IN THE EQUALITY COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 24942+3/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: ***NO***

Date: 12 August 2024

Signature: [redacted]

In the matter between:

LIBERTY FIGHTERS NETWORK	Applicant
And	
THE CORE COMPUTER BUSINESS (PTY) LTD	1st Respondent
ZA ONLINE STORE (PTY) LTD	2nd Respondent
UNIVERSITY OF JOHANNESBURG	3rd Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] These are two applications by the applicant against the respondents brought before the Equality Court sitting within this division, which is a specialised court drawing its powers from the Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA").[1]

[2] The complainant is Liberty Fighters Network, a 'voluntary association' without gain, otherwise referred to as a *universitas*, with perpetual succession and existence separate from its founding members, ability to own assets in its own name and which can sue or be sued its own name as well'.[2]

[3] The complainant is acting as the representative of employees of the respondents. The first respondent is Core Computer Business (Pty) Ltd, and the second respondent is ZA Online Store (Pty) Ltd. The third respondents are the University of Johannesburg, an institution of higher learning. This respondent was initially cited in a separate application which has since been joined herein

[1] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[2] Summarized statement of complaint para 17.

by agreement of the parties since the cause of action and relief sought are basically the same.

[4] The applicant, on behalf of its members, is challenging the COVID-19 mandatory Vaccination Policy implemented by the respondents, complaining that it contravenes the Equality Act and the Consumer Act on the basis that it discriminates against its members and the public. The applicant calls upon the court to review and set aside the policy, because it amounts to harassment and unfair discrimination, as well as an award for damages.

[5] The applicant seeks more specifically, the following relief:

5.1 An order declaring the respondents' mandatory Vaccination Policy ("the Policy") discriminatory and/ or harassment;

5.2 Reviewing and setting aside the Policy;

5.3 Certifying a class action against the respondents;

5.4 Compensation for damages suffered by the applicant and other parties who fall within the identifiable group described in Annexure A to the referral form; and ordering the respondents

to cease the alleged discrimination and/or harassment complained of in Annexure A.

B. THE FACTS

[6] The respondents implemented a mandatory COVID-19 vaccination policy propelled by the Disaster Management Act and its regulations, promulgated by the Minister of Employment and Labour, published in the government gazette, which endorsed the policy of mandatory COVID-19 vaccination within the workplace.

[7] Mandatory, as the word suggests, is required by law, making it final and fully enforceable in nature.

[8] The bone of contention raised by the complainant is that the policy is used as a weapon of harassment and discrimination. In the sense that, should some or other members of complainant refused to get vaccinated, thus failing to provide medical proof of vaccination; alternatively, failing to subject themselves to regular Covid-19 tests, at their own expense, they will be subjected to one or other occupational detriment as the complainant has put in its papers. The

complainant avers that such conduct constitutes forced medical intervention by way of coercion, intimidation and harassment.[3]

[9] The parties agreed that the preliminary objections should be heard and determined before the merits. To this end, the Court made an order by agreement between the parties for the filing of affidavits and written submissions. Further, the applicant stated in open court, with no objection by UJ, that Annexure A to the J693 Form will stand as its founding affidavit for purposes of adjudicating the preliminary objections.

[10] Furthermore, the parties agreed that the two applications would be argued together since the facts and circumstances are common cause.

[11] The University of Johannesburg (**"UJ"**) denies the merits of the applicant's assertion that its Covid Vaccination Policy fails to comply with the **Equality Act** and the Consumer Protection Act 68 of 2008 (**"Consumer Act"**).

C. POINTS *IN LIMINE:*

[12] The respondents raised points *in limine*, namely,

[3] Summarised statement of complaint para 38.

12.1 Mr Reyno de Beer – who is the signatory of the complainant, and essentially their "legal representative" has failed to prove his authority to institute proceedings on behalf of the alleged *universitas.*[4]

12.2 That the Equality Court has no jurisdiction to hear this application; and

12.3 Non-joinder of the Ministers responsible for the roll-out of the vaccine protocol in the country.

12.4 The applicant has not presented any case for the certification of the application as a class action lawsuit. The applicant has no *locus standi* to represent who it seeks to represent in said class action.

12.5 The application is moot; the applicant has failed to disclose a cause of action before the court.

[13] The above points will be dealt with hereunder in sequence.

[4] Summarised statement of complaint para 17.

No Authority

[14] It is an established procedure that authority to represent another in court should have a legal basis such as a power of attorney, a corporate resolution, an individual affidavit attesting to that fact or a cession agreement. Such authority must be alleged and proved.[5]

[15] Mr de Beer has filed the complaint on behalf of the LFN but has not provided any discernible evidence to found and support his authority to institute and prosecute the complaint. The purported letter of the association, dated 7 March 2022 - annexed to the complaint — does not show (i) who took the decision, (ii) the quorum required to make the decision, (iii) whether the alleged quorum validly passed the resolution, and (iv) the advisors consulted.[6]

[16] While the Constitution of the LFN in section 38(1)(e) may afford the President the power *"at any reasonable time [to] institute or defend legal proceedings"*[7], this does not inherently prove authority in this case. This provision can never have the effect of empowering the president of the LFN with unfettered power to act on behalf of its members and the general public interest as is the case here.

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[5] Sandton Civic Precinct (Pty) Ltd v City of Johannesburg 2009 (1) SA 317 (SCA) para 15; *Eskom v Soweto City Council* 1992 (2) SA 703 (W).

[6] Complaint, Annexure B.

[7] Replying Affidavit, p012-15.

[17] The conclusion on this aspect is that Mr. de Beer has no legal authority to represent the public interest.

No Jurisdiction

[18] In any application the founding affidavit, in this case Annexure A to the J693 form, should plead the necessary facts to establish the forum's jurisdiction. The Constitutional Court has held that:

Jurisdiction is determined on the basis of the pleadings ... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determinative factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings — including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court."[8]

[19] The Equality Court's subject-matter jurisdiction is prescribed by legislation. The Equality Act/PEPUDA empowers the Equality Court to adjudicate complaints of

[8] Gcaba v Minister for Safety and Security 2010 (1) SA 238(CC) para 75.

(i) unfair discrimination on a prohibited ground, (ii) hate speech. and (iii) harassment.[9] Other pieces of legislation may also afford the Equality Court jurisdiction to hear certain types of complaints. For example, the Consumer Act empowers the Equality Court to hear allegations of discriminatory practices in terms of contraventions of chapter two (sections 8 to 10) of the Consumer Act. The Equality Court thus does not have jurisdiction to hear other types of cases.

[20] Quite notably, section 5(3) of the Equality Act provides that it *"does not apply to any person to whom and to the extent to which the Employment Equity Act, 1999, applies".*

[21] The Employment Equity Act in turn provides:

[9] Equality Act, s 21(1) (The equality court before which proceedings are instituted in terms of this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination hate speech or harassment, as the case may be, has taken place, as alleged).

"Application of this Act

4. (1) Chapter II of this Act applies to all employees and employers.

49. Jurisdiction of Labour Court

The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise."

[22] As regards the employees/former employees of the first and second respondents the applicant states that they were either terminated/terminated constructively.[10] This description brings the matter squarely within the ambit of the Labour Relations Act and resultantly in the realm of the CCMA and the Labour Court forums.

[23] From the above it is clear that the matter was brought to a wrong forum.

[24] The applicant seems also to allege that the Disaster Management Act and its regulations are unlawful. Clearly, the Equality Court does not have jurisdiction to determine the validity of the Disaster Management Act and its regulations.

[10] Summarised statement para 22.

[25] The conclusion therefore, is that this Equality Court is not imbued with jurisdiction to hear this application.

Non-joinder

[26] In so far as the applicant seeks to impugn the DMA and its regulations, the respondents raise the point of non-joinder. The applicant has not joined the **cabinet minister responsible** for the DMA and its regulations in this application.[11] This constitutes a material non-joinder. (emphasis added).

[27] In *Amalgamated Engineering Union v Minister of Labour*[12] the Appellate Division held that courts are precluded from making an order against a party with a direct and substantial interest in such order or where the order to be made cannot be implemented or enforced without prejudicing such party, unless such party has been joined to the proceedings.

[28] The point *in limine* succeeds and the application fails on this score.

Certification of a class action:

[11] See Rule 10A of the Uniform Rules of Court. *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 7

[12] 1949 (3) SA 637 (A).

[29] The complainant requires the court to certify class action, as it is purportedly representing a group or class of people, which it refers to as its members. In addition to that point, the court is called to determine whether the complainant has *locus standi* to bring an application on behalf of a group of people.

[30] In South Africa, class actions follow a two-stage process. The first stage is the certification application which requires that, before a class action may be instituted, a potential plaintiff (who will represent the class action) must obtain permission from the court through motion procedure to institute such a class action, resulting in the certification of the class. After certification, the trial action commences.

[31] In *Mukadam v Pioneer Foods (Pty) Ltd*[13] the Constitutional Court confirmed that the test for certification is whether it is in the interest of justice to certify a class. In determining whether it is in the interest of justice, a court must consider all relevant factors, including whether (i) the class has identifiable members which can be identified with objective criteria; (ii) the class has a cause of action that has a triable issue, which in novel claims must allege sufficient facts showing that a new claim must be recognised; (iii) the claims of the members of the class must raise common issues of fact or law; and (iv) the representatives in whose name

[13] 2013 (5) SA 89 (CC).

the class action would be brought must be identified, which includes assessing whether the representative has funds necessary for litigation."[14]

[32] Unterhalter J (as he then was) in *De Bryn v Steinhof*[15] held that:

"… In essence, if the cause of action upon which the class action relies cannot survive an exception, there is no triable issue. And if the evidence available and potentially available will not make out a prima facie case, then there are no triable issues of fact."

[33] The quest for certification is not according to proper procedure. It is just part of a conglomerate of an attack on the subject-matter which I find hard to fathom.

[34] This point in *limine* too must succeed.

Mootness

[35] All Covid-19 restrictions have been lifted throughout the Republic of South Africa on 22 June 2022. The UJ suspended the Vaccination Policy on 24 June 2022.[16] There is therefore no live controversy before this court.

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[14] Mukadam, supra, paras 15-18.

[15]De Bryn v Steinhof International Holdings N.V. and Others (29290/2018) [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ) (26 June 2020) , Para 13.

[16] Supplementary Answering Affidavit, para 7. Annexure A to the Supplementary Affidavit.

[36] In *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs*[17] the Supreme Court of Appeal confirmed a High Court decision to dismiss an application similar to the current one challenging the DMA and its regulations on religious gatherings where the impugned regulations were long since repealed and no longer in force before the adjudication of the matter in the high court and in the court of appeal. The SCA held that the High Court had no discretion to determine a matter which is moot, the appeal was moot in turn and there was no need to deal with the merits.

[37] The SCA stated more fully that:

> "The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law. In *President of the Republic of South Africa v Democratic Alliance*, the Constitutional Court cautioned that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available

[17] [1] [2023] ZASCA 35 (31 March 2023).

to them and in circumstances where no actual purpose would be served by that decision…". [Footnotes omitted][18]

[38] The applicant argues that the issue is not moot and advances two reasons:

38.1 First, the applicant submits that the "policy was only suspended, but not revoked" and can be "implemented again". The distinction between suspending and revoking the policy is a difference without any material distinction for the purposes of deciding whether the matter is moot. While UJ may lift the suspension if circumstances require, it is also true that UJ would have been with its right to re-promulgate the Policy had it been revoked (rather than suspended) if UJ believed the circumstances warranted such an outcome. The fact remains that the Policy is not in effect, and, as such, the applicant will not obtain any tangible relief should it be successful. The purpose of the Equality Court is not to hear abstract and academic cases.

38.2 Second, the applicant submits that its matter cannot be considered moot because the Equality Court is "required to certify a class action which would direct the procedure of instituting a claim against UJ." But this cannot save the

[18] Solidariteit, supra, para 12.

application from its mootness. As set out above, applicant has followed the incorrect process for certification and has failed to set out any factors why it would be in the interests of justice to certify a class action.

[39] It follows that on this point *in limine* as well, the application stands to be dismissed.

D. COSTS

[40] The general rule is that costs should follow the event. They are awarded in the court's discretion. Constitutional litigation present special circumstances such as the instances elucidated in the *Biowatch* matter.[19] Nothing suggest that this matter presents such circumstances.

[41] In *Gold Fields Limited v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited*[20], Mojapelo DJP dealt at length with costs in an application related to certification and joinder of a party to litigation. His findings are of guidance in this matter.

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[19] Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC).

[20] Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015)

E. ORDER

[42] In the result, the following order is made:

[43] The application is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of Judgment: 12 August 2024

Date of hearing: 03 April 2023

On behalf of the Applicant: Mr Ryno de Beer

Liberty Fighters Network

On behalf of the First and Second Respondent: Adv. R. Itzkin

Duly instructed by: ENS Africa Inc

On behalf of the Third Respondents: Adv. M Dafel

Duly instructed by: Lawtons Africa Attorneys.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 12 August 2024.