



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 2797/2017

In the matter between:

BONGA BALDWIN MAJOLA

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR ROADS AND TRANSPORT

GAUTENG PROVINCIAL GOVERNMENT

Respondent

Application argued: 31 October 2017

Judgment delivered: 3 November 2017

JUDGMENT

VAN NIEKERK J

- [1] Until 18 October 2017, the applicant was employed by the respondent as a chief director: registration and operating licensing. In a letter addressed to the applicant on that date, the respondent said, amongst other things, the following:

In light of the foregoing, I have come to the conclusion that on the grounds of your incapacity to perform your tasks your services with the department should be terminated. You are dismissed.

- [2] I do not intend to canvass all of the facts that preceded this letter; it is sufficient for present purposes to say that the applicant had been charged with various acts of misconduct, that the respondent had invited him to respond to certain propositions concerning the employment relationship, and that this court had dismissed an urgent application in which the applicant sought to interdict disciplinary proceedings against him. The respondent recorded that he had been concerned that the applicant and whose head of department appeared to have been in 'a state of almost perpetual dispute about one thing or the other'. The applicant expressed the view that it was unlikely that the time, expense and effort expended in the forthcoming disciplinary hearing would be well spent and that irrespective of the outcome, it appeared likely that the state of affairs referred to would continue. On this basis, the respondent sought unequivocal undertakings that they would be no repeat of the applicant's insubordinate conduct, that he would respect the head of department as the most senior officer in the department and the applicant's superior officer and that he would carry out his lawful instructions and directives. In addition, the respondent sought an unequivocal and solemn undertaking that the applicant would not disrupt the

smooth and efficient operation of the department. The response to the letter fell far short of what the respondent had requested. In short, the applicant denied that he had conducted himself in the manner engaged by the respondent or that any of the concerns raised by the respondent were valid. On 17 October 2017, the respondent addressed a six-page letter to the applicant recording that the applicant's letter of response appeared to be dedicated to denying the validity of any suggestions of wrongdoing or misconduct and that he had refused or failed to provide the unequivocal undertakings that had been sought. Further, there was no assurance that the applicant would put in the requisite effort to repair the relationship between him and the head of department and what the applicants had sought to do was simply to vindicate and justify the manner in which he had conducted himself without making any commitment to change. The respondent recorded that he had come to the conclusion that the applicant did not have the capacity nor was he prepared to commit to develop the capacity to have a cordial and harmonious relationship with the head of department and other employees in the chief directorate for which he was responsible. Further, this was exacerbated by the applicant's inability to appreciate that adopting an approach of reasonable accommodation was necessary for the applicant properly to fulfil his functions. All of this led to the applicant being incompatible with others in the Department and of rendering his services properly. In the light of these considerations, the respondent came to the view that the applicant's employment should be terminated on the grounds of his incapacity. He was advised that he was dismissed and that he would be paid until 30 November 2017, in effect, giving him six weeks' notice.

- [3] In this application, brought on an urgent basis, the applicant seeks an order to the effect that the termination of his contract of employment is unlawful and invalid, and that he be reinstated until there has been compliance with the contract. The claim is one brought under s 77 (3) of the Basic Conditions of Employment Act, which confers concurrent jurisdiction on this court to adjudicate disputes about contracts of employment. The applicant specifically disavows any reliance on any of the remedies that might be available to him in terms of the

LRA. In other words, the applicant does not challenge the fairness of his dismissal – he claims a breach of a term of his contract by the respondent and seeks to enforce that term. In particular, the applicant relies on the provisions of s 17 of the Public Service Act, the Public Service regulations and the senior management service handbook which he avers have been expressly incorporated into his contract. The applicant submits that on the facts, the respondent has concluded either that he is guilty of misconduct or that he is unable to perform his work, but that in either case, the termination of his employment was not preceded by a duly-constituted hearing. In effect, the applicant seeks an order of specific performance, a remedy that this court is expressly entitled to grant in terms of s 77A (e) of the Basic Conditions of Employment Act.¹

- [3] The first hurdle that the applicant must overcome is that of urgency. In this regard, he avers that his contract affords him the right to human dignity and the freedom to engage in productive work. He submits that the respondent's conduct impairs that dignity, denies him his lawful entitlements in law and places him in a position his right to defend himself against the respondent's allegations have unilaterally been discarded and undermined. Should the court not intervene, the applicant avers that he will suffer and continue to suffer prejudice, financial hardship and injustice.
- [4] Even if the applicant's termination of employment was unlawful and unfair, that does not make the matter urgent. An averment of a breach of procedure, however egregious that breach might alleged to be, is not in itself a basis on which an applicant is entitled to have an application heard as a matter of urgency. Ultimately, considerations of financial hardship and prejudice aside, it is incumbent on an applicant to establish that he or she will not be able to secure adequate relief in due course. It may well be the case further that the termination

¹ The court has affirmed that the remedy of specific performance is available, subject to the court's discretion to grant or refuse the order (see *Ramabulana v Pilansberg Platinum Mines, Ngobeni v National Youth Development Agency* (2014) 35 ILJ 1356 (LC) and *Somi v Old Mutual Africa Holdings (Pty) Ltd* (2015) 36 ILJ 2370 (LC)).

of the applicant's employment has had or will have all of the consequences to which he refers. His difficulty is that these are consequences that inevitably flow from any termination of employment. Were the impairment of dignity and financial hardship to be the applicable criteria, any employee contending to have been unlawfully (or even unfairly) dismissed would inevitably be entitled to urgent relief. That is manifestly not the case; urgent relief is available to dismissed employees only in exceptional circumstances.

- [5] To the extent that the applicant relies on financial hardship, his counsel correctly points out that this court has on previous occasions granted urgent interim relief on this basis. In *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC), this court reaffirmed the general rule that financial hardship in itself, is not a basis for urgency (see the authorities referred to in paragraph of the judgment). This is not to say that it can never be, at least in circumstances where as the court said the 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.... Each case must be assessed on its merits.²

- [6] The applicant's averments in relation to financial hardship are no more than generalised, sweeping statements. He has made no specific, factual averments in relation to the nature and extent of any immediate or short-term financial loss or hardship that he says he will suffer, nor has he provided any particularity in this regard. In these circumstances, the applicant has failed to establish that his case is exceptional.
- [7] Similarly, there is no reason why considerations of dignity and self-esteem ought, in themselves, to establish a basis for urgency. As I have indicated, it is difficult to conceive of any termination of employment where from the employee's perspective at least, there is a loss of dignity and self-esteem, to some degree at least. Work confers status, and provides many people with meaning in life. But

² At paragraph 8

again, it does not necessarily follow that any impairment of dignity or self-esteem cannot be restored in the ordinary course.

- [8] As I have indicated, this court ordinarily does not come to the assistance of dismissed employees who seek intervention *pendente lite* by way of urgent proceedings when their claim is one of unfair dismissal, even when the test is posited at the level of a *prima facie* right. The position should be no different when employees seek the same result (i.e. reinstatement) by way of the different route of contract and a claim for specific performance.
- [9] In these circumstances, it is not necessary for me to consider the merits of the applicant's claim regarding the procedure that he contends ought properly have been followed. Those are matters that can be dealt with in the ordinary course.

I make the following order:

1. The application is struck from the roll for lack of urgency.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. B Ford, instructed by Ndumiso Voyi Inc.

For the respondent: Adv. V Soni SC, instructed by the state attorney.