

SOUTH AFRICA / JUDGMENT

Naicker and Others v Muswaba and Others (C194/2024) [2024] ZALCCT 20 (31 May 2024)

[2024] ZALCCT 20

COURT

Labour Court Cape Town

BEFORE

R Lagrange

CASE / FILE NUMBER

C194/2024

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THE LABOUR COURT OF

SOUTH AFRICA

AT CAPE TOWN

Of interest to other

judges

case

no:C194/2024

In

the matter between:

RAJENDRAN

NAICKER (aka BASIL)

First

Applicant

MUSTAKIEM

GAMILDIEN

Second

Applicant

And

DR

M M MUSWABA

First

Respondent

THE

COLLEGE OF CAPE TOWN

Second

Respondent

THE

HONOURABLE B E NZIMANDE,

MINISTER
OF THE DEPARTMENT OF HIGHER EDUCATION AND TRAINING
Third
Respondent
DR.
NKOSINATHI SISHI (N.O.), ACTING CHIEF DIRECTOR-GENERAL:
DEPARTMENT OF HIGHER EDUCATION AND TRAINING
Fourth
Respondent

Heard: 28
May 2024

Delivered: 31 May 2024

Summary: (Urgent interdict – application
for interim relief pending determination of final order –
alleged breach of contract
in terminating right to free accommodation
- employer taking steps to commence eviction of employees while
disputes over
the terms of their contracts of employment pending in
bargaining council proceedings – alternative relief granted)

JUDGMENT

LAGRANGE, J

Introduction

- [1] The order in this matter was made on 31 May 2024. The reasons for the judgement are set out below.
- [2] This is an urgent application brought by the first and second applicants, Mr R Naicker ('Naicker') and Mr M Gamaldien ('Gamaldien') against the respondents. Apart from seeking leave to have the matter heard on an urgent basis, the substantive relief sought in the notice of motion was for an order that:

"2. First and Second Respondents are interdicted from taking any further steps to evict First and Second Applicants from their on-campus housing.

3. The notice to vacate submitted to the First and Second Applicants dated 2 May 2024 be hereby set aside alternatively stayed.
4. It be declared that the First Applicant has made a protected disclosure in terms of the Protected Disclosures Act, No 26 of 2000.
5. First and Second Respondents are interdicted from subjecting the First Applicant to any further occupational detriment.

6. Pending the return date of this application on a date to be determined by the Registrar ... that the above prayers 2 to 3 operate as an interim interdict.

7. Costs of the suit on a punitive scale alternative an appropriate scale”

(sic)

[3] The application is opposed by the first and second respondents, namely Dr M Muswaba (‘Muswaba’ or ‘the principal’), who is the principal of the College of Cape Town (‘COCT’),

and COCT. The principal and COCT will be jointly referred to as ‘the college’. The Minister of the Department of Education (‘the minister’) and his department (‘the DOE’) are not opposing the application and have filed a notice to abide by the outcome. The respondent filed a substantial answering affidavit and the applicant filed a supplementary affidavit dealing with urgency which had not been fully canvassed in the founding affidavit. The college did not object to the supplementary affidavit but argued that the application was not urgent.

[4] Naicker and Gamaldien currently occupy rent-free residential premises on the Crawford and Thornton campuses of the college respectively. A central issue is whether they are entitled to occupy the premises in terms of their conditions of employment. The job designations and, or alternatively, the post appointments that they claim apply to them

are also disputed by the college.

[5] Unless otherwise specified, all events took place in 2024.

Brief Chronology

[6] In November 2023 a number allegations were made against the principal and were presented to the minister. Naicker was a party to the compilation of the allegations and they were discussed in a meeting between the minister and NEHAWU. Apparently, the complaints were submitted to NEHAWU, even though the applicants were members of NAPTOSA, because it was believed that union had good relations with the minister. The complaints concerned a wide range of alleged failings on the part of the principal, such as: failing to appoint lecturers; restricted tender bidding processes; unnecessary appointment of an investigator; nepotistic or irregular appointments ; harassment and bullying of staff; division within executive management, and attracting negative publicity of the college.

[7] On 27 March a circular dated 14 March was issued by the principal to all staff occupying residential premises at the college. The gist of the circular was that the college wished to regularise the leasing of college premises, for which no policy existed, and which was causing the college to lose money on immovable property that was being used without generating any income. The circular concluded with the following pertinent paragraphs:

“6.1 This internal circular supersedes all previous employee circulars and college policies that may have been issued from time to time on subjects covered in this circular. ...

6.2 These changes will be effective on the date of the signature and after this date all superseded parts of the related college practises will be null and of no effect. The circular will continue to be in force until all the related standard operating procedures are developed in line with the relevant government legal instruments governing TVET colleges in search of labour peace and of promoting

the college productivity.

6.3 All tenants who are occupying the college properties shall be given the first right of refusal to apply for renting the properties now occupying under the new policy statements.

6.4 In the event that the current tenants who are occupying college properties do not wish to apply to continue occupying them shall apply for three months' notice period to look for alternative accommodation. However, the tenant shall be given a three months' lease agreement under the new terms and conditions and the property is shall be advertised to tenant who might wish to occupy it for a longer period."

Attached to the circular was a proforma lease agreement.

- [8] On 5 April, Naicker sent an e-mail to the college in which he advised that he was taking legal advice on the issue and that he had a valid contract until the end of 2024 in terms of which he could stay on the premises rent free. He complained that his previous conditions could not be altered without following due process and claimed that other residents on college property had not been issued with the circular. He also pointed out that there was a grievance which had been lodged with the bargaining council which was scheduled for arbitration in June 2024.
- [9] On 10 April, Naicker's union, NAPTOSA, emailed the college. It pointed out that Naicker had lodged a grievance which was set down for arbitration on 12 June and accordingly it requested that the "rental arrangements" be stayed pending the outcome of the arbitration, which would determine if it was a requirement of his conditions of service that he should pay rental.
- [10] Gamaldien responded with the details of the accommodation he occupied and pointed out that his duties as a factotum required him to work after hours and over weekends and he was required to respond to any emergency at any given time. He indicated that he would like to have the opportunity to exercise a right of first refusal to engage in a rental of the accommodation he occupied. On 16 April 2024 he was advised that the rental amount applicable to the premises he occupied would be R 10,000 per month. In response to his claim about his duties, he was told "...you are not rendering full-time duties to the residences...". On 19 April he advised the college that he and two other factotums at the college were all staying rent free on college premises as part of the conditions of service as they were advised in their job interviews. He asserted his right to maintain his contractual

entitlement to rent free accommodation and would not be paying any rental at least until those conditions were changed as a result of a collective bargaining process.

[11] On 26 April, NAPTOSA refer a grievance on behalf of Gamaldien to the bargaining council. The grievance concerned the alleged unilateral variation of his contract of employment by demanding that he paid rental of R 10,000.

[12] On 2 May, both applicants were issued with a letter from the principal advising them that they had failed to take up the offer to rent the premises they were occupying and that they had not paid any rental for April. The letter went on to state:

“This notice is therefore serves as notice for you to vacate the college property on or before 31 May 2024 as you have not accepted the right of first refusal opportunity offered to you by the management on permission to continue with occupancy of the college property.

The service to notify you that you need to vacate the premises latest by 31 May 2024, failure to comply with this notice will leave the college with no choice but to institute legal proceedings against yourself and recover legal costs from you as well.”

[Emphasis added]

[13] On 6 May, in reply to the principal’s letter, the applicants’ attorneys of record wrote to the college advising that they intended to take legal proceedings against the college concerning the enforcement of the contractual obligations relating to the employment contracts. The letter asserted that the applicants were entitled to housing as part of their conditions of employment. The college did not make any response to this notice of intention to institute proceedings and on 13 May, the applicants’ attorneys reiterated their claim to be entitled to continue to occupy the premises they were living in and called upon the college to withdraw the notice to vacate the properties by midday on the following day failing which urgent proceedings would be instituted. The letter also noted that Naicker claimed to have made a protected disclosure concerning impropriety at the college and that the actions to a victim constituted an occupational detriment to him triggered by him making the disclosure.

[14] The college's attorneys responded on 14 May, stating that they still needed to consult fully with the college and obtain full instructions. They requested the applicants to hold all proceedings in advance pending that process and advised that a detailed response would be provided by 20 May. The next day they asked for proof that the applicants entitled to accommodation as part of their employment conditions and details of the protected disclosure. On 17 May, the applicants advised that Naicker had been employed since 2006 on the same terms and conditions on consecutive contracts of employment attaching documentation in support thereof and Gamaldien's contract of employment. The letter setting out the alleged improprieties which had been sent to the minister, which Naicker claimed was a protected disclosure was also attached. The applicants agreed to allow the college and to midday on 20 May to respond before they would take any further step. On that day, to the college replied that it was “reinstating” a notice dated 17 May, requiring them to

vacate the premises and warning that if they did not do so legal steps would be taken to institute eviction proceedings without further notice. In the bundle the only letter of this kind was the one dated 2 May, so I assume this was either a typographical error or the notice was re-issued on 17 May.

- [15] It is not disputed that when the disclosures came to light the principle decided on 22 November 2023 to summarily terminate Naicker's fixed term contract as the Crawford residence supervisor. The following day, Naicker referred a grievance to the bargaining council seeking to enforce the full terms of that contract.
- [16] Is 1 believes that the allegations he conveyed too Nehawu come out which were in turn conveyed to the minister disclosure amounted to a protected and that the principle's action in terminating his fixed term contract amounted to and occupational detriment in terms of the Protected Disclosure Act, 26 of 2000 ('the PDA'). There is nothing on the papers to indicate that he has done anything to refer a dispute concerning the alleged protected disclosure. However, he seeks final declaratory relief in these proceedings.
- [17] Insofar as there is any other legal process having a direct bearing on the issues before the court, the only ones I am aware of are the two Bargaining council dispute referrals by the applicants to the bargaining council concerning the enforcement of their terms and conditions of employment. Before turning to the interim relief sought by the applicants, I will first address the application for a declaratory order that Naicker made a protected disclosure and for interdictory relief Protecting both applicants from being subject to "further occupational" detriment

Relief relating to the PDA

- [18] Naicker seeks a final order declaring that he made a protected disclosure in terms of the PDA. The applicants have also sought final prohibitory relief to prevent any 'further' occupational detriment being visited on either of them.
- [19] Section 4 of the PDA describes the relief available under that Act. The section stipulates the remedies that are available for an employee who has or is being subjected to an occupational detriment or may be subject to one. This is pursuant to subsections 2(1)(a) and (b) of the PDA which set out two the objects of the legislation:

"2 Objects and application of Act

- (1) The objects of this Act are-
- (a) to protect an employee or worker, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
- (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; ..."

[20] Clearly, the statutory emphasis is on protecting an employee from suffering any prejudice in consequence of making a protected disclosure. Nowhere does the PDA envisage a separate remedy of declaratory relief solely to determine in isolation whether a protected disclosure has been made. The prescribed path for obtaining relief under the PDA is to refer a dispute to the Labour Court in terms of s 191(13)(a) of the Labour Relations Act, 66 of 1995 ('the LRA') for a determination whether they have been subjected to an occupational detriment under s 3 of the PDA, having made a protected disclosure. It seems plain that neither the

LRA nor the PDA envisage that the existence of a protected disclosure can be determined in isolation but must be part and parcel of the same proceedings which must determine if the employee had suffered prejudicial treatment because of making that disclosure.

[21] Quite apart from that consideration, in *Grieve v Denel (Pty) Ltd*, [1] the Labour Court clearly stated that in urgent proceedings the court may only grant interim relief in a dispute under the PDA:

"[9] The powers conferred upon this court are expressed in wide terms so that any employee who has been subjected, is subject or may be subjected to an occupational detriment in breach of s 3 may approach the Labour Court for appropriate relief. Since conciliation is a prerequisite before this court can grant final relief, in matters of urgency where the occupational detriment will occur unless the employer is interdicted and restrained, 'appropriate relief' must therefore include the power to grant an interim interdict pending the resolution of the underlying dispute. The court only has jurisdiction to determine the underlying dispute once the conciliation process has run its course. This is nonetheless the type of case where the court clearly has the power to order the status quo to be preserved or restored pending determination of the main dispute."

[22] In a rare instance, final relief has even been granted in opposed application proceedings but then only after the employee had obtained

interim relief to interdict the employer from proceeding with a disciplinary enquiry. Moreover, that application was brought before

the High Court, to which the dispute procedures of the LRA do not apply[2]. On considering the jurisprudence I am satisfied that it is competent to grant interim relief to halt or prevent an occupational detriment being imposed on an employee and in that context the court must necessarily take a prima facie view on whether a protected disclosure is made. It has also happened that a court, relying on the principles enunciated in *Booyesen v Minister of Safety & Security & others*[3], found exceptional circumstances existed for granting final relief without interim relief first being granted and without a referral of the dispute to conciliation.[4]

[23] However, in this instance, Naicker complains of an occupational detriment that already occurred in November 2023. Until this urgent application, the applicant has not taken any other steps to pursue a claim for final relief under the PDA by referring the dispute to conciliation. No exceptional basis has been advanced for the court departing from the normal pre-requisite steps required before it can determine final relief. In the absence of being able to determine the existence of an occupational detriment, it follows the court also

cannot grant any consequential final relief interdicting the college from subjecting either of the applicants to

any 'further operational detriment'. Consequently, granting either of the forms of final relief relating to the PDA would not be competent in these proceedings.

Urgency

- [24] Did the applicants act with sufficient speed in launching this application? It is arguable that the applicants might have sought urgent relief during April after they received the instruction at the end of March that they needed to apply to conclude a lease agreement if they wished to continue occupying their residential premises on the college property. However, at that stage they could not know whether they would be facing eviction if they failed to conclude such an agreement.
- [25] On 6 May their attorneys asserted the applicants' rights to occupy the premises rent free in terms of the contracts of employment and advised that they would take legal steps to enforce those rights. When the colleges' attorneys asked for more information relating to their claim, they promptly supplied information concerning their contractual entitlements. The college attorneys asked for time to consult with, and take instructions from, the college, promising to revert on 20 May. On that date, the college advised that it was 'reinstating' a notice dated 17 May that the applicants must vacate the premises and warned that if they did not do so the college would institute eviction proceedings against them without any further notice. The applicants then launched this application on 21 May, and it was enrolled for hearing on 28 May.
- [26] The college argues that the urgency was self-created. On the sequence of events, this was not a case in which the applicants simply delayed launching the application by issuing carefully timed correspondence addressed to the respondent designed to buy time. The college attorneys asked for time to respond and for information and it would have been reckless for the applicants to proceed without granting those requests. As soon as the college responded unequivocally, the application was launched. The application was launched a full week before the hearing and the nub of the dispute was already well known to the college, which was forewarned that urgent court proceedings were imminent. Consequently, I am satisfied that the applicants were not dilatory in launching the application and the respondents had sufficient time to respond.
- [27] Do the applicants have a suitable alternative remedy? The applicants have already referred disputes to determine their contractual rights to the bargaining council. The college is not willing to await the outcome of those disputes to settle the applicants' contractual rights which in turn will determine their right to rent-free occupancy of the premises in question. The college has shown that it intends to forge ahead with the eviction of the applicants, despite the pending disputes at the bargaining council. It was argued that the applicants do have a suitable alternative remedy which is to defend any action the college takes under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('the PIE

Act') to secure their eviction. On this argument, the applicants 'remedy' is their right to defend themselves as and when the respondent invokes the eviction process under the PIE Act. An implicit assumption of this argument is that it was premature of the applicants to launch this application until the threat of eviction becomes more tangible and that they are not entitled to try and halt the college from embarking on that course of action before it has formally begun even though the college has unequivocally stated its

intention to do so.

[28] The applicants have already invoked a suitable remedy to determine their contractual rights, which in turn will determine if they have a current contractual right continue to occupy the premises rent-free. If they are proven correct in those proceedings, that will negate the basis for pursuing any eviction proceedings by the college, which are based on them not having contractual rights to such accommodation. An order of interim relief will preserve their right to obtain finality on their current rights. In essence the applicants wish to halt a further legal process initiated by the college, which presumes to pre-empt the outcome of the council proceedings. Undoubtedly, in any proceeding under the PIE Act, the applicants could raise a defence of

lis pendens and argue that PIE Act proceedings be stayed pending the outcome of their disputes at the bargaining council.

[29] However, I do not understand that if a party invokes the statutory dispute procedures of the LRA to determine a dispute and the other party to the dispute is intent on embarking on another course of legal action in which the same issue in dispute would have to be determined, that its primary recourse is to have to defend itself in those other proceedings, rather than to restrain the other party from embarking on them. I do not think that is a suitable alternative to the course of action the applicants have chosen by bringing this application.

Merits of application for interim relief

[30] It is trite law that an applicant seeking interim relief must show a prima facie right, even though open to some doubt; a well-grounded apprehension of irreparable harm to the applicants if the interim interdict were not granted; no other satisfactory remedy, and the balance of convenience favours granting interim relief. The question of a suitable alternative remedy has been dealt with above.

[31] I am satisfied on the affidavits that there is prima facie evidence that the contracts of Naicker and Gamaldien in their respective capacities as residence supervisor and factotum do entail

them staying on the premises as part and parcel of the performance of those functions, though this is open to doubt. In this regard I note that the college maintains that neither of them occupy those roles, but the explanation for such claims seems somewhat contrived and lacks plausibility. It is apparent also that some of the disputes of fact can be resolved on the papers and are unlikely to be without oral evidence.

[32] The consequence of allowing the college to embark on eviction proceedings, while the dispute over the applicants' contractual entitlements including their right to rent free accommodation is pending, is to undermine the applicants' invocation of the statutory dispute resolution proceedings. The respondents are prejudiced by having to delay any eviction process till later, if they should ultimately be successful. On the other hand, if the applicants are compelled to vacate the premises before the outcome of the pending council proceedings, but they are ultimately successful, they will have suffered the cost and considerable inconvenience of having to move and find alternative temporary accommodation for them and their families, and will have to extricate themselves from those accommodation arrangements before they would be able to re-occupy their present accommodation on college premises. In the light hereof, the balance of convenience favours the applicants.

[33] The abovementioned harm the applicants could be exposed to if compelled to vacate the premises before an outcome is obtained, is also not the kind of harm that they can be reversed even if they are ultimately successful and is irreparable. It is also reasonable to apprehend this could occur.

Alternative relief

[34] The relief sought by the applicants was for interim relief pending the determination of a final order. From the discussion above it is clear that the appropriate vehicle for determining the applicants' contractual rights on which their right to rent free accommodation rests, are the disputes pending before the bargaining council, which processes this court would usurp if it were to consider final relief. Accordingly, the order is cast in the form of alternative relief.

[35] Accordingly, the following order was made on 31 May 2024

Order

[1] The matter is heard as one of urgency in terms of Rule 8 of the Labour Court Rules, and the Applicants' non-compliance with any rules relating to time periods and filing of documents is condoned.

- [2] Pending the outcome of the dispute dated 23 November 2023 set out in Annexure “BN 20” to the founding affidavit, which the First Applicant referred to a bargaining council, the First and Second Respondents are interdicted from taking any further steps to compel the First Applicant to vacate the residential premises he currently occupies with his family on a rent-free basis at the First Respondent’s premises, or to evict him therefrom.
- [3] Pending the outcome of the dispute dated 26 April 2024 set out in Annexure “BN 23” to the founding affidavit, which the Second Applicant referred to a bargaining council, the First and Second Respondents are interdicted from taking any further steps to compel the Second Applicant to vacate the residential premises he currently occupies with his family on a rent-free basis at the First Respondent’s premises, or to evict him therefrom.
- [4] The application to declare that the First Applicant made a protected disclosure in terms of the Protected Disclosure Act, 26 of 2000 is struck off the roll.
- [5] The First and Second Respondents are jointly and severally liable for the Applicants’ costs, the one paying the other to be absolved.

R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Advocate M Titus instructed by Richard Brown Heroldgie Attorneys
For the Respondent: Advocate L Dzai instructed by Mukomba Attorneys

[1]

(2003) 24 ILJ 551 (LC)

[2] See *Engineering Council of SA & another v City of Tshwane Metropolitan Municipality & another*

(2008) 29 ILJ 899 (T) confirmed on appeal in *City of Tshwane Metropolitan Municipality v Engineering Council of SA & another* 2010 (2) SA 333 (SCA).

[3]

(2011) 32 ILJ 112 (LAC)

[4] See *Gallocher v Social Housing Regulatory Authority & another*

(2019) 40 ILJ 2732 (LC)

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Prepared on 12 October 2026 · Esheria