Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J 122/17

In the matter between:

EPHRAIM MASHABA **Applicant**

And

SOUTH AFRICAN FOOTBALL ASSOCIATION ("SAFA") **Respondent**

Heard: 14 February 2017

Delivered: 21 February 2017

Summary: (Urgent – temporary relief pending outcome of CCMA proceedings – no prima facie right –existence of alternative remedies)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant in this matter is Mr E. Mashaba. Until his dismissal on 21 December 2016 by the South Africa Football Association ('SAFA'), he was the head coach for the Senior Men's National South African Football team ("Bafana Bafana"). He has referred a case of unfair dismissal to the CCMA, which he believes he has a good prospect of winning. The arbitration proceedings in the CCMA are currently scheduled to take place over three days starting on 7 to 9 March, though given that his disciplinary hearing took five days it is by no means clear that the CCMA hearing will be finished in three.

[2] Mr Mashaba's concern is that even if he succeeds in his unfair dismissal claim and is entitled to reinstatement as part of his relief, he might already have been replaced by SAFA. He believes it is unlikely in those circumstances that a Commissioner will order his reinstatement. Mr Mashaba has launched these proceedings in the Labour Court to try and prevent the appointment of a new head coach from damaging his prospects of reinstatement. The specific relief he seeks in this Court as a matter of urgency is to restrain SAFA from appointing a new head coach pending the outcome of his CCMA proceedings.

Nature of the relief

[3] Mr Mashaba argues that, since he is merely asking for this relief as a temporary measure pending the outcome of the CCMA proceedings his application is an application for interim relief only. In applications for interim relief the test which applied by the courts is that an applicant must demonstrate: a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted, even if the ultimate relief is granted; the balance of convenience in favour of granting the relief must lie with the applicant, and no satisfactory alternative remedy is available to the applicant.[1]

[4] Strictly speaking, although Mr Mashaba seeks temporary relief to prevent SADA appointing a new coach in the meantime, he will not be returning to

[1] Setlogelo v Setlogelo 1914 AD 221 at 227

court to make any such temporary order a final one, but he hopes that if he is successful in the CCMA the need for a final order in this court will become irrelevant if he is reinstated in the position of head coach. It may be a matter of debate whether the relief he seeks in this Court is really interim relief in the true sense because the relief he seeks is to stop SAFA contracting with a third party, whereas the relief he will obtain in the CCMA, if wholly successful, is to guarantee his reinstatement in the job, irrespective of any contracts SAFA might have entered into with a third party in the meantime. The requirement for obtaining final relief is more onerous because an applicant must establish the existence of a clear right. Nevertheless, even though his application might well be an application for temporary but final relief for which Mr Mashaba would have to establish a clear right, I will assume in his favour that he only needs to establish a prima facie right.

Urgency

[5] Mr Mashaba urges the court to treat this as a matter of urgency because he believes the appointment of a new head coach may be imminent. In this regard, the CEO of SAFA, Mr Mumble, has stated publicly that SAFA would be urgently consulting with its internal structures to find a replacement as soon as possible. As yet, SAFA has not decided on whom to appoint but concedes that it is in the process of "inviting applicants for the position and going through the process of identifying specific individuals who may qualify for the position with the intention of approaching them", but stated that this process will only commence when the SAFA's President returns from abroad. Nonetheless, there is no assurance provided by SAFA that a replacement might not be found and appointed before the conclusion of the arbitration proceedings. Consequently, in so far as Mr Mashaba can demonstrate that he is entitled to prevent such an appointment being made pending the outcome of his proceedings, I accept that it should be dealt with as a matter of urgency.

The prospect of irreparable harm and the existence of an alternative remedy

[6] Under the Labour Relations Act, 66 of 1995 ('the LRA') an employee whose dismissal is found to be substantively unfair is entitled to expect reinstatement as a remedy if the employee does not simply want compensation, provided two other considerations are not applicable. Section 193(2) of the LRA states:

> "The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
>
> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure."

[7] It is clear from the preamble of the section that the Commissioner or the Court is obliged to order the reinstatement or re-employment of an employee whose dismissal is substantively unfair, unless one of the conditions in the subsections applies. In Mr Mashaba's case, he believes he will succeed in establishing that his dismissal was substantively unfair and accordingly he will not be denied reinstatement on account of section 193 (2) (d) which has no practical effect unless a dismissal is found to be only procedurally unfair. Clearly, subsection 193(2)(a) will not apply unless Mr Mashaba changes his mind and abandons his quest for reinstatement. Consequently, if he is successful in convincing the arbitrator that his dismissal by SAFA was substantively unfair only subsections 193 (2) (a) and (b) could stand in the way of his reinstatement or reappointment. Whether subsection 193 and (2)(a) would present a problem for his reinstatement will not depend on the appointment of another coach, because that provision is only concerned with the extent to which the relationship between the dismissed employee and the employer had deteriorated to such an extent around the time the dismissal took place

that the prospect of a relationship of mutual respect and trust being restored is unlikely.

[8] The remaining provision which could present an obstacle to his reinstatement, assuming he is successful in establishing that his dismissal was substantively unfair, is subsection 193(2)(c). Mr Mashaba fears that if a new national coach is appointed, a Commissioner contemplating reinstating him might feel that the existence of a newly appointed coach would make it "not reasonably practicable" for the employer to reengage him and might deprive him of the reinstatement he believes he deserves.

[9] However, merely because Mr Mashaba's reinstatement would present a problem for SAFA if it appoints another person to the position in the meantime, that would not be sufficient justification for SAFA to say that the employment of a replacement would make it "reasonably impracticable" to reinstate him. The phrase "reasonably impracticable" does not simply mean inconvenient or impractical. The LAC has made this clear in its decision in *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v Num Obo Masha and Others*[2], where it said amongst other things:

> "The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."

[10] An employer may not thwart a dismissed employee's bid for reinstatement by replacing him and then arguing that it cannot reinstate the dismissed employee because there is someone occupying his former position.[3] That is an eventuality the employer must take into account when it replaces a

[2] (JA 4/15) [2016] ZALAC 25; (2016) 37 ILJ 2313 (LAC) (14 June 2016) at para [11].

[3] See *Volkswagen SA (Pty) Ltd v Brand NO & Others* [2001] 5 BLLR 558 (LC) at para [102] and also *Draken Industries CC v Maande and Others* (JA 69/2013) [2014] ZALAC 42 (19 August 2014) at para 23..

dismissed employee who is challenging their dismissal. In other words, if the employer does not take suitable steps in its contract with the replacement, it ought to realise it runs the risk that it will be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement's contract if the former incumbent is reinstated.

[11] Thus, on a proper interpretation of section 193(2)(c), if SAFA does appoint a replacement head coach before learning of the outcome of Mr Mashaba's case, that appointment cannot protect it against an order of reinstatement. Consequently, Mr Mashaba will not be deprived of his right to reinstatement, if the only consideration which might stand in its way is the employment of a replacement coach before his CCMA case was decided. That is not a factor which should influence any arbitrator deciding if there is anything which prevents his reinstatement, if he decides that Mr Mashaba's dismissal was substantively unfair.

[12] In light of the above, if SAFA takes the risk of employing a replacement coach there is no reason to believe that this factor will cause Mr Mashaba irreparable harm in his bid for reinstatement. It is the arbitrator exercising his or her powers under section 193(2)(c) who is given the power of reinstatement under the LRA, which is the right which Mr Mashaba seeks to preserve by bringing this application. The arbitration proceedings provide not merely a suitable alternative remedy but the primary remedy for any dismissed employee seeking reinstatement who has been dismissed for misconduct. There was no need to bring this application in order to preserve that remedy for the reasons already discussed. Thus the potential harm Mr Mashaba may suffer as a result of the appointment of a replacement before the CCMA decides his case is not irreparable and the remedy of reinstatement remains available as an alternative remedy notwithstanding such an appointment.

<u>Existence of a prima facie right to prevent SAFA employing a replacement</u>

[13] The right which the LRA provides by virtue of section 193(2) is the right of an employee to be reinstated if their dismissal is found to be substantively unfair and provided none of the subsections are applicable. As discussed above, an order of reinstatement pays no heed to other contractual

arrangements that might have come into existence between the employer and a replacement. That is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position. However, the fact that the arbitrator or the court may impose a reinstatement on an employer does not necessarily mean that the court can dictate how the employer conducts itself in concluding employment contracts with other third parties, unless such appointments may be challenged on other grounds such as being unlawful in terms of a statute.[4] The Labour Court, certainly has the power to enforce the terms of employment contracts,[5] but I know of no provision in any of the statutes which empowers the court to *prevent* the conclusion of private employment contracts. Likewise, the fact that Mr Mashaba may acquire a right to reinstatement once he is able to establish that his dismissal was substantively unfair, does not translate into a right to keep his position vacant merely on the assumption that he might be able to do so.

[14] This brings to the fore a further complicating factor which is implicit in this application. Since his right to reinstatement will only arise as a possibility if Mr Mashaba succeeds in establishing the substantive unfairness of his dismissal, and assuming that the right of reinstatement in some way could be a platform for a right to interfere beforehand in the employment of replacement staff, the court would necessarily have to take a provisional view that his dismissal will most probably be found to be substantively unfair. This is because his prospect of reinstatement will only arise if that is established. This would require the court to effectively second-guess the outcome of the arbitration proceedings, which the LRA has designated as the appropriate proceedings in which the substantive fairness of a dismissal for misconduct and any award of consequential relief must be determined.

[15] Consequently, the right Mr Mashaba argues for, apart from the difficulties highlighted above, is also fundamentally premised on his expected

[4] See e.g *Khumalo & another v MEC for Education, KwaZulu-Natal* (2013) 34 *ILJ* 296 (LAC)

[5] *Rand Water v Stoop & another* (2013) 34 *ILJ* 576 (LAC) 585-8, paras [19] to [35]

success in the CCMA proceedings, which is not for the court to evaluate in the context of urgent motion proceedings.

[16] In all the circumstances, I am not satisfied that Mr Mashaba has demonstrated the existence of a right to prevent the employment of a replacement coach pending the outcome of his arbitration proceedings, even if he would be entitled to reinstatement at the conclusion of those proceedings. In these circumstances, it is also not necessary for me to consider the balance of convenience.

[17] In passing, I should mention that all the considerations about the importance Mr Mashaba regaining his position as head coach and the importance of him fulfilling his dream of taking Bafana Bafana to the FIFA World Cup in 2018, which *Mr Bollo* strongly urged the court to consider in deciding the application, are matters best left for the arbitrator to deliberate on and have no direct bearing on the merits of this application.

Order

[18] The application is dealt with as one of urgency and the rules of the Labour Court relating to service and time periods are dispensed with.

[19] The application is dismissed.

[20] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant :	C Bollo of Biccari Bollo Mariano Inc
For the Respondent:	A Myburgh SC instructed by JMT Attorneys