IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J616/23

In the matter between:

NELLY LETSHOLONYANE **Applicant**

and

MINISTER OF HUMAN SETTLEMENTS **First Respondent**

ACTING DIRECTOR GENERAL: DEPARTMENT OF HUMAN SETTLEMENTS **Second Respondent**

Heard: **3 May 2023**

Delivered: **15 May 2023**

JUDGMENT

MAKHURA, AJ

Introduction

[1] When an employee is faced with an immediate or summary termination of her employment based on alleged misconduct before first following the agreed

procedure contained in the contract of employment and/or any binding applicable procedure, what is she to do? To refer an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant bargaining council? Or to approach this Court or the High Court to claim specific performance of her contract of employment? Is she limited to only one of these options or can she pursue both options separately?

[2] In the present matter, the applicant's employment contract was summarily terminated by the Minister of Human Settlements (Minister) on 20 April 2023. Her reaction to this summary termination was to approach this Court on an urgent basis, seeking a declaratory order that the summary dismissal breached her contract of employment and was unlawful, that the status *quo* be restored (i.e. she be reinstated to her employment with effect from the date of her dismissal), and that the Minister or her delegate be prohibited from terminating her before complying with clause 2.7(2) of the Senior Management Service Handbook (SMS Handbook).

Material facts

[3] The applicant was employed by the Department of Human Settlements (Department) as a Deputy Director General, Corporate Services (DDG), with effect from 1 December 2005. By virtue of her position as a DDG, she was a member of the Senior Management Service (SMS). Clause 1 of her contract of employment, which was signed by both parties on 23 February 2010, confirms that she was a member of the SMS. As a result, the SMS Handbook applies to her.

[4] At approximately 19h53 on 14 March 2023, the Minister posted on a WhatsApp group that she was stuck in the lift or elevator and that she was informed that the responsible person had already left work. The applicant immediately contacted the Acting Director: Facilities and Security (Ms Shabangu) and advised her to contact Melco Elevators, the company responsible for the maintenance of the elevators, to urgently attend to the elevator.

[5] At approximately 19h54, the applicant received a telephone call from the Acting Director General (ADG) advising her of the incident. The applicant advised the ADG that she had already communicated with Ms Shabangu to attend to the matter.

[6] At approximately 19h55, the applicant contacted the Deputy Director: Corporate Support (Mr Nemaguvhumi) to assist in obtaining security personnel to attend to the elevator and assess the incident. She also immediately contacted the full-time Director: Facilities and Security (Mr Raseleka), who was on leave, and requested him to assist in contacting Melco Elevators to attend to the incident.

[7] At approximately 19h56, the applicant contacted Ms Shabangu to enquire about the progress. Ms Shabangu informed her that she had contacted Melco Elevators and that the technician was on his way to the building.

[8] At approximately 07h30 on 15 March 2023, the applicant was called into the Minister's office. She was issued with a letter of intention to dismiss for her alleged gross negligence that threatened the lives of the employees. The Minister requested the applicant to provide her with a written explanation by close of business on 16 March 2023 why she should not be summarily dismissed for putting the lives of the employees and others who work at the building at risk. The letter went on to state that the "*misconduct emanated from an incident that occurred on 14 March 2023*" where she and others were "*trapped in a lift for a period of more than one hour*". The allegations of misconduct were elaborated as follows:

> '1. You have failed to ensure as head of branch and manager responsible to ensure (sic) regular maintenance of the building and/or the lifts, to avert risk;
>
> 2. You have failed to mitigate risk in case of occurrence of such an incident of emergency by ensuring someone or responsible service provider to be on side (sic) to respond timeously;

3. You ought to have known that there were still people working in the building at the time when the incident occurred;

4. Your action of negligence in the execution of your duties has potential risk of litigation against the department;

5. You failed to timeously respond to an incident that took place at around 19h40 in the department.'

[9] The applicant submitted her written explanation in which she denied the alleged misconduct and indicated that the appropriate forum to deal with these allegations would be in a disciplinary hearing.

[10] On 3 April 2023, the applicant was called into a meeting with the Minister and the ADG. In this meeting, the Minister informed the applicant that based on the allegations of misconduct, she had three options available: to be dismissed, face a disciplinary hearing with suspension, or take early retirement.

[11] On 14 April 2023, the applicant, under protest, accepted the retirement option, on the condition that the early retirement should commence 6 months from the date of signature of the settlement agreement. The Minister replied to the letter on the same day in terms of which she placed the applicant on precautionary suspension with immediate effect "*to allow the finalisation of the matter*". The Minister also proposed a meeting with the applicant on 20 April 2023, to engage on her conditional acceptance of the early retirement option.

[12] On 17 April 2023, the applicant accepted the request to attend the meeting on condition that the Department cover her legal costs from the inception of the matter to the attendance of the meeting of 20 April 2023. Unsurprisingly, the proposal to cover the legal costs was rejected by the Minister and the applicant was urged to attend the meeting.

[13] On 20 April 2023, the applicant attended the meeting. The Minister was not in attendance. She met with Legal Services and Human Resources represented respectively by their Chief Directors, Mr Masemola and Ms Thusi.

[14] Shortly after the meeting, whilst driving home, the applicant received a telephone call from the Minister, advising her that she was dismissed and that she should expect the dismissal letter soon. The applicant was issued with a letter of dismissal dated 20 April 2020. The material part of the letter reads as follows:

> 'I have considered the serious nature of your gross dishonesty, the gross misconduct or gross negligence which could have result (sic) in a loss of lives, your failure and lack of convincing explanation in your letters of response and/or your avoidance to furnish reasons why you should not be summarily dismissed.'
>
> You are therefore dismissed with immediate effect from your employment with the Department of Human Settlements as Deputy-Director General: Corporate Services.'

[15] The urgent application was served on the respondents by email on 25 April and by hand on 26 April 2023. The respondents opposed the application and argued that the matter is not urgent and that this Court has no jurisdiction to entertain the application. I address these preliminary points below.

Jurisdiction

[16] It is, in my view, appropriate to first establish whether this Court has jurisdiction as this is important to determine whether I have any power to consider the matter as pleaded or not and to make any order. In *Makhanya v University of Zululand*[1] (*Makhanya*), the Supreme Court of Appeal (SCA) described jurisdiction as the power of a court to consider, and to either uphold or dismiss a claim. In addition, the SCA cautioned against determining the issue of jurisdiction based on the merits of the case. It said that the power of a court to consider a claim is not dependent upon whether the claim is good or bad in law.

[17] The respondents argued that this Court has no jurisdiction. Two judgments of this Court, and one Constitutional Court judgment, were relied upon. First, they relied

[1] (2009) 30 ILJ 1539 (SCA) at paras 23 and 52 - 54.

on *Singhala v Ernst & Young Inc and another* (*Singhala*).[2] *Singhala* is distinguishable from the present matter. The applicant's claim in *Singhala* was not one of breach of contract.

[18] Second, the respondents rely on *Steenkamp and others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (*Steenkamp*).[3] The submission in my view is based on a fundamental misconception of the pleaded case and the *Steenkamp* judgment. *Steenkamp*, just like *Singhala*, did not deal with a breach of contract. Rather, it dealt with an alleged breach of the provisions of the LRA. In these proceedings, the applicant has confined her case to a breach of contract or binding disciplinary code and the remedy of restoration of her contract of employment. *Steenkamp* is not authority for the submission that this Court has no jurisdiction to entertain breach of contract claims.

[19] The third case relied on by the respondents is *Mohlala-Mulaudzi v Property Practitioners Regulatory Authority and another* (*Mohlala*).[4] There, the applicant alleged that the employer breached her contract of employment when it summarily terminated her employment, and further that the employer breached the process set out in section 188A(11) of the Labour Relations Act[5] (LRA) in which the parties were already engaged in and/or alternatively, breached the agreement to engage in the section 188A process. The Court criticised the applicant for labelling her case as one of breach of contract when, in truth, her case was one of unfair dismissal. Regarding the alleged breach of the section 188A process, the Court said that the employer did not act unlawfully by not seeing through the section 188A(11) process because it was not bound by this process as the employee did not satisfy the jurisdictional prerequisites of section 188A(11). The Court ultimately found that the application was heard as one of urgency but struck the application off the roll "*due to lack of the necessity for an*

[2] (2019) 40 ILJ 1083 (LC).
[3] (2016) 37 ILJ 564 (CC)
[4] Unreported judgment case no J68/23 delivered on 13 February 2023.
[5] Act 66 of 1995, as amended.

urgent relief". This does not support the respondents' contention that this Court lacks jurisdiction.

[20] Whether a court has jurisdiction or not is a factual enquiry, to be determined on the pleadings.[6] Nugent JA puts it this way in *Makhanya*:

> 'When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'[7]

[21] The applicant has disavowed any reliance on the LRA. She has pleaded that the application is based on a breach of contract, that she seeks a declarator that the Minister breached her contract of employment and the restoration of the status *quo* prior to the alleged unlawful dismissal. It is clear from the pleaded case that the application is brought in terms of sections 77(3) and 77A(e) of the Basic Conditions of Employment Act (BCEA).[8]

[22] Based on the undisputed facts of this case derived from the case pleaded by the applicant, I have no doubt that the jurisdiction of this Court has been engaged. The claim by the applicant is one based on contract, and:

> '…any claim that could be brought in a civil court that has to do with a dispute over a contract of employment falls within the jurisdiction of the Labour Court.'[9]

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[6] See *Gcaba v Minister for Safety and Security and others* (2010) 31 ILJ 296 (CC) at para 75; *SA Municipal Workers Union on behalf of Morwe v Tswaing Local Municipality and others* (2022) 43 ILJ 2754 (LAC) at para 5 (*Tswaing Local Municipality*).
[7] *Makhanya supra* at para 71.
[8] Act 75 of 1997. Section 77(3) provides that "*[t]he Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract*". Section 77A(e) provides that the Labour Court may make any appropriate order including an order for specific performance.
[9] *Tswaing Local Municipality* at para 11.

[23] The respondents' point in *limine* therefore must fail. This Court has jurisdiction to entertain this application.

Urgency

[24] The applicant contends that the Minister should not be allowed to do as she pleases at the expense of her rights contained in her employment contract, that the Minister cannot discard the agreed pre-dismissal process by exercising a discretion that the Minister does not have and that she would have no substantial recourse if the matter is not heard on an urgent basis as she stands to lose all her employment benefits. By the time the matter is heard in the ordinary course, she would have lost all her benefits, which she intends to protect by appearing before a disciplinary hearing as per her contract of employment where she will prove her innocence. She stands to suffer financially and all she seeks before this Court is the protection of her rights contained in her contract of employment.

[25] The applicant contends that she has established a clear right to direct the Minister to process the allegations of misconduct in terms of the contract of employment, and that dismissal without following the agreed procedure is unlawful. She is 62 years old - three years before retirement, with limited prospects of securing any employment, particularly with the reasons for the dismissal as articulated by the Minister. She worked for the Department for 18 years. If her rights are not protected and she is not given an opportunity to prove her innocence before a disciplinary hearing, she will fall behind in bond repayments, which will result in the bank repossessing her house and causing substantial prejudice considering that she is left with three years to settle the bond.

[26] The applicant submits that she has no alternative remedy. She contends that the case she brought before this Court is not about the fairness of her dismissal. She seeks a mandatory interdict to compel the respondents to comply with her contract of employment by subjecting her to a disciplinary hearing before terminating her employment.

[27] The respondents argued that it is normal for dismissed employees to lose their benefits and that this does not make the application 'unique'. Furthermore, the respondents contend that the applicant can pursue her breach of contract claim in the ordinary course, that the horse has bolted, that "*a case for urgent relief must be made with sufficient particularity*" and that urgency in and of itself is not sufficient.

[28] The matter before me is one of an alleged breach of contract. The applicant does not seek any remedy provided for in the LRA. In *Mahonono v National Heritage Council and another* (*Mahonono*),[10] Lagrange J had this to say when dealing with urgency in the context of a breach of contract claim:

> '…Of course it also must not be forgotten that an order of specific performance for a material breach of contract is a remedy available to a party to a contract, who is not obliged to simply sue for damages. When applied to an unlawful termination of employment, it requires the restoration of the actual employment relationship to what it was prior to the breach. The value of this remedy is naturally diluted if it is not sought as a matter of urgency. The timely availability of an order of specific performance as a remedy cannot be equated, except superficially, to an order of reinstatement under the LRA, which must be given effect to if the prerequisites of s 193(2) are met, even years after the dismissal.'

[29] In *Ngubeni v National Youth Development Agency and another* (*Ngubeni*),[11] the applicant brought a breach of contract claim on an urgent basis. The Court heard the matter on an urgent basis and declared the employer's decision to be in breach of contract. Although the judgment does not deal with urgency, it is my considered view, based on the nature of the application and the relief sought that urgency was inherent in that application.

[30] When political heads are alleged to have subverted the rule of law, or undermined the express provisions of valid agreements or binding procedures, and unleashed lawlessness on the people they are supposed to lead, courts of

[10] (2022) 43 ILJ 2335 (LC) at para 24.
[11] (2014) 35 ILJ 1356 (LC).

law should hasten, when called upon, to intervene - on good cause. Failure by the courts in that situation would lead to a perpetuation of the lawlessness, and embolden those in power to continue acting with impunity.

[31] The applicant is left with three years before she retires. A remedy in the ordinary course will in my view be diluted, and by the time the matter is finalised either at arbitration (with the possibility of review proceedings) for an unfair dismissal dispute, or at trial for a breach of contract claim (with the possibility of an appeal), the applicant would be close to reaching retirement or might have already reached retirement age. This case calls for the intervention of this Court at this stage, not later. Having considered the grounds of urgency and the factors above, I am satisfied the application is urgent.

[32] The next issue to consider is the argument developed based on Rule 8 of the Rules of this Court,[12] that the affidavit in an urgent application must set out the reasons for urgency and why urgent relief is necessary. In *Mohlala*, Moshoana J held that the application was urgent but falls to be struck off the roll for the lack of necessity for urgent relief. In essence, the Court found that the applicant has made out a case for the Court to entertain her application on an urgent basis, but she failed to show that the Court should pronounce on the relief she sought. This, in my view, is a technical reading and interpretation of Rule 8. A finding that the matter is urgent but the relief should be determined in the normal course is no different to a finding that the matter is not urgent. An order to that effect is contradictory and serves no purpose. It cannot be what the Rules envisaged. In any event, in the present matter, I find that, based on the nature of the right the applicant asserts and the relief sought, it is necessary for this Court to make a determination on the relief sought.

Evaluation of the merits

[33] The application before me has nothing to do with the merits of the dismissal. Whether there is a dispute of fact on the fairness or otherwise of the dismissal, or

[12] Rules for the Conduct of Proceedings in the Labour Court.

whether there has been a material breach of the employment contract that warrants dismissal, is not an issue that concerns this Court. Dismissal is common cause, and the issue is whether it was effected in compliance with the contract and/or the SMS Handbook. Put differently, the issue is whether it was effected in compliance with the binding disciplinary code.

[34] The applicant is a member of the SMS. She agreed to, and accepted, her appointment as a member of the SMS in terms of section 9 of the Public Service Act[13] (PSA). The SMS Handbook applies to her. Chapter 7 of the SMS Handbook sets out the applicable procedure when dealing with misconduct cases. She was terminated summarily on allegations of misconduct. In addition to the allegation of gross negligence, the letter of termination accused the applicant of gross dishonesty.

[35] Before termination, she was given 3 options, namely: dismissal, disciplinary action with suspension, or early retirement. Although the applicant conditionally opted for early retirement, the Minister's immediate response on 14 April 2023 was the second option of suspension and a disciplinary hearing would be exercised. The Minister immediately placed the applicant on suspension. Essentially, the Minister had rejected the applicant's conditional acceptance of the early retirement. However, 6 days later, she decided to summarily dismiss the applicant without a disciplinary hearing.

[36] Clause 1.1 of the SMS Handbook provides as follows:

> 'The chapter contains the procedures that must be applied in cases of misconduct … of members of the SMS… As regard misconduct, PSCBC Resolution 1 of 2003 envisages the issuing of a directive … to cover the disciplinary matters of the SMS. The procedures for misconduct in paragraph 2 below incorporates (sic) those provisions of the PSCBC Resolution 1 of 2003, which were considered appropriate and practicable in respect of members of the SMS.'

[13] Act 103 of 1994.

[37] Clause 2 of Chapter 7 of the SMS Handbook deals with the disciplinary code and procedures. If the alleged misconduct warrants a more serious disciplinary action than counselling or warning (i.e. for serious misconduct that may lead to dismissal), clause 2.6(1) provides that the Department "*may initiate a disciplinary hearing*", and must appoint an initiator. Clause 2.7(a) obligates the Department to issue a notice of disciplinary hearing at least 5 days before the hearing.[14]

[38] Clause 2.7(2)(c) provides as follows:

> 'If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days…'

[39] In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[15], the Labour Appeal Court (LAC), commenting on the status of the SMS Handbook, said that:

> 'The "SMS Handbook" referred to in the letter is the "Senior Management Service Handbook" which applies to senior management in the public service. The terms and conditions of the senior management of the public service, from the level of Director upwards, are not regulated by collective bargaining, but are determined by the Minister for the Department of Public Service & Administration by means of subordinate legislation issued in terms of the Public Service Regulations 2001, which determinations are referred to and known as the "SMS Handbook". The ministerial determinations in respect of misconduct proceedings are contained in Chapters 7 and 8 of the SMS Handbook.'

[40] The binding nature of the SMS Handbook was confirmed by this Court in *Mashiane v Department of Public Works:*[16]

> 'It has been suggested that the provisions dealing with discipline are guidelines and therefore are not binding. However, chapter 7 of the 2003 Handbook does not refer to any of the disciplinary provisions as "guidelines". In the SMS

[14] Clause 2.7(3) states that a disciplinary hearing must be held within 10 working days after the notice to attend a disciplinary hearing is issued.
[15] (2012) 33 ILJ 2033 (LAC) at para 5.
[16] [2013] JOL 30129 (LC) at para 9.

> handbook, the term "guideline" is specifically used to describe other procedures or practices set out in the SMS handbook, such as: "Guidelines for the composition of advertisements" (Clause 7.2); "additional guidelines on interviews" (Clause 8.6 (3)) or, "National policy and guidelines on performance based pay and rewards".'

[41] The applicant was dismissed on allegations of misconduct. Chapter 7 of the SMS Handbook contains the procedure that must be applied in cases of misconduct of members of the SMS. This chapter is binding.

[42] Did the Minister apply the procedure set out in Chapter 7? The answer is in the negative. The Minister considered the allegations against the applicant to be serious. She was obliged to institute a disciplinary hearing as provided for in clause 2.7 of the SMS Handbook. Considered with the other provisions, including clause 1.1 referred to above and clause 2.1(g), which sets out the purpose to be prevention of arbitrary actions from supervisors, clause 2.6(1) of the SMS Handbook does not, in my view, make the institution of a formal disciplinary hearing optional or discretionary. Further, clause 2.7(5) provides that for less serious forms of misconduct, no formal enquiry shall be held, which clearly suggests that for serious misconduct, a formal enquiry is necessary. There is no alternative procedure for misconduct cases in the Handbook, such as the one followed by the Minister.

[43] The applicant has argued that the Minister acted as the victim or complainant, witness, initiator, and referee. Having presided over a matter where she was the complainant and witness, and an initiator leading the Department's case, the Minister decided that the applicant was guilty of the allegations of misconduct and imposed a sanction of dismissal. This is not acceptable.

[44] The applicant was denied an opportunity to present her case on the merits of the allegations and to make any submissions in mitigation. This is in disregard of the provisions of the SMS Handbook that requires the appointment of an initiator and chairperson to deal with the allegations of misconduct.

[45] In addition, clause 2.7(4)(a) of the SMS Handbook states that if a member of the SMS is found guilty of the misconduct, "*the chairperson must pronounce a sanction*". The Minister in this case has assumed the powers she did not have by pronouncing a sanction. These powers are reserved for the chairperson of the disciplinary hearing.

[46] The Minister's conduct was unlawful. Such conduct should not be condoned by courts of law. This Court cannot and should not turn a blind to the injustice and lawlessness. The impact that such decisions have on the employees is unimaginable. Accordingly, the applicant has made out a case for declaratory relief.

Order of specific performance

[47] It is trite that this Court has discretion to order specific performance.[17] There is no suggestion in this case that an order of specific performance would be inappropriate. The applicant has sought the restoration of her contract and has repeatedly stated that she should be subjected to a disciplinary hearing before she is terminated. Accordingly, an order of specific performance as sought by the applicant will be appropriate.

Costs

[48] This is a contractual dispute. Although the Court retains the overall discretion, I see no reason why costs should not follow the result. The conduct of the Minister must be frowned upon.

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

Order

1. The respondents' jurisdictional point is dismissed, and it is declared that this Court has jurisdiction to entertain the application.

[17] See *Mahonono* at paras 38 – 41 and the cases referred therein.

2. The matter is heard as one of urgency in terms of Rule 8 of the Rules for the conduct of the proceedings in the Labour Court.

3. The decision of the first respondent to summarily dismiss the applicant from her employment on 20 April 2023 is hereby declared to be in breach of the contract of employment and chapter 7 of the SMS Handbook, and unlawful.

4. The applicant is reinstated to her employment with effect from 20 April 2023.

5. The first respondent or her delegate is prohibited from summarily dismissing the applicant without complying with the procedure set out in chapter 7 of the SMS Handbook

6. The respondents are ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved.

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M. Makhura

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. VJ Chabane
Instructed by :	N & N Ngogodo Attorneys
For the Respondents:	Adv. TS Madima SC with Adv. M Makwela
Instructed by:	The State Attorney, Johannesburg