

DELETE WHICHEVER IS NOT APPLICABLE

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

02/03/2021

DATE

[Signature]

SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 111/21

In the matter between:

**ONICA MARTHA NGOYE
 NKOSINATHI ALLEN KHENA
 TIRO HOLELE**

**First Applicant
 Second Respondent
 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 Khenani
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 position 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

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 Tlhotlhemaje 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.”

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] ZAECHMHC 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 case¹². 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 Khenani).

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

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 fairness¹⁶.

[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

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.”

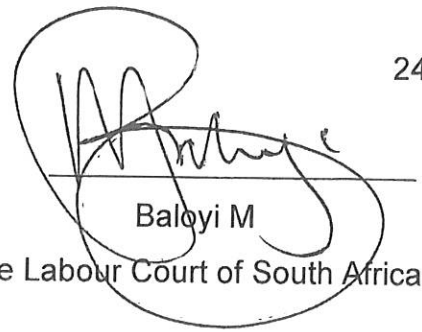
¹⁸ 2014 (5) SA 123 (SCA) para 30

[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