REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case NO: D1035/14

In the matter between

ENOS MASHAKA RAVHURA **Applicant**

and

DR. SM ZUNGU N.O. **First Respondent**

MEC:HEALTH, KWAZULU-NATAL **Second Respondent**

NHLANHLA MATHE N.O. **Third Respondent**

Heard: **05 December 2014**

Delivered: **15 January 2015**

Summary: **Urgent application seeking an order declaring the decision of the first respondent to dismiss applicant to be unlawful - a decision regarding the lawfulness of a dismissal will call for a preliminary finding on the allegations of serious misconduct on the part of the applicant as well as a determination of the fairness of the employer's dismissal – application dismissed.**

JUDGMENT

CELE J

Introduction

[1] The applicant has approached this Court on urgent basis in terms of section 158 (1) (a) of the Labour Relations Act[1], seeks an order declaring the decision of the first respondent to dismiss him unlawful, void *ab origine* and of no force and effect, together with ancillary relief consequent thereupon directing the third respondent to deliver a sanction, alternatively the first and second respondents to impose the sanction recommended to them by the third respondent.

Factual Background

[2] The applicant was in the employment of the first and second respondents holding the position of a Chief Financial Officer. At the time material to this matter, he had eighteen years experience with the Department of Health: KwaZulu-Natal, the Department. He had various charges of gross misconduct preferred against him, in the procurement process and involving dishonesty, and in an internal disciplinary hearing presided over by the third respondent on 26 September 2014, he was found guilty of a number of such charges.

[3] The third respondent disclosed to the applicant that he was unable to make any recommendation to the employer at that stage seeing the parties had yet to submit mitigating or aggravating circumstances The applicant and first respondent's representatives duly made their submissions in mitigation and aggravation and, at that stage, the applicant took no issue with the declaration of the third respondent that he was in fact only going to be concerned with making a recommendation to the employer with regard to sanction. On 15 October 2014, the third respondent duly dispatched a recommendation to the first respondent. That recommendation in light of the findings regarding guilt and the nature of the charges was in the opinion of the first respondent untenable.

[1] Act Number 66 of 1995.

[4] On 15 October 2014, the first respondent invited the applicant to submit reasons to why a more serious sanction, including possibly one of dismissal, should not be imposed by the first respondent consequent upon the recommendations. The applicant elected not to submit any written representations. On 24 October 2014, the first respondent communicated to the applicant that it was her decision to impose a sanction of dismissal on the applicant given, *inter alia,* the seriousness of the misconduct and the findings of guilt in relation thereto.

[5] The applicant challenged the lawfulness of that decision to dismiss on grounds that:

a) the third respondent as Chairperson must pronounce the sanction pursuant to the disciplinary enquiry and the first respondent must then only give effect to that sanction;

b) the first respondent was the complainant in the enquiry and her decision could hardly be impartial;

c) the first respondent was not the employer. That the power to dismiss ultimately rested in the second respondent.

Submissions

[6] In the circumstances the applicant prayed for a declarator that the sanction imposed by the first respondent be declared to be unlawful. As ancillary relief, the applicant asked that the third respondent's recommendation to impose a final written warning be imposed as the decision. The applicant placed reliance for his submissions, *inter alia*, on an opinion of the Chief Legal Advisor for the Premier who, when approached for her opinion, said that the decision of the first respondent was a flagrant violation of the code and was to be struck down. On urgency he relied on the decision in the case of Manamela Nnana *Ida v Department of Co-Operative Governance Human*

Settlement Traditional Affairs Limpopo Province and Others[2] where this Court per Snyman AJ held:

> '[55.3] The Labour Court would be generally competent to consider and finally determine urgent applications to challenge suspensions on the basis that such suspensions are unlawful and / or invalid, without exceptional circumstances and compelling considerations of urgency having to be shown by such applicants, provided the normal rules relating to all applications are of course still complied with. The contentions of unlawfulness or invalidity can only be founded and substantiated on the specific text of the rules as contained and prescribed in the employer's own regulatory provisions, and no reliance can be placed on any implied provision and especially not the *audi alteram partem* principle as such implied provision. The Court should further, at all times carefully consider what the actual and true nature of the contention of invalidity and unlawfulness by the Applicant is, in order to avoid a designated circumvention of the provisions of the LRA relating to suspensions under the guise of unlawfulness or invalidity where it is in fact an issue of unfairness'.

[7] The applicant contended that the principle set out in the *Ida*-case above was equally applicable to unlawful dismissal and he said that he had made a case for urgency, particularly where premised upon unlawful conduct by the first respondent. In respect of an alternate appropriate relief he averred that in light of the *Ida*-case he did not have any avenue available to him in which to address the unlawful conduct of the first respondent, saying that only this Court could assist and then too, only by declarator. He submitted that an unlawful conduct of the employer constituted special circumstances which warranted the grant of urgent interim or final relief as envisaged in *Jonker Wireless Payment System CC*[3]. The applicant then made submissions on whether the first respondent could, in law, impose a sanction other than one issued by the third respondent.

[8] The only respondent who opposed this application was the first respondent. Such opposition was essentially a submission that the first respondent was in

[2] Case Number J1886/2013
[3] (2010) 31 *ILJ* 381 (LC).

law, the officer with power to impose a sanction following a recommendation issued by the third respondent. There are four hundred and seventy one (471) cases conducted in the department, during the first respondent's tenure in which not one sanction has ever been imposed by a chairperson. The practice has been that the chaiperson issued a recommendation and submitted the same for a consideration of its appropriateness by the first respondent. The first respondent therefore conceeds that this Court may issue a diclarator in the event it finds the conduct of the first respondent to have been unlawful.

Analysis

Could a finding that the dismissal is unlawful justify the declarator sought by applicant?

[9] To the extent relevant in this matter dismissal, as defined in section 186 (1) of the Labour Relations Act[4], means that an employer has terminated a contract of employment with or without notice[5]. In this matter the employer being the Department of Health, KZN, has terminated a contract of employment with the applicant with a notice through its personnel, namely the first respondent. The LRA does not distinguish between lawful and unlawful dismissals. On the contrary, chapter VIII of the LRA deals with unfair dismissals. In *Discovery Health Limited v CCMA and Others,*[6] this Court held that a contract of employment concluded with a foreigner who was not in possession of a work permit, although unlawful, was not void *ab initio*. Such a foreigner was therefore an employee and terminating his contract because he did not have a work permit constituted a dismissal. In *Ndikumdavyi v Valkenberg Hospital*[7] the employee's offer of indefinite employment was withdrawn three weeks after his appointment because his refugee status was about to expire. The *Hospital* argued that the employment contract was unlawful and therefore a dismissal as contemplated by the LRA had not taken place. This Court rejected that argument on the basis that the phrase "termination of a contract" in section 186 (1) of the LRA referred to the termination of the employment relationship rather than of a contract in the strict sense. The unlawfulness of the employment contract was not the sole determining factor as the fairness of the dismissal had yet to be considered.

[4] Act Number 66 of 1995, hereafter referred to as the LRA.
[5] See also section 213 of the LRA.
[6] (2003) 24 ILJ 462.
[7] [2007] 7 BLLR 633 (LC).

[10] The case of *"Kylie" v CCMA and Others*[8] is yet another example evincing that the presence of unlawfulness in an employment contract does not necessarily signify that the employment relationship between the parties concerned will never enjoy any protection under the LRA and its jurisprudence. The case concerned an employment contract between a brothel owner and a sex worker. The Labour Appeal Court found that there was an employment relationship even though there was no valid contract. *"Kylie*" was found to fall within the scope of the LRA and that she was entitled to the protection of her dignity in terms of section 23 of the Constitution Act.

[11] Accordingly, the presence of unlawfulness on the conduct of one of the contracting parties in an employment relationship will not *ipso facto* result in the other party's entitlement to the *status quo* order being granted without the consideration of fairness of such conduct. In dismissal cases at least, there appears to be no evidence of this Court adopting an approach that unlawfulness is a stand-alone ground for it to intervene in favour of the aggrieved party, for instance to the exclusion of the considerations of fairness. Hence a need that disputes in dismissal cases be referred to conciliation first. In my view, a warning has already been given against the consideration of unlawfulness as a stand-alone ground, in the case dealing though with allegations of unlawful suspensions, of *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[9] where the Court held:

> '…. the judge erred in his approach to determining the lawfulness of a suspension in terms of para 2.7(2). His choice not to consider the serious allegations against the respondent was mistaken. As a general rule, a decision regarding the lawfulness of a suspension in terms of para 2.7(2) will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the reasonableness of the employer's belief that the continued presence of the employee at the workplace might jeopardize any investigation etc. The justifiability of a suspension invariably rests on the existence of a prima facie reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible meaningfully to engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be

[8] [2010] 7 BLLR 705 {LAC).
[9] (2012) 33 *ILJ* 2033 (LAC) at para 28.

> relevant considerations in deciding whether the denial of access to the workplace was justifiable'.

[12] As a general rule therefore, a decision regarding the lawfulness of a dismissal will call for a preliminary finding on the allegations of serious misconduct on the part of the applicant as well as a determination of the fairness of the employer's dismissal. There is an appropriate warning pronounced by this Court in *Mosiane v Tlokwe City Council*:[10]

> 'A worrying trend is developing in this court in the last year or so where this court's roll is clogged with urgent applications. Some applicants approach this court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this court with fanciful arguments about why this court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this court will grant them relief on an urgent basis.
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> All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant bargaining councils and then approach this court for the necessary relief'.

[13] A finding that the dismissal is unlawful will not, in my view, justify the declarator sought by the applicant who is yet to follow the procedures laid down in the LRA. It is only then that the merits and demerits of the full submissions made by the parties on whether the first respondent could impose a sanction other than that of the third respondent, stand to be considered.

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[10] (2009) 30 *ILJ* 2766 (LC) at paras 15 – 16. See also *Manamela Nnana Ida v Department of Co-operative Governance* Case Number J1886/2013 dated 5 September 2013 at para 52.

[14] The bases of opposition of this application by the first respondent are not the bases on which the matter was adjudged. The requirements of law and fairness of this matter dictate that each party should bear its own costs.

[15] Accordingly, the following order is to issue:

1. The application is dismissed.
2. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant:	Mr I Pillay
Instructed by:	Norton Rose Fulbright Attorneys
For the first Respondent:	Ms C Nel
Instructed by:	The State Attorneys, Durban.