IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case Number:
Labour Court Case Number: J111/21

In the matter between:

THE PASSANGER RAIL AGENCY OF SOUTH AFRICA	First Applicant
LEONARD RAMATLAKANE	Second Applicant
THINAVUYO MPYE	Third Applicant
DINKWANYANE MOHUBA	Fourth Applicant
SMANGA SETHENE	Fifth Applicant
XOLILE GEORGE	Sixth Applicant
NOSIZWE NOKWE-MACAMO	Seventh Applicant
MATODZI MUKHUBA	Eighth Applicant
THEMBA ZULU	Ninth Applicant
THANDEKA MABIJA	Tenth Applicant
and	
ONICA MARTHA NGOYE	First Respondent
NKOSINATHI ALLEN KHENA	Second Respondent
TIRO HOLELE	Third Respondent

APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicants hereby apply to the Labour Appeal Court for an order in the following terms:

1. Leave to appeal to this Court be granted against the whole of the judgment and order of His Lordship Mr Acting Justice Baloyi handed down on 2 March 2021;

2. Costs of the application for leave to appeal be costs in the appeal.

3. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **ZOLANI KGOSIETSILE MATTHEWS** together with the annexures thereto, will be used in support of this application.

TAKE NOTICE FURTHER THAT if you intend opposing this application, you are required to deliver your answering affidavit, if any, within 10 days of receipt of this application.

TAKE NOTICE FURTHER THAT the applicants have appointed **DE SWARDT MYAMBO ATTORNEYS** as its attorneys of record, at the address set out below, at which it will accept service of all further notices, documents and other process in these proceedings.

DATED AT PRETORIA ON THE 27 DAY OF MAY 2021.

DE SWARDT MYAMBO ATTORNEYS
ATTORNEYS FOR **APPLICANTS**
941 JAN SHOBA STREET
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REF: **MR MA MYAMBO/MS/P1038**

TO: **THE JUDGE PRESIDENT OF THE**
LABOUR APPEAL COURT
c/o: THE REGISTRAR
BRAAMFONTEIN

AND TO: **GWINA ATTORNEYS INCORPORATED**
ATTORNEYS FOR **APPLICANTS**
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REF: S GWINA/KM/MAT462

(SERVICE BY E-MAIL)

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

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Case Number:
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THANDEKA MABIJA	Tenth Applicant
and	
ONICA MARTHA NGOYE	First Respondent
NKOSINATHI ALLEN KHENA	Second Respondent
TIRO HOLELE	Third Respondent

FOUNDING AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

K.R

ZOLANI KGOSIETSILE MATTHEWS

do hereby make an oath and state that:

INTRODUCTION

1. I am the Group Chief Executive Officer of the first applicant ("PRASA").

2. I have the authority to bring this application and to depose to this affidavit on behalf of PRASA as well as the individual board members cited as the second to ninth applicants. The facts to which I depose herein are within my own personal knowledge and are, except where the context indicates otherwise or I expressly say so, to the best of my knowledge and belief, true and correct.

3. Any legal submissions that I may make are so made on the advice of our legal representatives and I believe them to be correct.

4. This is an application for leave to appeal to the above Honourable Court against the judgment and order of His Lordship Acting Justice Baloyi handed down on 2 March 2021. A copy of the judgment is annexed hereto as **"ZKM1"**.

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5. Our application to the court *a quo* for leave to appeal was dismissed with costs on 13 May 2021. A copy of the judgment refusing leave to appeal is annexed hereto as **"ZKM2"**.

6. At the heart of this matter lies the question whether the Labour Court has jurisdiction to determine an application brought in terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("the Basic Conditions of Employment Act") in circumstances where an applicant's pleaded case is one of unlawfulness as opposed to breach of contract. The learned judge found that since *"unlawfulness is claimed under the Basic Conditions of Employment Act to assert a right in terms of a contract. I find no reason to conclude that this Court has no jurisdiction"* (added emphasis).

7. I submit with respect that the learned judge erred for the reasons that will be demonstrated in detail below. I submit that the appeal has reasonable prospects of success, that there are compelling reasons why the appeal should be heard and that this case raises important legal issues that ought to be determined by the above Honourable Court.

K.R.

GROUNDS ON WHICH LEAVE TO APPEAL IS SOUGHT

Jurisdiction

8. The primary ground on which leave to appeal is sought is that the learned judge erred when he held that the Labour Court had the requisite jurisdiction to determine the application.

9. The learned judge erred in finding that the Labour Court had jurisdiction to hear the matter on the basis that it was called upon to determine the *"unlawfulness of the dismissal based on section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act"*.

10. In developing this finding on jurisdiction, the learned judge held that *"What is of essence, is that a claim for unlawfulness should within the accompanying pleadings establish unlawfulness, meaning that whatever is pleaded should establish unlawfulness."*

11. I am advised that this finding is flawed and amounts to a misdirection on the law. More specifically, the Labour Court does not have jurisdiction to determine cases which challenge the lawfulness of the employer's decision. In other words, when an applicant challenges the lawfulness of his/her dismissal, as distinct and separate from the unfairness of the dismissal, there is no remedy under the

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Labour Relations Act, 66 of 1995 ("the Labour Relations Act") and the Labour Court has no jurisdiction to make any determination on unlawfulness.

12. In making a finding that the court had the requisite jurisdiction, the learned judge erred and misdirected himself on both the facts and the law. The learned judge failed to assess jurisdiction based on the case as pleaded.

13. Section 77(3) of the Basic Conditions Act does not ground a claim for unlawfulness or a claim for asserting a right under a contract. The respondents' pleaded case was not one brought in contract. They did not assert a right in terms of their contract or allege breach on the part of PRASA neither did they seek to enforce specific performance.

14. On the papers before the Labour Court, the respondents (the applicants in the Labour Court) failed to:

14.1. plead the terms of their contracts which they sought to enforce;

14.2. plead the terms of their contracts that were allegedly breached;

14.3. make an election of whether to claim specific performance or to cancel the contract and claim damages.

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15. There was no record of any letter of a breach of contract, the contractual terms sought to be enforced, and an election of either specific performance or cancellation of a contract with a claim for damages. To the contrary, the letters consistently referred to *"unlawfulness"* and not breach of contract;

16. Furthermore, the learned judge overlooked the material concession by the respondents that *"We do not place reliance on the Labour Relations Act remedies"*. This concession was expressly pleaded in reply. It is clear that the claim as contained in the notice of motion and the contents of the founding affidavit was one that challenged the *"unlawfulness"* of the termination of employment.

17. I am advised that jurisdiction is determined on the basis of the pleadings. In the event of the court's jurisdiction being challenged. The applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim.

18. On a reading of the pleadings in the application, the claim as pleaded was

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18.1. *"At the heart of the application lies two issues"* [1] -

18.1.1. the issue of the lawfulness of the Board of PRASA in so far as it was not properly constituted. The proceedings of the Board were accordingly unlawful and of no force and effect; and

18.1.2. whether PRASA could in law validly terminate the employment contracts for the grounds set out in the termination letter.

18.2. *"...the Board did not confront us about their observation that we ought to have left the employ of PRASA years ago. The Board simply did its review, came to its conclusions and caused the Acting GCEO to issue letters of termination dated 29 January 2021 and 1 February 2021 and issued a media release with the outcomes of the review of our employment agreements on 30 January 2021".* [2]

18.3. *"The unlawful termination of our contracts of employment is in clear contravention of the basic values and principles governing public administration"* [3].

---

1 FA in the court *a quo*, para 9
2 FA in the court *a quo*, para 14
3 FA in the court *a quo*, para 124

19. It is on the above basis that the respondents (the applicants in the court *a quo)* sought an order:

19.1. declaring that the meeting of the Board of Control of PRASA, insofar as it purported to take the decision to terminate their contract of employment, was not properly constituted and was accordingly unlawful;

19.2. that the decision of the Board of Control and any consequent resolution, insofar as they purported to terminate the contracts of employment were invalid and of no force and effect;

19.3. that the contracts of employment are accordingly extant; and

19.4. that the termination of the applicants' employment contracts is accordingly unlawful.

20. It is clear that the case as pleaded by the applicants was that of unlawfulness and not unfairness.

21. The effect of this is that there is no remedy under the Labour Relations Act and the court *a quo had* no jurisdiction to make any determination on the issue.

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22. The learned judge erred by incorrectly interpreting the Constitutional Court judgment of *Baloyi v Public Protector and Others* 2021 (2) BCLR 101 (CC) to mean that *"the essence of the Constitutional Court's finding is that this Court [the Labour Court] has concurrent jurisdiction with the High Court on employment issues which do not require any determination of fairness."*

23. I am advised, that the Constitutional Court did not make such a finding in *Baloyi*. What the Constitutional Court found was that Baloyi had expressly framed her claim as one outside of the Labour Relations Act which was based purely on contract law. At paragraph 47-48 of the judgment of the Constitutional Court, the Constitutional Court held that:

> *"[47] Matters "concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract", are expressly noted in section 77(3) of the Employment Act as falling within the concurrent jurisdiction of the High Court and the Labour Court...*
>
> *"[48] A claim for contractual breach, absent reliance on any provision of the LRA, can be identified on Ms Baloyi's papers. The LRA does not extinguish contractual remedies available to employees following a breach of their contract of employment, or unlawful termination thereof. While she may also have a claim for unfair dismissal in terms of the LRA, Ms Baloyi has elected not to pursue this claim. Nothing in the LRA, or the*

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Employment Act, required her to advance that claim in the Labour Court."

24. The jurisdiction of the Labour Court is engaged where legislation mandates it, or where a litigant asserts a right under the Labour Relations Act or relies on a cause of action based on a breach of an obligation contained in the Labour Relations Act.

25. The mere reliance on section 77(3) of the Basic Conditions of Employment Act to bring the issue of unlawfulness under the jurisdiction of the Labour Court does not give the Labour Court the necessary jurisdiction.

26. In relying on section 77(3) of the Basic Conditions of Employment, the respondents failed to plead breach of contract and did not indicate the selection made. They failed to seek specific performance in the notice of motion in a contractual sense and failed to make out a case in terms of section 77(3) of the BCEA.

27. Breach and unlawfulness cannot simply be equated. Seeking an order of specific performance, for example, would not extend to declaring unlawfulness.

28. The learned judge therefore erred in finding that *"What is of essence is that a claim for unlawfulness should within the accompanying pleadings establish*

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unlawfulness, meaning that whatever is pleaded should establish unlawfulness. The unfairness disputes are only determinable within the scheme of the Labour Relations Act. Since the unlawfulness in this instant case is claimed under the Basic Conditions of Employment Act to assert a right in terms of a contract, I find no reason to conclude that this Court has no jurisdiction."

29. Jurisdiction is to be determined strictly on the basis of the pleadings, the Legislature deliberately provided in the Labour Relations Act for unfair dismissals and automatically unfair dismissals to be outlawed and to attract a remedy but did not make any provision for unlawful or invalid dismissals.

30. The effect is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the Labour Relations Act and the Labour Court has no jurisdiction to make any determination of unlawfulness.

31. To the extent that reliance is placed on section 77(3) of the Basic Conditions of Employment Act they have to plead a case in contract. The applicant's pleaded case is not one that invokes any term of their employment contract, or that alleges a breach of contract on the part of PRASA.

32. Accordingly, there is no dispute before the court that can properly be termed a matter concerning a contract of employment for the purposes of s 77(3) of the Basic Conditions of Employment Act.

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33. The Labour Court is a creature of statute and it derives its powers from the Labour Relations Act and any other law that gives it jurisdiction. Section 77(3) of the Basic Conditions of Employment Act does not give the Labour Court jurisdiction to determine unlawfulness in circumstances where an applicant does not plead a breach of contract.

34. The Constitutional Court in *Baloyi* specifically held that:

> *"[42] ... it is important not to conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action. When assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so. However, these views are irrelevant to the court's competence to hear the matter."*

35. For all these reasons, the court *a quo* ought to have found that it lacked the necessary jurisdiction to determine the case.

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No special circumstances to allow the admission of further affidavits and/or to allow the applicants to make out a case in reply

36. I am advised that it is trite that a litigant stands and falls by his founding papers.

37. In the absence of an application to the Court for leave to file a further affidavit, such affidavit should be regarded as *pro non scripto*. It was only in reply and/or subsequent affidavits that the respondents attempted to plead breach of contract. Fatal to their case however, is that they state that they stand by their notice of motion.

38. At paragraphs 37 to 38 of the judgment, the learned judge erred in finding that:

> *"[37] .... The case for all the applicants which remained uncontested has been made from the founding papers. By ruling on whether the supplementary affidavit should be admitted to evidence or not will not change the case that is already established in the founding papers. The respondents' act of terminating the applicants' contracts of employment with immediate effect gives rise to unlawfulness on account of violation of the terms and conditions of the applicants' contracts of employment.*
>
> *[38] The applicants sought specific performance consequent to the finding of unlawfulness of the termination of contracts."*

39. But the respondents did not assert a right in terms of their contract, they did not allege breach on the part of PRASA nor did they seek to enforce specific performance in terms of their contract.

Urgency

40. The respondents pleaded urgency was that of financial hardship.

41. However, the respondents failed to demonstrate that any exceptional circumstances existed for the court to intervene based on financial hardship.

42. The learned judge erred in finding that *"the abrupt manner in which the termination of employment contracts was effected, that is with immediate effect"* raised an exceptional circumstance.

43. The respondents fear regarding their livelihood as a result of the termination of their employment and resultant financial hardship is akin to that of every other employee. The fact that an employee who alleges that he has been dismissed unfairly (or in this case unlawfully) is suffering or would suffer financial loss or other consequential hardships if he were not reinstated immediately does not per se constitute a ground of urgency.

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Costs

44. I respectfully submit that the cost order should be set aside in light of the fact that the learned judge misdirected himself. There are no grounds on which the learned judge acting reasonably could have made the order in question.

45. As the case before the court *a* quo, properly pleaded, challenges the unlawfulness of the termination of the employment contracts, the court *a quo* did not have jurisdiction to hear the application.

CONCLUSION

46. The findings of the learned judge cannot be left unchallenged. I submit with respect that the Labour Appeal Court should consider the judgment of the court *a quo* as the judgment contains misdirections of law and fact which, I am advised, are contrary to a line of decided cases by the Labour Court and the Constitutional Court.

47. There is a reasonable prospect that the Labour Appeal Court will reach a different conclusion than that of the court *a quo.* There was no dispute before the court *a quo* concerning a breach of the contract of employment. The court *a quo* did not have the requisite jurisdiction to determine the claim.

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48. For all these reasons, it is respectfully submitted that leave to appeal be granted.

WHEREFORE I pray for an order in terms of the notice of motion to which this affidavit is attached.

ZOLANI KGOSIETSILE MATTHEWS

I certify that the above signature is the true signature of the deponent who has acknowledged to me that s/he knows and understands the contents of this affidavit, which affidavit was signed and sworn to at Hillbrow SAPS on this the 27 day of May 2021 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.

SUID-AFRIKAANSE POLISIEDIENS
STATION COMMANDER
2021 -05- 27

COMMISSIONER OF OATHS
Kgaogelo Malope
Sergeant
702265 7-1

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

02/03/2021
DATE

SIGNATURE

"ZKM1"

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: J 111/21

In the matter between:

ONICA MARTHA NGOYE	First Applicant
NKOSINATHI ALLEN KHENA	Second Respondent
TIRO HOLELE	Third Respondent

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	First Respondent
LEONARD RAMATLAKANE	Second Respondent
THINAVUYO MPYE	Third Respondent
DINKEANYANE MOHUBA	Fourth Respondent
SMANGA SETHENE	Fifth Respondent
XOLILE GEORGE	Sixth Respondent
NOSIZWE NOKWE-MACAMO	Seven Respondent
MATODZI MUKHUBA	Eighth Respondent
THEMBA ZULU	Ninth Respondent
MS THANDEKA MABIJA	Tenth Respondent

Heard: 12 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour

Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 02 March 2021.

JUDGMENT

BALOYI, AJ

Introduction

[1] The termination of employment contracts of the three applicants with immediate effect is the subject matter of this application. The applicants approached this court on urgent basis essentially seeking an order that such termination be declared unlawful and set aside. Consequently, the reinstatement to their respective positions be ordered. The application is opposed with pleas of lack of urgency and this Court's lack of jurisdiction in the forefront of the respondents' case. The matter was first scheduled for hearing on 11 February 2021. Due to administrative glitches a bulk of the Court papers did not reach the Court file on time. As a result, the matter was by agreement adjourned to 12 February 2021.

[2] It appears from the Court papers and the arguments that the termination was effected by the first respondent at the instances of its Board of Control. The said Board of Control is headed by the second respondent as its chairperson. The third to ninth respondents are the second respondent's fellow members of the Board of Control. The tenth respondent is the Acting Group CEO of the first respondent. They are cited on reason that the termination was precipitated by their collective decision. Part of the relief sought by the applicants is to have the resolutions so taken by the Board be declared unlawful, invalid and of no force. Furthermore, the Board was according to the applicants not properly constituted hence a specific order is sought in this respect. More of this appear herein below.

Background

[3] As pointed above, the respondents have raised legal objections with regard to lack of urgency and this Court's lack of jurisdiction. To enable me to deal with these points, it is thus imperative to briefly lay down the factual background to this dispute. The first applicant, Ms Onica Martha Ngoye, received a letter of termination of her contract on 29 January 2021 dated 29 January 2020. It appears that the parties held a common understanding that the date appearing in her letter of termination was intended to be 29 January 2021. The relevant content of the letter is self-explanatory and was crafted in the following manner:

> "Dear Ms Ngoye
> SAP Number: XXXXXX 29 January 2020
>
> **Re: Termination of Employment**
>
> 1. You will recall that on 13 January 2021, the Chairperson of HCM & REMCO requested employment contracts of all executives, including yours. In response to the said request, you indicated by way of an email dated 13 January 2021, that there is no contract signed between yourself and PRASA on your current position.
>
> 2. Having perused PRASA's records, the only contract of employment PRASA has with you relates to your previous role as Chief Executive Officer: Intersite
>
> 3. For your current position, only the letter of transfer [transferring you from Intersite to Group Executive: Legal, Risk and Compliance] dated 22 August 2014, could be found. For ease of reference, I attach the said letter as annexure **"A"**.
>
> 4. According to the letter, your transfer was to commence on 1 September 2014 and the other conditions of service were not amended by the said letter.
>
> 5. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives. In your

current position, PRASA relies on you for issues concerning legal, risk and compliance and you out to have brough this administrative defect to the attention of PRASA (sic).

6. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.

7. Having said that, PRASA hereby informs you of its intention to approach court for necessary relief against you in respect of various matters including the unauthorised and unlawful approval of R58 153 296.72.

8. You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Signed

Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa"

[4] On the very day, that is, 29 January 2021 the second applicant, Mr Nkosinathi Allen Khena, also received a letter of termination of his contract of employment dated 29 January 2021. The letter is similarly self-explanatory and it reads as follows:

"Mr Khena
SAP Number: XXXXXX 29 January 2021

Re: Termination of Employment

[1] Having perused PRASA's records, the only contract of employment PRASA has is that of Chief Operating Officer dated 1 December 2012.

[2] In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.

[3] Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.

[4] Having said that, PRASA hereby informs you of its intention to approach court for necessary relief against you in respect of various matters including the unauthorised and unlawful approval of an amount in excess of R 25 million without requisite authority.

[5] You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Signed

Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa"

[5] As at 29 January 2021 the first and second applicants occupied the positions of Group Executive: Legal Risk and Compliance and Chief Operating Officer respectively. These positions fall within the level of executives in terms of the first respondents' structure. These letters were followed by the first respondent's media statement published on 30 January 2021 announcing the termination of employment of three executives for having been in the employ of the first respondent for more than 5 years, and they ought to have left years ago. According to the statement all executives are employed for a period not exceeding 5 years with no expectation of extension of the contracts. The statement went on to state that these executives took advantage of instability at the level of the first respondent's Board, hence they stayed unlawfully for a longer period in the positions. The letter further conveyed the first respondent's intentions to institute legal action to recover R58 million from the first applicant and R25 million from the second applicant. The reason for the legal action relates to their approval of such payments to the external service providers without the requisite authority.

[6] The first applicant came into her position by virtue of the transfer from her initial position of CEO at one of the subsidiaries of the first respondent, Intersite Asset Investment Soc Ltd as per the transfer letter dated 22 August 2014 following the Board's resolution to the effect. What is of utmost importance in this regard is that in the first applicant's letter of transfer it is recorded that such transfer was lateral and did not amend all other terms and conditions. The conditions referred to, in the understanding of the parties are those set out in the first applicant's contract she entered into with Intersite Asset Investment Soc Ltd dated 01 September 2012. The commencement date is recorded as 01 September 2011.

[7] The relevant features of the contract as recorded in clause 3 are that the first applicant accepted the appointment subject to the terms and conditions contained in the very agreement and its annexures. Furthermore, that the appointment in question *shall be deemed to have commenced on 01 September 2011 and shall endure until terminated as provided for herein.* Clause 9 of the contract identified the grounds on which the employment shall be terminated. Firstly, without notice on account of misconduct or any other cause recognized by law. Secondly, within three months' notice which the employee has to serve. Whichever mode of termination to be effected in terms of clause 9, the parties are in all respects bound to have regard to the internal policies and procedures and the provisions of the Labour Relations Act prior to such termination.

[8] In Annexure "A" of the first respondent's contract, the salient details of employment are recorded as follows:

"ANNEXURE A – SALIENT DETAILS OF EMPLOYMENT

[1] **Full Name:** Martha Onica Ngoye
[2] **Identity Number:** XXXXXX
[3] **Capacity:** Chief Executive Officer
[4] **Annual Leave Entitlement:** 22 Days per annum
[5] **Duration:** Permanent

[6] **Commencement Date:** 01/09/2011

[7] **Termination Date:** N/A

[8] **Physical Address, postal address and telefacsimile:**

Physical - XXXXXX

Postal - XXXXXX

[9] **Sick Leave entitlement:** 40 working days per leave cycle"

[10] The second applicant's contract of employment signed on 30 November 2012 with commencement date recorded as 01 December 2012 contains the same terms and conditions as that of the first applicant with regard to the appointment and duration in clause 3 as well as the termination in clause 9. Annexure "A" of his contract reveals the salient details of employment as follows:

"ANNEXURE A – SALIENT DETAILS OF EMPLOYMENT

1. **Full Name:** Nkosinathi Khena
2. **Identity Number:** XXXXXX
3. **Capacity:** Chief Operating Officer: PRASA
4. **Annual Leave Entitlement:** 22(twenty two) paid working days per annum
5. **Duration:** Full time
6. **Commencement Date:** 01 December 2012
7. **Termination Date:**
8. **Physical Address, postal address and telefacsimile:**

Physical - XXXXXX

Postal - XXXXXX

9. **Sick Leave entitlement:** 40 working days per leave cycle"

[11] The third applicant, Mr Tiro Holele was appointed to the position of General Manager: Corporate Affairs on 30 May 2007 by the first respondent's predecessor known at the time as South African Rail Commuter Corporation Ltd. Although the appointment letter refers to an employment contract that he was supposed to sign, it was however never signed. On 01 December 2009 he was offered a position of Group Executive: Office of the CEO subject to 6

months' probation which he accepted. Reference to the signing of the contract is also made in the appointment letter. His continued occupation of the position beyond the period of 6 months signalled that he had probably completed his probation successfully. Between 2011 and 2020 he was moved to several executive positions within the first respondent by either transfer or appointments. This included appointment to the positon of the CEO at Autopax, one of the first respondent's subsidiaries.

[12] After the third applicant's recall from the Autopax CEO position in March 2020, he continued to serve the first respondent as Group Executive: Office of the CEO. In March 2020 he was offered a position of General Manager: Strategy following the phasing out of the position of Executive: Office of the CEO from the first respondent's structure. He only accepted the offer in August 2020 through his attorney. The General Manager position is not an executive position but a managerial position. On 01 February 2021 he received a letter terminating his contract of employment stating the same reason as that in the other applicants' letters with the following content:

"Mr Tiro Holele
SAP Number: XXXXXX 01 February 2021

Re: Termination of Employment

1. Having perused PRASA's records, a letter of appointment dated 01 December 2009 relates to your last role as Group Executive: Office of the GCEO, I attach the letter as annexure A.

2. For your current position, Group Executive: Office of the GCEO, there is no contract of employment that was signed between yourself and PRASA in our records.

3. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.

4. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.

5. You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Signed

Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa"

[13] Upon receipt of the letters of termination of contracts of employment, all applicants separately addressed letters to all the respondents raising their discontent with the termination as they viewed same to be unlawful. The core issues raised in the letters were akin to cautioning the first respondent about the incorrect position it has adopted. Furthermore, that there is no basis for its assertion in both letters of termination and the media statement that they had exceeded their stay at PRASA and ought to have left years ago. They also intimated that they were never aware of the alleged normal five years fixed term contract extended to all executives. They requested particulars upon which the claim of extension to all executive was based. They further reminded the respondents that at no point did they enter into five years fixed term contracts. Notably, none of the applicants' letters was favoured with a reply.

The case before this Court

[14] The applicants seek a relief that the resolution passed by the Board directing the termination of their contracts of employment be found to be unlawful. Furthermore, such resolution was passed by a Board that was not properly constituted as it did not have a member appointed from Department of Transport. The resolution does not form part of the Court papers and it is not pleaded in the founding papers as to when was the resolution passed. The applicants also seek an order that the termination of the applicants' contracts through the resolution be declared unlawful and accordingly be set aside. The

applicants' case goes further to seeking the setting aside of the termination of the contracts and reinstatement. In opposition the respondents deny the absence of a person sourced from the Department of Transport in the Board. A letter of appointment of Hlengiwe Ngwenya by the Minister of Transport dated 05 January 2021 is attached to the answering affidavit to back up the said denial.

[15] The applicants raised certain controversies in the replying affidavit which in effect suggest that it cannot be possible that Ms Ngwenya was appointed a Board member. This is in view of the second respondent's comments in another media statement of 03 February 2021 that the Director General is in fact the person appointed from the Department of Transport to serve as a Board member. Furthermore, Ms Ngwenya's name did not appear in the list of invitees to the Board meetings. The rest of the opposition of the application comprises of objections based on lack of urgency as well as this Court's lack of jurisdiction. I will, therefore, deal with these objections herein below

Lack of jurisdiction

[16] The respondents' challenge to the jurisdiction of this Court is heavily loaded with the attack on the primary relief sought, that is, unlawfulness. The respondents contend that it does not fall within the competencies of this Court to grant. Huge focus is placed on the fact that the applicants' founding affidavit lacks specificity as to the terms of the contract alleged to have been breached. The mere asking for an order to declare the termination unlawful, so goes the argument, does not in itself disclose a cause of action. The applicants' failure to specifically plead breach of contract deprives this Court jurisdiction to determine this application. In support of this contention the respondents relied on *Phahlane v Minister of South African Police Services*[1], *Shezi v South African Police Services*[2] *and Chubisi v South African Broadcasting Corporation (Soc) & Others*[3]. The respondent's arguments are in essence that this Court's

[1] Unreported J736/2020 (11 August 2020).
[2] [2021] 42 ILJ 184 (LC).
[3] (2021) 42 ILJ 395 (LC)

jurisdiction cannot be found where relief is sought to declare unlawfulness of the employer's action without locating a claim in the cause of action justiciable by this Court.

[17] The applicants' reaction to the jurisdictional issue is that the terms of the contract have been pleaded and specific references were made to clauses 3 and 9 of the contracts of the first and second applicants. The absence of the phrase 'breach of contract' cannot deprive this Court of its jurisdiction to determine a claim of unlawfulness of the termination of employment contract. By determining the matter solely based on the respondents' interpretation, the Court will undesirably be asked to prioritize form over substance. The applicants further relied on *Somi v Old Mutual Africa Holdings (Pty) Ltd*[4] and *Solidarity v South African Broadcasting Corporation*[5] to demonstrate that this Court has jurisdiction as it upheld the applicants' claims based on unlawfulness. The respondents' non-compliance with the terms of the agreement leads to unlawfulness and this cannot be dispelled by mere use of words.

[18] Based on what is placed before this Court, I am of the view that this Court has jurisdiction for the reasons appearing below. Section 157 of the Labour Relations Act has been given a consistent interpretation by various Courts as to the jurisdiction of this Court. The Constitutional Court has put this issue to bed in *Baloyi v Public Protector & Others*[6] and held as follows at paragraphs 26 - 29:

> "[26] By virtue of section 157(1), the Labour Court will enjoy exclusive jurisdiction over any matter "in terms of" the Employment Act. Matters governed by or concerning the enforcement of a provision of, the Employment Act accordingly fall within the ambit of the Labour Court's exclusive jurisdiction. The Labour Court and the Labour Appeal Court have held on a number of occasions that "the provisions of section 77(1) do no more than confer a residual exclusive jurisdiction on the

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[4] [2015] 36 ILJ 2370 (LC).
[5] [2016] 37 ILJ 2888 (LC).
[6] (2021 (2) BCLR 101 (CC) (4 December 2020).

Labour Court to deal with those matters that the [Employment Act] requires to be dealt with by the court".

[27] However, both the LRA and the Employment Act expressly recognise that there are certain matters in respect of which the Labour Court and the High Court enjoy concurrent jurisdiction. Section 157(2) of the LRA provides, in relevant part:

"The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—

(a) employment and from labour relations;

(b) . . .

(c) . . . ."

[28] Section 77(3) of the Employment Act provides, similarly, that the Labour Court "has concurrent jurisdiction with the civil courts to hear and determine any matter concerning *a contract of employment*, irrespective of whether any basic condition of employment constitutes a term of that contract". That disputes arising from contracts of employment do not, without more, fall within the exclusive jurisdiction of the Labour Court is further made clear by section 77(4) of the Employment Act, which emphasises that the exclusive jurisdiction of the Labour Court referred to in section 77(1)—

"does not prevent any person relying upon a provision of [the Employment Act] to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement."

[29] It is plain from these sections that the parameters of the scope of the exclusive jurisdiction of the Labour Court is not cast in Manichean terms. Section 157(1) of the LRA does not refer to specific sections of that Act as sources of the Labour Court's exclusive jurisdiction. It only provides that they are to be found elsewhere in the Act. In some instances, their location is clear: for example, sections 68(1), 77(2), 145 and 191. In others, it is left to the courts to determine whether a matter is one that arises in terms of the LRA and is, in terms of that Act, or another law, to be determined solely by the Labour Court."

[19] In the *Baloyi* matter the applicant sought an order declaring the termination of her contract unlawful for non-compliance with internal policies including probation policy in the High Court. A jurisdictional issue was raised to the effect that the High Court was not a correct forum but this Court. The essence of the Constitutional Court's findings is that this Court has concurrent jurisdiction with the High Court on employment issues which do not require any determination of fairness. The exclusive jurisdiction which this Court has is in respect of fairness which is only assertable through the Labour Relations Act. In view of the fact that *Baloyi* was not seeking relief based on fairness or unfairness of the termination of her employment contract, but unlawfulness, both this Court and the High Court were found to have jurisdiction to determine issues of unlawfulness.

[20] In so far as this matter is concerned, this Court is called upon to determine unlawfulness of the dismissal based on section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act. The three decisions referred to by the respondents above do not in my view suggest that this Court does not have jurisdiction to make a determination on unlawfulness. What is of essence is that a claim for unlawfulness should within the accompanying pleadings establish unlawfulness, meaning that whatever is pleaded should establish unlawfulness. The unfairness disputes are only determinable within the scheme of the Labour Relations Act. Since the unlawfulness in this instant case is claimed under the Basic Conditions of Employment Act to assert a right in terms of a contract, I find no reason to conclude that this Court has no jurisdiction. The question whether the applicants' pleadings do establish a case calling for the granting of the relief sought or otherwise, may be addressed through determination of the merits of the case. This will certainly receive attention herein below since this Court has jurisdiction.

Urgency

[21] A challenge to urgency is the next issue for this Court's consideration. The respondents are attacking the issue of urgency on two fronts. Firstly, the fact

that the application was filed on 5 February 2021 challenging the terminations that took place on 29 January 2021 and 01 February 2021 demonstrates that the applicants did not act with the necessary haste that enables this Court to deal with the matter on urgent basis. The second challenge is that financial hardship has never been a ground for urgency. The applicants argue otherwise and maintain that the matter was attended to with necessary urgency. The applicants accept that, as a general rule, financial hardship is in itself not a ground for urgency, as exceptional circumstances must exist for the Court to find this as a ground for urgency. Both parties referred to relevant case law in support of their arguments and are discussed hereunder.

[22] When a final order is sought, as it is the position in this matter, the bar remains high for the applicants to establish a clear right, that they stand to suffer irreparable harm, they do not have alternative remedy and that balance of convenience favours the granting of the relief sought. In *Hultzer v Standard Bank of South Africa (Pty) Ltd*[7] the Court held at paragraph 13 as follows:

> "[13] Financial hardship or loss of income is not regarded as a ground for urgency. Mlambo J in the *University of Western Cape* matter *(supra)* found that loss of income cannot establish a ground for urgency in an attempt to obtain urgent interim relief from this court. The applicant, in its founding papers, has not put forward any evidencery detail with regard to injury to his reputation if he is not reinstated in his former position, by way of urgent interim relief."

[23] The above decision was followed with approval in *Tshwaedi v Greater Louis Trichardt*[8] where the Court had this conclusion to make at paragraph 10:

> "[10] It was common cause between the parties that the rules which have been adopted by High Court in relation to urgent applications apply equally to this Court. Those rules are to the effect that an applicant who comes to court for urgent relief must explain the reason for his departure from the ordinary rules regarding service and time

[7] [1999] 8 BLLR 809 (LC).
[8] [2000] 4 BLLR 469 (LC).

periods and show that such departure is justified. He must depart from the rules as little as is possible under the circumstances. If an application is brought as a matter of urgency, there must be facts to show why relief at some later date or in the ordinary course would not have sufficed. In other words, in the present case the applicant must show that he will suffer harm which cannot be cured if relief is granted in the ordinary course."

[24] In *SACWU & Others v Sentrachem*[9] with regard to financial hardship it was held as follows at paragraph 20:

"[20] In my view, a medical aid benefit, *per se*, does not establish special circumstances. Virtually all employees, particularly those employed by large companies, are members of a medical aid fund. A medical aid benefit is often obtained on the same basis as the general remuneration package of an employee. Loss of income, probably the worst consequence of dismissal, is not a ground for urgency. Therefore, it is difficult to understand the argument that a loss of a medical benefit, *per se*, is a ground for urgency."

[25] In *Mthembu v Mpumalanga Economic Growth Agency*[10] the Court held as follows at paragraph 22, per Tlhotlhalemaje AJ (As then he was):

"[22] As already indicated, it is not always that this court should regard financial hardship and loss of income as grounds for urgency, but in this case the applicant has adduced sufficient evidence to support these grounds, which invariably extends beyond pure financial considerations. In conclusion on this issue, I am willing to further accept that the lack of diligence was not unreasonable given the circumstances of this case, and even if a contrary view was to be held, there are other factors in this case that are indeed compelling and exceptional to call for the court's intervention as illustrated below."

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[9] [1999] 6 BLLR 615 (LC).
[10] [2015] ZALCJHB 184.

[26] In *Ngqeleni v Member of the Executive Council for Department of Health, Eastern Cape*[11] the High Court found financial hardship to be sufficient reason for urgency based on the circumstances which the applicant found himself in due to termination of employment which its unlawfulness was subject matter of the application.

[27] I find it highly necessary to first consider whether the applicants were dilatory in filing the application on 05 February 2021 in respect of the termination of contracts of employment that took place on 29 January 2021 and 02 February 2021. All applicants addressed letters to the Board of Control wanting to know the legal basis for termination. The first applicant dispatched her letter on 31 January 2021 and demanded a reply on 01 February 2021. The second applicant did the same on 01 February 2021 and anticipated a reply on the same date. The third applicant sent a letter on 03 February 2021 through his attorneys with a demand for a response on 04 February 2021. None of these letters were afforded a courtesy of reply. In view of this, I have no doubt that the applicants were active from the moment they were terminated. The period between 29 January 2021 and 05 February 2021 is extremely short, during which period the applicants made attempts to get clarity on their termination. I am as much constrained to accept that the applicants acted with necessary swift in prosecuting this application.

[28] Turning onto financial hardship, it is now a well settled position that financial hardship cannot on mere mention be considered a reason for urgency. The argument that financial hardship is in fact a consequence of any form of termination of employment cannot fit in each and every case. In situations where an employee was afforded a notice prior to termination, whether in accordance with statutory provisions or contractual terms and conditions, the argument against a plea of financial hardship is likely to prevail. The argument against plea of financial hardship may also stick in situations where termination was effected without a notice to the employee, such as in a dismissal based on misconduct following a disciplinary action. From the above scenario, the

[11] [2018] ZAECMHC 77 (22 November 2018).

underlying issue is that the employee would have had some time to revise his/her own affairs bearing in mind that a termination of employment will obviously bring about some form of financial hardship.

[29] What happened in this matter is that on 29 January 2021, the first and second applicants woke up as employees of PRASA, when they went to bed later in the day, they formed part of the unemployment statistics, and so was the case in respect of the third applicant on 01 February 2021. I am under these circumstances compelled to consider the abrupt manner in which the termination of employment contracts was effected, that is with *immediate effect.* There appeared no prior word or sign of caution that their contracts were facing termination. I find this on its own to raise exceptional circumstances.

[30] The fact that the termination of contracts was also accompanied by what was placed in the public domain that they face multimillion law suits and that they took advantage of the first respondent's instability at Board level. This draws a great deal of public interest. The public policy consideration on its own renders the application urgent particularly where the public funds are made a subject matter of the case[12]. Furthermore, the applicants' reputation and good name are at stake in this matter. Two of the applicants have been branded as guilty of unauthorized and unlawful approval of R58 153 296.72 (in case of Ms Ngoye) and R25 million (in case of Mr Khena).

The merits of the application

[31] The critical issue here is the authority on which the respondents relied upon to effect termination of the employment contracts. The issue of contract has been raised twice by the respondents, that is, in the letters of termination addressed to the applicants and through the address to the public by way of a media statement. One important thing came out of these respective addresses by the respondents, that is, the applicants exceeded their stay at PRASA the stay was

[12] See *solidarity v South African Broadcasting corporation* 2016 *ILJ* 2888 (LC) at paragraphs 67 to 69 where the court considered the responsibilities of the parties towards the public.

supposed to be not in excess of five years in terms of the fixed term contract extended to all executives.

[32] The applicants refuted knowledge of their employment contracts being fixed to a term of five years. Their attempts to seek clarity through the letters to the Board drew blank. The very issue was raised as a persuasive factor to find urgency. The Court papers received no factual response from the respondents. It is not denied that the contracts of employment do not have expiry dates. The respondents elected not to produce documentation or to make averments to support the decision to terminate the contracts. It is not in dispute that clause 3 of the standard contracts signed by first and second applicants were designed to endure until terminated as provided for in the very contracts. Clause 9 which recognizes various forms of termination of employment, makes no mention of termination on ground of expiry of a five year fixed term contract.

[33] The respondents' contention that the absence of plea of a breach of contract disentitles the applicants a claim of unlawfulness in respect of their termination cannot in my view be sustainable in the context of this matter. By acting in a manner that is contrary to the terms of a contract, on its own amounts to breach which is unlawful. It is immaterial on how it is pronounced. The unlawfulness may as a result occur. The *Court in Ngubeni v National Youth Development Agency & Another*[13] found the employer's conduct to be in breach of contract for termination of the employee's contract in violation of the terms of the contract and concluded at paragraph 21 as follows:

> "[21] In so far as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages. The balance of convenience dictates that the order sought should be granted – there is

[13] [2014] 35 *ILJ* 1356 (LC).

> little inconvenience to the NYDA should it continue with and complete the disciplinary hearing; the result may well be the same. For Ngubeni, the effect of the NYDA's decision to terminate his employment at this stage is to deprive him of his employment and livelihood. Similarly, I am satisfied that Ngubeni will suffer irreparable harm should the application not be granted. He stands to suffer financially, and the high public profile of this matter (it is not specifically denied that much of the raising of this profile has been at the instance of the NYDA) has ensured that Ngubeni has been branded as corrupt and dishonest, with little prospect of alternative employment."

[34] The above decision was followed with approval in *Somi v Mutual Africa Holdings (Pty) Ltd*[14] where the Court, per Molahlehi J, found the termination of employment unlawful based on the employer's failure to follow the incapacity procedures as stipulated in the employees' contract read with IR policies.

[35] It deserves to be stressed that the third applicant does not have a standard contract similar to that of the first and second applicants. His appointment letter states that he was to sign an employment contract. Does this mean that the absence of the signed standard contract disentitles him a relief in terms of section 77(3) of Basic Conditions of Employment Act? The answer in my view is in the negative. There is no evidence presented to suggest that he was employed on terms that are different to those appearing in the first and second applicants' contracts. Although the first respondent states in the termination letter that there is no contract signed between itself and the third applicant, it is notable in the third applicant's termination letter that the first respondent acknowledges that all its executives have the same terms and conditions of employment. The appointment letter does not stipulate that he was appointed for a limited duration. On this note I do not find any reason to distinguish the third applicant's case from that of the first and second applicants.

[36] Although there are controversies raised as to whether the Department of Transport was represented in the Board when the decision to terminate the

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[14] [2015] 36 *ILJ* 2370 (LC).

contracts was made, with the filing of the actual proof of appointment of Ms Ngwenya signed by the Minister, I find no reason to doubt that the Board was constituted in compliance with the enabling legislation. I therefore attach no weight to the second respondents' media statement made post the date of appointment of Ms Ngwenya that the Director General was the relevant Board member from the Department of Transport.

[37] The resolution sought to be set aside is not attached to the applicants' founding affidavit and there are no details regarding the date on which it was passed. Therefore, there is no case made for the relief sought in respect of the constitution of the Board and the validity of the resolution. The case for all the applicants which remained uncontested has been made from the founding papers. By ruling on whether the supplementary affidavit should be admitted to evidence or not will not change the case that is already established in the founding papers. The respondents' act of terminating the applicants' contracts of employment with immediate effect gives rise to unlawfulness on account of violation of the terms and conditions of the applicants' contracts of employment.

[38] The applicants sought specific performance consequent to the finding of unlawfulness of the termination of contracts. The only specific performance available to the applicants is in the form of reinstatement. There is no evidence to suggest that reinstatement will not be practicable particularly where the dispute is about the restoration of the applicants' rights in terms of the binding contracts of employment. That there is possible civil litigation against the first and second applicants cannot impact on the trust relationship since the matters forming subject of such litigation have been known to the respondents for some years whilst the applicants continued with their ordinary duties.

[39] Regarding costs, the applicants have sought a cost order against the respondents. The respondents equally asked for a cost order against the applicants in the event of a dismissal of the application. In *Zungu v Premier*[15] of the province of KwaZulu-Natal the Constitutional Court restated a developed

[15] 2018 (4) *BLLR* 323 CC at paragraph 24

principle that: *The rule of practice that costs follow the result does not apply in Labour Court matter*. However a cost order may be made in accordance with the requirements of the law and fairness[16].

[40] In this regard there is sufficient course for this Court to make an order of costs against the respondents in view of their conduct as alluded to herein below. Upon receipt of the letters of termination of contracts of employment, all applicants addressed letters to all the respondents. Despite their contestations and reminders to the respondents that at no point did they enter into five year fixed term contracts, they never received any response from the respondents. Their attempts to seek clarity through the letters to the Board resulted in futility. The Court papers received no factual response from the respondents on the merits of the case founded on issues raised in the applicant's letters. The respondents failed to produce evidence to justify the decision to terminate the contracts.

[41] The respondents' above-mentioned conduct is of great concern. In *Gangaram v MEC for the Department of Health, KwaZulu-Natal and Another*[17], Tlaletsi DJP (as he then was) had this to say:

> "[31] There is one matter which is of great concern to me. This relates to the conduct of the respondents' officials in their dealings with the appellant. Most of the time the appellant's letters could not solicit a courtesy of a response from the respondent. This is an unacceptable conduct from a public office such as that of the respondents run on tax payer's funds. The same applies to the failure by the respondents' officials to respond to the appellant's formal application for reinstatement. What is more perplexing is that their failure to respond is subsequently used as a defence to the review application that there had not been a decision taken that can be a subject of review. They

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[16] *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O* [2008] 6 *BLLR* 540 (LAC) at para 19. See also *Martin Vermaak v MEC for Local Government & Traditional Affairs, North West Province* [2017] *ZALA* 2 (10 January 2017)

[17] [2017] 38 *ILJ* 2261 (LC); [2017] 11 *BLLR* 1082 (LAC); at paragraph [31].

> are prepared to use their failure to do what is expected of them to their benefit."

[42] In conclusion, the respondents did not deny the applicants' allegations concerning the meeting held on 25 February 2020 during which the Director General openly said amongst other things, that:

42.1 PRASA was well-resourced to out-litigate any employee challenging their unlawful terminations and that the Administrator should employ the resources of PRASA to out-litigate any employee challenging their unlawful terminations; and

42.2 No individual employee will be able to succeed using their own Personal resources against the resources of the state.

[43] These are serious allegations which needed the respondents to have pleaded to them. In *Kalil NO and Others v Mangaung Metropolitan and Others*[18], Leach JA had this to say:

> "...This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng*, our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights."

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[18] 2014 (5) *SA* 123 (SCA) para 30

[44] Given the above there exist no reason that costs should not follow the result.

[45] The following order is therefore made:

Order

1. This application is found to be urgent and, insofar as the applicants might not have complied with the Rules of this Court, their failure to do so is condoned, and the Rules relating to forms and service are dispensed with and the application is dealt with as one of urgency.

2. It is declared that the contracts of employment concluded by the applicants and the respondents are extant.

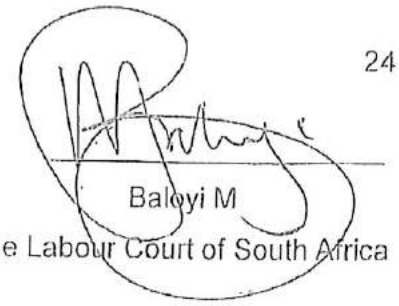
3. It is declared that the respondents' termination of the applicants' contracts of employment by letters addressed to the applicants on 29 January 2021 and on 1 February 2021 is unlawful.

4. The termination of the contracts of the applicants' contracts of employment is set aside.

5. The respondents are ordered to reinstate the applicants with immediate effect and retrospectively from the date of the termination of their contracts of employment.

6. The first respondent is ordered to pay any salaries and benefits due to the applicants from the date on which the contracts of employment were terminated to the date of reinstatement.

7. The respondents are to pay applicants' costs except for costs of 11 February 2021.



Baloyi M

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv. B Makola SC with Adv. Mahlaku and Adv. Mokgotho
Instructed by: Gwina Attorneys

For the Respondents: Adv. A Mosam SC with Adv. Phehane
Instructed by: De Swardt Myambo Attorneys

DELETE WHICHEVER IS NOT APPLICABLE.
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

13/5/2021
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

" 1 "
ZKM2

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 111/21

In the matter between:

ONICA MARTHA NGOYE	First Applicant
NKOSINATHI ALLEN KHENA	Second Applicant
TIRO HOLELE	Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	First Respondent
LEONARD RAMATLAKANE	Second Respondent
THINAVUYO MPYE	Third Respondent
DINKEANYANE MOHUBA	Fourth Respondent
SMANGA SETHENE	Fifth Respondent
XOLILE GEORGE	Sixth Respondent
NOSIZWE NOKWE-MACAMO	Seven Respondent
MATODZI MUKHUBA	Eighth Respondent
THEMBA ZULU	Ninth Respondent
MS THANDEKA MABIJA	Tenth Respondent

Decided: In Chambers

Date delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 13 May 2021.

JUDGMENT-LEAVE TO APPEAL

BALOYI, AJ

Introduction

[1] The first to tenth respondents are seeking leave to appeal to the Labour Appeal Court against the whole of the judgment and order handed down on 02 March 2021. The leave to appeal is sought based on the grounds set out in the application supported by written submissions filed in terms of the Practice Manual. The applicants have also in compliance with the Practice Manual filed their written submissions in opposition of the application.

[2] The background of the dispute is comprehensively outlined in the main judgment and I find it not necessary to have same repeated here. It is however imperative to regurgitate the orders appearing in the said judgment as follows:

> "1. This application is found to be urgent and, insofar as the applicants might not have complied with the Rules of this Court, their failure to do so is condoned, and the Rules relating to forms and service are dispensed with and the application is dealt with as one of urgency.
>
> 2. It is declared that the contracts of employment concluded by the applicants and the respondents are extant.

3. It is declared that the respondents' termination of the applicants' contracts of employment by letters addressed to the applicants on 29 January 2021 and on 1 February 2021 is unlawful.

4. The termination of the contracts of the applicants' contracts of employment is set aside.

5. The respondents are ordered to reinstate the applicants with immediate effect and retrospectively from the date of the termination of their contracts of employment.

6. The first respondent is ordered to pay any salaries and benefits due to the applicants from the date on which the contracts of employment were terminated to the date of reinstatement.

7. The respondents are to pay applicants' costs except for costs of 11 February 2021."

[3] In terms of the respondents' first ground of appeal the Court erred in finding that it has the requisite jurisdiction to determine the application. In support of this ground of appeal, the respondents submit that:

3.1 The Labour Court does not have jurisdiction to determine cases which challenge the lawfulness of the employer's decision,

3.2 The applicants' case fails to state which right in the contract they seek to assert and fails to state the nature of the respondents' breach of the contract,

3.3 The Labour Court failed to assess jurisdiction based on the Applicants' case as pleaded,

3.4 The applicants' case failed to plead the terms of their contracts which they sought to enforce,

3.5 The applicants' case failed to plead the terms of their contracts that were allegedly breached,

3.6 The applicants' case failed to make an election of whether to claim specific performance or to cancel the contract and claim damages,

3.7 There was no record of any letter by the applicants of a breach of contract, the contractual terms they sought to enforce and an election of either specific performance or cancellation of contract with a claim for damages, as the applicants' letters consistently referred to "*unlawfulness*" and not to breach of contract,

3.8 The Labour Court overlooked the material concession by the applicants' that "*We do not place reliance on the Labour Relations Act remedies*,"

3.9 The Labour Court failed to assess the legal basis of the applicant's claim,

3.10 The applicants' claim is one which challenges the "unlawfulness" of the termination of the applicants' contracts of employment,

3.11 The applicants' case failed to assert a right in terms of a contract, the applicants' pleaded case was not one brought in contract, it did not assert a right in terms of a contract or allege breach on the part of the respondent and neither did the applicants seek to enforce specific performance,

3.12 What the applicants' pleaded case does do, is to assert that the termination of their employment is unlawful,

3.13 Section 77(3) of the Basic Condition of Employment Act, does not ground a claim for unlawfulness or a claim for asserting a right

under a contract (all that section 77(3) does is provide for the dual jurisdiction of the Labour Court and the High Court),

3.14 Section 185 of the LRA does not provide an employee with a right not to be unlawfully dismissed, and the LRA does not contemplate an invalid dismissal, it follows that the applicants' claim cannot be adjudicated by the Labour Court.

[4] For the reasons appearing below, I find this ground of appeal to be grossly misconceived. The respondents' reliance on the decisions of *Phahlane v South African Police Service & Others*[1], *Chirwa v Transnet Limited and Others*[2], *Gcaba v Minister for Safety and Security and Others*[3], *Baloyi v Public Protector*[4], *Steenkamp and Others v Edcon Limited*[5], is misplaced. The respondents' further submission that the Court did not correctly interpret the decision of *Baloyi* does not reveal anything to demonstrate that a correct interpretation would have resulted in a finding that this Court has no jurisdiction. This is certainly argued in the air.

[5] In *Phahlane, supra* at paragraph 9 this Court held that it has jurisdiction to determine the matter about the unlawfulness of the dismissal based on section 77(3) of the Basic Conditions of Employment Act. Where an applicant has pleaded a case in the contract, such brings the matter within the jurisdictional purview of section 77(3). The Court restated this issue of jurisdiction in *Shezi*[6] to the effect that a pleaded case should be the one that invokes any term of the employment contract or alleging breach of contract . Holding a party to the contract goes to the heart of claim for a specific performance with the consequential relief of reinstatement, this practically translates to the respondents' restoration of the employment relationship it had with the

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[1] [2021] 42 *ILJ* 569 (LC)
[2] [2008] 4 *SA* 367 (CC)
[3] [2010] 1 *SA* 238 (CC), at paragraph 75
[4] [2021] 2 *BCLR* 101 (CC)
[5] [2016] 4 *BLLR* 335 (CC)
[6] At paragraph 15.

applicants. The decision in the main judgment is accordingly aligned to this analogy.

[6] The respondents' argument that unlawfulness cannot be equated to breach of contract is not consistent with the decision of this Court in *Botes v City of Johannesburg Property Company Soc Ltd and Another*[7] at paragraph 18 where the following was said:

> "[18] This court accepts that at a general level where a party breaches a contract that party is said to be acting unlawfully. By definition unlawfulness means the quality of failing to conform to law, acting contrary to accepted morality or convention; illegal or illicit. Reliance was placed on *Wereley v Productivity SA & another.* This judgment is distinguishable in that Wereley specifically pleaded s 77(3) of the BCEA."

[7] The applicants specifically pleaded that their case of unlawfulness of their dismissal was based on section 77(3) of the Basic Conditions of Employment Act in their founding affidavit. It is for this reason that the applicants did not seek the remedy in the LRA as they did not raise the dispute under the LRA.

[8] The principles set out in *Chirwa*, *Gcaba* and *Baloyi*, are not in conflict with the main judgment. Since the unlawfulness in this instant case is claimed under the Basic Conditions of Employment Act to assert a right in terms of a contract, this Court finds no reason to conclude that this Court has no jurisdiction (see *Phahlane v SA Police Service & Others, Shezi v SA, Police Service & Others; Botes v City of Johannesburg Property Company Soc LTD & Another, Wereley v Productivity SA & Another.*

[9] In the circumstances, there is no reasonable prospect that the Labour Appeal Court may reach a conclusion which differs from the conclusion of this Court that it has jurisdiction to determine the matter.

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[7] [2021] 2 *BLLR* 181 (LC)

[10] The second ground of appeal is that this Court erred when it held that the matter was urgent. This ground has no merit either. The order of this Court directing that the application be heard as an urgent matter is not appealable. It neither disposed of any issue at all nor was it final or definite of the rights of the parties on the merits of the main application. The Court has the inherent power to control its processes. Urgency "relates to form, not substance and is not a prerequisite to a claim for substantive relief" (See *SARS v Hawkers Air Services (Pty) Ltd*)[8].

[11] In any event, the Court had a discretion and has accordingly exercised same when hearing the application as an urgent matter based on the grounds that are in the main judgment. I am therefore, of the view that the second ground has no prospect of success.

[12] The third ground of appeal is that this Court erred when it held that the respondents must pay the applicants' costs. This Court took into account the principle that; the rule of practice that costs follow the result does not apply in Labour Court matters. Furthermore, a cost order may be made in accordance with the requirements of law and fairness. The reasons for this Court to make an order of costs against the respondents based on their conduct is abundantly clear in the main judgment.

[13] It is not shown from the respondents' grounds that this Court exercised its discretion improperly or unfairly. Consequently, there is no reasonable prospect of the Appeal Court interfering with the cost order (See *Ross Robson Irrigation (Pty) Ltd v Standermacher*)[9].

Conclusion

[8] [2006] (4) SA 292 (SCA)
[9] [1996] 1 BLLR 30 (LAC) at 34 F to G.

[14] The written submissions by both parties do reveal their understanding of the provisions of Section 17(1) of the Superior Courts Act 10 of 2013[10] on the test of leave to appeal. The Supreme Court of Appeal in *Kruger v S*[11] emphasised the existence of prospects of success as paramount issue for consideration in applications for leave to appeal. The following was said in paragraph 2:

> "What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in ***S v Smith 2012 (1) SACR 567 (SCA) para 7***:
>
> 'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'
>
> [3] The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case, it was not, and this court

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[10] "(1)Leave to appeal may only be given where the judge or judges concerned are of the opinion that- (a) (i) the appeal would have a reasonable prospects of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties".

[11] [2014] 1 SACR 647 (SCA) (2 December 2013)

has had to hear an appeal in respect of which there was no reasonable prospect of success".

[15] After having considered the application for leave to appeal together with the totality of material placed before this Court, I do not find existence of prospects of success in the appeal. The application for leave to appeal in its entirety cannot under these circumstances be sustainable.

[16] As to costs, there was simply no basis for the respondents to have applied for leave to appeal. They did so on a mere belief that the Labour Court's findings cannot be left unchallenged. The applicants have been subjected to an unnecessary litigation for leave to appeal that is devoid of reasonable prospects of success. In exercise of the wide discretion under section 162 of the LRA, I am of the view that this is a case where a costs order against the respondents is justified.

[17] In the premises, the following order is made:

Order:

1. The application for leave to appeal is dismissed with costs.

M Baloyi
Acting Judge of the Labour Court of South Africa