

SOUTH AFRICA / JUDGMENT

Modise v Road Accident Fund (102594/2024) [2024] ZALCJHB 489 (3 December 2024)

[2024] ZALCJHB 489

COURT

Labour Court Johannesburg

BEFORE

M Kumalo

CASE / FILE NUMBER

102594/2024

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: 102594/2024

In

the matter between:

JOHN

MOKGELE MODISE

Applicant

And

ROAD

ACCIDENT FUND

Respondent

Heard: 27 September
2024

Delivered:03

December 2024 (This judgment was handed down
electronically by emailing a copy to the parties. The 3rd
of December is deemed to be the date of delivery of this judgment).

JUDGMENT

KUMALO, AJ

- [1] On the day of the hearing of this application, two other matters were on the roll with similar facts and the Applicants seeking similar orders against the Respondent. All three Applicants were represented by the same law firm and counsel. The Respondent was also represented by the same law firm and counsel in all three matters.
- [2] In the light of that fact, it is agreed that the matters would be consolidated and argued at the same time as one matter.
- [3] The three Applicants brought separate applications before this court on an urgent basis, and they all are in the employ of the Respondent and have been on precautionary suspensions for a considerable period of time.
- [4] John Mokgale Modise (Modise) brought his application under case number 102594/2024, and he was suspended from his employment on 2 March 2020.
- [5] Modise further alleges that during his suspension, charges of misconduct unrelated to his suspension were brought against him and a disciplinary hearing was conducted in terms of section 188A of the Labour Relations Act[1] (LRA). He was found not guilty after a process that took almost two years to conclude.
- [6] He further alleges that the Respondent failed to comply with its own standard operating procedures in that it had failed to meet the timeframes for the investigation, bringing charges and finalization of a formal disciplinary hearing.
- [7] Ms. Charlotte Mandisa Ntlhaphi (Ntlhaphi) brought her application under case number 102582-2024 and was placed on precautionary suspension on 24 May 2022. Her disciplinary hearing was convened on 15 September 2022 and the parties dealt with the preliminary issue of legal representation. On 14 October 2022, a ruling was granted in favour of allowing her to have legal representation.
- [8] Ntlhaphi alleges that the Respondent as dominus litis has since failed to reconvene the hearing for further evidence. The hearing was chaired by an external person and the initiator was Mr. Lehlohonolo Mabe who has since also been placed on precautionary suspension.
- [9] Further, the Applicant seeks an order to interdict and restrain the Applicant from retrenching the Applicant prior to the implementation and finalization of the consultation process under section 189 read with section 189A of the Labour Relations Act, Act 56 of 1995 and other orders that relate to the Applicant's suspension.

- [10] Mr. Christopher Mapena Itumeleng Bok (Bok), like the two applicants mentioned above, was also put on precautionary suspension on 11 November 2020 allegedly on a charge of gross negligence in the performance of his duties. He also brought an urgent application under case number 102588-2024.
- [11] On 7 February 2022, he was served with a notice to attend a formal disciplinary hearing which was set down for 24 and 25 February 2022. The matter was postponed sine die at the request of the Respondent when its counsel indicated during the first sitting of the disciplinary hearing that the Respondent desired to amend the charge sheet. The hearing was never reconvened despite the chairperson's invitation to the Respondent to reconvene same.
- [12] On 26 August 2022, Bok received a letter from the Acting Chief Corporate Support Officer (the CCSO) with an offer of a voluntary early retirement. On 31 August 2022, Bok received further communication with the breakdown figures of the offer of the voluntary early retirement.
- [13] Bok, through his legal representative, responded and addressed a letter to the CCSO requesting further information on the early retirement package and alluded further to the outstanding matter of disciplinary action that seemed to have stalled and had gone nowhere.
- [14] Shortly thereafter and before replying to Bok's queries, the Respondent issued a letter dated 16 September 2022 to all employees giving its notice of its intended retrenchments in terms of section 189 of the LRA and only replied to Bok's queries on 22 September 2022 and communicated that the disciplinary process was to continue and made a commitment to consult him in terms of section 189 and provide all the information relating to the proposed retrenchments. However, no further information was provided to him or his representatives in this regard.
- [15] On 27 August 2024, the Respondent's new attorneys approached Bok's attorneys with a request that they be furnished with the contents of the disciplinary matter. This was startling to him in light of the fact that Bok was never furnished an amended charge sheet, the investigation report and/or the bundle of documents the Respondent intended to use in the disciplinary hearing.
- [16] On 3 September 2024, the Respondent addressed letters to all three Applicants stating that the applicants have been receiving salaries whilst they were on suspension in positions that have become redundant. The letters further stated that the Respondent could not find suitable positions for them and therefore intends to retrench them and called on them to give reasons why they should not be retrenched.

- [17] The receipt of these letters prompted the Applicants to approach their attorneys who attempted to engage Respondent with various letters and threatened to bring an urgent application before this court should the Respondent fail to give certain undertakings they demanded.
- [18] Needless to state that the Respondent failed to give the undertakings demanded and the Applicants brought individually the urgent applications as alluded above. In light of the similarities or the facts to their matters and the orders that are sought, this court thought prudent that they be consolidated and be heard as a single application.
- [19] The applications are opposed by the Respondent, and Mpho Manyasha (Manyasha) deposed to the Respondent's opposing affidavits and Richard Machete deposed to confirmatory affidavits.
- [20] In all the three matters, the Applicants challenged Manyasha's authority to oppose the applications stating that the Respondent's Delegation of Powers and Functions Policy is prescriptive over which officials have the authority to oppose such applications, and the official with such powers is the Chief Executive Officer.
- [21] It was argued on behalf of the Applicants that Manyasha's delegation is defective because the position of the Chief Executive Officer is not vacant, and he is not unable to exercise the powers conferred upon him. In the absence of the two conditions namely that the position is vacant or that the CEO is unable to exercise his powers, the delegation of the said powers is defective.
- [22] Further, the Applicants argued that Manyasha does not have any personal knowledge of the facts in the matter. Neither Manyasha nor Machete participated in the alleged consultation meetings of 23 November 2022, 08 December 2022, 16 and 17 January 2023.
- [23] Respondent argued that these matters should be struck off from the urgent roll for lack of urgency. It is further argued that the Applicants were served with the notices in terms of sections 189(3) and 189A of the LRA. The alleged notices were dated 16 September 2022. Respondent suggests that the Applicant ought to have instituted their applications then to challenge the Respondent's retrenchment process, but they chose to wait until 4 September 2024.
- [24] Respondent further argued that the National Union of Metal Workers of South Africa (NUMSA) approached it and requested that the intended retrenchments be implemented in accordance with the provisions of section 189 of the LRA and states that the consultative meetings were held in accordance with the provisions of the LRA. It is further argued that the Applicants made no attempt to address or challenge the voluntary retrenchment process until the Respondent effected the retrenchments.
- [25] It is perhaps apposite that this court restate the provisions of section 189A.

[26] Section 189A applies to employers that employ 50 or more employees and intends to retrench the following numbers of employees: -

26.1 10 employees, if the employer employs up to 200 employees;

26.2 20 employees, if the employer employs more than 200, but not more than 300 employees;

26.3 30 employees, if the employer employs more than 300, but not more than 400 employees;

26.4 40 employees, if the employer employs 400, but not more than 500 employees; and

26.5 50 employees, if the employer employs more than 500 employees.

[27] The main purpose of section 189A is to facilitate and protect job security and effectively resolve disputes in large scale retrenchments and provide speedy remedies, especially where procedural defects occur in the retrenchment process and to promote

meaningful engagement between employers and employees' representatives and/or employees in large scale retrenchments on issues pertaining to the retrenchment process including the manner in which retrenchments may be avoided or minimised.

[28] In casu, the Respondent is alleged to employ more than 2000 employees. It sought to embark on large scale retrenchments in September 2022 and at that time, triggered a retrenchment consultation process based on the provisions of section 189A. The Applicants at that juncture were already on indefinite suspensions.

[29] Respondent alleges in its papers that NUMSA approached it and requested that the intended retrenchments should be implemented in accordance with the provisions of section 189 of the LRA.

[30] It is not clear from the papers what NUMSA's locus standi was during this process, whether it was the recognised union with most membership, and whether the Applicants were members of NUMSA. It is further not clear if the individual applicants in these matters were appraised of the developments in the consultative process

bearing in mind that they were on indefinite suspensions.

[31] Nothing further is alluded to in the Respondent's papers of the outcomes of its consultative process with NUMSA or any other structure regarding the proposed retrenchments.

[32] On 03 September 2024, two years later, the individual applicants were issued with letters stating that they have been paid salaries whilst they were on suspension. The Respondent further alleged in these letters that the Applicants' positions have become redundant and called upon them to state reasons why their contracts should not be terminated.

[33] Nothing whatsoever is said about the retrenchment processes that Respondent purportedly embarked upon in 2022 which according to the Respondent, the Applicants were very much aware of but chose not to challenge.

- [34] One would have expected the Respondent to address or inform the Applicants the outcomes of those consultations and perhaps give reasons why it took a period of two years to complete.
- [35] The letters addressed to the three Applicants suggest that the proposed retrenchments have little to do with the process embarked upon in 2022 and has more to do with the fact that they are being paid a salary whilst they are on lengthy suspensions.
- [36] Surely it is the Respondent that placed the Applicants on suspension for reasons known to it and it was incumbent on it to pursue disciplinary actions against them to its finality which it is clear, failed to do.
- [37] In Modise's case, this court is told that an advisory disciplinary action was conducted under the auspices of the

Commission for Conciliation, Mediation and Arbitration in terms of section 188A of the LRA. Modise was found not guilty. Modise in fact, states that the charges that were brought against him had nothing to do with the reasons given for his suspension.

- [38] Ntlhaphi's case on the other hand, was abandoned when the chairperson thereof ruled that she may have legal representation and Bok's matter ended when the Legal Representatives of the Respondent requested a postponement to amend the charge sheet. The reason that the Applicants are paid whilst on suspensions for a lengthy period cannot be put on their doorsteps. It was all the Respondent's doings.
- [39] The Applicants have approached this court on an urgent basis for its intervention. Section 189A(13) of the LRA affords the employees the right to challenge the substantive fairness of the termination of their employment by referring a dispute to this court and this may be done between the notice inviting them to consult on the contemplated retrenchments and the expiry of 30 days after termination of employment, or the date of dismissal then no notice is given, whichever applies.
- [40] A proper reading of section 189A(13)(a) to (c) suggests that the Applicants are properly before court for the relief they seek. The Respondent has not complied with a fair procedure to retrench them. The Respondent simply issued them with letters stating that they are paid salaries whilst they are on suspension in positions that have become redundant and it could not find alternative positions for them in its structures.
- [41] To compound matters, the Respondent has treated the Applicant's issue in the same vein as it would do in matters of a precautionary suspension when an employer could call upon an employee that he/she give reasons why he/she should not be suspended pending the launching of formal disciplinary action.
- [42] As correctly submitted by counsel for the Applicants, the dictum of Prinsloo J in BIFAWU obo Lebo Miya and another v Scorpion Legal Protection (Pty) Ltd[2] is appropriate when she stated the following at paragraph 16 thereof:

“The purpose of section 189A(13) is to prevent procedural issues from clouding substantive fairness of the retrenchment, wherefore the relief will usually be sought on an urgent basis in the form of a pre-emptive interdict. An application in terms of section 189(A) (13) should not be delayed as the relief in terms of sections 189A(13)(a) to (C) will be granted with the aim of ensuring that the consultation process serves its purpose.”

[43] I am therefore of the view that the Applicants have made out a proper case for the order that they seek to interdict the Respondent from terminating their employment pending a proper consultation with them on Respondent’s intended retrenchments.

[44] The Applicants have further prayed for an order to lift their suspensions. The applicants allege that they have been on lengthy suspensions without charges and referred this court to certain violations of the Respondent of its disciplinary code mandatory timeframes for the finalization thereof.

[45] I am of the view that it is opportunistic of them to raise such issues before this court. They had ample opportunity to raise them at the appropriate forum namely the CCMA. As a matter of fact, they still have the right to refer such matters to the CCMA as an unfair labour practice. The LRA requires them to refer such matters to the CCMA for conciliation prior to approaching this court for relief. They have not exercised the right that the LRA grants to them on such matters.

[46] In the circumstances, the following order is made:

Order

1. The Applicants’ non-compliance with the Rules pertaining to the time limits, forms and procedures for service of this Court is condoned and this matter is heard as one of urgency;
2. The Respondent is interdicted and restrained from retrenching the Applicants prior to the implantation and finalization of the

consultation process envisaged in terms of section 189 of the LRA;

3. The Respondent is directed to provide the Applicants with the minimum information required in terms of section 189(3) of the LRA; and
4. The Respondent is ordered to pay the costs of this application on scale C.

M. Kumalo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv T. Mahlare

Instructed by: Mahlare Attorneys

For the Respondent: Adv Ngubane

Instructed by: Mponyana Ledwaba Attorneys

[1] No. 66 of 1995, as amended.

[2]

(2024) 45 ILJ 298 (LC).

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Prepared on 11 October 2026 · Esheria