Invalid or unfair? No shortcuts to the Labour Court

By Brett Abraham

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The Labour Court has confirmed in a recent judgment that terminating a contract of employment can be invalid, but it does not always follow that employees are entitled to jump the queue at the Labour Court for redress, and certainly not in circumstances in which the true dispute relates to an unfair dismissal claim governed by the Labour Relations Act.

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The Labour Court is routinely called upon to consider urgent applications brought by employees seeking to vindicate their rights on the basis of an unlawful termination of employment. The distinction between an unlawful dismissal and an unfair one was again considered in the recent judgment of *Nehawu obo LH & others v Unisa & another (2022)*. The ruling again cautions that there is not always a shortcut to the Court when the Labour Relations Act (LRA) provides well-defined recourse for dismissal claims.

Ongoing tensions between Nehawu and Unisa reached a head in April 2022 and following the disruption of many graduation ceremonies and other violent and unlawful conduct by Nehawu members seeking to disrupt the day-to-day operations of the university across its various campuses. Unisa reacted, inviting the five members of Nehawu's branch committee at the university (the branch committee members) to provide written reasons why their employment should not be summarily terminated, inter alia for their part in participating in, or orchestrating, the alleged unlawful conduct. Written representations were provided and, these notwithstanding, the employment of the branch committee members was summarily terminated.

Nehawu launched an urgent application in the Labour Court seeking reinstatement of the branch committee members. Nehawu relied on section 77(3) of the Basic Conditions of Employment Act (BCEA) and contended that the termination was unlawful, null and void given, so it said, the contractual right of the branch committee members to be dealt with in terms of Unisa's disciplinary code and the recognition agreement between Unisa and Nehawu, as well as their constitutional right to fair labour practices.

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Represented by Webber Wentzel, Unisa opposed the application on the basis that it was not urgent and, in any event, that Nehawu had not established a contractual right on the part of the branch committee members and, as such, the Labour Court lacked jurisdiction to entertain the application. The application was argued on 26 May 2022 and written reasons were handed down on 21 June 2022.

The court dispensed with Nehawu's argument that the application was urgent, confirming that:

i. challenging dismissals as unlawful and then relying on that unlawfulness as the basis of urgency in itself, was misguided and

ii. relying on financial hardship is not a sufficient ground to establish urgency, and certainly not in circumstances in which the alleged financial hardship was "pithily pleaded".

Rather than strike the matter from the roll for want of urgency, the Court then addressed the other aspects of the opposition to the application for finality.

The Court accepted that Nehawu had not presented evidence to support a contractual claim and, in any event, held that the branch committee members faced a further difficulty, even if the court found that there was a contractual right to be dealt with under Unisa's disciplinary code. Concurring with another recent decision of the Labour Court in *Noxolo Matoti v Komatsu Mining Corp and one other*, the Court held that the wording of section 77(3) contemplates an existing contract, while the employees' contracts had already been terminated. A cancelled contract is incapable of being enforced unless the right to cancel, not the effect of the cancellation, is disputed.

Nehawu's reliance on a constitutional right to fair labour practices took its argument no further, with the Court confirming this argument was undermined by the principle of subsidiarity.

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Turning to the argument that it also had jurisdiction in terms of section 158(1)(a)(iv) of the LRA, the Court accepted that Nehawu has impugned the unfairness of the conduct of Unisa, and not even attempted to disavow a reliance on such unfairness. On this basis, the Court accepted that it lacked such jurisdiction, quoting with approval the concluding remarks

in *Singala v Ernst and Young Inc and another*: “To my mind the Labour Court, being a creature of the LRA, lacks jurisdiction to entertain claims of unlawful dismissals. An employee … must pursue the remedies as per the LRA. This disavowal business should not be encouraged by this court. As pointed out above it should be resisted as it brings to the fore a state of lawlessness.”

Simply, the Court found that Nehawu's attempt to seek the invalidity of dismissals, that had already happened, was nothing more than a repackaged claim for reinstatement for unfair dismissal under the LRA. Nehawu's application was accordingly dismissed.

The judgment serves as a cautionary reminder to dismissed employees and their representatives that they may be better served seeking to vindicate their rights under the LRA, rather than circumventing these by rushing off to the Labour Court, which is likely to be unsympathetic to pleas of invalidity. At the very least, proper consideration should be given to whether, or to what extent, a contractual right to urgent redress will be capable of being established on the papers in application proceedings.

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