IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J380/17

In the matter between:

SITHA SIHLALI & 96 OTHERS **Applicants**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **First Respondent**

BOFFIN AND FUNDI (PTY) LTD **Second Respondent**

Heard: **10 February 2017**

Delivered: **29 February 2017**

Summary: **An applicant seeking to be heard on an urgent basis is obliged to meet the requirements of rule 8 of the Rules of this Court in full. The Labour Court should entertain cases of interdicting a recruitment and appointment process *only in exceptional* instances. A respondent who files an affidavit that supplicates an applicant's case in the circumstances where no relief is sought against it runs the risk of being mulcted with a costs order. Held: (1) A plea of non-joinder is**

bad in law and principles restated. (2) The application for an interdict is struck off the roll due to lack of urgency (3) The applicants and the second respondent to jointly and severally pay seventy five percent of the first respondent's taxed or agreed costs, the one paying absolving the other. Practitioners' attention is drawn to paragraph 29 of this judgment.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an opposed urgent application brought in terms of rule 8 of the Rules of this Court. The application is opposed by the first respondent only. The second respondent only filed an "explanatory affidavit". The applicants are seeking an order interdicting and restraining the first respondent from taking any further step in recruiting, interviewing and or appointing candidates/persons in all the positions advertised under the adverts issued on 13 February 2017 save for the identified six positions. Further, that the recruitment and interview process for the positions advertised under the adverts be stayed pending the final determination of Part B of the application.

[2] In Part B, the applicants are seeking a declarator to the effect that they have been appointed by the first respondent effective 01 September 2016. That the first respondent's unilateral termination of the applicants be reviewed and set aside. The six months' contracts offered to the applicants in November 2016, be declared invalid and be set aside. That the first respondent be directed to extend to all the applicants all the benefits which accrued to them by virtue of their

employment status. The first respondent be mulcted with costs on attorney and own client scale. The Part B relief is not before me.

Background facts

[3] It is not my intention to canvass all the background facts in this matter. I shall only canvass facts relevant to the Part A claim. In 2014 the first and second respondent entered into an agreement to provide credit control functions to the first respondent. Following a regulation 36 process, the second respondent was recommended for appointment. On 26 February 2014 the relevant committee, approved with a condition that the second respondent should utilize the staff from the *Tshepo 10000* and at the conclusion of the agreement, the first respondent was obligated to handover the equipment and staff to form part of the internal capacity. I pause to mention in passing that this contractual arrangement meant that the staff from *Tshepo 10000* would gain employment without complying with the recruitment processes of the first respondent. I doubt the legality of this arrangement. Nonetheless, this is a matter to be entertained by the judge hearing Part B in due course.

[4] In August 2016, the first respondent gave notice to the second respondent that the contract would expire on 01 September 2016. Following that, meetings were held wherein certain officials of the first respondents gave certain undertakings. Again, I remark in passing to express doubt on the authority of those officials ostensible or otherwise. On 1 September 2016, the applicants before me and others not before me gathered at Sammy Marks where an official of the first respondent informed them that they should await a call as to when they should report and where. Later, they were informed that all the technical teams were to report at Clubview and the Dispatch team to report at Sammy Marks from 5 September 2016.

[5] Indeed, on 6 September 2016 the applicants reported for duty at the various centers. On this day a Human Resources official advised them that the Department was busy finalizing their contracts. They were advised to report for work daily from 07h00 to 12h00 until further notice. They duly obliged. There was toing and froing for the month of September. On 26 September 2016, they did not get paid as promised. Upon enquiry, they were informed that the ushering in of the new administration after the local government elections occasioned the delay. Effectively they spent the whole month of October engaging the officials of the first respondent. The saga continued until 03 November 2016 when they were paid their salaries.

[6] On 08 November 2016, they secured a meeting with the Mayor of the first respondent. According to the applicants as an interim solution he offered them six months' employment contracts, which would allow him an opportunity to "*clear the mess he inherited including the second respondent*". It was at this meeting that the applicants informed the Mayor that—

> "*our expectations* were that we would be transferred to the City on a permanent basis at the conclusion and or termination of Boffin's contract; and our salaries would be aligned to the City's grades i.e. we shall retain the salaries we earned at Boffin." (Emphasis added.)

[7] On the applicant's own version, the Mayor maintained that he was going to offer them six months' contracts and nothing more. To this clear assertion, the applicants retorted that they were going to seek a legal opinion on the matter. There is no allegation that the Mayor agreed to their retorts and or suspended his assertion. I pause to mention that the applicants left that meeting with a clear and unequivocal assertion from the Mayor that, six months' contracts of employment and nothing more. This assertion is not in concert with their expectation.

[8] After a month the applicants started receiving the six months' contracts. By 20 December 2016, all had received the contracts. Some signed as demanded by the first respondent (few on the applicants' version) while others did not. Mainly all the applicants before me did not sign. I pause to mention that on their own version they remain with the expectation that they will be transferred to the first respondent on a permanent basis.

[9] Almost three months later, a letter was addressed from Mabuza Attorneys. This letter was captioned: *Demand: Permanent appointment of our clients*. The concluding paragraphs of this letter read in parts as follows:

> "In particular, you are required to give a written undertaking that the City ***will make permanent our clients'*** employment effective from 1 March 2017."[1] (Emphasis added.)

[10] I pause to mention that the demand was effectively to meet the expectations of the applicants. Ironically the letter of demand does not refer to a section 197 transfer. The letter refers to the actions of the first respondent in not making the applicants permanent as being unlawful, prejudicial and unfair.[2] I can only assume that the letter contains the legal opinion that was to be sought after the Mayor's clear and unequivocal assertion. Suffice to mention that the first respondent did not furnish the requested written undertaking.

[11] On 13 February 2017, the first respondent through its intranet and public website advertised various positions. All these positions were vacancies in Utility Services Department of the first respondent. According to the

[1] Paragraph 14 of the letter page 115 of the paginated papers.

[2] Paragraph 12 of the letter page 115 of the paginated papers.

applicants the advertised positions were less than the number of employees from the second respondent. The first respondent contends that it is its right to advertise job vacancies in line with the applicable Collective Agreement. The closing date for the advertised positions was 24 February 2017. The applicants consulted each other and took a decision to launch the present application in the two parts that I have alluded to earlier.

Evaluation

[12] As pointed out earlier the first respondent opposed the granting of Part A of the application. It raised two preliminary points. The first related to non-joinder and the other related to lack of urgency.

[13] The first point is bad in law and I do not uphold it. In its nature, non-joinder is a plea in abeyance. The principle around this plea was succinctly and accurately articulated in the matter of *Burger v Rand Water Board and Another*[3] where the SCA held as follows:

> "The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party [ies] has [have] a direct and substantial interest in the issues involved and the order which the court might make[4]."

[14] In raising the plea, the first respondent relied on some clauses in the Collective Agreement.[5] The contention is that the two Unions who are parties to the Collective Agreement should have been joined. Mr Lekala appearing for the first respondent was unable to point out to the Court how the contemplated interdict will affect the two Unions. It may well be

[3] 2007 (1) SA 30 (SCA).

[4] Id at para 7.

[5] Broadly, the clauses relied on deal with recruitment processes within the City. Clauses 1.1, 1.5, 21, 8.1.1.

that members of those Unions have applied for the positions, and an order stopping the appointment process would affect them. However, that was not the basis of the non-joinder. I do not see how the Unions will be affected by a potential order to be made in the present matter. If they are affected, they may resort to the provisions of section 165 of the Labour Relations Act.[6]

[15] In *Judicial Service Commission and Another v Cape Bar Council and Another*[7], the SCA reiterated the position thus:

> "It has by now become settled that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned…The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea…"

[16] Accordingly, I view this non-joinder plea as one for convenience as opposed to the one contemplated in the authorities above. Nonetheless, given the view I take at the end, the point is academic.

[17] The second point relates to urgency. I believe that this point is valid and ought to be upheld. Rule 8 of the Rules of this Court requires a party seeking urgent relief to set out reasons for urgency and why urgent relief

[6] 66 of 1995 (LRA). Section 165 is entitled "Variation and rescission of orders of Labour Court" and provides:

> "The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order—
>
> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings."

[7] 2013 (1) SA 170 (SCA); 2012 (11) BCLR 1239 (SCA) at para 12.

is necessary. In *Maqubela v SA Graduates Development Association and Others*[8], this Court stated the following:

> "Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her affidavit the reasons for urgency and to give cogent reasons why urgent relief is necessary…"[9]

[18] In *AMCU and Others v Northam Platinum Ltd and Another*[10], this Court emphasised the following further consideration:

> "A final consideration when it comes to urgency is the expedition when taking action. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event-giving rise to the proceedings, the more urgency is diminished."

[19] The reasons for urgency in the matter before me are set out in the founding affidavit at paragraphs 19-23. Those can be summarized to be that the advertisements triggered urgency. That the applicants' immediate reaction was to seek legal advice.

<u>Did the advertisement truly trigger the urgency?</u>

[8] [2014] 35 ILJ 2479 (LC); [2014] 6 BLLR 582 (LC).

[9] Id at para 32.

[10] [2016] 11 BLLR 1151 (LC); (2016) 37 ILJ 2840 (LC) at para 26.

[20] The applicants' gripe is that they had an expectation to be employed by the first respondent on a permanent basis. When the Mayor asserted that they would not be so employed as expected, the event-giving rise to these proceedings arose. There is a clear disjuncture between the applicants' gripe and the act of advertising the positions. The disjuncture is made apparent by the demand in the letter from Mabuza Attorneys. The letter demands that the expectation should be met-to be employed permanently. On the applicants' own version, they were not permanently employed.

[21] All they had was an expectation. That being the case, how does advertising positions, as routinely done out of necessity, thwart their expectations, is beyond me. There is what is termed self-created urgency. The situation herein is a classical case of such. By the time the advertisements arose, the applicants had a gripe already, which gripe they expressed in no uncertain terms to the Mayor on 8 November 2016. The applicants should have, if there was any urgency, approached this Court then. Why they did not do so, it is not explained. Instead what is apparent is that they sat back, took their time until they obtained a legal opinion after almost three months.

[22] Of importance, it is not clearly contended that those positions so advertised are theirs. On the contrary, Ms Sitha Sihlali gave contradictory evidence by stating that the first respondent advertised the jobs we currently occupy. This evidence contradicts the fact that firstly, they had an expectation to be employed and secondly that her and the other applicants (as confirmed by Mr Mmusi for the applicants) did not sign the six months' contracts. Other than testifying that they took a view to challenge the advertisements, this Court is not informed why it is contended that the jobs are what they currently hold. Accordingly, I do not agree that the advertisement is the true trigger of the alleged urgency. If there was urgency on 8 November 2016, such urgency had dwindled by the 24 February 2016.

Is the matter urgent nonetheless?

[23] During argument, I drew both counsels' attention to a decision of this Court in the matter of *Ephraim Mashaba v SAFA*[11]. After perusing the authority, Mr Mmusi sought to suggest that since Lagrange J decided to hear the matter as one of urgency, I must without more hear the matter before me as one of urgency. I need to state that hearing a matter as one of urgency involves an exercise of discretion. Such discretion is exercisable after being satisfied that the requirements of urgency espoused above have been met. Besides, Lagrange J stated the following:

> "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."[12]

[24] In *casu* I am not told when are the appointments likely to be made. The only thing I am told is that the closing date is the 24 February 2017. This closing date poses no threat to them because they have resolved not to apply. All I am told is that the applicants were told that by 1 March 2017, they would be without positions. This proposition is startling beyond measure. The applicants, on their own version, are still expecting permanent appointment. They are not under any fixed term contract, which is to expire at the end of February 2017. Section 186(2) of Labour Relation Act, prescribes that an employee who was employed on a fixed term contract and reasonably expects to be retained on a permanent basis, if not so retained is dismissed. The applicants' case is far from

[11] Case no J122/17 delivered on 21 February 2017 per Lagrange J.

[12] Id at para 5.

that. I do not see how they can remotely think of a dismissal by end of February 2017, in the circumstances where they are not under a fixed term contract regime.

[25] Another consideration for urgency is whether there is substantial relief at a later stage. The immediate difficulty I have with the applicants' case is that they are not staking appointment to the advertised position. I have already expressed doubt with the unsubstantiated testimony of Ms Sihlali that these advertised vacancies are their current position. Unlike in *Mashaba*, there is no evidence that they ever held those positions and were dismissed from them unfairly. In Part B, the applicants are still chasing a declaratory that the first respondent employed them on 1 September 2016. In argument it appeared so that the applicants wish to rely on the provisions of section 197 of the LRA. In fact, the second respondent suggests that the first and second respondent contemplated the provisions of section 197 in the arrangement I referred to earlier in this judgment.

[26] Nonetheless, I am not sure whether there was a transfer within the contemplation of section 197. As I have pointed out I see this arrangement as a way to appoint in circumvention of the recruitment procedures. From day one of the arrangement between the first and second respondent a "legal regime" was created to appoint the applicants without following the Collective Agreement. A true section 197 position arises if at the end of the contract, the second respondent sold the business or portion thereof to the first respondent as a going concern. However, these issues will detain the judge to hear the Part B claim. Therefore, if the judge hearing Part B arrives at the conclusion that section 197 situation has arisen, then the rights and obligations will transfer to the first respondent. Such is a substantial redress in due course.

[27] Other than seeking to rely on the *Mashaba* judgment on the findings on urgency, Mr Mmusi argued that the judgment is distinguishable when it held thus:

> "[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."

[28] I fully agree with Lagrange J when he held that the Labour Court certainly has powers to enforce the terms of employment contracts, but he knows of no provision in any of the statutes, which empowers the Court to prevent the conclusion of private employment contracts. This true statement of law implies that this Court is not empowered as it were to interdict a process, which may lead to a conclusion of an employment contract. To my mind this Court should as a matter of course refuse to entertain applications seeking to prevent recruitment processes unless exceptional circumstances are shown to exist.

[29] I take this opportunity to warn practitioners approaching the urgent court with such matters to ensure that such exceptional circumstances as contemplated in the ***Booysen's*** case do exist. Otherwise they run a risk of punitive costs being made against their clients. It is good practice for practitioners practicing in this Court to keep themselves abreast with the judgments of this Court particularly those arising from the urgent court. There is a developing trend that points to the fact that the urgent court is being abused. Might I state, an urgent court is meant for urgent matters. This Court should not be detained to use its scarce, valuable time entertaining self created urgent matters. Practitioners should exercise greater care when considering approaching this Court on urgency in matters where substantial redress is obtainable in due course.

[30] The case before me does not present any such exceptional circumstances that I have in mind to be expressed some other day. Exceptional circumstances are to be determined case by case. Accordingly, I firmly hold a view that the applicants have failed to meet the requirements of rule 8. Accordingly, I exercise my discretion and refuse to hear this matter as one of urgency.

[31] Turning to the issue of costs. Mr Mmusi argued that the first respondent should be mulcted with punitive costs. He accepted though that costs should follow the results. In terms of section 162 of the LRA I have discretion to order costs taking into account the law and fairness. The ordinary course is to order the applicants to pay the costs of the respondents. But I am minded to order the applicants together with the second respondent to pay the costs of the first respondent. The following is motivating me.

[32] I consider the second respondent as a co-applicant. The applicants cited it and specifically stated that no relief will be sought against it. I am curious to know why if no relief is sought against it the second respondent chose to enter the fray. The entire affidavit of Mr Nkosi, the Managing Director seeks to supplement the case of the applicants. He seeks to suggest that a section 197 transfer has taken place. Instead of providing historical background as he swore to do, he gratuitously offered a legal basis for the arrangement.

[33] He (Mr Nkosi) makes reference to a section 197 transfer when the text in the agreement relied on by the applicants makes no such reference. All of this is intended to strengthen the case of the applicants as opposed to weakening it as a respondent is expected to do.

[34] Since I agree that costs should follow results, then the first respondent is liable to the costs related to the non-joinder plea. The first respondent failed to have that plea upheld. Since the matter was heard as a composite lis, the only appropriate way to deal with the costs is to apportion them. Accordingly, in my view the substantial success of the first respondent entitles it to seventy-five percent of the taxed or agreed party and party costs.

[35] In summary, I come to the conclusion that the application is not one to be heard on urgency and the non-joinder plea must fail. The applicants have failed to meet the requirements of rule 8.

Order

[36] In the results, I make the following order:

1. Part A of the present application is struck off the roll due to lack of urgency.

2. The applicants jointly with the second respondent are to pay seventy five percent of the first respondent's taxed or agreed party and party costs, the one paying absolving the other.

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GN Moshoana

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Mr L A Mmusi
Instructed by: Mabuza Attorneys, Houghton.

For the First Respondents: Mr R Lekala
Instructed by: Ngoato Attorneys, Pretoria.

For the Second Respondent: Mr D Nel
Instructed by: KMG Attorneys, Pretoria.