



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: **17671/2023**

In the matter between:

MKHUSELI MICHAEL MATAKATA

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

First Respondent

PRASA BOARD

Second Respondent

HISHAAM EMERAN

Third Respondent

Heard : **10 November 2023**

Delivered : **28 November 2023 (Electronically)**

JUDGMENT

Pillay AJ

INTRODUCTION

1. This application was instituted by way of urgent proceedings on 13 October 2023. It was initially set down for hearing on 20 October 2023. It did not proceed on that date because the Court file was not in order.

2. The matter was allocated to me for hearing on 10 November 2023. The matter was heard on 10 November 2023 and at the invitation of the Court to the applicant and the respondents, supplementary submissions were filed on 14 November 2023.
3. This application has its genesis in certain decisions that were taken more than 5 years ago. Despite this, it was brought on excessively short notice to the respondents (five Court days) and amendments were sought two days before the hearing of the matter and at the hearing of the matter.
4. The relief as initially sought in the Notice of Motion is as follows:
 - 4.1. Directing that the forms and service provided for in the Rules of Court be dispensed with in terms of Rule 6 (12) (a).
 - 4.2. A Declaratory Order confirming the validity of the applicant's contract of employment.
 - 4.3. An Order compelling the first respondent to unblock and pay the applicant's October 2023 salary immediately and subsequent to this, all outstanding salaries due with full benefits to be paid retrospectively from April 2017 to October 2023 on a date to be determined by this Court.
 - 4.4. The respondents who oppose this application to pay the costs thereof jointly and severally.
5. On 8 November 2023 (two days before the matter was heard) the applicant filed a Notice in terms of Rule 28 (1). The relief sought by way of the amendment

fundamentally reframed the relief that had originally been sought to read as follows:

- 5.1. The forms, time limits and manner of service as prescribed by the Uniform Rules of Court be dispensed with in terms of Rule 6 (12) (a) and that the application is heard on an urgent basis (paragraph (a)).
- 5.2. The first respondent is interdicted from continuing any conduct with the intention of employing a new Head of Security (paragraph (b)).
- 5.3. An Order that the appointment of those who constituted the disciplinary hearing was not in accordance with the procurement policy of PRASA, including section 217 of the Constitution and as such, was unlawful and invalid (paragraph (c)).
- 5.4. The proceedings of the disciplinary hearing were, as such, vitiated and accordingly invalid (paragraph (d)).
- 5.5. The result of the said disciplinary hearing was equally vitiated and accordingly invalid (paragraph (e)).
- 5.6. The applicant's contract of employment was never terminated; as such, the applicant has a right to return to his workplace immediately upon the granting of this Order and to be paid his salary retrospectively, which shall include all increments effected since his purported dismissal (paragraph (f)).
- 5.7. Costs of the application (paragraph (g)).

6. On 9 November 2023, the respondents filed a Notice of Objection to the Rule 28(1) Notice. The Notice of Objection is founded on three main grounds, *viz*:

6.1. The first ground of objection is that the interdict (referred to in paragraph 5.2 above) that is sought against the first respondent to restrain it from continuing with any conduct relating to the employment of a new Head of Security is not founded on any grounds set out in the founding affidavit and is therefore neither a triable issue nor deserving of consideration. Furthermore, it is contended that the relief sought in paragraphs (c) to (e) of the Notice of Intention to Amend is not founded on any factual averments set out in the founding affidavit and for that reason too does not constitute a triable issue.

6.2. The second ground of objection relates to paragraph (b) of the Notice of Intention to Amend which seeks to interdict the first respondent from continuing with any conduct relating to the employment of the new Head of Security. It is contended that an entirely new cause of action has been introduced by this which is not addressed in the founding affidavit. A similar objection is raised in respect of paragraphs (c) to (e) of the Notice of Intention to Amend.

6.3. The third ground of objection is that the amendment was not sought timeously. It is alleged in this regard that the matter was struck from the urgent roll on 20 October 2023. Despite this, the applicant filed a Notice of Intention to Amend on 8 November 2023, two days before the matter

was set down again for hearing on an urgent basis, and for that reason, reasons for its late filing ought to have been provided.

7. On the morning of the hearing of the matter, the applicant brought an application in terms of Rule 28 (4). In addition to that affidavit setting out the legal principles pertaining to the amendment of pleadings, it addresses each of the objections raised in broadly the following terms:

- 7.1. As to the objection raised that there is no triable issue in relation to some of the relief sought, it is contended that these issues have indeed been dealt with at a factual level in the founding affidavit, thereby entitling the applicant to the amendment.

- 7.2. As to the objections raised relating to a new cause of action, it is contended that a new cause of action is permissible by way of an amendment especially if it is an alternative one or does not introduce new facts. According to the applicant, the facts to support the amendment can be gleaned from the founding affidavit and the intention is not to revive an expired cause of action and/or liability by the first respondent.

- 7.3. As to the objections raised in respect of timing, the applicant concedes that the amendment was not sought timeously. According to the applicant, difficulties with timing arose because the applicant was in person and when the legal practitioner representing him "finally had the opportunity to consider the papers already filed, saw a need to amend the relief based on the facts set out in the applicant's founding affidavit."

8. In the course of argument, a further amendment of the relief was sought. This was moved from the Bar and occurred in response to questions from the Bench: (a) as to the case that was being made out for the granting of final relief on an urgent basis; and (b) the final interdict that was being sought notwithstanding the formulation of the remaining final relief. I invited the applicant to formulate the further amendment sought which he duly did and provided this reformulation to the respondents and the Court ("**the further amendment**") subsequent to the hearing.

9. The following relief is sought by way of the further amendment:
 - 9.1. That the forms, time limits and manner of service as prescribed by the Rules of Court is dispensed with in terms of Rule 6(12)(a) and that the application is heard as one of urgency.

 - 9.2. That pending the final determination of the relief sought in paragraphs (c) to (g) of the Notice of Intention to Amend, the first respondent is interdicted and restrained from continuing with any conduct with the intention of employing a new Head of Security.

 - 9.3. Costs of the interdictory relief shall be costs in the main application.

10. It appears to me, that the following four issues fall to be determined:
 - 10.1. First, whether this matter falls to be heard on an urgent basis.

 - 10.2. Second, whether the amendment and the further amendment as sought fall to be granted.

- 10.3. Finally, whether the relief as sought (if the amendments are granted as per the amended notice of motion) fall to be granted.

URGENCY

11. In terms of the rules of court, an applicant is required, in an application which is brought as a matter of urgency to pertinently and expressly set out the grounds which justify it not following the ordinary rules and process, and to provide adequate and cogent reasons that it cannot be expected to await a hearing in due course.¹
12. It is trite that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course.²
13. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing; other prejudice to the respondents and the administration of justice; the strength of the case; and any delay by the applicant in asserting its rights.³

¹ **Heathrow Property Holdings No 3 CC v Manhattan Place Body Corporate** 2022 (1) SA 211 (WCC) ([2021] 3 All SA 527) at par 20.

² **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo** 2016 (4) SA 99 (GP) at par 64.

³ **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo** 2016 (4) SA 99 (GP) at par 64.

14. As to the question of urgency, it is common cause that this matter has a long and winding history. Pertinent aspects of its background may be summarised as follows:

14.1. The applicant was employed by the first respondent in the position of Head: Corporate Security on 10 June 2013.

14.2. The applicant was dismissed for misconduct on 9 March 2017, pursuant to a disciplinary hearing chaired by an independent third party. The dismissal was on one month's notice, with the last working day being 10 April 2017.

14.3. On 9 March 2017, the applicant referred an unfair dismissal dispute to the CCMA. This was a month before he was actually dismissed. Notwithstanding the premature referral to the CCMA, it heard the matter and found that the dismissal was procedurally and substantively fair.

14.4. On 27 September 2017, the applicant instituted an application in the Labour Court to review the arbitration proceedings.

14.5. Ultimately, the review application was deemed to have been withdrawn and/or archived and lapsed in terms of the Labour Court Practice Manual.

- 14.6. On 9 February 2019, the applicant lodged an application to retrieve the Labour Court file and to reinstate the 2017 review application on 6 March 2019.
- 14.7. On 15 September 2020, the Labour Court dismissed the applicant's application to revive the review application and found that the CCMA did not have the jurisdiction to conciliate the dispute. According to the Labour Court, both the conciliation and the arbitration were a nullity in that the applicant was dismissed on notice on 9 March 2017, effective 10 April 2017 but he referred his matter to the CCMA on 9 March 2017 (i.e. before the expiry of his notice). The Court noted in this regard that in terms of section 190 (2) (d) of the LRA if employment is terminated on notice, the date of the dismissal was the date on which the notice expired. The certificate of the outcome of the conciliation was dated 7 April 2017 which was some three days before the applicant's dismissal took place. As a consequence of this, the Court went on to hold that the conciliation in the arbitration must be considered to be a nullity. According to the Labour Court, the application before it was for the reinstatement of a review of an award which, *de jure*, does not exist. The judgment of the Labour Court further notes that the only recourse available to the applicant would be to refer his dispute anew to the CCMA and apply for condonation in respect of the delay. On account of the foregoing, the application was dismissed with each party to pay its own costs.

- 14.8. On 9 October 2020, the applicant served and filed his application for condonation in respect of the late referral of his unfair dismissal dispute to the CCMA.
- 14.9. On 16 October 2020, the first respondent served and filed a notice of intention to oppose the applicant's application for condonation.
- 14.10. The next communication from the CCMA was seemingly on 27 July 2021 when notice was given that the matter had been activated for an *in limine* process. On 13 August 2021, a condonation ruling was issued by a Commissioner of the CCMA. According to that Ruling, it was recorded that the matter was set down for an *in limine* process on 30 July 2021, following an application for condonation of the late referral of an alleged unfair dismissal dispute. It was further noted that the matter was dealt with by way of written submissions from the applicant and that there were no submissions from the respondent in response to the application.
- 14.11. It is apparent from the above-mentioned Ruling that the application for condonation was determined in the absence of the first respondent's answering affidavit which had been served and filed on 16 October 2020. As a result, the first respondent filed an application for rescission of the Condonation Ruling on 20 August 2021 ("**the first rescission application**"). The applicant's stance to the first rescission application was that he was not able to depose to an answering affidavit to the first rescission application and that the Commissioner could decide how to

handle this matter. The applicant also addressed his prospects of success in an email that he sent.

- 14.12. Ultimately, the CCMA's Ruling of 13 August 2021 was rescinded on 10 November 2021 ("**the rescission Order**").
- 14.13. On 24 November 2021, the applicant instituted his own application for rescission against the rescission Order and sought to have the condonation ruling reinstated.
- 14.14. On 8 December 2021 the CCMA issued a jurisdictional ruling indicating that on a balance of probabilities, the applicant failed to comply with certain rules of the CCMA and with LRA Form 7.11 being served on the first respondent. In the circumstances, it was held that there was no referral at all.
- 14.15. On 24 February 2022 and 10 March 2022, the applicant filed another application for review, accompanied by an application for condonation ("**the 2022 review application**"). Both the applications for review are alleged to effectively be the same.
- 14.16. On 5 April 2022 the first respondent served and filed its notice of intention to oppose the 2022 review application.
- 14.17. On 13 May 2022, the applicant served on the first respondent his notice of withdrawal of the 2022 review application.

- 14.18. On 1 December 2022 the applicant served his application for direct access to the Constitutional Court, together with an application for condonation.
- 14.19. On 13 February 2023 the Constitutional Court issued an order in terms of which it dismissed the applicant's application for direct access.
- 14.20. On 9 March 2023 the applicant served another application for review ("**the 2023 review application**"). After some enquiries, the applicant advised the respondents' attorneys that he had informed the Labour Court that he was no longer interested in prosecuting the matter.
- 14.21. On 27 June 2023, the applicant filed an urgent application in the Labour Court, which deals with the circumstances in respect of his dismissal ("**the prior urgent application**"). The respondents allege that the issues are the same in the prior urgent application as in this urgent application.
- 14.22. On 10 October 2023, the applicant withdrew the prior urgent application.
- 14.23. Three days later (i.e. after the prior urgent application was withdrawn), the present application was instituted.
15. The founding affidavit makes out a case for urgency on the following grounds:
- 15.1. That the applicant will not be afforded substantial redress at a hearing in due course. He alleges, in this regard, that following the normal process will prejudice him and any ruling in his favour and will defeat any attempt to prevent the abuse of public funds and the fruitless and wasteful

expenditure that would result if a new person were to be appointed permanently into his position.

- 15.2. He approached this Court on an urgent basis after realising that his concerted efforts to persuade the first respondent to unblock his salary that was due to him since April 2017 to date had failed. It was also after, the first respondent failed to furnish him with documentary proof or evidence that the attorneys it had appointed since 2016, were regularly appointed through the supply chain management procurement process, that he brought this application.
- 15.3. He explains that the reason why it has taken him on “a very long journey” to institute this application is because the first respondent and its attorneys never disclosed that they had been tasked by PRASA to conduct a disciplinary hearing which commenced on 6 December 2016.
- 15.4. The urgency of this matter is informed by an inescapable reality of an advert released and contained in the City Press newspaper inviting applicants to apply for the applicant's former post with a deadline of 24 August 2024 (the correct closing date (as it appears from the advertisement) is in fact 22 August 2023).
- 15.5. The applicant explains that on 13 July 2023 he saw the advertisement and sent correspondence to the first respondent's legal representatives advising that the advertisement was prematurely released in that the matter had not yet been resolved.

16. It is, in my view, clear from the above background that this matter is not urgent. On the contrary, it has a long history of applications that were instituted and withdrawn. More particularly, the prior urgent application was instituted in June 2023, withdrawn in October 2023 and followed by this application some three days later.
17. Furthermore, it is clear that since the date on which the applicant was dismissed (9 March 2017), there was a prospect that the first respondent would appoint a person into his former position. This is because notwithstanding a range of processes that have occurred since then, it is clear that that dismissal stands and has, to date, not been set aside.
18. Although the matter is not urgent, I heard full argument on it in light of the detailed affidavits that had been filed and the Heads of Argument that had been filed. I am also satisfied that there is no prejudice to the respondents in determining the matter on its merits.
19. In the circumstances, I have decided not to strike it from the roll or dismiss it for want of urgency. Instead, I have decided to deal with the merits of each of the issues that were argued before me.

THE AMENDMENT AND FURTHER AMENDMENT

20. It is well-established that a court has a wide discretion when it comes to whether to allow an amendment to a notice of motion. As the Constitutional Court held in **Affordable Medicines Trust & Others v Minister of Health & Others** 2006 (3) 247 at par 9 the practical rule that emerges from the case-law is that

amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed”. According to the Constitutional Court, these principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand.

21. In **Affordable Medicines**, the Constitutional Court referred to **Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (Tk) C** at 77F – I where White J set out the general principles governing applications for the amendment of pleadings and summarised them as follows:

- 21.1. The Court has a discretion whether to grant or refuse an amendment.
- 21.2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
- 21.3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.
- 21.4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
- 21.5. The party seeking the amendment must not be *mala fide*.
- 21.6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.

- 21.7. The amendment should not be refused simply to punish the applicant for neglect.
- 21.8. A mere loss of time is no reason, in itself, to refuse the application.
- 21.9. If the amendment is not sought timeously, some reason must be given for the delay.
22. I am of the view that the amendment and the further amendment ought to be granted notwithstanding the very late stage of the proceedings at which these amendments were sought. My reasons are as follows: (a) it is clear that the applicant was unrepresented at the time that the application was drafted and therefore he did not have the benefit of legal assistance in the preparation of his papers; (b) the amendment is necessary to allow for the proper ventilation of the dispute between the parties; (c) an explanation for the belated amendment has been given, which does not appear to be mala fides; (d) notwithstanding the amended relief, the applicant does not seek to supplement the affidavits that have been filed; (e) the applicant is not prejudiced by the amendment. Whereas the original relief sought was final in nature and consisted of a range of Orders, the further amendment seeks limited interim relief and a postponement of the further relief.

THE MERITS OF THE INTERIM RELIEF

23. As stated, the interim relief sought before me is for an interim Order that “pending the final determination of the relief sought in paragraphs (c) to (g) set out in the Amended Notice of Motion, the first respondent is interdicted and restrained from

continuing with any conduct with the intention of employing a new Head of Security.”

24. It is well established that the requirements which an applicant for an interim interdict has to satisfy are the following:

24.1. a prima facie right;

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

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

24.4. the absence of any other satisfactory remedy.

25. The Constitutional Court has recently held that an interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm.⁴

26. In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC) (2012 (11) BCLR 1148; [2012] ZACC 18) at par 49 and 50 Moseneke DCJ had this to say about the nature of the right that must be proved in an application for an interim interdict:

⁴ **UDM v Lebashe Inv Group (Pty) Ltd** 2023 (1) SA 353 (CC) ([2022] ZACC 34) at par 47.

26.1. There is a conceptual difficulty with the high court's holding that the applicants have shown 'a prima facie . . . right to have the decision reviewed and set aside as formulated in prayers 1 and 2'. The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.

26.2. As to the right to be established:

“(T)he 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.”

27. Notwithstanding the founding affidavit having been drafted in support of the final relief that was sought in the original notice of motion, the applicant submitted that it was to be used in support of the interim relief sought by way of the further amendment. Accordingly, the factual allegations in support of the amended relief are contained in the original founding affidavit which was not supplemented.

28. In support of the existence of a prima facie right, I was referred to the following two paragraphs of the founding affidavit (leaving aside the parts of the affidavit dealing with urgency, which I have already dealt with):

“35. Further to the first respondent's failure to provide termination of the contract of my employment, they have flatly refused to furnish

any documentary proof or evidence pointing to a legitimate appointment of Bowman's as their service provider which they purportedly appointed to conduct a purported disciplinary hearing wherein I was hauled into to answer charges of alleged misconduct.

36. The facts before me and which I alerted the first respondent to, confirmed that, Bowman's was never duly appointed through a due process by a duly appointed official of the first respondent and in compliance with the relevant laws, regulations and policies of the first respondent and therefore, whatever they did, is a nullity."

29. The respondents deny the above-mentioned allegations and aver as follows:

29.1. The applicant had a pending purported urgent application at the Labour Court, which was ripe for hearing. The purported urgent application largely dealt with the same and/or similar issues as this urgent application.

29.2. The legal services of the attorneys in question were properly secured following the relevant procurement processes in place at the first respondent. In this regard, it is alleged that Bowman's was on the panel of the first respondent and was properly mandated by the first respondent to assist in the disciplinary process, including instructing senior counsel to initiate the disciplinary proceedings on behalf of the first respondent.

30. In light of the foregoing evidence, I am of the view that the applicant has failed to demonstrate a prima facie right. In the words of the Constitutional Court, it is not for a claimant to establish merely the right to approach a court in order to review an administrative decision. But, it is for a claimant of an interim interdict to show a right to which, if not protected by an interdict, irreparable harm would ensue. This, in my view, on the evidence, the applicant has failed to do. In

addition, the relief seeking to impugn the appointment of those constituting the disciplinary hearing review relates to a decision that was taken some five years ago.

31. Furthermore, I am not satisfied that the remaining requirements for interdictory relief have, in any event, been met in that:

31.1. As regards a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, there are two factors of particular relevance: (a) in the event that an appointment is made to the position of a new Head of Security, this does not result in irreparable harm to the applicant because, even if he does succeed in the final relief sought, a Court will carve out a just and equitable remedy in respect thereof; and (b) in any event, it will not result in an abuse of public funds or in fruitless and wasteful expenditure given that, as matters stand, the position is vacant and the decision in respect of the applicant's dismissal, remains an extant one. In any event, even if a new appointment were to occur, that appointee would be paid for services rendered and it would therefore not result in fruitless and wasteful expenditure.

31.2. As regards the balance of convenience, I am of the view that this does not favour the granting of the interim relief. The applicant has been dismissed since early 2017. As stated, that decision remains valid and binding. In these circumstances, I am of the view that the balance of

convenience must favour the respondents who need to have the position filled.

- 31.3. As regards the absence of any other satisfactory remedy, I am of the view that the applicant does have an alternative satisfactory remedy available to him. On his own version, this would entail a review/application for declaratory relief which, if successful, would be followed by just and equitable relief. The applicant has failed to show why a just and equitable order (in the event of a successful review), would not constitute an alternative satisfactory remedy for him.

RELIEF

32. As stated, save for the interim relief with which I have dealt with above, the remaining amended relief is not sought by way of these urgent proceedings. Indeed, the applicant seeks to have the remaining relief postponed and accepts that further affidavits would have to be filed in respect of such relief.
33. In the circumstances, I am of the view that the remaining relief in the Amended Notice of Motion be postponed *sine die*.
34. As regards the issue of costs in these proceedings, the applicant has sought an order that the costs of this application shall be costs in the main application. I am of the view that it is appropriate for costs to follow the result in respect of this application.
35. For reasons set out herein, I make the following order:

- 35.1. The forms, time limits and manner of service as prescribed by the Uniform Rules of Court be dispensed with in terms of Rule 6 (12) ((a) and that the application is heard on an urgent basis.
- 35.2. The amendments sought by the applicant to the notice of motion are granted.
- 35.3. The Order sought that "pending the final determination of the relief sought in paragraphs (c) to (g) set out in the Amended Notice of Motion, the first respondent is interdicted and restrained from continuing with any conduct with the intention of employing a new Head of Security" is dismissed.
- 35.4. The remainder of the relief sought in paragraphs (c) to (g) of the Amended Notice of Motion is postponed *sine die*.
- 35.5. The applicant shall pay the costs of this application, which costs shall include the costs in respect of the amendment.


K PILLAY
Acting Judge of the High Court

APPEARANCES

For the Applicant

Mr K Lingani

Instructed by

Venfolo Lingani Inc.
(ref: Mr K Lingani)

For the Respondents

Advocate L Ackermann

Instructed by

Bowman Gilfillan Inc.
(ref: Ms Z Moosa)