

SOUTH AFRICA / JUDGMENT

Ledwaba and Others v Minister of Home Affairs and Others (J 1441/2022) [2022] ZALCJHB 327 (25 November 2022) [2022] ZALCJHB 327

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 1441/2022

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: J 1441/2022

In

the matter between:

TEBOGO
LEDWABA
First Applicant
THE 65 APPLICANTS
LISTED IN
ANNEXURE “A”
OF THE NOTICE OF MOTION
Second to Further
Applicants
And
THE MINSTER OF HOME
AFFAIRS
First Respondent
THE DIRECTOR GENERAL,
DEPARTMENT
OF HOME
AFFAIRS
Second Respondent
Heard: 22 November
2022
Delivered: 25 November
2022

(This judgement was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 25 November 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants are all employees of the Department of Home Affairs (the department). They have referred a grievance concerning the changing of the requirements attaching to posts for which they had applied, and for which they were interviewed. In this application, the applicants seek an interim order interdicting the department from continuing with the recruitment process in respect of the posts to which the changed requirements attach, pending the finalisation of the grievance process.
- [2] The material facts are not in dispute. In April 2022, the department advertised posts for adjudicators, at level 8. The advertisement stipulated a minimum educational requirement of a three-year qualification in law, public management and administration or a related qualification at NQF level 6 as recognised by SAQA. The applicants applied for the vacant posts, were short-listed and interviewed.
- [3] On 9 September 2022, the department withdrew the advertisement on the basis of what was described as a 'needs-based revision of the job profile'. The department advised that the positions would be re-advertised 'in accordance with the revised job profile'. A new advertisement was issued. This time, a minimum educational requirement a degree or diploma in law at NQF level 6 was required. The effect of fixing the minimum qualification at this level was to exclude the applicants from the pools of applicants for the post. The applicants dispute that a qualification in law at NQF level 8 is an inherent requirement of the position.
- [4] In November 2022, after internal discussions had failed to resolve the issue, the applicants requested the department to refer their grievance to the Public Service Commission, and to provide an undertaking that it would halt the recruitment process for the advertised posts. The undertaking was not forthcoming and led to the institution of these proceedings.
- [5] The parties accept that the application is urgent.
- [6] The requirements for interim relief in this court are no different to those that apply in the High Court – the applicant must establish 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 any other satisfactory remedy (see *Setlogelo v Setlogelo* 1914 AD 221 (AD); *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C)). In proceedings such as the present, where interim relief is sought pending the determination of a main dispute, it is also incumbent on an applicant to demonstrate some prospects of success in the pending action.

- [7] I deal first with the requirement of a prima facie right. This court has consistently held that while it has the power to enforce employment contracts, it is not empowered to prevent the conclusion of private employment contracts. In consequence, there is ordinarily no right to prevent the recruitment of a replacement employee pending the outcome of proceedings in which reinstatement is sought (see *Ephraim Mashaba v SAFA* [2017] 6 BLLR 621 (LC); *Sitha Sihlali & 96 others v City of Tshwane and Another* (J 380/17, 29 February 2017).
- [8] In the present instance, the applicants' complaint is process-related. They contend that pending the outcome of the grievance procedure that they have invoked, the department should be barred from recruiting employees into the newly-advertised posts. What they assert is not a substantive right – it is a right to process, or more particularly, a right in terms of section 35 (1) (b) of the Public Service Act to have their grievance referred to and determined by the Public Service Commission. *Setlogelo* was the subject of more recent commentary and application by the Constitutional Court in *National Treasury and others v Urban Tolling Alliance and others*[1] where the court affirmed that interdicts are intended to prevent a present or future violation of rights, and not any violation that may have occurred in the past. The court stated:

'Under the *Setlogelo* test, the prima facie right claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made.'

In the same way that a right to review an impugned administrative decision is not a right that requires preservation *pendente lite*, the applicants' right to pursue the applicable grievance procedure does not give rise to such a right. In these circumstances, I fail to appreciate how it can be said that the applicants meet the threshold of a prima facie right, though open to some doubt.

- [9] In any event, the applicants have failed to establish a well-grounded apprehension of irreparable harm if interim relief is not granted and they ultimately succeed in establishing the right to which they lay claim. There is no evidence to the effect that the recruitment of candidates to the positions concerned presents an imminent or irreparable harm to the pending grievance process. Should the applicants ultimately obtain the relief they seek, the department will be obliged to live with the consequences and afford the applicants the required redress. In these circumstances, it cannot be said the applicant will suffer any irreparable harm should an interim interdict not be granted. The application thus stands to be dismissed.

[10] The department charitably did not seek the costs of the application, given that section 162 of the LRA does not have the consequence that costs follow the result, and also the ongoing employment relationship between the parties.

Order

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Nombewu

Instructed by:

Bareng Mokoena Attorneys Inc

For the respondents:

S July, Werkmans Attorneys

[1] 2012

(6) SA 223 (CC).

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Prepared on 11 October 2026 · Esheria