IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J2519/16

In the matter between:

ONNICAH SEINGWAENG SEEMISE **First Applicant**

VUYISILE PERICLES NGESI **Second Applicant**

and

MINISTER OF POLICE **First Respondent**

ACTING NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE SERVICE **Second Respondent**

Heard: **02 February 2017**

Delivered: **10 February 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The Applicants initially approached this Court on an urgent basis on 27 October 2016, seeking a declaratory order that the notice to discharge them from the police service in accordance with the provisions of section 35 of the South African Police Service Act 68 of 1995[1] was unlawful, and that it should be set aside. In the alternative, they sought an

[1] "35. The National Commissioner may, subject to the provisions of the Government Service Pension Act, 1973 (Act No. 57 of 1973), discharge a member-

order suspending the contemplated discharge, pending the Respondents' full compliance with the provisions of section 189 of the Labour Relations Act[2], read together with the SSSBC collective agreement relating to Rules of Engagement. That application came before Mooki AJ on 1 November 2016, and had resulted with a settlement being reached between the parties, which was also made an order of court.

[2] The Applicants again approached the Court on an urgent basis on 30 January 2017. The relief sought in their Notice of Motion is substantially the same as in the first application, other than that it was in two parts. In Part A, an additional prayer was that the consultation meeting held on 21 November 2016 and/or any agreement concluded in that meeting should be declared *'null and void ab initio'*. They further seek interim relief pending the determination of relief sought in part B, which pertained to the reviewing, correcting and setting aside the decision of the Respondents and proceedings pursuant to the discharge of the Applicants; a declaration that the Respondents were in breach of the provisions of section 189 of the LRA, and further declaring and directing the Respondents to furnish them with certain documentary information outlined in prayers 3.1 to 3.10. The Second Respondent opposed the application.

Background:

[3] The two urgent applications came before the court following correspondence from the Second Respondent, (Acting National Commissioner of the South African Police Service, Lieutenant-General JK Phahlane) addressed to the Applicants, dated 13 October 2016, wherein the following was expressed:

> *"1. Kindly note that I am considering your discharge from the South African Police Service in terms of the provisions of section 35(a) of the South African Police Service Act, 1995, based on the fact that your post has been abolished due to the reorganisation or readjustment of the Service. A new organisational structure has been approved on 2016-08-12 and the post that you currently occupy does not exist on the new structure.*
>
> *2. Your alternative placement in the Service has been considered but unfortunately your skill profile does not meet the requirement of any existing vacant post at that level.*

---

a) because of the abolition of his or her post, or the reduction in the numerical strength, the reorganisation or the readjustment of the Service;
b) if, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the Service, or will otherwise be in the interest of the Service; or
c) if the President or a Premier appoints him or her in the public interest under any law to an office to which this Act or the Public Service Commission Act, 1984 (Act No. 65 of 1984), does not apply."

[2] Labour Relations Act 66 of 1995.

3. Based on the above you are hereby given an opportunity to submit representations within fourteen (14) days of receipt of this notice as to why your discharge should not be affected accordingly.

...

4. If the discharge is to be effected, it will be accompanied with the normal benefits associated with a section 35 discharge."

[4] The Second Applicant, Major General Vuyisile Pericles Ngesi, was appointed as Head: Corporate Communication, with effect from 01 May 2016. The First Applicant, Major General Onnicah Seingwaeng Seemise, was appointed as Head: Marketing and Liaison Service, with effect from 10 April 2014. The Applicants aver the above correspondence followed upon the events of 31 December 2015, when the Acting National Commissioner had presented to the Portfolio Committee: Police, of the South African Parliament, a "new" organisational structure that included their positions.

[5] On 13 May 2016, a meeting was held between the Applicants and the Acting National Commissioner, together with other high-ranking officials of the South African Police Service. According to the Applicants, the purpose of that meeting was to discuss the national communication strategy. That meeting however took a different turn when the Deputy National Commissioner: Human Resource Management, Lieutenant General Ngwenya, raised an issue of poor performance within the Corporate Communication Department. The Applicants were informed for the first time that the Corporate Communication structure was to be reviewed.

[6] A follow up meeting was held on 14 May 2016 to discuss the Corporate Communication structure. In terms of the "draft" structure, the number of Major Generals within the Corporate Communication department were to be reduced from two to one. The Applicants aver that they objected to the "draft" structure, as they had not been consulted in its formulation. They were however informed that any attempt to review the "draft" structure would be futile, as the Acting National Commissioner and the Deputy National Commissioner: Human Resource Management had already concluded discussions on the matter.

[7] Several meetings were held thereafter between the Applicants, the Corporate Communication Department and high-ranking officials of the Police Service in an effort to clarify the issue of the restructuring of the Corporate Communications Department. Those meetings, according to the Applicants did not yield any results. On 13 October

2016, the Applicants received the aforesaid notice in terms of section 35(a) of the South African Police Service Act.

[8] Aggrieved at these turn of events, the Applicants had filed the first urgent application, which was premised *inter alia* on an allegation that the Second Respondent had failed to meaningfully consult with them in accordance with the provisions of section 189 of the Labour Relations Act. The settlement agreement reached before Mooki AJ on 01 November 2016 *inter alia* recorded the following:

> *"3. The parties have agreed to engage in a process of consultation in respect of the contemplated discharge of the First and Second Applicant based on section 35(a) of the SAPS Act, the parties agree as follows:*
>
> *4. That the Second Respondent shall within the next two weeks of the date of this agreement commence with a proper consultation process as envisaged or similar to that provided for in section 189 of the Labour Relations Act, 66 of 1995 (hereafter referred to as "the LRA")*
>
> *5. That the consultation process shall include discussions on all relevant issues such as, but not limited to, the reasons for restructuring, implications of possible abolitions of posts, alternatives to abolition of posts, timing of possible termination and financial consequences thereof.*
>
> *7. That this settlement agreement be made an order of court"*

[9] Pursuant to the settlement agreement, the parties held a consultative meeting on 21 November 2016, in respect of the contemplated discharge. It was common cause that this was the one and only meeting held between the parties. Significant with that meeting is that Mr Tumisang Phasha of the Applicant's attorneys of record had represented them. He had also signed the minutes of that meeting on their behalf. For the sake of completeness, it would be appropriate to summarise those minutes as follows;

a) the parties were *ad idem* that the only alternative available position that the Applicants could be translated into was that of Head: Corporate Communication and Liaison;

b) the Applicants were encouraged to make representation on whether either of them were suitable for the aforesaid position;

c) having considered the matter, the Applicants acknowledged and conceded that they did not meet the requirements of that position;

d) the Applicants were not interested in alternative positions/placement in the SAPS (The Applicants however raises a dispute in this regard)

e) the parties were to then consider settlement proposals with regard to severance package.

[10] The Applicants subsequently submitted a draft settlement proposal to the Respondents. They had *inter alia* proposed that;

> *1.1 "The respondents shall pay the 1st applicants R22, 843, 863 (Twenty-two million, eight hundred and [forty] three thousand and eight hundred and sixty-three [R]ands).*
>
> *1.2 The respondents shall pay the 2nd Applicants R20, 688, 257 (Twenty million, six hundred and sixty-eight thousand and two hundred and fifty-seven [R]ands).*
>
> *…*
>
> *1.4 Alternatively, to paragraph 1.1 and 1.2 above, the parties agree as follows:*
>
> *1.5 The respondents shall continue to pay the applicants their salary of R75209.49 (Seventy-five thousand, two hundred and nine [R]ands and [forty] nine cents) per month until the applicants retires at the age of (60) sixty years.*
>
> *1.13 The Respondents shall place the applicants on special leave and the applicants will continue to earn their salary as mentioned in paragraph 1.6 above."*

[11] The Applicant's Counsel during argument correctly conceded that the proposals were indeed preposterous. In a response in a letter dated 01 December 2016, the Acting National Commissioner recorded that:

> *"…the outcome of the consultative process was that your clients indicated that neither of them qualify for the newly-created major general post in the Communication and Liaison component, nor are they interested in alternative placement within the South African Police Service. The net effect of the above is that the only outstanding issue between the parties is the quantum payable to your clients in terms of the discharge from the South African Police Service in terms of the provisions of section 35 of the South African Police Act, 1995.*
>
> *…*
>
> *Based on the prescriptive provisions of the above legislation, this office is unfortunately not in a position to agree to the proposed settlement. The quantum payable in instances of a section 35 discharge is duly regulated and dos not allow for a deviation therefrom.*
>
> *Based on the above the attached Estimate Benefits Schedules payable to your respective clients, are attached for consideration. The benefits have been calculated as if the discharge will be effected on 2016-12-31."*

[12] The letter concluded by referring the Applicants to a legislative acceptable formula of calculating a quantum payable upon a discharge and/ or monetary proposed settlement for the contemplated discharge.

[13] The Applicants contended that as a consequence of information obtained from media reports on 17 January 2017 and 11 May 2016, they had adopted the view that the Respondents failed to disclose all the relevant information material to the consultative process, which had hindered the parties from having a meaningful consultative meeting. As a result, the Applicants, through their representative sent a letter on 12 December 2016, to the Respondents, requesting access to information for the purposes of a further meaningful consultative meeting. The Respondents rejected that request on 22 December 2016, on basis that the parties had abandoned the consultative process and therefore the request to access to information was immaterial to the settlement proposal discussions.

[14] Further correspondence was exchanged between the parties during the month of January 2017. The Applicants maintained that the consultative processes were not abandoned and insisted with their request to access to information. As a result of this impasse, the second urgent application was launched.

Evaluation:

[15] It needs to be stated at the outset that the Applicant's application is fraught with inherent difficulties. The first hurdle to surmount is to convince the Court to treat the matter as urgent. The principles surrounding urgency are trite. Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court provide that;

> (1) "A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
>
> (2) The affidavit in support of the application must also contain-
>
> a) the reasons for urgency and why urgent relief is necessary;
>
> b) the reasons why the requirements of the rules were not complied with, if that is the case; and
>
> c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted".

[16] In explaining the above rules, the Labour Appeal Court in *Mimmo's Franchising CC v Spiro, Harry David*[3] held that;

> *"A party applying for relief on an urgent basis must in the founding papers set out the reasons for urgency; state why urgent relief is necessary; and also set out why the requirements of the rules of court have not been complied with, if that is the case (sub-rules 8(2)(a) and (b)). The purpose of those sub-rules is self-evident. Considerations of fairness dictate that litigious matters should be heard in more or less the sequence in which they have become ripe for hearing. If it were to be otherwise, it will bring about additional delays in the hearing of matters already awaiting their turn and result in self-evident unfairness and the potential for prejudice. Sub-rule 8(2) requires an applicant to place such facts before the court as would be sufficient to enable it to exercise a judicial discretion in regard to whether sufficient and satisfactory grounds have been shown to exist to justify giving the particular matter preference. Urgency usually entails a deviation from the forms, time-limits and procedures prescribed by the rules or a departure from the established sitting times of the court (Cf: Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135 (W) at 136 H). The factors that are usually taken into account in the exercise of such a discretion are a) any prejudice that an applicant might suffer if the application had to be dealt with in the ordinary course; b) any prejudice other parties awaiting the hearing of their matters might suffer if the particular application were to be given preference; and c) any prejudice that the respondent might suffer as a result of any deviation from the prescribed forms and procedures, the abridgement of any prescribed time-limits and an acceleration of the hearing (See: IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another: Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981(4) SA 108 (C) at 112 H – 113 A; 114 A – B). The provisions of Rule 8 clearly apply to all urgent applications, irrespective of whether the relief claimed is of an interim or final nature"*

[17] In this case, the Applicants contended that the application was urgent on the basis that they were furnished with a letter confirming their discharge with effect from 1 February 217. The Applicant however omit to state that the correspondence confirming their discharge is dated 18 January 2017. No attempt was made to explain the delay between 18 and 30 January 2017, other than to state that upon receipt of the letter from the Respondent, the Applicants had then despatched an urgent letter on 23 January 2017 raising concerns that the Respondent had consulted 'mala fide' as they did not disclose certain material information, and that it was only upon receipt of the Respondents' response on 26 January 2017 that they had to act.

[18] In bringing this application however, it was also set down for a hearing on 2 February 2017. The difficulty however is that the Applicants cannot decide as to when a matter is

[3] (JA58/00) [2002] ZALAC 7 (29 March 2002) at paragraph 29

urgent, and when it is convenient for them to set it down. It is more the circumstances that give rise to urgency, that compels a court to treat a matter as urgent. On the whole, the Applicants failed to place before the Court, circumstances that call for their application to be heard urgently, and any prejudice that they alleged they would suffer if their matter was heard in the ordinary course is exaggerated.

[19] Furthermore, it is trite that in circumstances where a party has alternative remedies available, it cannot claim urgency, as that urgency would be clearly self-created. In this case, I conclude without hesitation that the urgency alleged herein is clearly self-created. The basis of this conclusion is that as at the meeting of 21 November 2016, the only outstanding issue between the parties was that of the severance package. Having made ridiculous proposals in that regard, which were correctly rejected by the Respondents, the Applicants had then changed tune, and alleged that the Respondents did not consult in good faith. Even more curious is that these allegations arose out of media reports in respect of restructuring processes within SAPS, which allegedly came to the Applicants' attention after the consultation meeting of 21 November 2016.

[20] In my view, nothing further was left for discussions where in that meeting, the Applicants, as competently represented by their attorney of record, had confirmed that they did not qualify for the alternative post, nor were they interested in any other posts within SAPS. Thus, where the only issue was that of severance package, and given the legislative confines within which any severance package could be negotiated, there was nothing further for the Respondents to negotiate over.

[21] With this contrived application, the Applicants only seek to undo the concessions they made at the meeting of 21 November 2016. This court cannot unfortunately assist them in extricating themselves from their chosen approach in regards to matters that were consulted over. There is no reason why they should be allowed to circumvent the statutory provisions related to alleged unfair dismissal disputes. Like all other unfortunate dismissed employees, they should join the proverbial litigation queue. The avenue to approach the relevant forum to determine the fairness of their discharge remains open to them.

[22] In the end, to the extent that the application is not urgent, and moreso since the Applicants have alternative remedies available to them, this application ought to be struck off the roll. Such an order however given the circumstances of this case, the relief sought and the pleadings, would not serve any purpose, as this application would

still find its way in the court's roll. Accordingly, it ought to be dismissed based on the following;

[23] Equally problematic is the relief that the Applicants seek. It is unheard of, as correctly pointed out on behalf of the Respondents, that the court can be asked to make a declaratory order within the context of an interim order. Worst still, the Applicant chose to set down this matter long after the proverbial horse had bolted. The discharge of the Applicants effectively took place on 1 February 2017, and by 02 February 2017 when they approached the Court, there was therefore nothing to suspend or interdict.

[24] Equally without logic is the order sought under Part B of the Notice of Motion. To the extent that the discharge has taken effect, any alleged breaches of the provisions of section 189 are matters to be dealt with in a proper forum in the event that the Applicants elect to refer an alleged unfair dismissal dispute. Further to the extent that the Applicants were inclined to form the view that the Respondents failed to properly consult with them or where in breach of the settlement agreement subsequently made an order of court on 1 November 2016, these proceedings were clearly an irregular step. Nothing also turns on the alleged concession made by the Respondents that they had not, subsequent to the meeting of 21 November 2016, consulted with the Applicants. As already indicated, and emanating from the Applicants' concessions made in that meeting, there was nothing or little to consult over, other than the issue of severance package.

[25] Insofar any clear or *prima facie* right might be alleged, their case is based on the alleged breach of the provisions of section 189. The Respondents in discharging the Applicant invoked the provisions of section 35 (a) of South African Police Service Act. *Prima facie*, and in view of the events of 21 November 2016, there can be no basis to conclude that there are any of the Applicants' rights that were violated, as the Respondents were indeed entitled in law to invoke those provisions. In the light of a failure to establish any clear or *prima facie* right, there would then be no need to consider other factors pertaining to the requirements to be met in such applications.

[26] In regards to the issue of costs, I agree with the submissions made on behalf of the Respondents that this application was clearly misconceived. The Applicants were assisted throughout by their attorneys of record. In the light of the events and meeting of 21 November 2016, and further subsequent correspondence from the Respondents, it should have dawned upon them that any other means to protract their discharge were

doomed to fail. In the light of these factors, the requirements of law and fairness dictate that a cost order should follow.

Order:

i. The applicants' application is dismissed costs.

_____

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. YF Saloojee
Instructed by:	Machaka Incorporated
For the Second Respondent:	P Kennedy SC
Instructed by:	State Attorney