SOUTH AFRICA / JUDGMENT

Molefe and Others v South African Police Service (JS87/2018) [2021] ZALCJHB 18; (2021) 42 ILJ 1240 (LC) (11 February 2021)

[2021] ZALCJHB 18

COURT
Labour Court Johannesburg

BEFORE
Van Niekerk

CASE / FILE NUMBER
JS87/2018

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IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

Case No: JS 87/2018

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between-

INNOCENTIA LEBOGANG MOLEFE & 11 OTHERS Applicants

and

SOUTH AFRICAN POLICE SERVICE Respondent

Decided in Chambers.

Date of judgment: 11 February 2021.Judgment delivered by email to the parties' representatives.

JUDGMENT

VAN NIEKERK J

[1] This is an application to amend a statement of claim. The notice of amendment seeks to substitute the statement of claim on file in its entirety, a statement of claim was itself the subject of a prior amendment. The respondent has objected to the proposed amendment on a number of grounds, including that it seeks impermissibly to introduce new facts in support of a new cause of action, and that the statement of claim is in conflict with a

jurisdictional ruling made by a bargaining council commissioner when the matter was originally referred to arbitration. Further, the respondent submits that certain of the claims sought to be introduced are claims over which this court has no jurisdiction. Finally, the respondent submits that certain of the proposed amendments are internally contradictory and would, if permitted, be excipiable.

[2] The dispute has a long history. The applicants originally referred an unfair labour practice dispute to the bargaining council in which they challenged what they alleged to be their suspension in June 2015. On 18 July 2017, the arbitrator issued a ruling in terms of which he found that the real dispute between the parties was a dispute concerning the applicants' dismissal for operational requirements on 5 June 2015. In terms of the ruling, the applicants were directed to refer a dispute in those terms to the council, with an application for condonation for the late referral of the dispute. In the event that the late referral was condoned, the arbitrator directed the applicants to refer the dispute to this court. On 29 January 2018, the bargaining council condoned the late referral of the dispute.

[3] On 9 February 2018, the applicants filed a statement of claim in this court. They contended that the dismissal was procedurally unfair, as they had never been consulted or given any notice of termination of service. They further appear to contend that the dismissal was still substantively unfair in that there was no operational requirement that justified their dismissal.

[4] On 10 July 2018, the respondent filed a statement of response. In that statement, the respondent recorded that the applicants were temporary employees, engaged on a series of fixed-term contracts. The respondent states that in June 2015 the applicants were informed not to report for duty as their contracts had expired, and denied that there was any dismissal on account of operational requirements.

[5] In the amended statement of response, filed some two years later on 15 July 2020, the applicants record that from 2001, they were employed by the respondent as trained police reservists to perform, amongst other things, guard duties for awaiting trial prisoners at the Leratong hospital. In December 2008, the applicants aver that several temporary employees, excluding them, were employed on a permanent basis. The applicants contend that they were offered a 12 month fixed-term contract, which they accepted. In terms of that agreement, their employment could only be extended once, and then only in exceptional circumstances. The agreement terminated by the effluxion of time, but the applicants aver that they continued to perform work on similar terms under a tacit agreement for an undetermined period. In 2014, various circulars addressed the applicants' enquiry as to why they had not been appointed as permanent employees. They state that on 1 April 2015, their fixed term contracts for an undetermined period became deemed to be contracts of indefinite duration in terms of section 1988 of the LRA. From these asserted facts, the applicants seek to draw certain conclusions of law. The first is that the respondent has committed an unfair labour practice as envisaged by section 185 (b) of the LRA by acting inconsistently in that 'other temporary employees were offered permanent employment'.

Secondly, the applicants aver that the respondent has repudiated their fixed-term contract by purporting to terminate the contracts and by 'renouncing to remunerate, or continue to remunerate, the applicants for the work performed'. Further, the applicants contend that the respondent has contravened section 187 (d) of the LRA by dismissing them for reporting an unfair labour practice to the relevant authority that the respondent has contravened Schedule 8 of the LRA by failing to give the applicants a reason for dismissal and reminding them of their right to refer the matter to a bargaining council with jurisdiction. In the premises, the applicants contend that the respondent has contravened section 185 (a) of the LRA and that they are entitled to remedies for unfair dismissal. Finally, the applicants contend that for the period they continued to perform work contrary to the express wishes of the respondent, they advanced the affairs of the respondent and that in consequence, the respondent has unjustly enriched itself at their expense. In this regard, applicants contend that they are entitled to payment of 1 1/2 month salary in terms of section 195 of the LRA.

[6] The respondent objects to the proposed amendment to the statement of claim. The respondent contends that the proposed amendment disregards that part of the commissioner 's ruling which determined that the dispute between the parties was one concerning a dismissal for operational reasons and seeks unlawfully to extend the terms of the dispute beyond that narrow issue. Further, insofar as the applicants' claim is one of an unfair labour practice, the respondent submits that this court has no jurisdiction to entertain such claims and that the proper forum for the determination of an unfair labour practice is an arbitration hearing. Finally, the respondent submits that the proposed amendment is internally contradictory and, in itself, vague and embarrassing .

[7] The relevant legal principles are well-established. The court has a discretion to allow or refuse an amendment, and in doing so, takes into account the right of a party to amend its pleadings where the amendment is made bona fide, and the rights of the other party to object to the amendment where the amendment has the potential to prejudice that party. Ultimately, the primary object of permitting an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done (Cross v Ferreira 1950 (3) SA 443 (CPD). In particular, the court must have regard to whether the text of the amendment is set out in clear and particular terms; an amendment that would render the pleading excipient will ordinarily be granted.

[8] I am satisfied in the present instance that the terms of the proposed amendment would render the pleading excipiable , and that the amendment ought to be refused for that reason. First, and to the extent that the applicant seeks to introduce a claim of an unfair labour practice, it is trite that this court has no jurisdiction to entertain such claims as a court of first instance. Section 157 (5) makes clear that this court does not have jurisdiction to adjudicate an unresolved dispute if the LRA or any other employment law requires the dispute to be resolved through arbitration. Section 191 of the LRA regulates the resolution of disputes about unfair labour practices and provides that any unresolved disputes concerning an unfair labour practice may be referred to either a bargaining council with

jurisdiction or to the CCMA. The only exception (see section 191 (13)) concerns an unfair labour practice in the form of an occupational detriment on account of having made a protected disclosure, an exception that is not relevant in the present instance. There is no basis on which this court is entitled to entertain the claim reflected in paragraph 19 of the amended statement of claim, nor does this court have jurisdiction to entertain the claim to the effect that any inconsistent conduct on the part of the respondent contravened section 185 (b) of the LRA and thus constituted an unfair labour practice.

[9] Insofar as paragraph 20 is concerned, the applicants appear to contend that the respondent has repudiated their fixed-term contract by purporting to terminate it, which they contend amounts to a dismissal that was substantively and procedurally unfair. In the same breath, the applicants contend that they were in fact dismissed, and that the dismissal was automatically unfair on account of their having exercised the rights in terms of the act by reporting an unfair labour practice to the relevant authority. Further, the applicants contend that their fixed-term contract was, with effect from 1 April 2015, deemed to be a contract for indefinite duration. The pleading in this regard is imprecise and confusing. It is internally contradictory, vague and embarrassing. In particular, it is not open to the applicants to contend that they were engaged in terms of a contract which is deemed in terms of section 1988 to be of indefinite duration, while claiming that the respondent repudiated their fixed term contract, which repudiation amounted to a dismissal. Insofar as the claims for unjustified enrichment and negotiorum gesto are concerned, the applicants have simply failed to plead a case to sustain either of those causes of action. The basis of the court's jurisdiction to entertain these claims is also not established.

[10] Sight should not be lost of the fact that in terms of the arbitrator's ruling, the dispute between the parties is one that concerns the dismissal of the individual applicants on account of the respondent's operational requirements . The dispute referred to this court was a dispute cast in those terms. What the applicants have now sought to do is to stray significantly beyond the scope of the dispute as defined by the commissioner and introduce unsustainable causes of action or causes of action over which this court has no jurisdiction.

[11] For the above reasons, in my view, the application to amend the statement of claim ought to be refused.

I make the following order:

1. The application to amend the applicants statement of claim is dismissed.

Andre van Niekerk

Judge of the Labour Court of South Africa

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