

SOUTH AFRICA / JUDGMENT

SAMWU obo Lehole and Others v Calvin Security Services (Pty) Ltd and Another (J 1062/2023) [2023] ZALCJHB 241 (10 August 2023)

[2023] ZALCJHB 241

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 1062/2023

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THE LABOURCOURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J

1062/2023

In the matter between:

SAMWU
obo KATLEGO LEHOLE AND OTHERS
Applicants
And
CALVIN
SECURITY SERVICES PTY LTD
First
Respondent
SOUTH
AFRICAN AMALGAMATED AND INTEGRATED WORKERS UNION
Second
Respondent

Heard:

02 August 2023

Delivered:

10 August 2023
(This judgment 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 10 August 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] On 21 July 2023, the applicant in the present proceedings (the union) withdrew an urgent application filed on 14 July 2023 in terms of which they sought an order interdicting and restraining the respondent from proceeding with the termination of fixed term contracts concluded between the respondent and the union's members, 'pending the outcome of the close shop agreement dispute referred to the Commission for Conciliation and Mediation (sic) ("CCMA")'. In that application, the union averred that the first respondent was forcing members to join another union (SAAIWU) and was intent on dismissing them on account of their refusal to do so.
- [2] Less than a week later, on 27 July 2023, the same applicant filed the present application, yet another urgent application, under a different case number, in which it sought relief in the first part interdicting the first respondent from unlawfully terminating the employment contracts of its members by relying on the close shop agreement with the second respondent (SAAIWU), pending finalisation of Part B of the application. Part B seeks a declaratory order to the effect that the 'closed/agency shop collective agreement' concluded between the first respondent and SAAIWU is unlawful and invalid.
- [3] The factual background is one in which the individual applicants were employed by the first respondent in terms of a fixed term contract. The duration of that contract was tied to a service level agreement between the first respondent and its client, Rand Water. The fixed term contract expired in February 2023, but continued on a month-to-month basis from 1 March 2023 pending the submission and adjudication of tenders for a new contract. The first respondent was awarded a new contract by Rand Water in June 2023. The contract contained new terms and specifications and in consequence, the first respondent advised its employees of this fact and invited them to reapply for positions that became available in terms of the new contract.
- [4] In June 2023, notices were issued to the employees giving four weeks' notice of the termination of the month-to-month contracts. Interviews were conducted with the individual applicants in late June, during which the applicants averred that the affected individuals were ordered to accept a closed/agency shop agreement and to join SAAIWU. The applicant states that the affected individuals refused to join the SAAIWU and that they were then told that they would not be considered for appointment.
- [5] On 3 July 2023, the union wrote a letter to the first respondent demanding that it refrains from forcing its members to join SAAIWU and that it undertakes to suspend what it referred to as the unlawful termination of their contracts, pending the finalisation of the organisation of rights dispute referred to the CCMA. This is a reference to a dispute referred to the CCMA

on 6 March 2023 that concerned organisational rights. That dispute was withdrawn and a fresh dispute referred and set down for conciliation on 20 July 2023. That dispute remains pending.

- [6] It would appear that the union considers that, as a matter of law, by permitting the individual applicants to work beyond the date of expiry of the fixed term contract the necessary consequence is that their employment is deemed to continue for an indefinite period on similar terms and further, that a reasonable expectation had been created that the fixed term contract would be renewed on similar terms. In the founding affidavit, the deponent avers that 'the continuation of the employment contract beyond the termination date resulted in the applicants' contract being novated to a contract of indefinite period'.
- [7] In essence, the union contends that the first respondent has relied on an unlawful closed/agency shop agreement between the first respondent and SAAIWU to terminate the contracts of employment of the applicants. The first respondent denies that it has dismissed any employees. The first respondent avers that after its reappointment as a service provider to Rand Water in June 2023, it extended an invitation to all of those employees previously engaged on a fixed-term basis to be considered for appointment. The majority

of employees have applied and have been reappointed. In these circumstances, the first respondent denies the existence of any termination of employment. In so far as the closed shop agreement is concerned, the first respondent avers that it concluded a 'close

shop' (sic) agreement with the second respondent, with effect from March 2023. (I would note that the agreement attached to the papers is an agency shop agreement, and not a close shop agreement. The difference between the two is of course fundamental and perhaps not understood by the deponent to the answering affidavit filed on behalf of the first respondent).

- [8] In Part A of the notice of motion, as I have indicated, the union seeks to interdict the first respondent from unlawfully terminating the contracts of its members by relying on the closed/agency shop agreement, pending the outcome of Part B. The requirements for an interim interdict oblige the applicant to establish a prima facie right. I have had some difficulty appreciating the exact nature of the applicants' case, and the right that they seek to assert. The applicants have specifically cast their claim in contractual terms. The deponent to the founding affidavit states that the application 'is brought in terms of section 77 (3) of the BCEA as the applicants' contract are not supposed to be terminated unlawfully, especially using an unlawful closed/agency shop agreement', and that without the application, 'the first respondent will continue with its unlawful termination of contract of the applicants contrary to section 77 (3) of the Basic Conditions of Employment Act...'
- [9] Section 77 (3), to which the applicants specifically appeal, does no more than confer jurisdiction on this court in respect of matters that concern contracts of employment. It confers no substantive rights either in relation to termination of employment contracts or otherwise. Why the applicants have elected not to rely on the right against unfair dismissal

established by the LRA is not explained. But cast as it is, the applicants are at least obliged to establish a termination of employment by the first respondent and that the termination of the contract is unlawful, in a contractual sense.

- [10] The first respondent's case is that the duration of the employment contracts was tied to the duration of its contract with Rand Water, and when that contract expired by the effluxion of time in June 2023, so did the employment contracts. Between March and June 2023, pending the awarding of a new contract, the employment of its employees was continued on a month-to-month basis. When the new contract was awarded, the first respondent gave its employees four weeks' notice of the expiry of the fixed term contract.
- [11] In my view, the union has failed to make out a prima facie case to the effect that the contracts of its members were terminated other than by the effluxion of time. What the facts disclose, at best for the union, is a refusal or failure to re-employ, rather than a termination of employment. To the extent that the applicant relies on what it terms a novation of the fixed term contract, there is no case for novation made out in the papers. Curiously, the applicants have not sought to rely on section 198B of the LRA, which creates a presumption of a contract of indefinite duration in certain circumstances where an employee is initially engaged on a fixed-term contract. In any event, contractual principles are generally speaking not concerned with the reason for termination of employment – the concept of unlawful termination in contractual terms is concerned primarily with process, and in particular the question of notice and whether the required period of notice was given, if it was required at all. If the union's complaint (as it seems to be) is that the first respondent is not entitled to terminate an employment contract by reason of a closed or agency shop agreement that is invalid, that is quintessentially a claim of unfair dismissal. Again, why the union has not elected to invoke the remedies available in the LRA is not apparent.
- [12] For the above reasons, I am not satisfied that the union has established a prima facie right for the purposes of the claim for interim relief. The application stands to be dismissed.
- [13] In so far as costs are concerned, both respondents sought costs on a punitive scale. This is not the first time that the union has approached this court, on an urgent basis, in respect of the same factual matrix, with a claim that is ill-conceived and misguided. The respondents have had to incur the costs of opposing the proceedings. The requirements of the law and fairness dictate that they should be indemnified, as far as an order for costs on the ordinary scale permits.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Mr. J Gwebu, Madlela Gwebu Mashamba Inc. Attorneys

For the first respondent:

Adv Z Buthelezi

Instructed by:

Aphinda Gungqa Attorneys

For the second respondent:

Adv A Cook

LDA Incorporated Attorneys

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Prepared on 13 October 2026 · Esheria