

SOUTH AFRICA / JUDGMENT

Shema v Ditsobotla Local Municipality and Another (J 1625/23)

[2024] ZALCJHB 151 (2 April 2024)

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COURT

Labour Court Johannesburg

BEFORE

Ngwenya

CASE / FILE NUMBER

J 1625/23

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J 1625/23

In

the matter between:

ISAAC

TSIETSI SHEMA

Applicant

And

DITSOBOTLA

LOCAL MUNICIPALITY

First Respondent

THE

ACCOUNTING OFFICER

(DITSOBOTLA

LOCAL MUNICIPALITY)

Second Respondent

Heard:

30 November 2023

This judgment was

handed down electronically by consent of the parties' legal representatives by circulation to them via email.

The date for

hand-down is deemed 2 April 2024.

JUDGMENT

NGWENYA, AJ

Introduction.

- [1] The Applicant, has approached the Court seeking two categories of urgent relief. First is contractual relief in the form of specific performance and the second is leave to execute an order granted by this Court in different proceedings between the same parties.
- [2] There was a challenge to the urgency of this application, however, I am satisfied that the Applicant has made out a case for urgency. Any complaint about the delay in launching these proceedings, does not offset my finding that the Applicant will not obtain substantial redress at a hearing in the ordinary course[1].

The Relevant Facts Giving Rise to this Application

- [3] The Applicant is employed by the First Respondent as the Legal Manager. It is not seriously in dispute that the Applicant commenced employment during 1 June 2021. It is common cause that the Applicant

was dismissed during or about 24 April 2023, pursuant to a disciplinary enquiry which was, it is pleaded “purportedly” held in accordance with the Disciplinary Procedure Collective Agreement.

- [4] Following the Applicant’s dismissal, he referred an unfair dismissal dispute to the Bargaining Council. During conciliation proceedings, the parties entered into a settlement agreement in terms of which the Applicant was reinstated retrospectively and it was agreed that:
- a. The employer agrees to reinstate the employee with effect from 3 July 2023 on the same terms and conditions of employment as existed prior to the dismissal. [Clause 1]
 - b. The Applicant to report for duty on 3 July 200213, at 07:30 at the Respondent’s premises. [Clause 3] (sic)
- [5] On 13 July 2023, the First Respondent’s Acting Municipal Manager, issued a letter confirming the Applicant’s reinstatement in terms of the settlement agreement and confirming the payment of outstanding salaries.
- [6] On 8 August 2023, the Applicant launched urgent proceedings in this Court seeking to claim outstanding remuneration to which he had become entitled to as a result of his reinstatement. An order was granted to this effect by this Court on 18 September 2023.

[7] On 11 August 2023, the Applicant launched an application to review and set aside the settlement agreement entered into between the parties. The Applicant contends that the First Respondent has not taken any steps to prosecute the review proceedings. On 25 September 2023, the First Respondent delivered an application for leave to

appeal the order granted by this Court on 18 September 2023.

[8] On 15 November 2023, the First Respondent's Acting Municipal Manager, distributed a memorandum in terms of which Managers were invited to participate in a management meeting scheduled for 17 November

2023. Shortly before the commencement of the meeting, the Applicant pleads that he was called aside by the Acting Municipal Manager who informed him that he would not be permitted to participate in the meeting and that he should not report for duty until the pending Court proceedings are finalised. A memorandum was issued to the Applicant to this effect.

[9] Following the meeting of 17 November 2023, the Applicant's attorneys of record placed the First Respondent on terms by means of a letter dated 19 November 2023 which tendered the Applicant's

services.

[10] On 21 November 2023, the First Respondent's attorneys of record responded stating the following:

- a. The matter of the Applicant's salary is the subject of an application for leave to appeal.
- b. The matter of the Applicant's reinstatement is subject to a review application.
- c. As a result the Applicant knows and/or is reasonably expected to know that he is not an employee of the First Respondent and did not render any services in return of any payment thereof since 14 June 2023.

[11] This application was launched by the Applicant against this

background.

Analysis

[12] This Court has consistently recognised the power and jurisdiction, in terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("BCEA"), to make orders of specific performance compelling an employer to honour contractual obligations.[2]

[13] It is important to point out, on the question of jurisdiction, that the Applicant's case does not concern the termination of a contract of employment nor a dismissal. The Applicant, seeks to enforce a contract of employment which was revived and reinstated by agreement between the parties following the conclusion of the settlement agreement.

- [14] The nature of the relief is relevant to the exercise of jurisdiction, as this Court has lamented litigants seeking to bypass the statutory dispute resolution procedure, by approaching this Court in terms of section 77(3) of the BCEA with claims that are clearly justiciable in terms of the Labour Relations Act, 66 of 1995 (“LRA”).
- [15] The Labour Appeal Court most recently in *The Passenger Rail Agency of South Africa v Ngoye*[3], held that:
- [28] While there are provisions in the legislation, notably section 77(3), that endow the Labour Court with authority to adjudicate contractual claims. In my view, these provisions must be interpreted by having regard to the objectives sought to be achieved by the labour law dispensation as a whole. I do not believe that the intention of the legislature in enacting section 77(3) was to give the Labour Court jurisdiction over disputes that arise from dismissals and ULPs which should, in the first instance, be categorised as unfair dismissal disputes or unfair labour practice disputes and dealt with by the CCMA. In dealing with employment disputes, our first point of reference should be the constitutional right to fair labour practices, which is given effect in the LRA.
- [16] In my assessment the Applicant’s claim is not such a case.
- [17] The First Respondent, has in essence determined that no employment contract or employment relationship exists by virtue of the review application that has been launched and it appears the application for leave to appeal the order of the Labour Court of 18 September 2023. There is no merit to this argument.
- [18] The First Respondent peculiarly pleads that “[T]he employment relationship between the applicant and the respondents was terminated on or about 24 April 2023.” I say that it is peculiar because the parties settled the dismissal dispute by way of a settlement agreement in June 2023 – the Respondents cannot seek to rely upon the initial decision to dismiss the Applicant in April 2023.
- [19] It is trite that even if conduct is invalid or unlawful, until it is rescinded or reviewed and set aside it stands. In the present matter the settlement agreement concluded between the parties has not been set aside.[4]
- [20] In addition, it is not clear nor was it explained in the answering affidavit or in argument the basis upon which the First Respondent contends that the employment relationship had ceased to exist, bearing in mind (i) the settlement agreement reinstating the Applicant and (ii) the letter from the First Respondent’s Municipal Manager confirming the Applicant’s reinstatement.
- [21] In *Chubisi v South African Broadcasting Corporation*[5] this Court considered similar circumstances and held as follows:

- [30] Reference in this regard is made to the 'Notification of non-recognition of your purported contract of employment with the SABC', in terms of which the applicant was notified that her appointment was irregular and unlawful, and as also duly established by the Public Protector. In essence, she was informed that the SABC does not 'recognise' her contract of employment, and therefore she is not considered an employee. Conspicuous with this notice of non- recognition is that nowhere is the applicant informed that her services are terminated, or that she is dismissed.
- [31] The concept of 'non-recognition of a contract of employment' is unknown, unheard of, and foreign within the context of the LRA, or any other legislative provisions one can think of. In my view, it is a meaningless if not a vague concept. Even if the definition of dismissal under section 186(1) of the LRA was extended as pointed out by the LAC in Steenkamp, so that the word "terminated" in those provisions is given its ordinary meaning of "bringing to an end", it is doubted that from the concept of 'non-recognition of contracts', one can readily infer 'terminated' or 'dismissed', for the purposes of a claim under section 186(1) of the LRA. It is indeed easy for an employer to decide that it no recognises an employee's contract of employment. It will however be an even more onerous burden on an employee at the CCMA or Bargaining Council, to discharge the onus under section 192(1) of the LRA, that he or she was dismissed, when all that she was told that a contract of employment was no longer recognised.
- [22] Having found that the contract of employment and the employment relationship remains extant, I must now determine whether the Applicant is entitled to specific performance.
- [23] After referring to Nationwide Airlines[6], the LAC in PRASA[7] considered the discretion to be exercised in granting specific performance, particularly in the case of employment contracts, the

LAC stated:

'[51] The reason why employment contracts were considered differently when it came to the relief of specific performance is precisely because an employment contract is not a commercial or transactional contract, it is a personal contract. In my view, when we are dealing with employees on the upper echelons of a business enterprise one must not lose sight of the fact that these employees on the level of management need to involve themselves in helping with the running of the enterprise, they need to conduct the business in cooperation and consultation with the owners or those who are authorised to control the affairs of the enterprise. In this instance, although there has been an unlawful termination of the contract, I cannot exercise a discretion in favour of granting specific performance without being satisfied that in their continued employment there will be no interaction between the Respondents and those who control the affairs of the Appellant to determine the continued operation of the enterprise, or whether the grant of specific performance may lead to conflict within the workplace. Added is the fact that the termination of the employment contracts demonstrates' that the Appellant is no longer in need of the Respondents' services. These factors must be taken into account in

determining specific performance for an unlawful termination but may play no role where the dismissal is found to be unfair. Finally

seeking specific performance because of financial prejudice that employees suffer as a result of losing their income is not grounds

for granting of this relief.

[24] In exercising my discretion, in my view it is appropriate to grant specific performance in the present circumstances. The papers before this Court do not demonstrate that specific performance would not be appropriate. It appears that the First Respondent intended to comply with its obligations in terms of the Applicant's contract of employment, following its revival by the settlement agreement. However, at some stage a decision was taken to review and set aside the settlement agreement, which in the absence of mere reference to some "corruption", no factual basis laid for such decision.

[25] In my view, the Applicant has clearly made out a case for specific performance.

[26] I now turn to the relief seeking to enforce the order granted by this Court in September 2023. This Court in *Justice for All Workers of South Africa v Registrar of Labour Relations and Others*[8] summarised the requirement for an application in terms of section 18(3) of the Superior Courts Act, as follows:

[12] The effect, in short, is this: the Superior Courts Act limits the discretion of a court to grant the relief of interim execution and section 18(3) introduced a higher threshold and more onerous requirements. An applicant must prove three distinct requirements on balance of probabilities: 1. Exceptional circumstances (including the balance of convenience and prospects of success); 2. That it will suffer irreparable harm if interim execution is not ordered; 3. That the other party will not suffer irreparable harm if an order of interim execution is granted. [13] Section 18(3) places a heavy onus on an applicant and if an applicant fails to prove any one of the requirements, the application must fail and be dismissed.

[27] In my assessment, the Applicant has not made out a case for exceptional circumstances. While I am mindful that the Applicant is entitled to the past remuneration as provided for in the previous order of this Court, I do not find that in these circumstances it may be elevated to exceptional circumstances. Additionally, the Applicant's concerns regarding the dilatory manner in which the Respondent has prosecuted its review application and the application for leave to appeal are catered for by the provisions of the Practice Manual of this Court. I am not satisfied, that at this stage, the jurisdictional requirements for the application for leave to execute have been met.

Costs

[28] Guided by section 162 of the LRA, I am of the view that having regard to considerations of law and fairness, the Applicant should not be burdened with the costs of this application. The Respondents were aware that the settlement agreement is valid until such time as it has been set aside, hence the approach to this Court in August 2023, they were not entitled to resort to self-help.

[29] In the premise I make the following order:

Order:

[30] The application is dealt with as an urgent application in terms of Rule 8.

[31] The Respondents' refusal to allow the Applicant to render his service as the First Respondent's Legal Manager is unlawful.

[32] The First Respondent is in breach of the Applicant's employment contract and must comply with its contractual obligations by permitting the Applicant to render his services, in terms of his contract of employment, as the First Respondent's Legal Manager.

[33] The First Respondent is order to pay the Applicant's costs on a party and party scale.

Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr Scholtz (Scholtz Attorneys) For the Respondent: Advocate L Nyangiwe
Instructed by: Morathi Mataka Attorneys

[1] East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd [2011] ZAGPJHC 196 also [2012]

[2] Ngubeni v National Youth Development Agency and another (2014) 35 ILJ 1356 (LC); Solidarity and others v South African Broadcasting Corporation 2016 (6) SA 73 (LC).

[3] The Passenger Rail Agency of South Africa v Martha Ngoye and others; Unreported Judgment; Labour Appeal Court, Johannesburg, Case Number JA 78/21, 26 March 2024

[4] Sisa Maradona Gobombo v Servest (Pty) Ltd T/A Servest Security JS 10523/13, 6 January 2016; Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)

[5] (2021) 42 ILJ 395 (LC)

[6] Nationwide Airlines (Pty) Ltd v Roediger and another 2008 (1) SA 293 (W)

[7] Fn 3

[8] Unreported Judgment, Labour Court Johannesburg, Case No J 930/23 (27 February 2024),

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