IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Of interest to other judges
Case no: J 1177/2017

In the matter between:

LUVUYO NOWALAZA **First Applicant**
INDIVIDUALS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION **Second to Eighteenth Applicants**

and

OFFICE OF THE CHIEF JUSTICE **First Respondent**

MEMME SEJOSENGWE *N.O.* **Second respondent**

Heard: **9 June 2017**
Delivered: **15 June 2017**
Summary:

Urgent application - applicants on fixed term contracts rely upon a reasonable expectation of permanent employment in terms of section 186(1) (b) (ii) of the Labour Relations Act, 66 of 1995.

The Public Service Act, 1994 requires a process of recruitment, advertising and selection before temporary status can be converted into indefinite period employment –whether expectation can be reasonable if subject to a prescribed statutory process.

Section 186 trumps the Public Service Act – applicants not required to follow the recruitment process of the Public Service Act if reasonable expectation of permanent employment established. Reasonable expectation established

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JUDGMENT

COETZEE AJ

Introduction

[1] This matter comes before Court as an urgent application.

[2] The applicants apply for the following relief:

[2.1] 'Declaring the applicants be permanent employees, alternatively fixed term contract employees for the period 1 July 2017 to 30 June 2020, alternatively 1 July 2017 to 30 June 2018 with effect from 1 July 2017 on the same terms and conditions of employment as were agreed between the applicants and the first respondent in the three month fixed term contracts of employment between these parties for the period 1 April 2017 to 30 June 2017;

[2.2] Interdicting and restraining the first respondent from interviewing and placing candidates, including the applicants, in the applicants' current positions as Judges' Secretaries at the Labour Courts throughout South Africa and the Labour Appeal Court.'

[3] When the applicants launched the application, there were 18 applicants. The third applicant has since left the employ of the Office of the Chief Justice (the OCJ). There remain 17 applicants. They are the applicants in this matter.

The background facts

[4] The OCJ was established on 23 August 2010 and is responsible for all aspects relating to the functioning of the superior Courts, including the Labour and Labour Appeal Court.

[5] The OCJ employs all the applicants as Judges' Secretaries.

[6] The OCJ in the past employed them on 12-month fixed term contracts. Some have had their contracts renewed only once, some more times and at least one has had it renewed eight times.

[7] The fixed term contracts, in accordance with the longstanding practice, every year all expired on 31 March of that year. Each year the OCJ (and its predecessor) entered into new fixed term contracts for another year.

[8] It is common cause that over time the OCJ adjusted the remuneration of the Judges' Secretaries in accordance with their seniority and service.

[9] According to the OCJ, it commenced an investigation of appointing all employees appointed on fixed term contracts for longer than three months on a permanent basis.

[10] This investigation commenced "… at some stage after the transfer of the functions of the Superior Courts" to the OCJ. That must have been after the establishment of the OCJ in 2010. The respondents did not disclose the precise date.

[11] Ms Mokoena, the Director Court Operations on an undisclosed date met with the Judges' Secretaries and advised them of the investigation. This must have occurred between 2010 and prior to September 2016.

[12] Mr JS Mabena, the Labour and Labour Appeal Court, Court Manager acting on behalf of the OCJ on 6 June 2016 issued a questionnaire to, amongst others, all the applicants. They were requested to indicate: "Are you willing to be absorbed? Yes/No."

[13] The applicants rely upon the long-standing practice and the repeated number of fixed term contracts for a reasonable expectation of permanent employment.

[14] The OCJ intended to appoint Judges' Secretaries on a permanent basis by absorbing them into permanent positions.

[15] The process to absorb the applicants had been in progress when the Attorney-General (the AG) submitted a report to the OCJ that "… extending of contracts without following recruitment and selection process is in contravention of the Public Service Act and its regulations.[1]" (the PSA).

[16] It is common cause that the PSA demands that the employer in the public service must follow a recruitment, selection and appointment process for the appointment of temporary and permanent staff.

[17] The same procedure applies when temporary employment is converted into permanent employment – a change in status as was contemplated by the AG in respect of the applicants when he reported to the OCJ. The procedure requires an advertisement, interviews, consideration of all candidates and the appointment of the successful candidates.

[18] The AG required the OCJ to follow the prescribed process of the PSA with the filling of the positions of the applicants.

[19] It is common cause that the finding of the AG triggered the events that eventually led to this application.

[20] As a result of the AG's report the OCJ and the AG:

> '… subsequently agreed that when the contracts ended on 31 March 2017, the first respondent would not renew them and thereafter the recruitment process stipulated in the statutory prescripts and Policy would be followed.'

[21] The respondents did not disclose to the applicants the date of this decision.

[22] The OCJ at the expiry of the fixed term contracts at the end of March 2017 then faced the following dilemma:

[22.1] The fixed term contracts of all the applicants expire on 31 March 2017,

[22.2] The OCJ has not yet followed the process required by the AG, and

[22.3] If the OCJ did nothing the applicants according to the OCJ were not employees anymore and without them, the functioning of the Labour Court and the Labour Appeal Court would suffer if not come to a complete standstill.

[1] The Public Service Act, 1994

[23] The OCJ quickly resolved the dilemma (in the short term) by requesting the applicants to enter into fixed term contracts for three months to enable the OCJ to get its house in order. The OCJ required three months for this exercise.

[24] The applicants had little choice in the matter.

[25] Only on 4 April 2017, four days after expiry of his fixed term contract, did the first applicant conclude a contract for a 3-month period effective from 1 April 2017 to 30 June 2017. The other applicants concluded similar contracts.

[26] The OCJ without formally warning the applicants, on 6 April 2017 advertised the posts of 17 Judges' Secretaries in the Labour Court and Labour Appeal Court. The closing date was 13 April 2017. The advertisement made it clear that an application may be unsuccessful and that the Department "reserves the right not to fill these positions".

[27] The OCJ drew the attention of the applicants to the advertisements.

[28] The applicants now faced a dilemma. If they do not apply for the positions they occupy, they, or some of them, might well be unemployed from 1 July 2017. If they applied and were unsuccessful, the same result may still follow. They all applied for the posts in accordance with the advertisement, on their version, "in order to safeguard our employment".

[29] They were 18 candidates for 17 posts when the advertisement appeared and had to compete with an unknown number of candidates who might apply for the posts.

[30] The OCJ subsequently shortlisted 41 candidates for the 17 positions. The applicants in this application do not know whether they have been shortlisted for interviews.

[31] After submitting their applications and subsequent to the closing date of 13 April 2017 the applicants submitted numerous emails to the OCJ as the applicants were concerned and wished to know whether they would be automatically absorbed into the posts as they expected all along.

[32] Ms Tsiane, the Chief Director: HR only on 21 April 2017 addressed an email to a host of recipients. In the email, she confirmed that it had been recommended to the various Divisions of the High Court to consider either permanent

appointment where such posts exist on the establishment and, subject to certain approvals, three-year contracts for the others. She pointed out that the PSA applied.

[33] She further confirmed that approval was given for three-year contracts in relation to some Courts and permanent contracts in relation to others. Approval was given for the permanent employment of the applicants. She did not address the email to the applicants. The email came to their attention.

[34] In reaction to the emails from the applicants and some judges, the OCJ had a 3-hour meeting with the applicants on 9 May 2017. The applicants at this meeting referred to the decision taken by the OCJ to make the appointments permanent by absorbing them into permanent positions.

[35] The meeting of 9 May 2017 was the first direct contact between the OCJ and the applicants relevant to this application.

[36] The OCJ informed the applicants that the OCJ and the AG had taken a decision to follow the PSA and its relevant regulations. No mention was made as to when the decision had been taken.

[37] The applicants during the meeting of 9 May 2017 mentioned that during 2016, a representative from the Service Centre of the OCJ addressed them and informed them that those who wanted to be absorbed would be absorbed and there would be follow-up meetings.

[38] The applicants further mentioned that during 2016, they had a meeting with the Court Manager after having completed yet a further questionnaire on whether they wished to be absorbed and they were informed that they would be absorbed and those who wanted to be permanent would be absorbed automatically.

[39] The meeting concluded on the basis that the OCJ informed the applicants that they had to compete through a recruitment process with the other candidates for the positions they held.

[40] The applicants then acquired the *pro bono* services of their attorneys of record and counsel and a letter of demand was sent to the OCJ on 18 May 2017. They requested the OCJ not to proceed with the interviews of the shortlisted candidates during that week.

[41] They launched the application on 23 May 2017 where after the parties agreed on dates to file their papers and the respondents agreed to stay the process pending the outcome of this application.

[42] The respondents elected to challenge urgency, the jurisdiction of the Court to hear the matter and the merits of the case of its employees.

The arguments and an analysis of the arguments

Jurisdiction

[43] The respondents' first submission is that the horse has bolted and that the Court cannot grant the relief that the applicants seek.

[44] They submit that the OCJ dismissed the applicants on 4 April 2017 when they entered into new 3 month contracts. The respondents rely upon an interpretation of section 190(2) of the Labour Relations Act[2], (the LRA) for the submission**.** It is not necessary to repeat the contents of the section.

[45] The argument would have had merit except for the fact that the OCJ in its papers admitted an anticipated dismissal on 30 June 2017. There is no factual basis for the submission that the horse has bolted and no need to have reference to section 190 of the LRA, as the date is not in dispute.

[46] The alternative submission is that the Court lacks jurisdiction because it cannot deal with a dismissal that has not yet taken place. The submission is that the dismissal, on the version of the applicants, will only occur on 30 June 2017 and the Court cannot now declare an anticipated dismissal unfair or grant any relief in respect thereof. The applicants in any event have an alternative remedy, that of an alleged unfair dismissal available and if successful may later be re-instated.

[47] The short answer is that the applicants want a declaration of rights in respect of their reasonable expectation of further employment to avoid a dismissal.

[48] There are appropriate cases in which this Court intervened to interdict processes because of the fact that a continuation thereof would result in an unfair (automatically unfair) dismissal.

[2] Act 66 of 1995

[49] The first example is where it can be established that a disciplinary enquiry is an occupational detriment arising from a protected disclosure.

[50] The second and more general example is where the employee can establish that it will suffer a grave injustice if the disciplinary enquiry proceeds in the manner contemplated by the employer or where it is an exceptional case.[3]

[51] A third example is in the section 197 litigation. Here, again, the Court does not adopt a position that in the absence of an (automatically) unfair dismissal having occurred, it will not intervene. Instead, it intervenes by way of a declaratory order to avoid one occurring. The position is analogous to the present case.

[52] The Court in any event has jurisdiction to deal with the lawfulness argument and whether the PSA applies as argued by the respondents.

[53] I find that the Court has jurisdiction to entertain the application for a declaratory order and ancillary relief.

Urgency

[54] The respondents placed in dispute urgency.

[55] In the case of *Member of the Executive Council for Education, North West Provincial Government v Gradwell*-[4] the Labour Appeal Court referred to the threshold for intervention in a comparable situation as being, that "… *extraordinary or compelling urgent circumstances*" that must be established by the applicant.

[56] The OCJ submits that there are no such circumstances and any urgency is self-created.

[57] The OCJ submits that the applicants on 4 April 2017 knew that on their version their rights would be affected. If they did not, they should have known on 6 April

[3] *Booysen v The Minister of Safety and Security and others* [2011] 1 BLLR 83 (LAC) at paragraph 54: "… the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered within my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive."

[4] [2012] 8 BLLR 747 (LAC) at para 46. (*Gradwell*)

2017 when the advertisements appeared that they must take steps to protect their rights. They nevertheless neglected to do so.

[58] The fact that their rights were affected negatively should have become even more abundantly clear during the meeting of 9 May 2017 when the OCJ informed them that the OCJ must follow the prescribed process of the PSA.

[59] They delayed the matter and only issued a letter of demand on 18 May 2017 and this, amongst others, demonstrated that the urgency is self-created.

[60] The applicants explained that after the meeting of 9 May 2017 they needed legal representation and advice and sought and found their attorneys of record who agreed to assist them on a *pro bono* basis. The next step was to find suitable counsel to assist them on a *pro bono* basis. This took time. They were criticised for not giving more details of dates and attempts made to demonstrate that they acted as quickly as possible.

[61] The urgency of the matter must, however, also be judged against the pace set by the OCJ before and after the date when the AG submitted its report to the OCJ in September 2016.

[62] According to the OCJ, it commenced an investigation of appointing all employees appointed on fixed term contracts for longer than three months to be appointed on a permanent basis. This investigation commenced "… at some stage after the transfer of the functions of the Superior Courts" to the OCJ. Ms Mokoena on an undisclosed date met with the Judges' Secretaries and advised them accordingly. This must have been prior to September 2016.

[63] The process to absorb the applicants had been in progress when the AG during September 2016 submitted its report that "… extending of contracts without following recruitment and selection process is in contravention of the [PSR]".

[64] Mr Mabena, on 6 June 2016, issued a questionnaire to, amongst others, all the applicants. They were requested to indicate: "Are you willing to be absorbed? Yes/No."

[65] The electronic communication from Ms Tsiane of 21 April 2017 (not directed at the applicants) makes it clear that the response from the applicants had been a preference for the third option i.e. that of permanent appointment. This recommendation had been made and approval had been obtained for

permanent appointment. The rider on 21 April 2017 was that they had to compete through the process demanded by the AG.

[66] The respondents do not disclose when the OCJ and the AG '… subsequently agreed that when the contracts ended on 31 March 2017, the first respondent would not renew them and thereafter the recruitment process stipulated in the statutory prescripts and Policy would be followed.'

[67] They never formally met with the applicants until 9 May 2017.

[68] What is clear is that between September 2016 when the AG intervened and 4 April 2017 the process driven by the OCJ developed at a slow pace and only escalated when the OCJ was faced with a dilemma at the end of March 2017.

[69] The new fixed term contracts were concluded on 4 April 2017 followed by the advertisement on 6 April 2017. The applicants were still in the dark as to their future.

[70] It was only on 21 April 2017 that the OCJ addressed the email to a host of recipients excluding the applicants. They nevertheless came to know of the contents of the email.

[71] The first actual contact between the parties was a meeting between the parties on 9 May 2017 at the Labour Court. This was the first real opportunity for the applicants to raise their concerns and get formal feedback.

[72] The lack of pace on the part of the OCJ in finalising the appointments is relevant to the urgency of this matter. It is important that the first meeting between the OCJ and the applicants took place only on 9 May 2017.

[73] The applicants acted diligently in pursuing their case from 9 May 2017.

[74] The respondents deny that there is anything exceptional about this case to make it urgent. What is different is that the OCJ acceded to the view of the AG that the LRA does not apply to the applicants under circumstances where the parties, at least until the AG arrived on the scene, agreed that their employment status would be recognised as permanent without any formalities.

[75] It is exceptional that the parties were *at idem* that they were to be absorbed onto the permanent staff but instead because of a wrong interpretation and

application of the law, their service to the employer has been disregarded and they were left in the dark.

[76] The Court's interference is further justified by the fact that the OCJ has embarked upon a process to interview 41 candidates and appoint 17 of them under circumstances where the dispute can be resolved without any factual dispute. Unless the Court interferes, much time and human resources will be wasted and the hopes of 41 candidates prolonged in vain.

[77] The nature of the legal dispute makes this case also exceptional.

[78] The applicants persuaded me that they are entitled to approach the Court on an urgent basis to avoid a grave injustice to a large number of people and to determine the novel argument raised by the respondents.

[79] I also have regard to the fact that the dispute must be resolved in the public interest to enable the two Courts to remain functioning in the short term.

The main argument

[80] The applicants allege that the conduct of the OCJ would amount to a dismissal when their contracts expire on 30 June 2017 unless the OCJ recognise their reasonable expectation of renewal of their contracts.

[81] The OCJ in its answering affidavit admitted that such a dismissal would occur if the version of the applicants were correct.

[82] They rely upon the protection of section 186(1) (b) (ii)[5] of the LRA for their employment status.

[83] The applicants submit that by virtue of their reasonable expectation they are (in fact and law) permanent employees and not temporary employees whose positions have to be converted into permanent positions.

[84] There can be no doubt that prior to the report of the AG the OCJ recognised the reasonable expectation of a renewal of the contracts. The practice that the

[5] (1) '**Dismissal**' mean-

(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.'

employer has followed for many years is proof thereof. The applicants also say so. The OCJ was in the process of converting the fixed term contracts into permanent employment for the applicants without a recruitment process when the AG expressed its opinion.

[85] They submitted that their dismissal would also be unlawful as the OCJ wrongfully applies the provisions of the PSA and its regulations.

[86] The applicants denied that the PSA and its regulations apply to them. While in form they may be on fixed term contracts, in substance they are permanent employees by virtue of the operation of section 186(1) (b) (ii) of the LRA.

[87] They also submit that in any event the positions that the OCJ advertised are not vacant positions. The position is that the provisions of the PSA can only apply to a vacant position. Because they are in substance permanent employees, there are no vacancies to advertise.

[88] They occupy those positions and have a reasonable expectation to keep on occupying those positions for another year or on a permanent basis.

[89] The OCJ in these proceedings disputed that they harboured a reasonable expectation. The OCJ argues that the applicants after 4 April 2017 and certainly after 6 April 2017 could never have harboured a reasonable expectation of any form of appointment because of the information provided to them and because on 4 April 2017 they concluded the new contracts for three months.

[90] The fact that they entered into short term contracts on 4 April 2017 cannot serve to show that they had no expectation of further employment. They entered into the contracts to solve the short-term dilemma of the OCJ. They did not enter into the contracts because they harboured no expectation of further employment. They applied for the positions not because they had no expectation of permanent employment, but in order to protect their employment.

[91] The applicants expressed their expectation. They expressed their understanding that the new contracts constituted a holding position for the OCJ. They at all times wished to pursue their rights to employment. They harboured such an expectation.

[92] The further argument is that even if there was such an expectation, it can never be a reasonable expectation if it is in conflict with a statutory provision. The PSA has such a statutory provision fortified by the relevant regulations.

[93] The argument is that because the PSA requires a prescribed process for appointments or any conversion of temporary status to a permanent status, the expectation at best can be to be included as candidates for the positions when the OCJ (in this case) follows the prescribed process. Therefore, they cannot harbour an expectation of permanent appointment without going through a recruitment process.

[94] The argument that the expectation can never be reasonable if it is in conflict with a statutory requirement has a serious consequence. The consequence is that in the public service no temporary employee can ever rely upon the protection of section 186(1) (b) (ii) of the LRA.

[95] There is a clear conflict between section 186(1) (b) (ii) and the PSA and its regulations. The LRA resolves such a conflict in section 210[6] in favour of the LRA. The LRA also specifically states that it binds the State.[7]

[96] Section 186 must therefore trump the provisions of the PSA where employees rely upon a reasonable expectation of permanent employment (or a further fixed term contract).

[97] The dispute between the parties as to whether the PSA and its regulations apply is resolved in favour of the applicants. There is nothing in law that prevents them from harbouring a reasonable expectation of further employment without having to comply with the provisions of the PSA and its regulations.

[98] The OCJ submitted that by entering into the new contracts, the applicants not only could not harbour an expectation of employment but also *waived* any claim thereto.

[99] The argument that the applicants waived their right to further employment by entering into the contracts is also without substance. The presumption against waiver requires of the OCJ to persuade the Court of waiver. The circumstances

[6] "Section 210 **Application of Act were in conflict with other laws**
(1) if any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law says the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."
[7] Section 209.

pertaining to the entering into the new contracts and the conduct of the applicants do not demonstrate any waiver.

[100] It is clear that the parties (before the advent of the AG report) contemplated permanent employment for the applicants on the terms and conditions similar to those in the current fixed term contracts. They are entitled thereto.

The interdict

[101] The respondents deny that the requirements for final relief in respect of an interdict have been established.

[102] I have found that the applicants have made out their case of a clear right in terms of the LRA.

[103] They entertain a reasonable apprehension of harm in that they will not be successful during the interview competing with 41 other applicants and that they might be left without a job.

[104] The respondent submit that the applicants have an adequate alternative remedy in that they may pursue an unfair dismissal dispute if they are dismissed on 30 June 2017.

[105] There is authority for the proposition that it must be an *adequate* alternative remedy. In this case the respondents act unlawfully in advertising the positions and in filling the positions in accordance with the PSA and its regulations. The alternative remedy is inadequate in that there is no reason why they should be prejudiced because of the wrong application of the law.

[106] The Court has a discretion to grant an interdict. This is an appropriate case to grant interdictory relief.

[107] Both parties left the matter of costs with the Court. The parties are in an ongoing relationship. The matter involved a somewhat novel point of law unsuccessfully raised by the respondents.

Order

[108] I make the following order:

1. The forms and service provided for in the Labour Court Rules are dispensed with and the matter is treated as one of urgency in terms of Rule 8.

2. The applicants are declared permanent employees on the same terms and conditions of employment as were agreed between the applicants and the first respondent in the three month fixed term contracts of employment between the parties for the period 1 April 2017 to 30 June 2017.

3. The first respondent is interdicted and restrained from interviewing and placing candidates, including the applicants, in the applicants' current positions as Judges' Secretaries at the Labour Courts throughout South Africa and the Labour Appeal Court.

4. Each party to pay their own costs.

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F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant:	Adv AT Myburgh SC, with Adv MJ van As
Instructed by:	Edward Nathan Sonnenbergs
For the First Respondent:	Adv G Hulley SC with Adv T Motloenya
Instructed by:	State Attorney Johannesburg