IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG\DURBAN

Not reportable

Case No: D1269/2019

In the matter between:

ZODWA PATRICIA MBATHA **Applicant**

and

DUBE TRADEPORT CORPORATION **Respondent**

Heard: **2 October 2019**

Delivered: **15 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The applicant seeks a declaratory order that her dismissal by the respondent was unlawful and *void ab initio*, and that she should be entitled to resume her duties. The urgent application was opposed on the applicant's own papers.

[2] The applicant was until her contract of employment was terminated on 2 September 2019, employed by the respondent since August 2015 in the position of Corporate Services Executive. The respondent is a business entity of the KwaZulu-Natal Provincial Government, which is charged with the responsibility of developing the province's infrastructural projects, with the aim of promoting foreign and local investment.

[3] The applicant's employment was subject to probation and security clearance from the State Security Agency. The respondent had however utilised the services of an entity called Foresight Advisory Services (Pty) Ltd (FAS) to conduct the applicant's security clearance, whose report formed the basis of the termination of the employment contract.

[4] The basis of the termination as per the notice issued on 2 September 2019 was as follows;

4.1 FAS had conducted a lifestyle audit and security vetting on the applicant and another executive, and the results were negative as it was found that she presented a risk to the company.

4.2 Since the contract of employment was subject to a security clearance, her employment would automatically be invalid if the security vetting results were negative.

4.3 The Board of the respondent on 26 August 2019 took account of the negative lifestyle and security vetting and resolved to automatically terminate her employment, as the contract is rendered invalid by the negative results. This was further so since her continued employment was demonstrably risky and untenable.

4.4 The contract of employment was invalid and was to be automatically terminated with immediate effect. It was further added that this was not a dismissal but an automatic termination of the contract of employment by virtue of her negative lifestyle audit and security vetting.

[5] The applicant challenged the termination of her services on the grounds that;

5.1 It was done in breach of her contract of employment as she was summarily dismissed on grounds not listed therein, and further that the respondent had relied on the contents of the FAS report.

5.2 The respondent failed to follow the procedures as required by the Labour Relations Act (LRA)[1] as she had successfully completed her probationary period at the time that she was dismissed.

5.3 The respondent failed to acquire a security clearance from the State Security Agency, which is the only competent authority that can confer the security clearance status of the level of 'secret'.

5.4 FAS was not competent to perform the vetting as its mandate did not deal with security clearance, nor could its investigation be construed as 'a security clearance'.

5.5 The FAS recommendations did not in any event find her guilty of any misconduct.

5.6 Her dismissal was predicated on malice and was a witch-hunt, as she;

5.6.1 Had differences of opinion with Hamish Erskine, the CEO of the respondent in respect of certain functioning of the respondent;

5.6.2 Had also challenged certain instructions related to procurement processes in her capacity as a member of the Bid Evaluation Committee;

5.6.3 Had made recommendations for a skills audit of the respondent's employees to be performed, as she had established that some of these employees occupied positions which they were not suitably qualified for;

5.6.4 Had also challenged the manner in which financial transactions were handled, including the non-reconciliation of the respondent's payroll;

[1] Act 66 of 1995 (as amended)

5.6.5 She was targeted as her performance rating was downgraded without reasons, her work environment was changed to her detriment, and was side-lined on key decisions of the respondent which were to be considered by her. In August 2019 she had declared a dispute in relation to her performance assessment moderation.

Preliminary issues:

[6] In opposing the application, the respondent raised two preliminary points, *viz*, the lack of jurisdiction, and the lack of urgency. In regards to urgency, it is trite that it is required of an applicant seeking urgent relief to set out in the founding papers, the reasons for urgency, and why urgent relief is necessary. Equally so, an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules, nor can the matter be treated as urgent, when there are alternative appropriate remedies.[2]

[7] It is equally trite that an applicant seeking urgent relief must approach the Court with the necessary haste, and where this was not done, at the very least, an explanation is required for the delay, and the applicant must show cause why in the circumstances, the Court still ought to grant the relief sought.

[8] In this case, it being common cause that the termination of the applicant's services took place on 2 September 2019, this application was only launched on 30 September 2019. The applicant's explanation for the delay was that upon the termination of her services, she was unable to react immediately as she was fearful that these events, which came as a shock to her, may exacerbate her medical condition (high blood pressure), particularly after being hospitalised in August 2019. It was only after when she had settled

[2] See J*iba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 I*LJ* 112 (LC); *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6, where it was held;

> '…. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

emotionally that she had contacted her attorneys of record on 10 September 2019 and had her first consultations on 12 September 2019. Counsel was consulted on 16 September 2019 and on 17 September 2019, correspondence was sent to the respondent in which a demand was made for her reinstatement within 48 hours failing which this application would be launched. The response from the respondent on 19 September 2019 was not positive, resulting with further consultations with counsel on 23 September 2019 in order to settle the papers. It was only on 24 September 2019 that the papers were settled.

[9] Inasmuch as the applicant had made an attempt to explain the delay in bringing this application since her dismissal on 2 September 2019, not much is said about the period between the date of her dismissal, and 10 September 2019 when she started her consultations with her attorneys, and between 24 September 2019 after the papers were settled and 30 September 2019 when the application was filed and served. As it was submitted by Mr Van Niekerk SC for the respondent, the invariable conclusion to be reached is that in the light of the failure to address these gaps, either the applicant's legal representatives or herself took their own time in approaching the Court for urgent relief, making the urgency claimed self-created.

[10] Central to the grounds upon which urgency is sought in this case is the applicant's personal circumstances as the sole provider in her household and extended household. She further averred that the length in having an unfair dismissal dispute referred and adjudicated in the Commission for Conciliation Mediation and Arbitration (CCMA) will be prejudicial to her, as she cannot be able to sustain herself and her dependents without an income for the period in which can be expected to have the matter finalised at the CCMA. She averred that she had no financial means and resources to fund legal costs at the CCMA.

[11] The issue of whether financial hardship is a basis of seeking urgent relief has received attention in this and other Courts. As a general principle, financial

hardship does not establish a basis for urgency[3]. It has been held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to acquire the requisite urgency necessary to justify a departure from the ordinary court rules[4]. The Courts have however accepted that the general principle may be departed from if exceptional circumstances are established, depending on the merits of each case[5].

[12] In line with this approach, it can be accepted that an applicant may be granted urgent relief if she can demonstrate detrimental consequences that may not be capable of being addressed in due course. In this case, cruel and insensitive as it may sound, (given the averments in regards to her personal circumstances), the financial hardship that the applicant complains of are the ordinary consequences of a dismissal, which are experienced by multitudes of employees on a daily basis upon a loss of a job. The circumstances are thus hardly exceptional, and there is no basis for a conclusion to be reached that any such harm is incapable of being fully addressed in the normal course, and

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[3] *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16.

[4] *Ntefe J Ledimo & others v Minister of Safety and Security & Others(* Case Nr : 2242/2003 (Unreported): A decision of the High Court OFS Provincial Division delivered on 28 August 2003 at paragraph 32, where Rampai J) held that:

> "In the three cases I have quoted above the courts have held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to ground the requisite urgency necessary to justify a departure from the ordinary court rules. In applying this principle, a judge will do well to keep the words of wisdom which were expressed through the lips of Kroon J on p 15 in **CALEDON STREET RESTAURANTS CC** (*supra*). I find it apposite to echo those sentiments here by quoting him verbatim:
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> > "However, the following comments fall to be made. First, to the extent that these cases may be interpreted as laying down that financial exigencies cannot be invoked to lay a basis for urgency, I consider that no general rule to that effect can be laid down. Much would depend on the nature of such exigencies and the extent to which they weigh up against other considerations such as the interests of the other party and its lawyers and any inconvenience occasioned to the court by having to entertain an application on an urgent basis. Second, whatever the extent of the indulgence, the sanction of the court thereof that an application be heard as a matter of urgency, would not in general, in this Division, accord the matter precedence over other matters and result in the disposal of the latter being prejudiced by being delayed."

[5] See *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8 where it was held:

> 'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

to the extent that the applicant may be vindicated. Consequently, financial hardship as in this case is not is cause to depart from the normal rules of this Court.

[13] Equally so, the fact that the applicant is employed by a public entity in a relatively senior position, and performs important functions at that entity is hardly an exceptional circumstance or a basis to grant urgent relief. This is so in that to hold otherwise would imply that employees in lesser positions and with even lesser or no means to approach the Court on an urgent basis should be treated differently. It would not only be iniquitous but also untenable for this Court to grant urgent relief on those grounds. Furthermore, the contention that the applicant would not be in a position to get redress on the grounds that she has no financial means to pursue her dispute (at the CCMA as she averred), cannot be a basis for granting urgent relief, as it is well known that to the extent that a dispute may be referred to the CCMA, litigants at that forum need not be legally represented.

[14] In regards to the issue of jurisdiction, it was submitted on behalf of the respondent that an order declaring the dismissal of the applicant as unlawful and *void ab initio* was inconsistent with the principles set out in *Steenkamp and Others v Edcon Limited*[6], more in particular, the views expressed by

[6] CCT47/15) [2016] ZACC 1; (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC), where it was held;

> "[116] I think that the rationale for the policy decision to exclude unlawful or invalid dismissals under the LRA was that through the LRA the Legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them. In this regard a declaration of invalidity is based on a "winner takes all" approach. The fairness which forms the foundation of the LRA has sufficient flexibility built into it to enable a court or arbitrator to do justice between employer and employee. For example, where a dismissal is unlawful by virtue of the employer having failed to follow a prescribed procedure before dismissing an employee and the dismissal is declared invalid, in law the employee is regarded as never having been dismissed and will be entitled to all arrear wages from the date of the purported dismissal to the date of the order. Under the LRA a dismissal will be recognised as having taken place irrespective of whether the dismissal is held to have been automatically unfair or unfair because there was no fair reason for it or because there was no compliance with a fair procedure in effecting it."

And,

> "[180] The LRA does not contemplate orders of invalidity in respect of dismissals. This is because through orders of reinstatement that operate with retrospective effect to the date of dismissal the same result may be achieved as is achieved through an order declaring a dismissal invalid. Furthermore, that is achieved while retaining the flexibility that comes with fairness and equity which are the foundation of the LRA dispensation and without the rigidity

Zondo (as he then was) that first, the LRA does not contemplate invalid dismissals or an order declaring a dismissal invalid and of no force and effect; and second, that the declaratory order sought is a wrong remedy for a breach of the LRA[7]. To this end, it was submitted that the applicant has alternative remedies in the form of a referral of the dispute to the CCMA

[15] To the extent that the applicant seeks a declaratory order, a difficulty she is faced with is that it has long been held that such an order would be inappropriate in circumstances where she has alternative remedies[8], and it can be said that this approach is in sync with what was stated in *Steenkamp* as referred to above.

[16] It was submitted on behalf of the applicant that she brought this application in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA)[9]. The first difficulty however is that this is not specifically pleaded in her founding affidavit and was only raised during arguments. Second, it was stated in *Steenkamp* that if a litigant's cause of action is contractual in nature,

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of the common law on which the invalidity of dismissals is based. Therefore, under the LRA the need for invalid dismissals does not arise."

[7] At para 102. See also at;

"[106] Section 189A falls within Chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE. Under the heading appears an indication of which sections fall under the chapter. The sections are reflected as "ss 185-197B". The chapter starts off with section 185. Section 185 reads:

"Every *employee* has the right not to be—
(a) unfairly dismissed; and
(b) subjected to unfair labour practice."

Conspicuous by its absence here is a paragraph (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in section 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA.

"[107] This indication is reinforced when one has regard to the definition of "dismissal" in section 186(1). It starts with what would ordinarily be understood as a dismissal, namely, a termination of employment with or without notice. That encompasses the ordinary situation of the employer giving notice under the contract of employment and a summary dismissal. But then in five further paragraphs it extends the concept of dismissal far beyond its ordinary meaning. Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if a dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA."

[8] See *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC)at para 46

[9] Act 75 of 1997

the remedy will have to be found within contract law[10]. The applicant's difficulty however in this regard is that in relying on her contract of employment, clause 30 of that contract provides that in the event that there may be any dispute whatsoever between the parties concerning the termination of the employee's employment, including any dispute concerning conditions applicable to any such termination, this shall be determined in terms of the dispute resolution procedures in the LRA. In the alternative, private arbitration may be agreed upon by the parties following a disciplinary hearing or an appeal.

[17] To the extent that it is common cause that there was a summary dismissal (whether framed as 'unlawful termination' or something else), it is apparent from the very provisions of the contract of employment that the applicant's remedies lie in the dispute resolution scheme designed in the LRA, and it would thus be impermissible for her to rely on the provisions of section 77(3) of the BCEA, which should not be read to be an open invitation to bring contractual disputes, where imbedded in the very provisions of the contract relied upon, is a dispute resolution procedure. Thus, all the issues that she had raised in regards to how in dismissing her the respondent had not complied with the provisions of her contract of employment, including the fact that she was not afforded a disciplinary hearing before termination, or that the procedures under the LRA were not followed, are issues to be determined within the context of a referral of a dispute as envisaged in section 191 of the LRA, even if it was the respondent's contention that she was not dismissed but that there was an automatic termination of the contract of employment by virtue of her negative lifestyle audit and security vetting.

[18] In conclusion, having had regard to the applicant's founding affidavit and the submissions made by both counsel, I am not satisfied in the end, that there is a basis for according this matter urgency. Furthermore, the preliminary point related to the jurisdiction of this Court to grant the relief sought ought to be upheld. Ultimately, the applicant has alternative remedies available to her

[10] At para 103

from which she can obtain redress in respect of any harm consequent upon the termination of her services.

[19] I have further had regard to the requirements of law and fairness, and clearly given the facts and circumstances of this case, there is no basis for any award of costs to be made. Accordingly, the following order is made;

Order:

1. The Applicant's urgent application is dismissed.

2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. Qono-Reddy, instructed by Cebisa Attorneys
For the Respondent:	Adv. G.O Van Niekerk SC, instructed by A.P Shangase & Associations