THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 787/2024

In the matter between:

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**Applicant**
and	
LESEGO DORCAS MPHEFO	**First Respondent**
ELAINE MOLEKO N.O	**Second Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Third Respondent**

Heard: **23 July 2024**
Delivered: **30 July 2024**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them by email. The date for hand-down is deemed to be 30 July 2024.

JUDGMENT

PRINSLOO, J

Introduction

[1] On 21 June 2023, the Applicant's council resolved to appoint the First Respondent (Respondent) conditionally as the Executive Director: Economic Development with effect from 1 July 2023. The Respondent's conditional appointment was made in terms of section 57 of the Local Government: Municipal Systems Act[1] (Systems Act), which requires *inter alia* that a written employment contract be entered into and that a performance agreement be concluded within 60 days after commencement of service, failing which the appointment lapses.

[2] The Respondent commenced service with the Applicant on 1 August 2023 and she had to conclude a written employment contract as contemplated in section 57(1)(a) of the Systems Act and a performance agreement within 60 days of commencement of service, as contemplated in section 57(1)(b). Thus, the Respondent had to conclude a performance agreement by 30 September 2023. This did not happen and on 21 November 2023, the Applicant notified the Respondent that her appointment had lapsed by operation of law.

[3] On 21 December 2023, the Respondent referred an unfair dismissal dispute to the Third Respondent (SALGBC). It is common cause that the Respondent had not concluded a written contract of employment or a performance agreement. The dispute was conciliated in January 2024 and subsequently referred for arbitration.

[4] The dispute was enrolled for arbitration on 22 March 2024 and prior to the commencement of the arbitration, the Applicant raised two jurisdictional issues to wit that the Respondent did not conclude a contract of employment and that she was therefore not an employee and alternatively and to the extent that she was indeed an

[1] Act 32 of 2000, as amended.

employee, she was not dismissed but that her appointment lapsed by operation of law, wherefore the SALGBC lacked jurisdiction to adjudicate the matter.

[5] The Second Respondent (arbitrator) ruled that she first had to determine whether an employment relationship existed and whether there was a dismissal, before considering the merits of the case or the issue of fairness. The parties led evidence on the aforesaid questions and submissions were made on the question of jurisdiction.

[6] On 7 June 2024, the arbitrator issued a jurisdictional ruling wherein she found that an employment relationship existed between the Applicant and the Respondent, that she was indeed dismissed and that the dispute must be arbitrated.

[7] The Applicant filed a review application on 20 June 2024 seeking the review and setting aside of the jurisdictional ruling and for the ruling to be substituted with an order declaring that the SALGBC lacks jurisdiction to arbitrate the dispute.

[8] After the filing of the review application, the Applicant requested the Respondent to agree to postpone the arbitration proceedings pending the finalisation of the review application, but she refused. The Applicant subsequently filed an application to postpone the arbitration proceedings pending the review application, but no response was received from the arbitrator or the SALGBC.

[9] The arbitration was scheduled to proceed on 25 July 2024 and on 17 July 2024 the Applicant approached this Court on an urgent basis to stay the arbitration pending the finalisation of the review application, instituted under case number JR1023/24.

[10] The urgent application was enrolled for hearing on 23 July 2024 and was opposed by the Respondent. Considering the facts placed before this Court, I am satisfied that the application is urgent and will be dealt with as such.

<u>Section 158(1B) and the relief sought</u>

[11] Section 158(1B) of the Labour Relations Act[2] (LRA) provides that:

> 'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

[12] The purpose of this section is clearly to prevent the delays caused by review applications brought prior to the finalisation of a dispute. In general, this Court is reluctant, prior to the conclusion of the arbitration proceedings, to entertain reviews of rulings made during those proceedings, as a willingness to intervene too quickly and too easily could inspire parties to dilatory conduct or tactical manoeuvres when they should instead be proceeding with the arbitration. It is evident from the wording of section 158(1B) that the Labour Court is constrained from reviewing interlocutory rulings and should only do so when it is just and equitable to review a ruling before the final determination of the dispute.

[13] As a general proposition, this Court should be extremely loathe to intervene in arbitration proceedings before the CCMA or bargaining council that have not been completed. However, section 158(1B) allows for the review of a ruling made during arbitration proceedings prior to the finalisation of the dispute, if it is just and equitable to do so. The Applicant must establish that it would be just and equitable for the Court to intervene by entertaining the application to review and set aside the arbitrator's jurisdictional ruling.

[14] In *casu,* the Applicant seeks an interim order to stay the arbitration proceedings, pending the determination of the review application and the aforesaid issues are ultimately to be decided by the review Court.

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[2] Act 66 of 1995, as amended.

[15] The requirements for interim relief, as sought by the Applicant *in casu,* were set out more than 100 years ago in *Setlogelo v Setlogelo*[3]. They are:

1. a *prima facie* right;

2. a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;

3. the balance of convenience in favour of the granting of the interim relief; and

4. the absence of any other adequate ordinary remedy.

[16] The well-known authority in relation to the application of this test is *Webster v Mitchell*[4]. The headnote reads as follows:

> 'In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up … in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.
>
> In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible, to conditions which will protect the respondent.'

[3] 1914 AD 221 at 227.
[4] 1948 (1) SA 1186 (W).

[17] In order to establish a *prima facie* right, an applicant must provide *prima facie* proof of facts that establish the existence of a right in terms of the substantive law. An applicant must also establish a well-grounded apprehension of irreparable harm if interim relief is not granted and it ultimately succeeds in establishing its right. The balance-of-convenience requirement, as well as its interrelationship with the requirement of a *prima facie* right, was explained in *Olympic Passenger Service (Pty) Ltd v Ramlagan*[5]:

> 'The expression "*prima facie* established though open to some doubt" seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

[18] As the Applicant seeks an interim interdict, it must satisfy all the requirements for an interim interdict, which I will deal with *infra.* This Court has to decide whether the Applicant has made out a case which would entitle it to the relief it seeks.

Prima facie right

[19] The applicant for an interim interdict must show a right which is being infringed on or which he or she apprehends will be infringed. The right may arise out of contract, delict or it may be founded in the common law or on some statute; it may be a real or personal right. The right set out by an applicant for interim relief need not

[5] 1957 (2) SA 382 (D) at 383D–F.

be shown by a balance of probabilities. Where the interim relief is sought *pendente lite,* the applicant is required to furnish proof which, if uncontradicted and believed at the trial, would establish his or her right.[6]

[20] The Applicant submitted that the Respondent's appointment was a statutory one, regulated by section 57 of the Systems Act and as the Respondent did not conclude a contract of employment or a performance agreement within 60 days of commencement of service, her appointment terminated automatically by operation of law. The Applicant's case is that there was no employment relationship and no dismissal and that the arbitrator accepted jurisdiction to adjudicate an unfair dismissal dispute where there was no jurisdiction. The Applicant has filed a review application to determine whether the arbitrator has, on the objective facts, the jurisdiction to arbitrate the dispute.

[21] The Applicant does not seek an order from this Court to pronounce on the issue of jurisdiction – that is to be decided by the review court. The Applicant only seeks interim relief to stay arbitration proceedings, following the arbitrator's finding that she has jurisdiction, pending the finalisation of the review application.

[22] An applicant for interim relief has to show that it has a right, although the right might be open to doubt.

[23] In *National Treasury and others v Opposition to Urban Tolling Alliance and others*[7] *(OUTA),* the Constitutional Court held that:

> 'Under the *Setlogelo* test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm.'

[6] CB Prest, "*The Law and Practice of Interdicts*", Juta, at pp 52 – 61.
[7] [2012] ZACC 18; 2012 (6) SA 223 (CC) at para 50.

[24] The Applicant has a *prima facie* right to approach the court to review the jurisdictional ruling, but following the dicta in *OUTA,* the mere right to approach the court is not sufficient. The Applicant has to show that the *prima facie* right is threatened by an impending or imminent irreparable harm.

Harm

[25] The Applicant must show irreparable harm or damage and a well-grounded apprehension of a prejudicial act on the part of the respondent parties.

[26] It is trite that the arbitrator or the SALGBC cannot assume jurisdiction where it does not exist, and they cannot decide their own jurisdiction – it is ultimately to be decided by this Court.

[27] The Applicant seeks to challenge the ruling which determined that the SALGBC has jurisdiction and that the dispute be enrolled for arbitration. The reality is that the review application could be dispositive of the matter and could bring an end to the Respondent's unfair dismissal claim. Should the review court find that the Respondent was not dismissed, the underlying *causa* (namely unfair dismissal) would be removed and the jurisdiction of the SALGBC to adjudicate the dispute will be ousted and the matter will go no further.

[28] In *Emalahleni Local Municipality v Phooko NO and others*[8]*,* it was held that irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed, i.e. where the underlying *causa* is the subject matter of an ongoing dispute between the parties.

[29] In *casu,* the parties are involved in an ongoing dispute and the pending review application seeks to remove the underlying *causa* and to set aside the jurisdictional ruling. If the Applicant is compelled to continue with the arbitration prior to the adjudication of the review application, and the review application is ultimately

[8] [2021] ZALCJHB 61; (2021) 42 ILJ 2196 (LC).

successful, the underlying *causa* would be removed and the Applicant would have suffered irreparable harm in defending the alleged unfair dismissal dispute.

[30] In *Builda Construction Cape Proprietary Limited v Verveen and Another*[9], the Court held that:

> '[33] I find that the applicant will suffer irreparable harm should the arbitration proceedings proceed before the review application is finalised. From the outset the applicant has opposed the forum of arbitration. It would be impractical to continue with the arbitration proceedings.
>
> [34] The common sense approach determines that if the applicant is successful later on review and the findings confirm that the matter was not arbitrable, then the applicant would have not only incurred unnecessary expenditure and time but was forced to participate in proceedings it did not concede to. In this instance, the applicant is further prejudiced as it has not pleaded to the statement of claim in light of the dispute. The prejudice suffered by the applicant most certainly outweighs the prejudice the respondent would suffer if the arbitration proceedings are not stayed.'

[31] In my view, all the parties would be prejudiced if the arbitration proceedings were to continue before the issue of jurisdiction has been decided by this Court – they will all spend time, money and resources to participate in a process before a body which might not have had jurisdiction to adjudicate the dispute in the first place and the outcome of such process, would inevitably lead to further litigation and would contribute to the burden of this Court.

Balance of convenience

[32] The Court has to consider the balance of convenience and in exercising its discretion, weighs the prejudice to the applicant if the relief sought is withheld against the prejudice to the respondent if it is granted. It is the balancing of

[9] 2023] ZAGPPHC 178; 018498/13 (22 March 2023) at para 33 and 34.

respective harms and an assessment of which of the parties will be least seriously affected or prejudiced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of the trial.[10]

[33] The Applicant's case is that the balance of convenience favours the stay of the arbitration proceedings pending the outcome of the review application. The Labour Court will finally determine the issue of jurisdiction and provide the parties with certainty as to whether the SALGBC has jurisdiction to arbitrate the dispute.

[34] Once the Labour Court has decided the matter, the parties will have certainty as to the way forward. If the Court finds in favour of the Applicant, it will be the end of the matter and the parties and the SALGBC would not have wasted resources to arbitrate a dispute over which it has no jurisdiction. Should the Court find that the SALGBC indeed has jurisdiction, the unfair dismissal dispute would be set down for hearing and the arbitration process will be concluded.

[35] It cannot be disputed that the Respondent will be prejudiced if the relief sought is granted and the arbitration proceedings are stayed, as she will have to wait for the review application to be finalised and be dismissed before she can proceed with her unfair dismissal dispute. However, this Court has to balance the respective harms and the prejudice to be suffered and make an assessment of which of the parties will be least seriously affected or prejudiced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found when the review application is adjudicated upon.

[36] In my view, the balance of convenience favours the Applicant. The question as to the SALGBC's jurisdiction to arbitrate the unfair dismissal dispute should be considered and decided before the dispute is arbitrated as this would provide clarity and certainty to the parties and would avoid the wasting of resources and unnecessary litigation. The outcome of the review application could be dispositive of the entire matter.

[10] Prest, "*The Law and Practice of Interdicts*" at pp 72 – 73.

[37] The harm to the Respondent can be limited by expediting the review application instituted by the Applicant. In the papers before this Court, the Applicant conveyed its intention to expedite the adjudication of the review application.

Alternative remedy

[38] The final requirement for the grant of an interim interdict is the absence of another adequate remedy.

[39] The Applicant submitted that it has no alternative remedy available but to approach this Court for relief. The Applicant attempted to obtain an agreement from the Respondent to stay the arbitration proceedings pending the finalisation of the review application, but she refused. After the Respondent's refusal, the Applicant sought a postponement from the SALGBC, pending the finalisation of the review application, but such application was not considered.

[40] I am satisfied that the Applicant, prior to approaching this Court, tried to postpone the arbitration either by agreement or by application, pending the finalisation of the review application, but those efforts did not yield any positive result. There is no other alternative remedy available to the Applicant.

[41] The remedy that will be adequate at this point, is a temporary injunction in the form of an interim interdict, staying the finalisation of the arbitration proceedings, pending the finalisation of the Applicant's review application.

Conclusion

[42] In *National Gambling Board v Premier, Kwazulu-Natal and Others,*[11] the Constitutional Court considered interdict proceedings and held that:

'An interim interdict is by definition

[11] [2001] ZACC 8; 2002 (2) SA 715 (CC) at para 49.

> "a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute.'

[43] The relief sought by the Applicant is interim in nature, pending the final determination of a review application. The Applicant has satisfied the requirements for an interdict and is entitled to interim relief *pendente lite.*

Costs

[44] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[45] Mr Omar for the Applicant indicated that the Applicant was not seeking a cost order against the Respondent. In my view, this is a case where the interest of justice will be best served by making no order as to costs, more so where the Applicant was not seeking costs.

[46] In the premises, I make the following order:

Order

1. Pending the finalisation of the review proceedings instituted under case number JR 1023/24, the arbitration under case number JMD122304 is stayed;

2. Pending the finalisation of the review proceedings instituted under case number JR 1023/24, the Second and Third Respondents are interdicted and restrained from setting down the First Respondent's unfair dismissal dispute for arbitration;

3. The parties are directed to jointly approach the acting Judge President of the Labour Court with a request and motivation to expedite the adjudication of the review application instituted under case number JR 1023/24.

4. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate A B Omar
Instructed by:	Salijee Govender van der Merwe Inc
For the First Respondent:	Advocate Z Q Majenge
Instructed by:	Lankalebalelo Attorneys