

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 3238/2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

MURENDENI NDLANDULENI

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF TREASURY, FREE STATE

1st Respondent

HEAD OF THE DEPARTMENT

DEPARTMENT OF TREASURY, FREE STATE

2nd Respondent

MASECHABA SESING

3rd Respondent

HEARD ON: 28 JUNE 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 29 JUNE 2023

[1] The applicant approached the court on an urgent basis seeking an order in the following terms:

- "1. The applicant's non-compliance with the forms and service and time periods provided in the Uniform Rules of Court is condoned and that this application be heard as a matter of urgency in terms of Rule 6(12) of the Rules of Court.*
- 2. It is declared that the applicant's precautionary suspension dated 20 June 2023, is unlawful and invalid.*
- 3. The second respondent is directed to uplift the precautionary suspension of the applicant with immediate effect, and restore the status quo ante.*
- 4. The second respondent is restrained and prohibited from placing the applicant on precautionary suspension, without complying with Chapter 7 paragraphs 2.6 and 2.7(2) of the SMS Handbook.*
- 5. Third Respondent is ordered to pay the applicant's costs in her personal capacity and such costs may not be recovered from the department of provincial treasury, in whatever form or manner; alternatively*
- 6. Second Respondent is ordered to pay the costs of the applicant on an attorney and own client scale; and*
- 7. In the event the second respondent engages the service of an attorney, a costs order de bonis is moved against such attorney/s as well, jointly and severally the one paying the other to be absolved.*
- 8. That the applicant is granted further and/or alternative relief."*

[2] The application is opposed by the second and third respondents who *inter alia* pleaded specially that the application is not urgent and any alleged urgency was self-created. Furthermore, the applicant failed to satisfy the requirements of a final interdict. The respondents' answering affidavit addressed in detail and *ad seriatim* the allegations contained in the founding affidavit.

[3] The applicant filed a replying affidavit and a notice in terms of Rule 7(1) of the Uniform Rules of Court before the start of the proceedings. The respondents filed

a power of attorney and a confirmatory affidavit by one Rifumuni Bridget Holeni, an office manager in the department of treasury. The power of attorney was signed by the third respondent, nominating and appointing Rampai Attorneys to oppose the urgent application on behalf of the second and third respondents. The applicant contested the authority of Rampai Attorneys to act on behalf of the second and third respondents.

- [4] I was concerned about the urgency of the application and requested the parties to address me on that point as it could be dispositive of the application before adjudicating the merits. Rule 6(12) of the Uniform Rules of Court provides as follows:

“(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph (a) of this sub rule, the applicant must set forth explicitly the circumstances which are averred to render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course.”

- [5] A brief background of the facts is as follows: On 08 June 2023, the third respondent forwarded a letter to the applicant charging him of having circulated/carbon copied a letter addressed to her by the first respondent to other officials of the department who were her subordinates. She perceived this act as undermining her authority and enquired of the applicant to furnish reasons for the said act on/ or before 19 June 2023.
- [6] On 20 June 2023, in the absence of the applicant's response, the third respondent dispatched to him a notice of pre-cautionary suspension from his employment with the Department. On the same day, the applicant consulted his attorneys who addressed a letter to the third respondent on 21 June 2023 demanding the applicant's suspension to be uplifted by 22 June 2023, failing which the courts would be approached for the necessary relief.

- [7] The first respondent replied on 20 June 2023 to the third respondent's letter of the same date in which the former was advised of the applicant's pre-cautionary suspension. The first respondent decried her not having been consulted about the applicant's suspension and gave the third respondent 24 hours to recall the pre-cautionary suspension as the applicant *"was acting out on a request that had been issued directly by her to carbon copy all the listed officials in the finance, corporate services and legal units for information and action purposes."* The third respondent was advised by the first respondent on 22 June 2023 that the applicant was requested to resume office on 23 July 2023.
- [8] The applicant advised the first respondent on 22 June 2023 that he had noted her instruction and directive to report for duty. He stated that he would work from home and attend to his function virtually with effect from 23 Jun 2023. However, as his pre-cautionary suspension was yet to be uplifted by the third respondent, he had instructed his legal representatives to approach the court *"to have certainty regarding my return to work and the execution of my functions within the Department."*
- [9] The application was served on the State Attorney on 23 June 2023 on behalf of the respondents at 15h03 and 15h28. The second and third respondents filed their notice to oppose through their current attorneys on the same day at 16h54 and the answering affidavit on 27 June 2023. The first respondent filed a notice to abide by the decision of the court and a confirmatory affidavit to the replying affidavit on 28 June 2023.
- [10] The question that arises is: should this application have served before this court at the time and manner that it did? The applicant's founding affidavit sheds some light in this regard. In response to the letter addressed to him by the third respondent on 08 June 2023, the applicant stated that:
- "25. The letter enquires if I was instructed to copy the other officials and whether such instruction was lawful and reasonable. I was directed to give an answer by 19 June 2023. I attach a true copy of this letter hereto to marked annexure FA3.
26. Undeniably, I did not respond to this question as I was not the author of the letter issued to the HOD, nor was I responsible for the issuing of instructions to transmit the MEC's letter and the copying thereof to the Departmental officials. The HOD should have

directed her enquiries to the MEC. I got the distinct impression that I was being shot as the messenger and I was now collateral damage used as a scapegoat.

27. *I was proven correct in my impressions that I was being shot as a messenger, as without further ado, I was placed on the so-called pre-cautionary suspension in a letter dated 20 June 2023, and signed by the HOD.”*

[11] The applicant admitted that he was placed in possession on 22 June 2023 of the letters from the first respondent to the HOD dated 20 June 2023 and 22 June 2023 respectively, in which the second respondent was advised that the latter should recall the suspension within 24 hours and that he should report for duty on 23 June 2023.¹

[12] The next question that arises is: at this stage, 22 June 2023, was it necessary for the applicant to proceed with the application which was only launched on 23 June 2023 on the very same day that he was instructed to return to work by the first respondent? In my view, the answer is a resounding no. The suspension was brought about by the applicant's own conduct when he failed to respond to the third respondent's letter. His task at the time was a simple one, namely, to inform the third respondent that he had acted and circulated the letter to the officials on the instructions of the first respondent and/or he should have informed the first respondent, whom he considered as the employer, of the third respondent's letter. He failed to do so.

[13] He also failed to inform the first respondent of the third respondent's notice of suspension which he received on 20 June 2023. Instead of doing so, he decided to approach his attorneys who then engaged the third respondent through correspondence, insisting on the upliftment of the applicant's suspension. Despite the instruction by the first respondent that he should return to work, the applicant failed to discuss the matter with either the first or the second respondent to resolve the apparent conflict of instructions.

[14] It was argued by the applicant's counsel that in the face of an unlawful suspension and abuse of authority, the applicant would suffer a continuous

¹ Paragraphs 36 and 38 of the Answering Affidavit.

violation of reputational dignity and be the subject of perpetual abuse of power by the first respondent if this matter were not heard as one of urgency. The third respondent had no power to suspend the applicant as the first respondent was the employer and not the third respondent. The third respondent's conduct flouted the principle of legality which required public functionaries to act within the bounds of the law.

[15] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and others*,² it was stated that the applicant must state the reasons why he claims he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of the absence of substantial redress in an application in due course. The correct and crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application.

[16] The applicant is of the view that the third respondent is the employer of employees reporting under her line function, which excludes employees in the office of the first respondent.³ The third respondent's reliance on the SMS Handbook to the exclusion of his contract of employment with the first respondent, under whose supervision he serves, is enough evidence that the third respondent is not his employer.⁴ However, the applicant prayed in his notice of motion that the second respondent be restrained and prohibited from placing the applicant on pre-cautionary suspension without complying with Chapter 7, paragraphs 2.6 and 2.7(2) of the SMS Handbook.⁵ This is strange as the applicant does not consider the third respondent as his employer.

[17] The respondent's counsel argued that the applicant approbates and reprobates in that the one moment he did not consider the second respondent as his

² 2011 ZAGPJHC 196 (23 September 2011).

³ Paragraph 43 of the Replying Affidavit.

⁴ Paragraph 42 of the Replying Affidavit.

⁵ Prayer 4 of the Notice of Motion.

employer and yet, in the same breath, he expected her to comply with the provisions of the SMS Handbook to effect a precautionary suspension. The SMS Handbook applied only if the decision was taken by the employer. Paragraph 2.8 of the SMS Handbook defines an employer as (i) the head of the department in respect of all members (excluding heads of department in their capacity as employees) or any member of his or her department designated to perform the specific action and (ii) in respect of heads of departments, the relevant executing authority. Consequently, the second respondent's suspension of the applicant was not illegal and the applicant's reliance on the principle of legality as infusing the application with urgency is misplaced.

[18] The respondents' counsel contended that the applicant failed to disclose in the founding affidavit the impediments to his return to his office or workplace now that he had been instructed to return to work by the first respondent. It would appear to me that the only reason is that the third respondent refused to uplift the suspension.⁶ If an application lacks the requisite element or degree of urgency, the court can, for that reason, decline to exercise its powers under rule 6(12) and the matter would then not be properly on the roll. The appropriate order under such circumstances is to strike the application from the roll. If a case has lost its urgency as a result of an interim arrangement between the parties, the case will not be enrolled otherwise than in accordance with the rules.

[19] In *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)*⁷ it was stated that:

"Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

⁶ Paragraph 69 of the Founding Affidavit.

⁷ 1977 (4) SA 135 (W).

[19] In this matter, I am not persuaded that the application is so urgent that it should be placed on the urgent roll and stands to be struck off for lack of urgency. It has failed to comply with the provisions of Rule 6 (12) (b). I am of the view that the respondents were entitled to oppose the application taking into account the circumstances and the prayers sought in the notice of motion.

[20] It is trite that the successful party is entitled to the costs. It was unnecessary for the applicant to approach the court in the manner that they did on 23 June 2023 as he had received substantial redress through the first respondent who had ordered him to resume his duties immediately.

[21] In the premises, the following order issues:

Order:

The application is struck from the roll with costs.

MHLAMBI, J

On behalf of the Applicant: Adv Masihleho
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