IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no. J1068/09

Not Reportable
In the matter between:

MASIHLEHO, THABO PETER	Applicant
and	
UNIVERSITY OF LIMPOPO	First Respondent
MOKGALONG, N M	Second Respondent
MAILULA, M.L, N.O	Third Respondent

JUDGMENT

Bhoola AJ

Introduction

[1] This is an urgent application in which the applicant seeks the following relief:
"1.Condoning the non-compliance with the Rules of the above Honourable Court dealing with time periods for serving and filing, and hearing this matter on an urgent basis;
2.Interdicting the Respondents from proceeding with the retrenchment process against the Applicant scheduled for 29 May at 15:00;
3.Ordering the Second Respondent to pay the costs of this application in his personal capacity on a punitive scale. Alternatively;
4.Ordering the First and Second Respondents to jointly and severally, the one paying the other absolved, pay the costs of this application on a punitive scale.
5.Ordering the Third Respondent to pay the costs of this application on a punitive [sic] only in opposition of the relief sought.
6.Further and/or alternative relief."

[2] The application was brought on 26 May and set down for hearing on 27 May 2009. It was postponed by consent to 4 June 2009 to enable the parties to file answering and replying affidavits. On 8 June 2009 I issued an order dismissing the application with costs, and indicated that reasons would follow. These are the reasons for my order.

Background

[3] The applicant seeks a final interdict against the respondents from proceeding with what he contends is an unlawful and unfair process which will lead to his

retrenchment. He contends in essence that the respondents are using the retrenchment exercise for an ulterior purpose in that they have conducted themselves in a manner which reflects an abuse of authority; the first and second respondents have already made up their minds to retrench him and now seek to formalize their unlawful conduct; and that the second respondent does not have the authority to proceed against him.

[4] The applicant was employed in 1997 by the Medical University of South Africa ("Medunsa") as Vice-Principal for Finance and Administration. In 2005 Medunsa merged with the University of the North to form the first respondent. The second respondent was appointed Interim Vice Chancellor and Principal of the newly formed institution and has since been confirmed in this position. During this period the Interim Council formed to oversee the merger of the two institutions offered the applicant the position of Vice Principal (Human Capital), which he contends he accepted conditionally, following which he was suspended pending an investigation into misconduct. The position was advertised during this period of suspension, and the respondents also sought to appoint incumbents to the positions of Deputy Vice Chancellor: Finance and Administration, to which the applicant contends he was entitled. The applicant was suspended for two years and a disciplinary enquiry cleared him of misconduct. Following his reinstatement in 2008 he was placed on special leave pending consideration of alternative positions given the alleged redundancy of his position. Thereafter, in May 2009, he was issued with a retrenchment notice in terms of section 189 if the Labour Relations Act, 66 of 1995 ("the LRA"), which gave rise to this application.

[5] The matter has an acrimonious history detailed in the voluminous pleadings, which consist to a large extent of irrelevant and argumentative material, and which for the reasons set out below, I do not intend to traverse. It is this history that the applicant seeks to rely on for the urgency of this matter. In essence the applicant contends that the retrenchment consultation meeting he seeks to set aside is a subterfuge to get rid of him, which the respondents have already made up their minds to do, and that it reflects the "naked hatred" towards him and the "naked abuse of power" of the respondents, particularly the second respondent.

[6] At the hearing of this matter two points *in limine* were raised by the attorney for the respondents, Mr Maserumule. These relate to an application to strike out irrelevant material contained in the Founding Affidavit, and the issue of joinder of the third respondent. These are dealt with below.

Striking out

[7] In this regard Mr Maserumule submitted that the applicant makes various allegations against the second respondent (in paragraphs 28 and 29 of his Founding Affidavit), which are irrelevant, malicious and defamatory and should be struck from the record. The applicant relies on the judgment of the Labour Appeal Court in *Moila v Shai N.O and others* (unreported case number JA26/045) in which certain factual findings were made about the conduct of the second respondent, to submit that he has a propensity to lie, and should accordingly not be believed in the present matter. Mr Maserumule further contended that the report of the assessor annexed to the Founding Affidavit is not relevant and should similarly be struck out.

[8] The applicant's counsel, Mr Mathibedi, submitted that the averments regarding the character of the second respondent are necessary and relevant to the apparent abuse of power and disregard for the rule of law that the respondents are perpetrating. Mr Mathibedi referred me to authorities to the effect that the test as to whether material should be expunged from the record is prejudice, which the respondents have not proven, or that the averments are scandalous: *Titty's Bar & Bottle Store vs A.B.C. Garage & others* (1974 (4) TPD at 368 E) and *Tshabalala-Msimang and another v Makhanya and Others* (2008 (6) SA 102 at page 111 para [20]). In my view the allegations regarding the character of the second respondent, irrespective of where they emanate from, are nothing short of scandalous and undoubtedly cause prejudice to him, as was contended by Mr Maserumule, and stand to be expunged. In my view, insofar as the applicant contends that the character of the second respondent is relevant to the fairness of the pending retrenchment process, which will be tainted by *mala fides* and therefore unfair, he clearly has suitable alternative remedies at his disposal should this materialize. I discuss these below.

Joinder of the third respondent

[9] The respondents object to the joinder of the third respondent in these proceedings. The applicant seeks no relief against her other than costs in the event of opposition. It makes no averments that she was involved in the interaction between the applicant and the second respondent either in her official or personal capacity, or that she has been involved in the consultation process. Mr Maserumule submitted that it was sufficient to cite the first respondent, being the applicant's employer, and there was no reason in law and in fact for the third respondent to be cited. Insofar as the applicant sought to contend that the third respondent ought to have acted against the second respondent for incompetence, this is clearly of no import to the present matter. The third respondent has filed an affidavit confirming her non-involvement in the matter and opposes the relief sought by the applicant on these grounds.

[10] In my view, the applicant's reasons for joining the third respondent, are, at the very least, spurious and untenable. The applicant's counsel contended that the first respondent, as a legal person, functioned through its Council and management team and that only the Council could make decisions and resolutions affecting the day to day management of the first respondent. Therefore, as the Chairperson of Council it was necessary for the third respondent to indicate to this court whether or not the second respondent had been authorised to initiate the process against the applicant as alleged. The joinder was furthermore necessitated by the finding of the Labour Appeal Court in *Moila* (supra) in regard to the second respondent's conduct. In my view it is sufficient for the first respondent to be cited, given that it acts through various entities including its Council, sub-committees and staff. There are no averments against the third respondent which would justify her joinder, and this is another example of the papers being unnecessarily encumbered by irrelevant material and unjustified aspersions.

[11] I was not required to make a ruling on the *in limine* points, and Mr Maserumule submitted that it would be appropriate to take them into account in

considering costs, and in particular whether a punitive costs order as sought against the applicant was justified.

Does the second respondent have the authority to initiate retrenchment consultations?

[12] The applicant also raised a preliminary point that the Council has not authorised and/or delegated the second respondent to initiate the retrenchment consultation. It submits that if such a decision or resolution had been made by Council, the respondents would have made the necessary averments and annexed documentary proof to that effect. This submission is incorrect, in that the necessary documentation was annexed and moreover, I permitted the respondents to hand up Exhibit 1 in further clarification of the second respondent's mandate. I do not consider it necessary to deal with Mr Mathibedi's objections to documents being tendered from the bar, given that it is his client that created the urgency of this matter. The second respondent alleges that he has been mandated by the first respondent to address the situation concerning the applicant and his continued employment with the first respondent (Answering Affidavit, page 327 paragraph 73). Reliance was further placed on annexure NMM2 (see Answering Affidavit, page 335 paragraph 120), although, as applicant's counsel correctly pointed out, this is a power of attorney rather than authority to engage in retrenchment consultations.

[13] Insofar as the respondents seek to reply on the Human Resources ("HR") Committee Report to Council (at page 338 to 340 of their Answering Affidavit), the applicant submits that this is a recommendation to Council and has not been approved. Moreover, the second respondent conceded (at page 375 of the Replying Affidavit) that decisions of committees cannot be implemented until authorised by Council.

[14] The applicant cited the following authorities in support of its contention that the second respondent had failed to prove that it had authority in this regard:

Tzaneen Local transitional Council v Lou Uxorn and another (1996 (2) SA 860 (TPD) at 863) : *"[t]he manner in which the authority is challenged is also relevant to the kind of evidence that will be required to satisfy a Court as to the existence of authority".*

*Moll (Cape) (Pty)(Ltd) v Maroni Ko-op Bpk (*1957 (2) 347 at 351 F-352 B):
"*Wheras in the present case, the Respondent has offered no evidence at all to suggest that the Applicant is not properly before the Court, I considered that a minimum of evidence will be required from the Applicant".*

The authority should relate to the matter before the Court : *Union Government v Sacher* (1952 (2) SA 410 (C) at 411-412).

I fail to see the relevance of these *dicta.*

[15] Furthermore, the applicant contends that the second respondent has conceded that he does not have the power to dismiss the applicant, and by analogy this means that he has no power to initiate the consultation proceedings without authority and delegation from Council. The applicant submitted accordingly that

given the lack of authority the steps taken by the first and second respondents to initiate the proceedings against the applicant are unlawful and of no force and effect.

[16] The respondents dispute that the second respondent is not authorised to consult with the applicant in regard to his possible retrenchment. They submit that management was mandated by the HR Committee, as confirmed in its report to Council of 19 May 2009 as follows:
"(i)to engage in consultations with [the applicant] with a view to offering him an alternative position, given that due to operational requirements the position he occupied previously does not exist any more; and
(ii) should the University not find an alternative position for him or should Prof. Masihleho not accept the alternative position offered, a process of terminating his employment be initiated forthwith". (Answering Affidavit, pages 339-340).

[17] Insofar as the applicant sought to challenge the authenticity of the HR Committee's report, Mr Maserumule contended that it had no basis to do so given the time constraints within which the respondents were brought to court. Furthermore, Exhibit 1 confirmed the scope of authority of the HR committee and the acceptance of its report by the Executive Committee of Council on 1 June 2009. In my view, this disposes of the issue.

Have the grounds for urgent relief been established?

Clear right

[18] The applicant submits that it is common cause between the parties that the contract of employment of the applicant was transferred to the first respondent. Thus the applicant is protected in that in *Johnson & Johnson (Pty) Ltd v CWIU* ((1998) 12 BLLR (LAC) at 1214) the court reaffirmed the right of every employee to fair labour practices, and made the point that section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons, and stated "[*i]t is a provision that is inextricably linked to the fairness or otherwise of a dismissal based on operational requirements".* Thus the applicant submits that the contention by the first and second respondents that his position is redundant and that there is no other available position for him is contrived. Accordingly, he submits, a clear right has been established to remain in his post. A dispute of fact exists in regard to whether the position the applicant contends he is still in no longer exists. I do not consider it necessary to deal with this for present purposes, given my ruling herein. In any event it is exactly the nature of the consultation process that alternatives can be proposed and, insofar as the applicant is correct in contending that there do not appear to be any current alternatives at his rank and salary, it is up to him to propose alternatives in this regard. He cannot however seek to prevent the employer from consulting with him in this regard on the basis that he has a right to remain in employment.

Alternative relief

[19] The applicant submits that he has no suitable alternative relief. Mr Maserumule submitted that it is trite that he has a clear right not to be unfairly dismissed, and that section 193 sets out the relief, including reinstatement, he would

be entitled to. Fully retrospective retrenchment would give him what courts have refused in interdicting retrenchment proceedings on these grounds : see *Afrox v SACWU* 1997 (18) ILJ 406, where the court refused to grant an urgent interdict, and *Fordham v OK* (1998 (19) ILJ 1156) where an interdict was granted because the employer was not complying with a fair procedure, although the employee was refused reinstatement and referred to the CCMA. Insofar as the first respondent seeks to engage him in a lawful process, he is entitled to propose alternatives to his retrenchment and the respondent is entitled to reject alternatives that are unreasonable but must provide reasons for it. The applicant is moreover obliged to participate in a consultation process in respect of a redundancy that arose from the restructuring. *A fortiori*, Mr Maserumule submitted, he must have a right which is being interfered with and he cannot contend that it is the right to remain in employment at the first respondent in perpetuity.

Urgency

[20] In terms of Rule 8 of the Rules of this court the applicant has to provide reasons why it is entitled to urgent relief. The applicant received notice in terms of section 189 of the LRA on 20 May 2009, inviting him to a consultation meeting on 29 May 2009 at which he could address issues of *inter alia*, the rationale for the contemplated dismissal and alternatives to retrenchment. This application was launched on 26 May 2009. The retrenchment consultation meeting was postponed.

[21] The respondents have a legal obligation in terms of section 189 to consult. Section 189(1) is peremptory in this regard. It provides that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, it "*must*" consult, *inter alia* with, *"the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose".* The employee has a concomitant obligation to engage and has options available should it elect not to do so. It cannot however, behove the employee to prevent the consultation process from continuing in perpetuity, which is what the applicant seeks to do. Mr Maserumule submitted that even in the case of a large scale retrenchment the LRA does not empower a court to interdict an employer from retrenching in terms of a permanent interdict. The most the court can do is intervene during the consultation process to order an employer to comply with a fair procedure.

[22] The applicant has a legal obligation to participate in the retrenchment process and can avail himself of a suitable remedy should he be dissatisfied at the conclusion thereof that the conspiracy against him has tainted the fairness of the process. I do not agree with Mr Mathibedi that the applicant is entitled to final relief on the grounds that he is entitled to reject a junior post. This pre-empts the consultation process, which requires the parties to engage meaningfully in an attempt to reach consensus on the various issues in section 189(3). The LRA moreover does not envisage simply going through the motions or undertaking a mechanical checklist exercise, but requires a substantive engagement to consider reasonable alternatives to the retrenchment, amongst others. Moreover, where insufficient progress is made the employer is entitled to call off the process at some point and proceed with the retrenchment: see *SACCAWU v Sun International SA Ltd* ((2003) 24 ILJ 594 (LC) para 46) where the court expressed this as follows:

"*Section 189(2) of the LRA imposes a duty on an employer to attempt to reach consensus but it does not impose a duty to reach consensus. It follows, in my view, that a time may be reached in a consultation process when the employer is entitled to call off the consultation process and to act unilaterally (albeit fairly, in terms of the requirements of the LRA). Since this is so, depending on what has gone before, it is in my view not necessarily unfair or contrary to the requirements of the LRA, for an employer to decide that it is only prepared to attempt to reach consensus on one more occasion and to decide that, if necessary, it will act unilaterally thereafter".*

[23] It is trite, Mr Maserumule submitted, that the court will only intervene to grant interlocutory relief prior to a process being exhausted in exceptional circumstances. Mr Maserumule referred me to recent authority of Van Niekerk J in an unreported judgment in *The Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson and others* (Case number C249/09) in which the applicant sought to interdict an arbitration pending a review in respect of preliminary findings by the commissioner. Van Niekerk J (at para [3]) reiterated the principle that intervention by way of interdict in uncompleted proceedings was exceptional in the following words : *"the exercise of this power has been held to be confined to those rare cases where a grave injustice might otherwise result or where justice might by other means not be attained".* This *dictum* is nowhere more apt than in the present matter and the consultation process should run its course, following which the applicant has effective remedies at his disposal, and would be entitled to reinstatement should the employer be found to have acted unfairly, which would restore the *status quo*.

[24] Van Niekerk J has moreover commented on the recent "worrying trend" to inundate the court with urgent interdicts in respect of disciplinary proceedings sought by applicants of means in unexceptional circumstances: see *Nomgcobo Jiba v Minister of Justice and Constitutional Development and 16 Others* (unreported, case number J167/09, LC).

[25] The applicant submits that the urgency of the matter arises from a notice issued to him on 5 June 2009 that the respondents intend proceeding with the retrenchment consultation. He submits that the urgency arises from the unlawful and unfair consultation meeting scheduled. Furthermore, he has a clear right to the position he is currently in and given the correspondence from the respondents' attorneys in regard to the pending retrenchment, no other inference can be drawn but that they have already made up their minds to dismiss him. However, in oral submissions the applicant, Mr Mathibedi submitted, does not contend that the first respondent is not entitled to retrench him, but that this must be effected in a lawful manner. If this was indeed the case on the pleadings, then, in my view the applicant should have sought a declaratory order to this effect. In his Answering Affidavit to the Explanatory Affidavit he confirms that the relief sought is to set aside the consultation meeting as being *"an unlawful and unfair charade*". Mr Mathibedi contended further in his replying submissions that given that the notice to the applicant states that should his dismissal be unavoidable he will be dismissed with effect from 30 June 2006, this implies that the respondents have already made up their minds to dismiss him. He added that the applicant did not want to wait until *"the horse has bolted*" before seeking relief. In my view, this does not found urgency.

[26] I was not addressed on any of the other grounds applicable to grant of an urgent interdict and do not canvass those.

[27] In the circumstances, I am not satisfied that grounds for urgency have been made out and I am entitled to strike the matter from the roll or dismiss the application without dealing with the merits. I have accordingly issued an order dismissing the application, with costs, as little purpose would be served by striking it from the roll in that, in my view, it is ill-founded from the beginning. Insofar as attorney client costs were sought and my order was unclear in that regard, it is hereby amended to read as follows:

> The application is dismissed, with costs payable on an attorney and client scale.

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Date of hearing and order: 4 and 8 June 2009
Date of reasons: 26 June 2009

Appearance:
For the applicant: Advocate T F Mathibedi instructed by Mabuza Attorneys
For the respondents: Maserumule Inc