedy in the referral form - which may or may not be ordered
- she would lose "backpay" and as such should be heard on an urgent basis is without merit.

[14] In my view, the applicant would have failed to demonstrate a prima facie right, which is capable of being protected by an interdict to avoid any irreparable harm. One aspect to be highlighted is that there exists a dispute of fact with respect to whether Edebery was appointed to the advertised position. On her version there are no formalities required for such an appointment. On the version of Duma, the policy and the establishing Act requires a formal approval by the Chief Executive Officer. Motion proceedings are not designed to resolve disputes of fact[7]. Properly considered, in this application, Edebery is seeking a final relief disguised as an interim relief. If Edebery is employed albeit on a temporary basis such an order is final in nature particularly because at the CCMA the relief sought is unrelated to the temporary employment sought. Regard being had to the correspondents exchanged prior to the launching of the present application Edebery must have reasonably foreseen a genuine dispute of fact on this crucial aspect of her case. As proof, Edebery deemed it appropriate to obtain a transcript to prove the ipse dixit of Duma. Unfortunately for Edebery, the transcript does not prove the legal requirements - approval by the Chief Executive

Officer. In terms of section 16 (1) of the National Youth Development Agency Act (NYDAA)[8], the statutory power to appoint staff resides with the Chief Executive Officer. Duma simply does not possess appointing powers and on application of the principle of legality any purported appointment by Duma is ultra vires and offends the principle of legality. It is of course a different question as to whether Duma promised Edebery that she shall be

appointed into the position in due course. The CCMA is better placed to answer this question and not this Court.

The issue of jurisdiction.

[15] Given the view I took above, it is unnecessary to decide the issue of jurisdiction in respect of this matter. However, it is important for this Court to clarify what appears to be conflicting views between the judgment of MTN v Knoetze [9] and that of De Beer[10]. In my view on the facts, the two cases are distinguishable. The MTN matter dealt with the situation which was ultimately legislated for in section 189A (13) of the LRA. The conclusion reached in MTN was that this Court under section 158 (1) (a) has jurisdiction to entertain a claim for an urgent relief even though the dispute was not referred to conciliation. In De Beer the issue was somewhat nuanced in that De Beer was seeking an interim re- instatement pending action which was not instituted at the time. The respondent before me placed reliance on De Beer in so far as prayer 2[11] of Edebery's notice of motion is concerned. On the respondent's submission, in that prayer, Edebery effectively seeks an interim

reinstatement. I tend to agree. In *De Beer*, the LAC at paragraph 27 of the judgment identified the issue to be one where interim reinstatement was granted as a remedy in an unfair dismissal case before the issue regarding the same had been referred to conciliation. In that regard, the LAC concluded at paragraph 29 of the judgment that it is clear that the Labour Court does not have jurisdiction to adjudicate a dispute about an unfair dismissal or unfair labour practice, unless the dispute has been referred to conciliation.

[16] After considering whether the relief sought by *De Beer* was truly interim in nature, the LAC decisively concluded that the Court a quo ought to have found that it had no jurisdiction to effectively adjudicate the termination of *De Beers'* employment with the SAPS in the circumstances where there has been no compliance with the jurisdictional requirements provided for in section 191 and section

24 of the LRA.[12] In an attempt to avoid the principle achieved in *De Beer*, Advocate Pretorius, appearing for *Edebery* submitted that *Edebery* does not wish this Court to adjudicate the fairness of her dismissal. At a superficial level that appears to be the case. However properly considered, *Edebery* wishes this Court to conclude that indeed *Duma* has promised her the position of Manager: Learning and Development, which conclusion will support an argument that she had a reasonable expectation - an issue to be decided by the arbitrator in considering whether the requirements of section 186 (1)

(a) (i) have been met. Hence *Edebery's* reliance on the decision of *Department of Agriculture, Forestry and Fisheries v Baron and Others*[13], which was an appeal of a review application following an arbitration award.

[17] The last point to be made is that in as much, as *Edebery* in a thinly disguised manner prays for temporary employment, in effect, she seeks a remedy of interim reinstatement. In terms of section 193, a remedy of re-instatement or re-employment can only be afforded once a finding is made that the dismissal was unfair. In the absence of such a finding, a remedy of reinstatement and or re-employment cannot be lawfully made. Even if, as argued, this Court has powers to do so, it can only do so in instances where it is glaringly obvious that an employee has been subjected to egregious unfairness, which requires the immediate attention of this Court. On the facts of the present case, it is common cause that the employment of *Edebery* was for a fixed period and that period has expired. Unless the requirements of section 186 (1) (a) (i) of the LRA are met, *Edebery* was not dismissed and as such not entitled to remedies for unfair dismissal in terms of the LRA. That being the case, this is not a case of glaringly obvious unfairness. The onus lies on *Edebery* to still prove that she has been dismissed within the meaning of the implicated section. If she fails to discharge the onus she shall not be entitled to any of the remedies contemplated in the LRA. Besides, even if she succeeds in discharging the onus, there is no guarantee that she will be afforded a primary remedy. All of the above buttresses the point that no egregious unfairness is apparent and no urgent relief is necessary. Like many millions of the dismissed employees, *Edebery* should wait her turn at the CCMA. She does not deserve a special attention before then.

The issue of costs

[18] Having referred a dispute to the CCMA, it was unnecessary for Edebey to have launched the present application. The respondent's attorneys warned her that her alleged urgency was dissipating and she failed to heed that warning. In my view the conduct of Edebey smacks of frivolity and vexatiousness and warrants an order as to costs. The weight of authorities in this Court are such that this Court frowns against applications brought without urgency and as a mark of displeasure costs orders are invariably made without hesitation[14].

[19] For all the above reasons, the application lacks urgency and cannot be entertained.

[20] In the results, I make the following order:

Order

1. The application is struck off the roll due to lack of urgency.
2. The applicant is to pay the costs of this application.

G. N Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate Pretorius

Instructed by:

Ndebele Du Plessis Attorneys, Johannesburg.

For the Respondent: Mr V Mkwibiso of DM5 Inc, Sandton.

[1] Act 66 of 1995.

[2] See *Potgieter v Modikwa Platinum Mine and others* /2019] ZALCJHB 267 (8 October 2019)

[3] See *National Treasury v OUTA* 2012

(6) SA 223 (CC)

[4] See *Sihlali and others v City of Tshwane Metropolitan Municipality & another* (2017) 38 ILJ 1692 (LC) and *Mashaba v SAFA* (2017] 38 ILJ 1668 (LC)

[5] See *Mbatha v Dube Tradeport Corporation* [2019] ZALCD 10 (15 October 2019) and *De Beer v The Minister of Safety and Security/Police and another* [2013] 34 ILJ 3083 (LAC)

[6] See *Vermaak v Taung Local Municipality* (JR315/13)

[2013] ZALCJHB 43 (12 March 2013)

- [7] See *National Director of Public Prosecutions v Zuma* (2009] 2 All SA 243 (SCA) para 26.
- [8] Act 54 of 2008.
- [9]
- [2006] 6 BLLR 250 (LAC)
- [10] Ibid fn 5 supra.
- [11] The respondent is ordered to temporarily employ the applicant as the Acting Manager: Learning and Development pending the finalisation of the dispute referred to the CCMA under reference number GAJB2433-20.
- [12] At para 39 of the judgment.
- [13]
- [2019] 12 BLLR 1289 (LAC)
- [14] See *Motaung v Minister of the Department of Correctional Services* (J1693/19) 16 August 2019.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2021/1.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/edebery-v-national-unknown-topic-alcjhb-2021>

Prepared on 23 October 2026 · Esheria