REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable Yes/No

Case no: JA 90/11

In the matter between:

Public Servants Association of South Africa **Appellant**

and

Minister: Department of Home Affairs **1st Respondent**

Director – General: Department of Home Affairs **2nd Respondent**

Department of Home Affairs **3rd Respondent**

Heard: **24 August 2012**

Delivered: **27 November 2012**

Coram: Waglay AJP, Ndlovu JA et Musi AJA

JUDGMENT

MUSI, AJA

[1] This is an appeal, with leave of the Court *a quo*, against the judgment of the Labour Court (Molahlehi J) in terms of which it dismissed the appellant's application for an urgent interdict.

[2] In its notice of motion, in the Court *a quo*, the appellant sought an order in the following terms:

> "1. That the rules of service and process provided for in the rules of this court be dispensed with in order that this matter be heard as one of urgency in terms of Rule 8;
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> 2. That the third respondent is hereby interdicted and restrained from continuing with recruiting employees from the Department of Home Affairs pending –
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> 2.1. Full compliance with chapter 1, Part VII C.2.4 of the Public Service Regulations;
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> 2.2. Conclusion of the workshop agreed upon between the parties at the GPSSBC: Departmental Chamber meeting of 21 July 2011; and
>
> 2.3. Proper and meaningful consultation with the applicant regarding the effect such recruitment would have on the members of the applicant who are currently employed by the third respondent as agreed between the parties during the meeting of 21 July 2011.
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> 3. Costs of suit in respect of any respondent who opposes this application…"

[3] I pause to deal with a preliminary issue before considering the merits of this appeal. The Labour Court, *inter alia,* ordered that the appellant's founding and replying affidavits be struck out. The appellant is of the view that the striking out order was erroneously made. I now consider the correctness of this submission.

[4] Mr Danny-Boy Zamile Adonis (Adonis) the General Manager of the appellant deposed to the founding and replying affidavits on behalf of the appellant. In the founding affidavit he referred to and attached the minutes of the General

Public Service Sectoral Bargaining Council (GPSSBC): Department Chamber: Department of Home Affairs meeting held on 21 July 2011 (the meeting). The appellant's case hinged strongly on what was contained in the minutes and its understanding and interpretation thereof. It was common cause that Adonis did not attend the meeting.

[5] Mr Semenya SC, on behalf of the respondents, applied, in the Court *a quo*, without notice to the appellant, for the striking out of the founding and replying affidavits on the ground that they contain hearsay evidence because Adonis was not at the meeting.

[6] The Court *a quo* correctly stated that in urgent applications hearsay evidence will be admitted, in some cases, provided that the party who relies thereon gives an acceptable explanation as to why direct evidence was not or cannot be presented. The Court *a quo* found that the appellant did not tender any explanation why direct evidence was not presented and that Adonis' *"testimony in relation to what transpired at that meeting is hearsay."* The Court *a quo* was of the view that the averments made by Adonis were central to the issues in dispute between the parties and therefore struck out the founding and replying affidavits.

[7] The Labour Court Rules do not make provision for the striking out of matter from affidavits. It is trite that where the Labour Court Rules are silent on a particular aspect the Uniform Rules of the High Court may be applied[1].Rule 6(15) of the Uniform Rules of Court should therefore be applied.

[8] Rule 6(15) provides that:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexations or irrelevant, with an appropriate order as to costs, including cost as between attorney and client. The court shall not grant the

[1] See Vita Foam (Pty) Ltd v CCMA & Others [1999] 12 BLLR 1375 (LC) at paragraph 5. Myburg and Others v Autonet (Passenger Services) and another (C 428/00) [2002] ZALC 75 (12 September 2002) at paragraphs 5 and 6. Mathenjwa v State Information Technology Agency & Others unreported LC case JS 801/2010 delivered 7/3/2012.

application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted."

[9] The following meaning has been ascribed to these words:

> "Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.
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> Vexations matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.
>
> Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."[2]

[10] An application to strike out scandalous, vexations or irrelevant matter is an interlocutory application or an application incidental to pending proceedings.[3] In terms of Rule 11 of the Labour Court Rules such applications must generally be brought on notice supported by affidavit. Rule 11 reads as follows:

> "(1) The following applications must be brought on notice, supported by affidavit:
>
> (a) Interlocutory applications
>
> (b) Other applications incidental to, or pending proceedings referred to in these rules that are not specifically provided for in the rules; and
>
> (c) Any other applications for directions that may be sought from the court.
>
> (2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.
>
> (3) If a situation for which these rules do not provide arises in proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

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[2] Vaartz v Law Society of Namibia 1991 (3) SA 563 (NMHC) at 566 C-E

[3] See Viljoen v Federated Trust Ltd 1971 (1) SA 750 (0) at 755 A-B; Swartz v Van Der Walt T/A Sentraten 1998 (1) SA 53 (WLD) at 56 H.

> (4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act"

[11] Although affidavits, for purposes of applications, are pleadings they differ from pleadings in actions in that they are part of the evidence that the court will consider in deciding the merits of the matter. An application to strike out offending matter from an affidavit is therefore not an objection to a pleading, in the strict sense, it is an objection to evidence that a party intends to tender.[4] It is therefore not a mere procedural aspect.

[12] An application to strike out can be based on any one or all three grounds mentioned above. It may also be based on other grounds not mentioned in Rule 6(15). The grounds mentioned in the sub–rule are therefore not exhaustive.[5]

[13] That being the case, it would be unfair to ambush an opponent with an application to strike out without notice to such party, as has happened in this matter. The other party must be apprised of the grounds on which the application is based in order to facilitate informed and sensible opposition to such application, if it is opposed.

[14] In my view applications to strike out must be brought upon proper notice to the other party. The notice must set out the grounds of the objection and refer to the specific portions of the affidavit to which the objection is taken. The facts and circumstances of the case will dictate whether it is necessary for the notice to be supported by an affidavit.

[15] In this matter no notice was given to the appellant that an application to strike out matter from its affidavits would be brought. Moreover the respondents did not object, in the answering affidavit made on their behalf by the second respondent, to the matter being introduced by the appellant. There being no

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[4] See Elher (Pty) Ltd v Silver 1947 (4) SA 173 (W) at 176
[5] See Titty's Bar & Bottle Store v A. B. C Garage & Others 1974 (4) SA 362 (TPD) at 368 F-H

proper notice to the appellant, the Court *a quo* should have refused to entertain the application to strike out.

[16] There is another reason why the application to strike out should have been dismissed. In terms of Rule 6(15) an applicant must surmount two hurdles. Firstly, the applicant must show that the matter is scandalous, vexations or irrelevant and secondly, that the applicant will be prejudiced in his case if the application is not granted.[6]

[17] Mr Mkhari SC, for the appellant, argued that the Court *a quo* misdirected itself in that it did not consider the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988. According to Mr Mkhari the Court a *quo* adopted a *"fallible (sic) approach that did not take into account, inter alia, the probative value of the hearsay evidence, and any prejudice to the respondents which the admission of the evidence might entail."*

[18] Section 3(1) of the Act 45 of 1988 (the Act) reads as follows:

> "3. Hearsay evidence. – (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -
>
> (a) Each party against whom the evidence is to be adduced agrees to Pthe admission thereof as evidence at such proceedings;
>
> (b) The person upon whose credibility the probative value of such evidence depends, himself testified at such proceeding; or
>
> (c) The court, having regard to –
>
> (i) The nature of the proceedings;
>
> (ii) The nature of the evidence;
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> (iii) The purpose for which the evidence is tendered;
>
> (iv) The probative value of the evidence;

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[6] See Steyn v Schabort en Andere NNO 1979 (1) SA 694 (0) at 697 F-H.

(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) Any prejudice to a party which the admission of such evidence might entail; and

(vii) Any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

[19] Section 3(1) of the Act has ushered our approach to the admissibility of hearsay evidence into a refreshing and practical era. We have broken away from the assertion–oriented and rigid rule–and–exception approach of the past.[7] Courts may receive hearsay evidence if the interest of justice requires it to be admitted.[8] In **S v Ndlovu** Cameron JA, as he then was, puts it thus:

> "The 1988 Act was thus designed to create a general framework to regulate the admission of hearsay evidence that would supersede the excessive rigidity and inflexibility - and occasional absurdity - of the common-law position. In the result, as this Court recently stated in Makhatini v Road Accident Fund, the 1988 Act retained the 'common law caution' about receiving hearsay evidence, but 'altered the rules governing when it is to be received and when not', principally by glossing the common-law exceptions with the general criteria of relevance, weight and the interest of justice."[9]

[20] I now turn to evaluate the hearsay evidence which the appellant wanted to put before the Court *a quo* to determine whether it should have been admitted.

[21] The appellant endeavoured to adduce the evidence in urgent civil proceedings. The hearsay rule – as the Court a *quo* correctly observed – is not applied rigidly in such proceedings, because it is not always possible to garner all the evidence in time.

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[7] D T Zeffert et al : The South African Law of Evidence. Butterworths 2003 at pages 365 to 366.
[8] See The South African Law of Evidence : Butterworths 2003 at pages 365-366.
[9] See S v Ndlovu 2002 (6) SA 305 (SCA) at paragraph 15. footnotes omitted.

[22] The evidence which the appellant wanted to put before the Court *a quo* is documentary evidence relating to a meeting which was attended by representatives of both the appellant and the respondents.

[23] The evidence was tendered in order to show that a meeting was held by the parties and that certain decisions were taken at such meeting. The appellant endeavoured to show that its interpretation of the minutes is correct.

[24] The probative value of the evidence is high. Both parties however rely on the minutes of the meeting for their respective cases.

[25] Although no reason was given as to why the author of the minutes or any person who attended the meeting did not file a confirmatory affidavit, it is clear that both parties are *ad idem* that the meeting was held and that the minutes are a true reflection of the deliberations.

[26] It is hard to discern what prejudice the respondents would have suffered had the Court *a quo* admitted the hearsay evidence. I am of the view that the production of the minutes could not have occasioned any prejudice to the respondents. In any event, this being an application for final interdictory relief the well known rule set out in **Plascon Evans Paints (Pty) Ltd v Reebeeck Paints (Pty) Ltd** would apply.[10] The respondents would be in an advantageous position. Adonis attached an unsigned copy of the minutes to his founding affidavit. The respondents attached a signed copy to their answering affidavit. The dispute between the parties was not whether the meeting was held or whether the minutes were a true reflection of the decisions taken. The dispute is based on the interpretation or understanding of what was captured therein. The deponent to the answering affidavit attached the minutes of a meeting of the GPSSBC Department Chamber: Department of Home Affairs meeting held on 12 July 2011 in support of its case. Ironically, he too did not attend any of the two meetings.

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[10] 1984 (3) SA 623 (A) at 634E-635C

[27] It is abundantly clear that the interest of justice dictates that the evidence contained in the minutes should have been allowed. So even if it is assumed that the Court *a quo* was correct in entertaining the application; it erred in disallowing the evidence.

[28] Furthermore, it is also clear that the Court *a quo* erred in striking out the entire affidavits. As stated above, an affidavit is evidence. When the Court *a quo* considered the striking out application it should have asked itself which portions of the affidavits constituted hearsay evidence. The fact that Adonis stated in his affidavit that he is an adult male and the General Manager of the appellant cannot be hearsay evidence. Likewise his evidence as to who the parties are, the purpose of the application and the reasons why it is urgent can surely not be hearsay evidence. I agree with Mr Mkhari that the Court *a quo* erred in striking out the founding and replying affidavits.

[29] The advent of democracy in South Africa in 1994 resulted in the government scaling down the deployment of members of the erstwhile South African Defence Force to our porous borders. This and other reasons let to an exponential increase in foreigners, legal and illegal, entering the country. The ingress and egress through our borders presented a huge challenge to the Department of Home Affairs (DOHA).

[30] Cabinet took a decision to redeploy members of the South African National Defence Force (SANDF) to our borders in order to secure the borders. This was to be done in collaboration with other government departments. It was also decided to transform the DOHA into a security department. Allied to this the security and justice cluster of the government, of which the DOHA is a part, decided to use employees within the cluster when transforming the DOHA into a security department.

[31] As part of the transformation process, the DOHA studied best practices in other jurisdictions. The DOHA decided that the Cuban model, suitably adjusted to this country's needs, should be implemented.

[32] The study revealed that to affect a coherent and efficient border control system the Republic of South Africa (RSA) would require a diverse range of disciplines that include comprehensive training, with a large element of such training being military expertise, which resides with the SANDF. The DOHA did not have the particular skills set which was needed for the migration to a security department.

[33] It was discovered that the SANDF has a significant number of its members who are above the age of 35 and therefore not ordinarily deployed to do active duty. It was determined that they were often senior members whose expertise could better be exploited to help achieve more efficient border control.

[34] The DOHA decided to implement a pilot project at the O.R. Tambo International Airport with the assistance of Cubans.

[35] According to the DOHA, the pilot project would yield 344 posts of which 291 are entry level posts which would need to be filled by applicants from outside the DOHA because employees of the DOHA already earned above the salary level indicated for such posts. The remaining 53 positions were positions that required military training which would be in line with Cabinet's decision to utilize members of the SANDF at borders, thereby tightening security at ports of entry.

[36] The minutes of the meeting held on 12 July 2011 reflect the following which is germane to this matter:

> "4 PARTNERSHIP BETWEEN THE DEPARTMENT OF HOME AFFAIRS AND THE CUBAN GOVERNMENT"
>
> The employer representative Mr J Mamabolo made a presentation on the partnership between the Department of Home Affairs and the Cuban Government.
>
> Labour indicated that they appreciate the Employer's initiative but they should have been part of the process from the beginning and furthermore they should be part of the delegation delegation (sic) for the Russian study tour. Labour further indicated that they would like to see the report from the Cuban delegation studies.

The employer noted Labour's comments and indicated that they appreciate Labour's cooperation and that as parties they should in principle commit themselves to this process. Furthermore, they will share the key observations of the report and maybe even have a workshop or a meeting. The Employer noted Labours (sic) proposal that they to (sic) be part of the delegation that will be going to Russian." (My underlining.)

[37] The signed minutes of the meeting held on 21 July 2011 records the follow-up discussion as follows at paragraph 6.11:

> "**6.11. PARTNERSHIP BETWEEN THE DEPARTMNET OF HOME AFFAIRS AND THE CUBAN GOVERNMENT**
>
> The Employer reported that the agreement with the Cuban Government has been signed and that the gist of the matter is to build DHA as a security Department and that this will include training and skilling staff in HR an IT. The employer indicated that they are still committed to having an information sharing session with Labour and that they still awaiting a response on the issue of organized Labour being part of the next round trip to Russia.
>
> The Employer indicated that as part of their vision to build DHA as a security Department they would want to recruit a cadre who has competencies acquired in security training and that for this purpose they intend to recruit any person with advanced or basic military background particularly in the core business of security.
>
> The Department is also looking into the Department of Defence, as it becomes the ideal Department to collaborate with and to find the people with these particular attributes and Cuban training as well. The direction that the Department seeks is to meet the security requirements of the country.
>
> Labour welcomed and supported the employer's efforts to improve the country and requested that the issue of the workshop should be speeded up to get the whole report of this process, including the Russian tour.
>
> Labour indicates that they need to be careful that they do not send their members for military training but they do support the initiative. Labour requested clarity if there is any relationship between DHA, SAPS and DOD.
>
> The Employer welcomed Labour's sentiments and reaffirming their commitment to the workshop. The Employer indicated that the Department is intending recruiting the military personnel for their expertise and competency not to militarize the Department. The Department has an arrangement with other departments and that there are consultations taking place with the Intelligence as well.

> Labour requested clarity as to what will happen to employees who do not have military background.
>
> The Employer indicated that the Department has a qualification that is recognized by SAQA that they can go through. The Department's intention is to empower and re-skill their employees. This process will not affect their employees negatively. The Department has not taken a decision if they will provide military training to their current employees.
>
> The Employer indicated that all area of core business that affected building DHA as a security Department starting at Ports.
>
> **It was agreed that**:
>
> - A workshop will be held on the 12 August 2011"

[38] It is common cause that the workshop was not held on 12 August 2011. The workshop was ultimately held on 30 September 2011. According to the DOHA a detailed report relating to the Cuban report and pilot project was presented at the workshop. Questions and concerns relating to the effect that the pilot project will have on the appellant's members, which directorates will be affected thereby, training and up–skilling of the appellant's members were addressed. After the presentation and question and answer session, which ran for approximately 3½ hours, the appellant's representatives stated that they will not engage in the process and left the workshop. The appellant on the other hand alleges that it expected the DOHA to make a presentation on issues that would have an impact on labour relations when it operationalise the recommendations contained in the report, which was not done.

[39] On 7 September 2011 the appellant discovered that the DOHA circulated advertisements for the posts within the Department of Defence (DOD).

[40] On 9 September 2011 the appellant wrote to the DOHA, demanding that the advertisements circulated within the DOD be withdrawn because the procedure prescribed in the Public Service Regulations was not followed, and secondly, because circulating the advertisements exclusively within the DOD unfairly excluded and discriminated against other potential applicants.

[41] On 16 September 2011 the DOHA responded to the letter of 9 September 2011 and pointed out that it does not intend to withdraw the advertisements. The DOHA indicated that it has complied with the prescripts of the Public Service Regulations. It also indicated that it is prepared to engage the appellants on the issues mentioned in its letter of 9 September 2011.

[42] Pursuant to the DOHA's invitation the parties met on 22 September 2011. At the GPSSBC chamber meeting held on 23 September 2011 the DOHA reiterated its stance to continue with the recruitment process.

[43] The Court *a quo* after striking out the founding and replying affidavits said the following:

> "Accordingly, the Applicant's application stands to fail for this reason. The striking off (sic) of the affidavits means that no proper application was put before the Court."

[44] The Court *a quo* thereafter stated that the application stands to fail even if the founding and replying affidavits are admitted. The Court *a quo* found that the applicant sought a final interdict but that it failed to show that it had a clear right. It also found that in relation to the Public Service Regulations, the appropriate order that the appellant ought to have sought was a declaratory order rather than an interdict. It further found that if the appellant's complaint is the possible non–promotion of its members then it has an alternative remedy, in that it may refer an unfair labour practice dispute to the GPSSBC.

[45] The appellant listed the issues to be determined by this Court as follows:

> "Whether the third respondent contravened or breached the provision of Chapter 1 Part VII,C.2.4 of the Public Service Regulations by recruiting employees from the DOD, and by failing to properly advertise the recruitment process.
>
> 6.2 whether the third respondent's actions or conduct in recruiting employees from the DOD breached the Constitutional rights of the third respondent relating to prohibition (sic) against discrimination and to right to be treated equally and fairly.
>
> 6.3 The proper interpretation of Chapter 1, Part VII, C.2.4 of the Public Service Regulations.

> 6.4 Whether the Court a quo was entitled to strike out the applicant's affidavits when no application to strike out was made, and if so whether the applicant's affidavits were inadmissible and disserved (sic) out."

[46] Mr Semenya argued that the issues to be determined as listed in the appellant's heads of argument differed substantially from the relief sought in the Court *a quo* and that we should not allow the appellant to raise new issues on appeal.

[47] A party may raise a new point of law on appeal for the first time if it involves no unfairness to the other party and raises no new factual issues. Where the issue raised for the first time on appeal is a pure legal one due notice must be given to the other party of the intention to rely upon it. A party may not raise a point for the first time on appeal which is dependent upon factual considerations that were not fully explored in the court of first instance.[11]

[48] The constitutional issue was not canvassed or pursued in the Court *a quo*. The closest that the appellant came to raising the constitutional point was in paragraph 56 of the founding affidavit where the following was stated:

> "Secondly, it is the appellant's contention that the inherent requirement of the positions advertised by the third respondent exclusively within the DOD was arbitrarily designed to limit and/or discriminate against other potential applicants within the Public Service when, it is absolutely clear that such positions do not need any military training skills(sic)."

[49] Based on the aforementioned paragraph Mr Mkhari, in his heads of argument, argued that the Court *a quo* was also called upon to determine a constitutional provision relating to the rights of the appellant's members employed in the DOHA not to be discriminated against when employment opportunities became available within the DOHA. According to the appellant's argument, its members employed by the DOHA were discriminated against and this constituted an infringement of their constitutional rights when the DOHA decided that the advertisements would target only one class of people

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[11] Naude and Another v Fraser 1998(4) SA 539(SCA)at 558 A-E.

employed in the DOD to the exclusion of any other person in the DOHA irrespective of whether such person would meet the requirements of the post advertised.

[50] It is clear, as I will demonstrate shortly, that the constitutional issue that the appellant endeavours to raise is a poor attempt to embellish its case.

[51] The Constitution of Republic of South Africa, 1996 (the Constitution) does not prohibit discrimination. What is disallowed is unfair discrimination. Section 9 of the Constitution reads as follows:

"9.**Equality.-** (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms…

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)…

(5) Discrimination on one or more of the grounds listed in subsection (3) unfair unless it is established that the discrimination is fair"

[52] Nowhere in the founding affidavit is it alleged that the DOHA unfairly discriminated against members of the appellant.

[53] More importantly, if unfair discrimination is alleged it is incumbent on the complainant to show whether the discrimination is based on one of the grounds listed in sub-section (3) or not. If the differentiation is based on an unlisted ground then an objective inquiry must be held by the court in order to

determine whether such differentiation constitutes discrimination based on an unlisted ground.[12]

[54] If the complainant proves that the discrimination is based on a listed ground then it is presumed that the discrimination is unfair unless the other party shows that the discrimination is fair. If the discrimination is based on an unlisted ground then the complainant bears the onus to prove on a balance of probabilities that the discrimination is unfair and hence outlawed by section 9(4).[13]

[55] In my view the mere allegation of discrimination is not an invocation of section 9 of the Constitution. A proper factual basis must be laid in the founding affidavit, at least, as to the ground on which the allegation of unfair discrimination is based. The mere assertion that there was discrimination without a factual basis to show the unfairness thereof is not enough. There was no proper factual basis placed before the Court *a quo* to consider this issue. This issue was not canvassed before the Court *a quo.* All that the Court *a quo* had to decide, as Mr Semenya correctly pointed out, was whether the appellant proved that it was entitled to a final interdict pending full compliance with Chapter 1 Part VII, C.2.4 of the Public Service Regulations; conclusion of a workshop as agreed upon between the appellants and the DOHA at the meeting of 21 July 2011 and proper and meaningful consultation with the appellant regarding the effect of the recruitment process would have on the appellant's members as agreed upon between the parties at the meeting of 21 July 2011.

[56] Although the other issues, for consideration by this court, are couched somewhat differently from the notice of motion it is clear that in order to decide whether a clear right has been established regard must be had to the

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[12] See generally Prinsloo v Van der Linde and Another 1997(3) SA 1012 (CC); President of South Africa and Another v Hugo 1997(4) SA 1 (CC).

[13] See Harhsen v Lane WO and Others 1998(1) SA 300 (CC) at paragraph 63.

provisions of the Public Service Regulations. This seems to me to be a situation of six of the one, half a dozen of the other.

[57] I am constrained to say the following before dealing with the merits. The reason why litigants are required to delineate the issues that fall to be determined on appeal is not a mere formality. It assists the Court to focus on the real issues to be adjudicated upon. It obviates the inconvenience of reading page upon page of irrelevant matter. Where a party is of the view that a matter that was canvassed and contested in the Court *a quo* need not be considered by this Court it should state so clearly. In this matter, the appellant does not list its purported entitlement to a workshop and the proper and meaningful consultation as issues that fall to be considered. It also does not state that it does not rely on those issues anymore. Those issues were canvassed and dealt with by the Court *a quo.* We are therefore constrained to deal with them.

[58] Mr Mkhari argued that the Court *a quo* failed to deal with the merits of the application. According to him, when the Court *a quo* decided to strike out the founding and replying affidavits and found that there is no proper application before it, spelt the end of the matter. According to him, the Court *a quo* was not supposed to continue to deal with the merits. I must confess I fail to understand this argument. On the one hand it is said that the Court *a quo* failed to consider the merits but on the other hand it is said that the Court *a quo* was not supposed to consider the merits after it found that there was no proper application before it.

[59] In my view the Court *a quo* was correct to deal with the matter in the manner in which it did. In essence it found that there is no proper application before it. It however also decided the matter on the assumption that the affidavits contained admissible evidence.

[60] A judgment is not a one note symphony. It is not defined by one conclusion to the exclusion of others. One must have regard to the entire judgment. It is clear that the Court *a quo* found that there is no application before it and alternatively that the appellant did not prove its case on the substantial merits.

My view is fortified by the fact that the application was dismissed. This is an indication that the merits of the application were considered and found wanting. Had the matter been disposed of based on the fact that there was no proper application before it, the Court *a quo* would have struck it off the roll. I now turn to the merits.

[61] The appellant's notice of motion is not a good example of how an application for an interdict (interim or final) should be couched. The Court *a quo* found that it is an application for final relief. I agree. It has been said that:

> "…an interim interdict does not involve a final determination of the rights of the parties and does not affect such a determination. In short, an interim interdict serves to adjust the applicant's interest until the merits of the matter are finally resolved. That final decision has to be arrived at by a Court of law or, conceivably, another body or person such as an arbitrator. Consequently a temporary injunction does not necessarily constitute interim relief in the above sense: if an applicant seeks an interdict which is to be operative for a fixed or determinable period, it may still be final in its nature and effect…"[14]

[62] Although the application in this matter was dressed up as an interim interdict, its nature and effect is indeed for final relief. Mr Mkhari did not challenge the Court *a quo's* finding in this regard.

[63] The requisites for a permanent interdict are a clear right, injury actually committed or reasonably apprehended, and the absence of any other ordinary remedy.[15]

[64] The appellant's case is that the Minister of Home Affairs as an executing authority, was supposed to advertise the posts within the DOHA because Chapter 1 Part VII C.2.4 of the Public Service Regulations provides that:

> "C.2.4. An executive authority shall advertise any other vacant posts within the department as a minimum, but may also advertise such posts

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[14] See Airoadexpress v TRTB Durban 1986(2) SA 663 (AD) at 681 D-F

[15] Setlogelo v Setlogelo 1914 AD 227 at 227, Sanachem (Pty) Ltd v Farmers Agri-Care & Others 1995 (2) SA 781 (A) at 789 B-D. See LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (c) at 267 A-F for the requirements for interim interdicts.

(a) elsewhere in the public service; or

(b) outside the public service either nationwide or locally."

[65] It further contends that the Minister of Home Affairs has no authority to deviate from the Public Service Regulations. In as far as the Minister did not comply with the Public Service Regulations her actions were unlawful. It is this alleged unlawful conduct which the appellant sought to stop.

[66] The issues to be determined are, firstly, whether the Minister of Home Affairs breached the provisions of Chapter 1, Part VII C.2.4. of the Public Service Regulations and, if so, whether such contravention gave the appellant a clear right deserving of protection, secondly whether the appellant had a clear right to the workshop and, lastly, whether the appellant had a clear right to be consulted.

[67] The provisions of Chapter 1, Part VII C.2.4 (a) and (b) are only part of the picture. A clear and full picture emerges when the entire Chapter 1 Part VII C.2 is considered. Unfortunately a repetition is necessary. Chapter 1 Part VII C.2 reads as follows:

"C.2.1 An executive authority shall ensure that vacant posts in the department are so advertised as to reach, as efficient and effectively as possible, the entire pool of potential applicants, especially persons historically disadvantaged.

C.2.2 An advertisement for a post shall specify the inherent requirements of the jobs, the jobs title and core functions.

C.2.3 Any vacant post in the SMS shall be advertised nationwide.

C.2.4 An executing authority shall advertise any other vacant post within the department as a minimum, but may also advertise such post –

(a) Elsewhere in the public service; or

(b) Outside the public service either nationwide or locally.

C2.5 An executing authority may fill a vacant post without complying with regulations VII C.2.3 and C.2.4 if –

(a) The department can fill the post from the ranks of supernumerary staff of equal grading;

(b) The department can absorb into the post an employee who was appointed under an affirmative action programme, if she or he meets the requirements of the post;

(c) The department plans to fill the post as part of a programme of laterally rotating or transferring employees to enhance organizational effectiveness and skills or;

(d) The post is filled in terms of section 38 of the Act.

C.2.6 An executive authority may utilize an appropriate agency to identify candidates for posts, as long as the advertising and selection procedures comply with regulations VII.C and D.

C.2.7 The Minister may issue directives regarding the matter in which vacancies must be advertised within the public service." (My emphasis).

[68] The DOHA contents that the aforementioned regulation should be read with section 14 of the Public Service Act, Proclamation 103 of 1994 (the PSA) which reads as follows:

"14 (1) Subject to the provisions of the Act, every employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position is another division, or is of a lower or higher grade, or is within or outside the Republic.

(2)(a) The transfer of an employee from one post or position to another post or position may, subject to the provisions of paragraph (b); be made on the authority of the person having the power of transfer.

(b) In the case of a transfer from one department to another department the approval of the persons who in respect of each of those departments have the power to transfer, shall first be obtained."

[69] According to the PSA, an executing authority in relation to a department or organisational component within a Cabinet portfolio, means the Minister responsible for such portfolio. Transfer, on the other hand, includes a change-over to regraded or renamed post, or from one grade to a higher grade connected to the same post, or from one rank to a higher rank.[16] It does not exclude an inter–departmental transfer.

[70] The provisions of section 14 of the PSA are clear. An employee may be transferred from one department to another when the public interest so requires provided that the approval of the persons who, in respect of each of those departments, have the power to transfer, must first be obtained.

[71] In terms of Public Service Regulation C.2.5(c) a Minister may fill a vacant post without advertising such post if the department plans to fill the post as of a programme of laterally rotating or transferring employees to enhance organizational effectiveness and skills.

[72] The appellant disputes the fact that a decision was taken to transform the DOHA into a security department. It also denies that foreign lessons have revealed that to affect a coherent and efficient border control system the RSA would require a diverse range of disciplines that include comprehensive military training with a large element of it being some military expertise which resides within the DOD.

[73] The appellant's denial is hollow and clearly out of sync with the minutes of the meeting. The minutes reflect unambiguously that the DOHA indicated that it is their vision to develop the DOHA into a security department and that it would want to recruit persons who have competences acquired in security training and for that purpose it intended to recruit persons with an advanced or basic military background particularly for the core business of security. It was also recorded that the DOHA will collaborate with the DOD in that regard.

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[16] See section 1 of the PSA

[74] I have no doubt that the public interest required that members of the DOD be transferred to the DOHA. It cannot be gainsaid that such transfers would enhance the organizational effectiveness of and skills in the DOHA.

[75] That being the case, the persons in the DOHA and DOD who have the power to transfer employees from one department to another could do so. It follows that the Minister of the Department of Home Affairs, as the executing authority, could recruit members of the DOD who were interested in being transferred to the DOHA in order to enhance its effectiveness and skills, without advertising the posts in the DOHA or elsewhere.

[76] In my view the appellants did not show that they have a clear right to the relief sought in terms of the PSA or the regulations promulgated thereunder.

[77] The rosetta stone to decipher the workshop issue lies glaringly in the minutes of 12 July 2011. The relevant part reads as follows:

> "Furthermore, they will share the key observations of the report and maybe even have a workshop or a meeting."

[78] It is clear that there was no agreement to hold a workshop. The DOHA only indicated that it might even have a workshop to share the key observations of the Cuban delegation studies. The purpose of the workshop was to share key observations of the Cuban delegation studies only.

[79] On 21 July 2011 it was agreed that the workshop would be held on 12 August 2011. The workshop was ultimately held on 30 September 2011. A presentation was made and the appellant's representatives were given the opportunity to ask questions. After they did that they indicated that they would not engage in the process and left the workshop. The respondents fulfilled their undertaking to hold an information sharing workshop. According to the appellant it expected issues relating to the impact of the operationalisation of the recommendations to be discussed but this was not done. A mere expectation – without more – is not at clear right. Even on the appellant's own version it had not shown a clear right to a further workshop.

[80] The appellant also prayed that the interdict be issued pending proper and meaningful consultation with it regarding the effect such recruitment would have on the members of the appellant who were at that stage employed by the third respondent as agreed between the parties during the meeting.

[81] The minutes of the meeting reflect that the DOHA indicated that it is its intention to empower and re–skill its employees and that the recruitment process will not affect the appellant's members negatively.

[82] The appellants do not challenge the rationality of the implementation of the pilot project or the Department of Home Affair's migration to a security department.

[83] The only issue is whether there was meaningful and proper consultation. In **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another** it was stated that:

> "It is true that, in determining what constitutes procedural fairness in a given case a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. It is also true in a country such as ours that faces immense challenges of transformation that we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly. On the other hand, to permit the implementation of a scheme that would have an adverse financial effect on the appellants without affording them a fair opportunity to make representations would flout the important principle of procedural fairness."[17]

[84] What is required is a balancing act between the DOHA's right to implement the pilot project in order to enhance its efficiency and skills level and the right of the appellant to be consulted properly. In balancing the right to implement and the duty to consult, the prejudice to or adverse effect on the appellant should also be considered.

[85] In *casu* there were consultations held on 12 July 2011 and 21 July 2011. Missives wherein the project and its implications were explained were

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[17] 2002 (3) SA 265 (CC) at paragraph 244

exchanged between the parties. A workshop was held whereat the appellant's representatives were given the opportunity to interrogate the process, which they did. They indicated that they would not be part of the process and walked out. During the meetings it was stressed that the appellant's members would not be adversely affected by the pilot project.

[86] Given all the consultations between the appellant and the respondents, the appellant's intimation that they would not be part of the process and the ultimate walk out, the appellant has not, in my view, succeeded in showing that it has a clear right to any further meaningful and proper consultations in this matter.

[87] In my view the appeal ought to fail.

[88] The appellant won a battle but lost the war. Its success and failure coincided. The respondents did not ask for costs. In my view equity and the law dictate that no order as to costs should be made.

[89] I accordingly make the following order:

a. The appeal is dismissed.

b. No order as to costs is made.

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CJ MUSI, AJA

I agree,

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WAGLAY, AJP

I agree,

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NDLOVU, JA

APPEARANCES:

FOR THE APPELLANT: Adv. Mkhari SC

Instructed by: WERKSMANS ATTORNEYS

FOR THE RESPONDENT: Adv. Semenya SC

Instructed by: THE STATE ATTORNEY PRETORIA