DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
13/5/2021
DATE
SIGNATURE

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.
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> 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

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[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***:
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> '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.'
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> [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