



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

CASE NO: P19/2022

In the matter between:

MZIKAYISE SHAKESPEARE BINZA

Applicant

and

WALTER SISULU UNIVERSITY

First Respondent

THE COUNCIL FOR THE WALTER SISULU

UNIVERSITY

Second Respondent

PROFESSOR RUSHIELA SONGCA N.O

Third Respondent

Heard: 22 February 2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First and Third Respondent's 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 14h00 on 25 February 2022.

JUDGMENT

LALLIE J

- [1] The applicant launched this urgent application seeking an order declaring his suspension from his employment at the first respondent invalid and of no legal force. He further sought to have the respondents ordered to permit him resume his duties as the Deputy Vice-Chancellor. The application is opposed by the first and third respondent who will be referred to as the respondents in this judgment.
- [2] The respondents challenged the urgency of the application on the grounds that the applicant delayed in bringing it and afforded them an unreasonably short period to file their answering affidavits. The facts of this matter do not support the respondents' claim. The applicant received his letter of suspension on 8 February 2022. He consulted with his attorneys who in a letter dated 13 February 2022 attempted to resolve the dispute amicably. The first respondent indicated in a letter of 15 February 2022 that the attempt would not succeed and the applicant filed this application on 18 February 2022. The circumstances of the case proved that the applicant acted with the necessary urgency. Although the applicant gave the respondents less than 48 hours notice to file their answering affidavits he expressed his intention to launch it in his letter of 13 February 2022. The respondents' right to file their answering affidavits was not violated by the period the applicant afforded them. The period was, in the circumstances, not unreasonably short. The respondents' submission that the application be dismissed for lack of urgency was not sustained. The applicant proved the urgency of the application.

- [3] The facts which culminated in the filing of this application are that the second respondent conducted a Council Governance and Induction Workshop (the workshop) in East London on 4 February 2022. Amongst the people who attended the workshop were senior executive members of the first respondent as well as members of the second respondent. During the course of the workshop the third respondent made a presentation on Vision 2030: Focus on Campus Consolidation and Rationalization. The presentation was followed by a discussion. The applicant submitted that during the discussion the third respondent supported the view of the closure of the Queenstown campus of the first respondent while he 'came strongly in defence of the closure'. The third respondent's version was that the applicant stated and/or insinuated that she had been dishonest in her presentation. The applicant's conduct, in the third respondent's view, constituted gross insolence which impacted on the working relationship between the applicant and herself and the first respondent. On 8 February 2022 the third respondent issued the applicant with a letter of precautionary suspension in which the applicant was suspended from duty with immediate effect as there was reasonable suspicion that his continued presence might hamper investigations and an intended disciplinary hearing.
- [4] The applicant submitted that the third respondent had no valid reason to suspend him. The decision to suspend him was *ultra vires*, arbitrary, capricious and irrational and not supported by any policy of the first respondent. It offended the code of conduct of the first respondent and what he referred to as the law of general application. The applicant further submitted that the third respondent

acted as a complainant and decision maker in circumstances where she could have avoided the unfairness by referring the matter to the second respondent. He viewed the suspension as a form of victimization and a suppression of his views. He denied that there was a need to suspend him as he was in no position to interfere with the investigation of an alleged offence which took place in East London when he worked in Mthatha.

- [5] A further attack on the third respondent's conduct was that it was in breach of the *audi alteram partem* rule in that the applicant was denied an opportunity to make representations before the decision to suspend him was taken. The decision was taken, so the applicant averred, with the intention to denigrate him and tarnish his dignity and jeopardize his future employment opportunities. All the grounds the applicant sought to rely on were opposed by the respondents.
- [6] It is trite that when an applicant approaches a court on motion proceedings the applicant's case must be presented in the founding affidavit. The principle was expressed in the following words by the Labour Appeal Court¹:

[25] Although the above dictum deals with what a respondent is required to do to oppose an application, it demonstrates that a founding affidavit must set out all of the essential evidence which, if left unchallenged, would prove the applicant's case and grant it the relief sought. Alternatively, challenges to the averments the applicant makes could arguably not be sustained.'

¹ *Kwazulu-Natal Tourism Authority and Others v Wasa* [2016] 11 BLLR 1135 (LAC).

- [7] The applicant adopted a shotgun approach in his founding affidavit. He relied, *inter alia*, on unlawfulness, unfairness and irrationality. The difficulty with his approach is that he was required to be specific. The applicant was required to set out his cause of action and disclose the grounds for the relief he is seeking. In the answering affidavit the respondents attacked the applicant's failure to disclose his cause of action in clear terms. As the applicant alleged that the respondents violated his constitutional right to fair labour practices, the respondents submitted that the applicant should, in that case, have challenged the fairness of his suspension at the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 186(2)(b) of the Labour Relations Act² (the LRA). They further submitted that the CCMA has exclusive jurisdiction over alleged unfair suspension disputes and that this court lacks jurisdiction to grant the applicant the final relief he seeks in this application. In his replying affidavit the applicant accused the respondents of being confused on how the South African legal system works. He added that this court has adjudicated numerous cases which involve issues of unfair suspension.
- [8] The respondents' submissions are legally sound. The applicant could not approach this court based on his constitutional right to fair labour practice. The reason is that the LRA was promulgated to give effect to his right to fair labour practices. Section 185(b) of the LRA provides that every employee has the right not to be subjected to unfair labour practice. The applicant should have therefore asserted his constitutional right to fair labour practice through section 186(2)(b) read with sections 191 and 193 of the LRA which outlaw unfair

² Act 66 of 1995, as amended.

suspension and provide remedies for breach of that legislation. The LRA does not provide the Labour Court with residual powers to adjudicate unfair labour practice disputes. The disputes therefore fall under the exclusive jurisdiction of the CCMA. The applicant's attempt to rely on the unfairness of his suspension could not assist him.

- [9] The applicant's averment that this court has on a number of occasions decided cases involving unfair suspension overlook the reality that each case is determined on its merits. In bringing an application challenging his or her suspension, an applicant needs to ensure that his or her dispute falls within the jurisdiction of this court. Jurisdiction is determined on the manner in which a matter has been pleaded. In all the authorities the applicant sought to rely on the basis of the jurisdiction of this court is disclosed. *Mogothle v Premier of the North west Province & Another*³ is not based on the LRA but on breach of contract as envisaged in section 77 of the Basic Conditions of Employment Act⁴ which gives this court jurisdiction over disputes arising from contracts of employment. In both *Lebu v Maquassie Hills Local Municipality and Others*⁵ cases the unlawfulness of the suspension is challenged based on the contract of employment and regulations which were incorporated in it. Further, the clauses which were violated were specifically pleaded. The *POPCRU obo Masemola and Others v Minister of Correctional Services*⁶ case is based on review and the LRA has granted this court jurisdiction over reviews.

³ [2009] 4 BLLR 331 (LC)

⁴ 75 of 1997.

⁵ (2012) ILJ 2623 (LC)

⁶ (1229/09) [009] ZALC 65.

- [10] In what appears to be reliance on his contract of employment the applicant submitted that the respondents unlawfully and unreasonably violated and/or breached his contract of employment and denied him the right to perform his duties. The respondents submitted, correctly, that the applicant's allegation does not constitute reliance on his contract of employment. The applicant was required to base his cause of action on breach of contract as envisaged in section 77 of BCEA and disclose the clause or clauses of his contract that were breached by the respondents. He failed to do so. His submission that he entered into a contract of employment with the first respondent is not enough. The applicant's obligation is to tender his services for which he has the right to be remunerated. He does not have a contractual right to perform his duties.
- [11] The applicant's general statement that the respondents' behaviour is against the first respondent's Employee Disciplinary Code Policy which provides for fairness and efficiency as a basic principle in disciplinary process does not assist him. The reason is his omission to disclose how the specific clause that was breached brought his dispute under the jurisdiction of this court. The respondents submitted, correctly, that the conduct the applicant complains of falls under the jurisdiction of the CCMA.
- [12] The applicant provided no counter submissions to the respondents' averments that his attempt to rely on the rationality and reasonableness of his suspension is misplaced. The allegations are of no relevance in determining whether the relief the applicant is seeking should be granted.

[13] The respondents denied that they violated the applicant's rights by not affording him an opportunity to make representations before the decision to suspend him was taken. Both parties relied on *Long v South African Breweries (Pty) Ltd*⁷. It was the respondents' case that in *Long* the court made it clear that the right of an employee to be heard before a decision to suspend him or her does not exist. The applicant submitted that the court did not lay a general rule to do away with the right but took the decision based on the serious allegations against applicant. The court held as follows:

[24] In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the application was a precautionary measure, not a disciplinary one. This is supported by *Mogale, Mashego and Gradwell*. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.'

[14] The above *dictum* does not support the applicant's interpretation. The court made the correct legal position clear. It merely distinguished between precautionary and punitive suspension.

[15] The applicant seeks an order declaring his suspension invalid and of no legal force. He relies on section 158(1)(a)(iii) and (iv) of the LRA which empowers

⁷ [2018] ZACC 7.

this court to grant urgent relief, a declaratory order and in terms of section 158(1)(a)(iii) ' an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act' Although section 158(1)(a)(iii) is couched in wide terms its operation is not without limits. Its limitations are illustrated in the following *dictum*:

'Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: 'Unfair dismissal and unfair labour practice'. Under the heading appears an indication of which sections fall under the chapter. The sections are reflected as 'ss185-197B'. The chapter starts off with s 185. Section 185 reads:

'Every employee has the right not to be –

- (a) Unfairly dismissed; and
- (b) Subjected to unfair labour practice.'

Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA.'

The Constitutional Court further expressed the view that the legislature deliberately provided that unfair dismissals be outlawed but made no provision for unlawful or invalid dismissal. The court referred with approval in the following

words to *Madrassa Anjuman Islamia v Johannesburg Municipality*⁸ whose correctness was confirmed in, inter alia, *Fose v Minister of Safety and Security*⁹:

'... as a general rule of construction, if it is clear from the language of a statute that, in creating an obligation, the legislature has confined the party complaining of its non-performance or suffering from its breach to a particular remedy, such party is limited to that remedy and has no further remedies. One exception to this general rule is the grant of an interdict.'

[16] The right not to be subjected to unfair labour practice is provided for in section 185 of the LRA. Section 186(2)(b) defines unfair labour practice to include any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee. Section 191 of the LRA provides the procedure to be followed in resolving disputes based on unfair labour practice and section 193 makes provision for remedies for unfair labour practice. Sections 185 to 193 fall within chapter viii of the LRA. The principles based on the absence of the right not to be dismissed unlawfully enunciated in *Steenkamp (supra)* apply equally to the absence of the right not to be subjected to unlawful labour practice. It is the right to be subjected to unlawful labour practice that enables an employee to seek an order declaring the labour practice invalid. Absent that right, the declaratory order may not be sought or granted.

[17] Amongst the allegations the applicant sought to rely on is the unfairness of the decision so suspend him. An employer who suspends an employee unfairly

⁸ 1917 AD 718

⁹ 1997 (3) SA 786 (CC)

acts in breach of section 185 read with section 186(2)(b) of the LRA. The remedies for the breach are limited only to those provided for in section 193 of the LRA. The only exception is an interdict. The applicant did not seek interdictory relief.

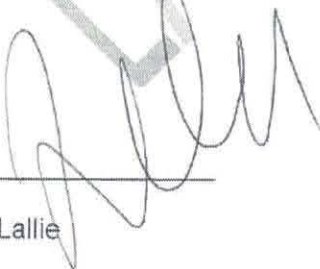
[18] The provisions of section 158(1)(a)(iii) cannot be read in isolation. They therefore do not grant this court power to grant orders to remedy every wrong. The power has boundaries and has to be interpreted in the context of the entire LRA. It covers only those causes of action which fall within the jurisdiction of this court. The applicant did not establish his entitlement to the declaratory order. His application cannot succeed.

[19] The applicant did not act unreasonably in bringing this application, a costs order against him will, in the circumstances not be appropriate.

[20] In the premises, the following order is made:

Order:

1. The application is dismissed.
2. There is no order as to costs.



Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Mhambi
Instructed by	Mashiya Attorneys
For the Respondent:	Advocate M. Grobler
Instructed by	Kirchmanns Inc

LABOUR COURT