THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

Case no: P18/24

In the matter between:

ELSWORTH JOHN O' CONNOR **Applicant**

and

LEXISNEXIS (PTY) LTD **Respondent**

Heard: **19 March 2024**
Delivered: **11 April 2024**

This judgment was handed down electronically by emailing a copy to the parties. The 11th of April 2024 is deemed to be the date of delivery of this judgment.

Summary: Unfair discrimination under the EEA – refusal to employ because of criminal history unfair discrimination based on arbitrary ground – criminal history not relevant to inherent requirement of job

Unfair discrimination under the EEA – possible to obtain urgent order on motion in appropriate circumstances – Rule 6 no bar to doing so although dispute must first be conciliated

Urgent applications – urgency requirement as two legged test – first leg is absence of substantial redress in normal course – absence of substantial redress something less than irreparable harm – second leg is further factors in the interests of justice including self-created urgency, prejudice to respondent, prejudice to administration of justice – urgency only self-created if, had the applicant not delayed, it could have obtained

substantial redress in the normal course – court should be loath to deny an urgent hearing if first leg of test satisfied because first leg realises Constitutional right of access to court – second leg of test represents justifiable limitation on the right of access to court

Practice and procedure – failure to initial every page of affidavit does not invalidate affidavit – no need to initial every page of annexures

JUDGMENT

MEYEROWITZ AJ

Introduction

[1] The applicant is Mr Elsworth O'Connor, and the respondent is the well-known publisher of legal and other academic texts, LexisNexis. At the beginning of this year the respondent offered the applicant a job but, when it discovered that the applicant had a criminal history, the respondent retracted the offer of employment.

[2] The applicant has approached this court on an urgent basis requesting that the respondent be ordered to honour its original offer. In doing so the applicant has invoked various provisions of the Labour Relations Act[1] (LRA), the Basic Conditions of Employment Act[2] (BCEA), and the Employment Equity Act[3] (EEA).

[3] It is necessary to briefly set out the salient facts before dealing with the precise nature of the applicant's various alternative claims, and then whether this matter is deserving of an urgent hearing.

[1] Act 66 of 1995, as amended.
[2] Act 75 of 1997, as amended.
[3] Act 55 of 1998, as amended.

The facts

[4] During December 2023 the respondent advertised a position it wanted to fill in its taxonomy team. The position was for a "*Senior Data Discovery and Enrichment Expert I*" which job entailed, *inter alia*, organising and classifying the information published in the respondent's various legal products. The applicant applied for the position.

[5] On 20 January 2024, the respondent's Ms Natasha Singh (Ms Singh) emailed the applicant saying that his interview had been positive, and that the respondent required further information from the applicant to continue processing the application. This information included filling out a "*RefCheck Consent and Indemnity Form*".

[6] The applicant responded with the requested information the following day. When filling out the above-mentioned form, the applicant responded "*yes*" when asked if he had ever been criminally charged. In response to the section "*If yes, details of charge / conviction*", the applicant filled out the available space by saying "*For theft in 2001 which has been expunged…*".

[7] On 27 January 2024, the applicant provided his fingerprints at a local PostNet for the purposes of the respondent conducting a criminal background check.

[8] On 29 January 2024, Ms Singh sent the applicant an email stating the following:

> '[The respondent] is pleased to offer you permanent employment in the position of a Senior Data Discovery and Enrichment Expert I, effective 15 February 2024 (9-month contract) until 31 October 2024. Your employment will be subject to the acceptance of this estimated salary breakdown and the conditions set out in your contract of employment which will be sent once acceptance has been received… Once your acknowledgment has been received,

> [the respondent] will send you a contract of employment… This offer of employment is subject to RefCheck verifying all your credentials as valid, criminal checks being clear and a positive reference from a previous employer.'

[9] The applicant accepted the offer on the same day.

[10] On 30 January 2024, the respondent emailed the applicant a contract of employment and the document was signed electronically by both parties that same day. The applicant was subsequently given access to the respondent's "*work day schedule portal*" where the applicant would receive his daily work schedule. This is because the position was an entirely remote position where the applicant would do all of his work from home.

[11] However, on 6 February 2024, Ms Singh emailed the applicant stating that the respondent was now "*retracting*" the "*conditional offer*" of employment because the criminal check had revealed six counts of theft, one count of fraud, and two counts of defeating the course of justice.

[12] The applicant responded by explaining that these convictions took place 20 years ago and that his criminal record had in fact been expunged. He concluded by saying "*I plead with you [to] allow me the opportunity to explain*". There was never any response from Ms Singh or from anyone else representing the respondent.

[13] The applicant then referred a dispute to the CCMA and the matter was set down for conciliation on 6 March 2024. The respondent did not attend the conciliation and the commissioner issued a certificate of non-resolution.

[14] On 8 March 2024, the applicant launched this application.

The applicant's case

[15] To begin with, the applicant claims that the parties concluded a valid contract of employment and that the respondent's conduct constituted an automatically unfair dismissal on the arbitrary ground of past criminal convictions within the meaning of section 187(1)(f) of the LRA, alternatively that the respondent's conduct constituted a simple unfair dismissal in terms of section 188.

[16] Secondly, and in the alternative, the applicant claims that by retracting its offer the respondent repudiated the contract of employment. The applicant is therefore claiming specific performance of his contract (although he does not explicitly mention section 77(3) of the BCEA, this is obviously the basis upon which this court might have jurisdiction for such a claim).

[17] Thirdly, also in the alternative, the applicant claims that by retracting its offer the respondent unfairly discriminated against him on the arbitrary ground of past criminal convictions within the meaning of section 6 of the EEA.

Urgency

The facts regarding urgency

[18] In his founding affidavit the applicant states that, immediately after signing his employment contract on 30 January 2024, he resigned from his previous employment and closed down his consulting practice. He also spent money upgrading his computer equipment, improving his internet speed, and setting up an uninterrupted power supply. He claims that if urgent relief is not granted then he will have no means to pay his rental with the result being that he and his family will be left homeless, and that he will not be able to pay for his elderly mother's cancer treatment.

[19] The respondent has opposed the granting of an urgent order without putting up any facts in support of its opposition. It merely argues that the applicant will be able to obtain substantial redress in the normal course, and that the applicant "*has not provided any explanation as to why he waited a whole month before approaching this court on an urgent basis*".

[20] The latter proposition is not correct, the applicant explained that he felt it prudent to first refer the dispute to the CCMA for conciliation before approaching this court, and that during the preceding month he attempted on numerous occasions to resolve the dispute with the respondent.

The test for urgency

[21] In my view the test for urgency consists of two legs. The first leg requires a court to assess whether an urgent hearing is necessary because the applicant will not be able to obtain substantial redress in the normal course.[4] The second leg requires the court to assess whether it would be in the interests of justice to consider other factors that might nonetheless preclude an urgent hearing.[5] These factors include, but are not limited to (1) the issue of self-created urgency[6], (2) any procedural prejudice that

[4] See *Maphalle v National Heritage Council & Others* (2023) 44 ILJ 579 (LC) at [18]; *Vumatel (Pty) Ltd v Majra & Others* (2018) 39 ILJ 2771 (LC) at [8]; *Association of Mineworkers & Construction Union & Others v Northam Platinum Ltd & Another* (2016) 37 ILJ 2840 (LC) at [21]. See also *Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others* (2023/080436) [2023] ZAGPJHC 1162 (13 October 2023) at [18]; *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others* [2012] JOL 28244 (GSJ) at [6]; *In re: Several matters on the urgent court roll* 2013 (1) SA 549 (GSJ)

[5] See *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others* 2016 (4) SA 99 (GP) at [64]. These factors have been referred to as "*secondary considerations*" in De Wit (2021) *The correct approach to determining urgency* in Without Prejudice: Sabinet (June 2021) at p13

[6] *Vumatel* (supra) at [18], [20] to [25]; *Ecolab (Pty) Ltd v Thoabala & Another* (2017) 38 ILJ 2741 (LC) at [28]

might befall the respondent[7], and (3) any prejudice to the administration of justice[8].

[22] When determining the first leg of the urgency test the court must consider the merits of the applicant's claim as set out in its founding papers; but this is only for the purposes of identifying a *prima facie* likelihood that the applicant it entitled to the relief it seeks.[9] It will then be up to the applicant to convince the court that this relief will not equate to "*substantial redress*" if heard in the normal course because the delay (occasioned by a hearing in the normal course) would substantially diminish the benefit of that relief.[10]

[23] To pass the first leg of the urgency test the applicant need only show that it will not obtain "*substantial redress*" in the normal course. This is not equivalent to irreparable harm; it is something less.[11] What constitutes "*substantial redress*" will depend on the facts of each case, but generally speaking financial compensation in due course, plus interest, will meet this definition.

[24] The first leg of the urgency test is all important. Once this leg has been satisfied a court will be loath to deny an urgent hearing unless the second leg of the test reveals compelling reasons to not do so.[12] This is because the failure to grant an urgent hearing when the applicant cannot obtain substantial redress denies the applicant its Constitutional right of

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[7] *Chung-Fung* (supra) at [24]; *Mogalakwena Municipality* (supra) at [64]; *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 112H and 144B.

[8] *Mogalakwena Municipality* (supra) at [64]

[9] See *Both Roodt Pretoria (Pty) Ltd v Van Der Merwe* 2006 JDR 0909 (T) where the court held as follows: "*[10] In order to determine whether the matter is urgent, the Court needs only look at the averments by the applicant without necessarily having to adjudge the merits and the demerits thereof. Whilst the Court will have regard to the fact that the respondent is disputing that the matter is urgent, the Court need not weigh the correctness or otherwise of the said averments, but merely, in my view, makes a value judgment. In other words, the assessment of the averred facts regarding urgency need not be approached in the same vein as the assessment of the evidence for purposes of adjudging the entire case*".

[10] *East Rock (supra) at [7]*

[11] Ibid

[12] Chung-Fung (*supra*) at [24]

access to court, which right has been described by the Constitutional Court in *Chief Lesapo v North West Agricultural Bank*[13] in the following terms:

> 'The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable…'

[25] The second leg of the urgency test imposes a reasonable and justifiable limitation on the right of urgent access to court by empowering the court to consider whether, in the interests of justice, there may be some reason to deny an urgent hearing notwithstanding that an applicant cannot obtain substantial redress. This power derives from the court's inherent ability to regulate its own process in the interests of justice in terms of section 173 of the South African Constitution.

[26] When implementing the second leg of the urgency test the court may take into account any relevant factor in the interests of justice, but the most common factors are (1) the issue of self-created urgency, (2) any procedural prejudice that might befall the respondent, and (3) prejudice to the administration of justice.

[27] The first factor, self-created urgency, relates to a scenario where the applicant has created the need for an urgent hearing because it has culpably delayed in approaching the court. This is a justifiable limitation on the right of urgent access to court because, but for the applicant's culpable conduct, there would be no need to burden the administration of justice with an urgent hearing (or push other litigants further back in the queue for justice).

[13] 2000 (1) SA 409 (CC) at [22] as cited in *Chung-Fung* (*supra*) also at [22]

[28] However, urgency is only self-created if the applicant has culpably delayed to such an extent that, if it had not delayed, it would have been able to obtain substantial redress on the normal motion roll. This means that even a delay of several months might not equate to self-created urgency if the applicant would, in any event, not have been able to obtain substantial redress in the normal course. It is therefore not always necessary for an applicant to account for every day leading up to the issuing of urgent papers, much less fly off to court with a half-cocked application in the interests of expedition.

[29] Regarding the second factor, a court will not grant an urgent hearing if the nature of the urgent proceedings will cause the respondent undue procedural prejudice.[14] When making this assessment the court will need to consider how much time the respondents have been afforded to file their answering papers, and if any culpable delay on the part of the applicant has deprived the respondent of being able to comprehensively defend itself in accordance with the principle of *audi alteram partem* (bearing mind the alleged urgency of the matter and the procedural benefits of being a respondent in motion proceedings, such as the *Plascon-Evans* Rule). The court may also need to consider whether any potential prejudice might be cured by an interim order preserving the *status quo* and/or a postponement to allow the respondent more time file answering papers (a postponement that will generally not be granted if the applicant has, from the beginning, provided the respondent with enough time to file answering papers).

[30] Regarding the third factor, a court must assess the prejudice that the administration of justice may suffer as a result of granting an urgent hearing. This would include an assessment of the degree of urgency; meaning that, while a matter may be urgent, it may not be urgent enough

[14] *Chung-Fung* (supra) at [24]; *Mogalakwena Municipality* (supra) at [64]; *Marcow Caterers* (*supra*) at 114B.

to be heard on the date requested by the applicant.[15] Other considerations include unnecessarily clogging up the urgent roll, culpably placing the urgent judge under too much pressure, or failing to comply with any local practice directions.[16]

[31] With the above test in mind, I now move to consider each of the applicant's alternative claims as set out in his founding affidavit.

Urgency of the unfair dismissal claim

[32] I am not prepared to entertain the applicant's claim for unfair dismissal on an urgent basis. The remedy of unfair dismissal (whether automatically unfair or simply unfair) constitutes a statutory remedy that is fundamentally *ex post facto* in nature. The right provided by the LRA is the right to have a dismissal declared unfair after the event, with the primary remedy being reinstatement such that the employee is placed in the position they would have occupied if the dismissal had not occurred. While employees perforce suffer financial hardship while they wait for the wheels of justice to slowly turn, this is the nature of the remedy that has been provided to them by the LRA.

[33] Accordingly, the applicant will still be able to obtain this same remedy in the normal course.

Urgency of the specific performance claim

[34] This court has regularly granted specific performance on an urgent basis.[17] In the present matter, according to the applicant, he obtained a contractual bargain and, on the basis of that bargain, he incurred further expenses and gave up his previous employment (placing his family and

[15] See *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W)

[16] *Chung-Fung* (*supra*) at [25]; *Several matters* (*supra*) at [20]

[17] See *Mpane v Passenger Rail Agency of SA & Others* (2021) 42 ILJ 546 (LC); *Wereley v Productivity SA & another* (2020) 41 ILJ 997 (LC); *Solidarity & others v SA Broadcasting Corporation* (2016) 37 ILJ 2888 (LC); Ngubeni v National Youth Development Agency & another (2014) 35 ILJ 1356 (LC)

sick mother in jeopardy). The respondent's alleged repudiation has therefore placed the applicant in a worse position than if he had been dismissed like most employees during the subsistence of their employment. Specific performance would, in these circumstances, cure the disastrous financial consequences of the alleged repudiation and ensure that the applicant's obtains his contractual bargain.

[35] In argument the respondent's representative, Mr Mabena, stated that financial hardship cannot found a basis for urgency. This is an oversimplification of the principle. If the financial hardship in question can be substantially redressed by an award of damages (or equivalent compensation) in due course, plus interest to compensate for the delay, then the principle holds firm. However, if the financial hardship cannot be substantially redressed in the normal course, then the matter deserves an urgent hearing.[18] A good example are orders in restraint of trade (which this court regularly grants on an urgent basis)[19]. In these latter cases the applicant business will suffer financial hardship because, but for an urgent order, it will forever lose the competitive advantage which it had obtained in a contractual bargain.

[36] Without an urgent remedy the applicant in this matter will suffer financial prejudice (being homeless and unable to pay for his mother's cancer treatment) which I am not certain will be substantially redressed by a remedy in due course.

[37] Another important factor is that specific performance has its own special character.[20] An opera singer booked to perform at the opera house has a right to insist that they be allowed to perform and attain the accolades

[18] See *Ziegler South Africa (Pty) Ltd v South African Express SOC Ltd and Others* 2020 (4) SA 626 (GJ) at [17]; *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at [6] to [11]; *Twentieth Century Fox Film Corporation and Another v Anthony Black Films* (Pty) Ltd 1982 (3) SA 582 (W) at 586F – G. See also *Shetu Trading CC v The Chair of the Tender Board for Namibia and Others* (APPEAL-2010/352) [2011] NAHC 179 (22 June 2011) and the cases cited therein.

[19] *Plumblink SA (Pty) Ltd v Legodi & Another* (2020) 41 ILJ 1743 (LC); *New Justfun Group (Pty) Ltd v Turner & others* (2018) 39 ILJ 2721 (LC)

[20] See *Mpane* (supra) at [18] and the court's discussion of *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 (5) SA 73 (C)

that go with the performance, rather than simply sue for damages for the opera house's repudiation of their contract. Specific performance, in my view, is worth more to the applicant than an award of damages. Specific performance will allow him to prove that he is able to do his job despite his criminal record, and hopefully secure further employment with the respondent beyond the initial nine month contract.

[38] I am prepared to take judicial notice of the fact that it will take at least a year before the applicant's claim for specific performance will be heard by this court on the normal opposed motion roll, and by that stage specific performance will be impossible (given that the contract specifically terminates on 31 October 2024). I am therefore satisfied that the applicant will not be able to obtain substantial redress in the normal course.

[39] Turning to the second leg of the urgency test, I am satisfied that the applicant has approached this court with the appropriate expedition because, if he had approached the court sooner, he still would not have been able to obtain substantial redress in the normal course.

[40] Regarding prejudice to the respondent, the applicant served his application on the respondent on 11 March 2024, and then set the matter down for hearing on 19 March 2024. This period of eight days was an imprudently short period of time within which to set the matter down. To minimise potential prejudice the applicant should have provided the respondent with 10 court days to file its answering affidavit in accordance with Rule 7(4)(b). As it happened, the applicant required the respondent to deliver its answering affidavit within what amounted to three working days after receipt of the application, whereafter the applicant would file his replying affidavit one day later, and thereafter set the matter down on Thursday, 14 March 2024 for a hearing the following Tuesday.

[41] However, in neither its answering affidavit, nor in argument, did the respondent say that it did not have enough time to prepare its defence.

I am acutely aware that in its answering affidavit the respondent only raised technical arguments and did not deal with merits. This might well have been because it did not have time to deal with the merits, but that would be speculation on my part.

[42] If the respondent did not have enough time to deal with the merits (which, again, is simply speculation) then it could have a) asked the applicant for further time to file its answering affidavit, b) unilaterally exercised its *audi alteram partem* rights by simply filing its answering affidavit closer to the hearing date and then seeking the court's indulgence, c) filed an answering affidavit with the caveat that it had not had sufficient time to deal with the merits, d) argue that the matter should not be heard on an urgent basis because it had not been afforded enough time to defend itself, or e) asked the court for a postponement so that it could have more time to prepare its answering papers. The latter order is regularly granted in urgent court and is even contemplated by section 12.13 of the Practice Manual.

[43] If the respondent had alleged that it was not able to comprehensively defend itself in accordance with the principle of *audi alteram partem*, then I would have probably not granted an urgent hearing on 19 March 2024 and instead I would have postponed the matter to the following week in terms of section 12.13. However, in the absence of any allegation of prejudice whatsoever, I am satisfied that the respondent was not unduly prejudiced.

[44] My decision is fortified by the respondent's allegation in its answering affidavit that it only intended opposing the application on technical grounds "*without delving into the merits of the allegations made by the applicant*" and that "*It is unnecessary to deal with the rest of the allegations contained in the founding affidavit [i.e. the merits]…*" (my emphasis).

[45] Regarding prejudice to the administration of justice, I remain concerned about the short lead time discussed above. Indeed, while the matter may be urgent, it is probably not so urgent as to have required a hearing on 19 March 2024 as opposed to the following week. However, I am also aware that applicants do not always have control over the urgent dates that are allocated to them by the Registrar, which means that the applicant may not be entirely to blame. Indeed, until recently litigants in the Johannesburg High Court were required to set down their urgent applications on one weeks' notice unless approval to set it down later was obtained from the Deputy Judge President.

[46] Considering the matter holistically, and only because the respondent has a) not alleged any prejudice as a result of the short lead time, and b) actually said that dealing with the merits is unnecessary, I consider that it would be in the interests of justice to hear the applicant's specific performance claim on an urgent basis on 19 March 2024.

Urgency of the claim for unfair discrimination

[47] Unlike unfair dismissal under the LRA (which is designed as a purely *ex post facto* remedy), unfair discrimination under sections 6 and 50 of the EEA contemplates a remedy that is less fundamentally *ex post facto* in nature. Section 50 empowers this court to "*make any appropriate order that is just and equitable in the circumstances*"[21]. In *Christian v Colliers Properties*[22] this court held as follows:

> "Section 50(1) [and 50(2)] of the Employment Equity Act (55 of 1998) requires the court to make an order which is appropriate. The determination of appropriate relief requires that the court duly consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations,

[21] Section 50(2) of the EEA.

[22] [2005] 5 BLLR 479 (LC) at 483. See also *Duma v Minister of Correctional Services and others* [2016] 6 BLLR 601 (LC) at [28]; *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC) (where the respondent was ordered to apologise to the applicant in writing).

the dispensation of justice which is fair to all those who might be affected, and the necessity of ensuring that the order can be complied with. (*Hoffmann v South African Airways* [2000] 12 BLLR 1365 (CC) at paragraph 45; *Fose v Minister of Safety & Security* 1997 (7) BCLR 851 (CC) at paragraph 38)".

[48] While a claim under section 6 of the EEA will normally proceed by way of trial under Rule 6, I see no reason why a litigant cannot approach this court on an urgent basis if the circumstances justify an urgent order. A good example is an urgent order setting in place restrictions on an employer so as to prevent an employee from being sexually harassed pending a trial for full and better compensation in due course.

[49] In its answering affidavit the respondent claims that this court "*can only adjudicate the dispute after a referral in terms of Rule 6*". However, the EEA itself does not state that a claim under section 6 may only be referred to this court under Rule 6. The footnote to Rule 6 states that Rule 6 "*applies to*" automatically unfair dismissals and other claims; it does not say that Rule 6 applies to unfair discrimination claims. It may be that a correct interpretation of Rule 6 (when considering textual context, legislative context, and the purpose of the rule)[23] reveals that Rule 6 does indeed apply to unfair discrimination claims. However, even if this is the case, the present matter is an urgent application and the applicant has asked for condonation for non-compliance with the Rules. I see no reason why condonation for non-compliance with Rule 6, insofar as such condonation is even necessary, cannot be granted in urgent court.

[50] An urgent order under section 6 of the EEA would generally only be granted on an interim basis because a final order would usually be

[23] See *Herbert v Head of Education: Western Cape* (2022) 43 ILJ 1618 (LAC) at [13] *et seq*. See also *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA); *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

defeated by the *Plascon-Evans* Rule; but, if there is no material dispute of fact, then a final order can be granted.

[51] It is also important to note that compliance with Rule 6 not a jurisdictional requirement. The EEA requires a "*referral*" to the Labour Court, and a referral may be by notice of motion and founding affidavit, or by way of statement of claim (and in the case of the CCMA, by way *pro forma* referral form). I do not see Rule 6 as a jurisdictional stumbling block in this matter.

[52] In its answering affidavit the respondent claims that this court lacks jurisdiction because the CCMA has not yet certified that the dispute remains resolved. On the facts, the applicant referred a dispute to the CCMA on 8 February 2024 (two days after the respondent retracted its offer of employment), conciliation took place on 6 March 2024 in the respondent's absence, and a certificate of non-resolution was issued on the same day.

[53] In his founding affidavit the applicant states that he referred "*this dispute*" to the CCMA. On the applicant's version this would appear to constitute conciliation of the dispute that arose on 6 February 2024, including all of the applicant's complaints about that dispute as set out in this application. For the purposes of considering whether to grant an urgent hearing, I am prepared to accept, at least on a *prima facie* basis, that the applicant's unfair discrimination claim was conciliated.

[54] Having satisfied myself that an urgent application under section 6 of the EEA is competent in principle, my decision to hear the applicant's unfair discrimination claim on an urgent basis is *mutatis mutandis* based on the same factors that informed my decision to hear the specific performance claim on an urgent basis, save for the two paragraphs that follow.

[55] Firstly, I believe that a remedy for unfair discrimination will be worth more to the applicant now than it will after a hearing in the normal course (considering that a trial hearing will likely take at least a year to

complete). Will an urgent remedy be worth so much more to the applicant that a remedy in a year's time will not equate to "*substantial redress*"? I think so. Without an urgent remedy the applicant will suffer financial prejudice which I am not certain will be substantially redressed by a remedy in due course – for example, being homeless and unable to pay for his mother's cancer treatment.

[56] Secondly, the delay in approaching this court (such as it is), is even more excusable because it was a jurisdictional requirement that the applicant first have his dispute conciliated.

Lis pendens, failure to initial every page of founding affidavit

[57] During argument Mr Mabena stated that the applicant had launched the very same claim for specific performance as the present one in the Magistrate's Court, and that this claim was dismissed for lack of urgency but was nevertheless still pending on the normal motion court roll. The applicant stated that this was correct, but that he was no longer pursuing his claim in the Magistrate's Court.

[58] This revelation placed me in a difficult position because, on the one hand forum shopping is to be discouraged. On the other hand, the respondent did not plead *lis pendens* in its answering affidavit. On the authority of *Kerbel v Kerbel*[24] this court may not consider the issue of *lis pendens* unless it has been pleaded.

[59] Nonetheless, I am satisfied that the danger of different courts ruling on the same issue is minimal to none. The applicant has given his word to this court that he will no longer pursue his claim in the Magistrate's Court, and now that the claim has been decided on the merits in this court (see below), in the unlikely event of the applicant not keeping his word the respondent need only raise a plea of *res judicata*.

[24] 1987 (1) SA 562 (W); See also *Amler's Precedents of Pleadings* (9th Edition): LexisNexis at p250

[60] I also wish to point out that, while the founding affidavit has been properly commissioned on the last page, every other page has not been initialled by either the applicant or the commissioner. I am nevertheless satisfied that there is no defect in the founding affidavit because, on the authority of *Minister of Safety and Security and others v Mohamed and another (2)*[25], initialling every page is not a requirement for the validity of an affidavit.

[61] In my view, initialling every page of an affidavit certainly represents best practice (because it gives the court confidence that the words used in the affidavit are really those of the deponent). However, initialling every page of the annexures seems to me unnecessary as the other party will always be free to dispute the authenticity of those documents whether they are initialled or not.

The applicant's claim for specific performance

[62] In its email dated 29 January 2024, the respondent specifically stated that its offer of employment was "*subject to… criminal checks being clear*". When assessing urgency I had assumed, based on the applicant's submissions, that when the parties concluded the written contract of employment the following day this document had created a distinct contract of employment that did not contain a similar resolutive condition.

[63] The above would have been true if the contract itself had contained the standard "*entire agreement clause*" stating that, for example, "*this contract contains the entire agreement between the parties".* However, upon closer inspection it is apparent that the contract contains no such entire agreement clause. In fact, the written offer of employment made by the respondent on 29 January 2024 specifically states that the offer was "*subject to… the conditions set out in your contract of employment which will be sent once acceptance has been received*".

[25] [2010] 4 All SA 538 (WCC) at [26]

[64] This means that the agreement between the parties consists of the written offer made on 29 January 2024, the written acceptance of this offer on the same day, and the terms of the contractual document dated 30 January 2024. Given that the offer of employment was always subject to criminal checks being clear, a revelation that the applicant's criminal checks were not clear would, according to contract law, immediately terminate the contract.

[65] While it is unfortunate that the respondent only informed the applicant on 6 February 2024 that it was going to invoke the resolutive condition, according to the strict terms of the agreement the respondent was entitled to do so if, on the facts, the applicant's criminal checks were not clear.

[66] The applicant has stated under oath that the previous convictions which the respondent relied upon have been expunged, and he provides an email from the Fresh Start Law Centre dated 1 February 2020 stating that the Director-General of the Department of Justice had "*signed the order to expunge [the applicant's] criminal record*". Given that the respondent has not denied that the applicant's criminal record has been expunged, I must accept that this is the case.

[67] However, it is nevertheless apparent that the applicant's criminal record still existed to some extent because, according to Ms Singh's email dated 6 February 2024, the criminal check revealed "*a report of the details surrounding your criminal record*".

[68] Having considered chapter 27 of the Criminal Procedure Act 51 of 1977 (the CPA), it seems to me that previous convictions are "*expunged*" under section 271B of the CPA for the purpose of not taking those previous convictions into account when sentencing criminals convicted of later offences. This is a very specific purpose relating to the administration of justice.

[69] Unlike the Promotion of National Unity and Reconciliation Act 34 of 1995 which provides that a conviction in respect of which amnesty has been granted "*shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place*", previous convictions expunged under the CPA are not deemed to have never taken place (at least not for the purposes of contract law).

[70] As a result I believe the respondent was entitled to classify an expunged criminal record as representing something less than a "clear" criminal check. A clear criminal check in this instance would mean someone without any criminal history at all.

[71] In light of the above analysis, I find that the respondent was entitled to invoke the resolutive condition, and therefore did not repudiate the applicant's contract of employment. Accordingly, the applicant's claim for specific performance must fail.

<u>The applicant's claim for unfair discrimination</u>

Jurisdiction

[72] For the purposes of assessing urgency I was willing to accept, on a *prima facie* basis, the applicant's version that his unfair discrimination claim had been conciliated. However, a closer inspection of the relevant documents reveals this issue to be slightly more nuanced.

[73] The applicant's referral form in the CCMA is not before this court. The notice of set down classifies the dispute for conciliation as "*dismissal for misconduct*", and the certificate of outcome dated 6 March 2024 states that the matter should be referred to arbitration (in the CCMA).

[74] The Constitutional Court in *September & Others v CMI Business Enterprise CC*[26] made it clear that this court is bound neither by the parties' description of the dispute, nor by the commissioner's. Having regard to all the evidence available to it, including evidence of what took place at conciliation, this court must assess on the facts whether the dispute before it was conciliated.

[75] In the present matter the applicant claims that he referred "*this dispute*" to the CCMA. "*This dispute*" would appear to consist of the dispute that arose on 6 February 2024, including all of the applicant's complaints about that dispute as set out in this application (which was launched two days' later).

[76] In its answering affidavit the respondent baldly states that a dispute regarding "*a dismissal and its unfairness*" was referred to the CCMA. I do not see the basis upon which the respondent claims that the dispute before the CCMA was only about unfair dismissal. Firstly, the respondent was not present at the conciliation. Secondly, this dispute is clearly about more than simply "*dismissal for misconduct*" as stated in the notice of set down. In fact, neither the applicant nor the respondent has alleged that the applicant was dismissed for misconduct.

[77] In light of the respondent's feeble evidence in this regard (taking into particular account the fact that the respondent was not present at conciliation), and considering the high probability that the applicant complained that he was being discriminated against on the basis of his criminal past (a central feature of this application), I am satisfied that the applicant's unfair discrimination claim was conciliated.

The merits

[78] Sections 6 and 9 of the EEA together state that no person may unfairly discriminate against an applicant for employment on an arbitrary ground.

[26] (2018) 39 ILJ 987 (CC)

The applicant in this matter contends that the respondent unfairly discriminated against him by retracting its offer of employment because of his criminal past.

[79] Paragraph 7.3.32 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices[27] (the Code) states that:

> 'An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references and investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job.' (own emphasis)

[80] And paragraph 17.3.6 states that:

> 'An employer may not collect personal data regarding an employee's sex life, political, religious or other beliefs, or criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision.' (own emphasis)

[81] These provisions of the Code strongly suggest that excluding an applicant from employment on the basis of a criminal history would constitute unfair discrimination in circumstances where that criminal history is irrelevant to the requirements of the job. Such an exclusion would be arbitrary (within the normal meaning of the word) because the decision would be without rational justification.

[82] But the Labour Appeal Court (LAC) confirmed in *Naidoo & Others v Parliament of the Republic of SA*[28] that unfair discrimination based on an arbitrary ground requires more that logical arbitrariness. Referring to the

[27] GN 1358 of 4 August 2005: Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices

[28] (2020) 41 ILJ 1931 (LAC)

seminal decision of *Harksen v Lane N.O.*[29]*,* the LAC held that a claim for unfair discrimination on an arbitrary ground under the EEA can only be sustained if the discrimination is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a manner that is comparably as serious as discrimination on a listed ground, such as race, gender and culture.[30]

[83] The court went on to hold that the purpose of section 9 of the South African Constitution, which is given expression by the EEA, is to "*give recognition to the value of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted*"[31].

[84] In the present matter the applicant has an inherent attribute that is intimately connected to how he is perceived by society. He has been convicted of a crime. Our criminal justice system is premised on the idea that once the criminal has paid their debt to society, that person must be allowed back into society. To deny that person their right to freely participate in society with dignity, is to deny them their Constitutional rights as a person.

[85] But the Constitution also set limits on that person's future participation in society. This limitation finds expression in section 6(2)(b) of the EEA which states that it is not unfair discrimination to "*distinguish, exclude or prefer any person on the basis of an inherent requirement of a job*".

[86] So the question before this court is whether it was an inherent requirement of the job for the respondent's Senior Data Discovery and Enrichment Expert I to be able to demonstrate a clear criminal check. Or more particularly, would the applicant's criminal history have in any way affected his ability to do his job?

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[29] 1998 (1) SA 300 (CC)

[30] At [16]

[31] At [25]

[87] On the papers before me there is very little evidence regarding the nature of the applicant's prior convictions. The applicant does not deny that some 20 years ago he was convicted of six counts of theft, one count of fraud, and two counts of defeating the course of justice, but that is all that is before this court.

[88] I am prepared to assume, for the sake of argument, that despite the two decades past and the expungement of this record, convictions of this nature might preclude the applicant from taking up positions that require trust and honesty (although I make no such finding). However, on the papers, there is no indication that the position of Senior Data Discovery and Enrichment Expert I requires any significant amount of trust and honesty, and certainly not so much that the possibility of the applicant's rehabilitation should be completed disregarded.

[89] The applicant will conduct his work from his home in Komani (previously Queenstown), whereas the respondent's main offices are in Durban. The applicant will do his job over the internet using his own resources. It stretches credulity to imagine that the applicant will sit at home and maliciously miscategorise legal information for his own benefit.

[90] I therefore find that the applicant's criminal history is not relevant to the job which the respondent has denied him.

[91] My finding in this regard may have been different if the respondent had chosen to engage with the applicant's allegations of unfair discrimination on the merits (rather than simply state that there was no need to do so). The respondent put all of its eggs in the two baskets of jurisdiction and urgency, and once those points failed, the applicant's substantive allegations remain undisputed.

[92] It is a bold strategy to leave allegations in a founding affidavit, which the respondent believes to be untrue or incomplete, unanswered. In this

regard the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd*[32] held as follows:

> 'There is... a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[93] The above notwithstanding, on the probabilities it is unlikely that the respondent would in any event have been able to claim that a temporary work-from-home contract regarding the categorisation of legal information over the internet requires high levels of trust and honesty (and the nature of this position is confirmed from the respondent's own advertisement). I am therefore confident that taking a robust approach is the correct thing to do. The applicant, in my view, deserves the opportunity to prove that he can be trusted to do the job during the initial three month probationary period.

[94] In light of all of the above, the respondent's decision to deny the applicant the job of Senior Data Discovery and Enrichment Expert I on the sole basis of his criminal history, constitutes unfair discrimination within the meaning of section 6 of the EEA.

Remedy

[95] During argument the applicant stated that all he wants is to be able to work out the contract he believes was unfairly taken away from him. In his notice of motion the applicant prayed that the respondent's retraction of the offer be declared void *ab initio* and/or that he be appointed to the position of Senior Data Discovery and Enrichment Expert I.

[32] 2008 (3) SA 371 (SCA) at 375F–376B

[96] There is a growing opinion in legal circles that requesting "*Further and/or alternative relief*" at the end of a notice of motion is meaningless. It is beyond the scope of this judgment to decide under what circumstances a court of law is empowered to grant relief that is different but nonetheless related to the prayers in a notice of motion (whether or not there is a supplementary prayer for further and/or alternative relief). However, when it comes to deciding the issue of remedy in this matter, I am sitting as a court of equity. Section 50(2) of the EEA empowers this court to "*make any appropriate order that is just and equitable in the circumstances*", which in turn makes the applicant's prayer for "*Further and/or alternative equitable relief* (my emphasis)" entirely appropriate.

[97] In the circumstances I believe that it would be just and equitable for the applicant to be placed in a position roughly equivalent to the position he would have occupied had the respondent not unfairly discriminated against him by retracting its offer of employment on 6 February 2024. In the premises, I make the following order:

Order

1. The respondent is hereby ordered to employ the applicant, within 10 court days of the date of this judgment, as a Senior Data Discovery and Enrichment Expert I on the terms and condition set out in the written contract of employment concluded between the parties on 30 January 2024, save that the contract shall endure for a period of 9 months from the date of employment so specified in this order.

2. There is no order as to costs.

Mark Meyerowitz

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	In person
For the Respondent:	Attorney Lucky Mabena
Instructed by:	Moshoana Mabena Inc, Johannesburg
	BMC Attorneys, Komani