

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

HELD AT EAST LONDON

CASE NO: EL 1092/2012

ECD 2492/2012

Date Heard: 02 October 2012

Date delivered: 2 May 2013

NOT REPORTABLE

In the matter between:

NYANISILE ZONO

Applicant

and

MINISTER OF POLICE

1st Respondent

THE NATIONAL COMMISSIONER:

SOUTH AFRICAN POLICE SERVICE

2nd Respondent

PROVINCIAL HEAD: CRIME

INTELLIGENCE, EASTERN CAPE

3rd Respondent

Nature of matter: Labour law - employment contract – enforcement of the contract - termination of payment of salaries to the applicant – jurisdiction – urgency etc

Order: The termination of applicant's salary is declared invalid and set aside; 1st, 2nd and 3rd respondents are hereby ordered forthwith to re-instate and pay applicant's salary with retrospective effect; & 1st, 2nd and 3rd respondents pay the costs of this application.

JUDGEMENT

DUKADA J:

[1] This is an application in which the Applicant seeks the following orders:-

- (i) That the applicant's non-compliance with provisions of the Rule 6 (5) of the Rules of this Honourable Court be condoned and that leave be granted to the applicant to bring this applications as a matter of urgency in terms of Rule 6 (12) of the Rules of Court;
- (ii) That a Rule Nisi do hereby issue calling upon the respondents to show cause, if any, on 23rd October 2012 at 10H00 or so soon thereafter as the matter may be heard, why an order in the following terms should not be made final:-
 - (a) That the respondent's action of terminating applicant's salary or remuneration be and is hereby declared unlawful, invalid and of no force and effect;
 - (b) That the respondents be and are hereby ordered to forthwith re-instate applicant's salary or remuneration with retrospective effect.
 - (c) That the respondents' intention or threat to terminate applicant's contract of employment with the respondent be and is hereby declared unlawful, invalid and of no force and effect;
 - (d) That the respondents be and are hereby prohibited, restrained and/or interdicted from terminating applicant's contract of employment with the respondents;

- (e) That the respondents' notice of intended placement issued on 8th 2009 marked as annexure "D" be and is hereby declared unlawful, invalid and of no force and effect,
- (f) That the action of placing or transferring the applicant to Mdantsane Crime Intelligence Cluster as an intelligence collector be and is hereby declared unlawful;
- (g) That the respondents be and are hereby prohibited, restrained and/or interdicted from placing or transferring the applicant to Mdantsane Crime Intelligence Cluster as an Intelligence Collector.
- (h) That the provisions of paragraphs 2.2, 2.3 and 2.7 above shall operate as an interim interdict or mandamus pending finalization of this application.

[2] This application is strenuously opposed by the respondents.

[3] A certificate of urgency was presented to Van Zyl J who, after due consideration of the same, decided on the 10 September 2012 that "the matter does not appear to be sufficiently urgent to be heard on a day other than motion court day. If *"it is enrolled it must be done with prior service and notice to the respondents."*

The papers were served upon respondent's attorneys on the 11 September 2012 and this application was then set down for hearing in the Motion Court on Tuesday 18 September 2012.

[4] Smith J on 18 September 2012 granted the following order:-

- “(i) That the application be and is hereby postponed to 2nd October 2012;*
- (ii) That the applicant is hereby directed to file his replying affidavit, if any and Heads of Argument on or before 25 September 2012;*
- (iii) That the respondents are hereby directed to file their Heads of Argument on or before 26 September 2012;*
- (iv) That the costs occasioned by the postponement are reserved”.*

[5] Respondents delivered their answering affidavit and applicant also delivered his replying affidavit.

[6] The matter then came before me on the 2nd September 2012 and was fully argued.

FACTUAL BACKGROUND

[7] The facts are largely common cause. The applicant is residing at No. 3 St Marks, Road Southernwood, East London. He was employed by the South African Police Services on 8th April 1987.

He spent two years as a crime prevention officer and nine years in the finance department and ten years in the technical support services section. He joined the technical support services after having completed the necessary trainings, workshops and courses for that unit.

He opened a third branch of the technical support services unit and became a commander thereof until July 2005 when he was elevated to the rank of a captain.

He then became a section commander of the electronic surveillance and technical support service based at no. 12 St Peters Road, Southernwood, East London.

- [8] Applicant was later transferred and placed at Mdantsane Crime Intelligence Collection Office, East London.

He refused to go there. He objected to the afore-mentioned placement and submitted representations in that regard.

- [9] During May 2012 applicant received a copy of a letter dated 15 May 2012 written by the Provincial Head of Crime Intelligence, Eastern Cape, paragraphs 2 and 3 of which read as follows:-

"2. Our records indicate that you never took up the post or tendered your services at the Mdantsane Crime Intelligence Station. We record that you had no permission to report at any other workplace of crime intelligence or the South African Police Service. We do not regard such a tender as a proper tender of service.

2.1 We record our view that you have been absent from work without any authority. Please be advised that a contract at common law is of reciprocal nature. You must tender your services in exchange for which your employer will remunerate you.

2.2 You failed to comply with your obligation to tender your service in terms of your contract of employment and as such, the contract is deemed to be suspended.

- 2.3 *It is our view that you have been absent from work for an unreasonably long period and as such have repudiated your contract of employment.*
3. *You are hereby afforded the opportunity to submit written representations with seven (7) days from receipt of this letter as to why should we not terminate your contract with the South African Police Service."*

Applicant replied to that letter per his of the 4 June 2012. In that letter applicant disputed that he had not made representations, saying he had done so in response to a letter dated 8 April 2009. He also denied that he has been absent from work as he has been reporting for duty in the office at 12 St Peters Road, Southernwood, East London where he was left alone when the other members were placed in the Mdantsane office. He further stated that he is in that office "until proper official process to place him elsewhere is followed". He categorically denied to have been absent from work without proper authority.

- [10] The Provincial Head of Crime Intelligence, Eastern Cape, replied per a letter dated 22 June 2012, paragraphs 2 and 3 of which read as follows:-

- "2. *Accordingly you are hereby informed that you should take up your post at the Mdantsane Crime Intelligence Office with immediate effect and not later than the 29th June 2012. It is our view that your assumption of your duties at Mdantsane Crime Intelligence is in the interests of the service.*

3. *Please be advised that in the event that you fail and/or neglect to take up your post as indicated above, the service reserves the right to suspend its obligation to remunerate you"*

Applicant in his reply dated 27 June 2012 states as follows in subparagraphs 1.1 and 1.2:-

"I wish to place on record that I duly made the required representation to the relevant office of the National Commissioner (National Placement Committee- which committee has since been disbanded) on 2009.05.15. Enclosed herewith please find a copy of the fax transmission slip or communication journal as the proof that it was received by the office of the National Commissioner.

- 1.2 *Thereafter it is clear from the foregoing that a representation was made and there is no determination on it, therefore I cannot take the post you wish me to take at Mdantsane Crime Intelligence Office until such time that the relevant office has made some consideration and determination of the process of the representation made."*

- [11] On the 17 August 2012 applicant further received a copy of a letter dated 18 July 2012 written by the Provincial Head of Criminal Intelligence, Eastern Cape which reads as follows:-

*"NOTICE OF INTENTION TO TERMINATE YOUR EMPLOYMENT
COTRACT: CAPTAINN.ZONO PERSAL NO: 0526605-0*

- A.1 *Your letter dated 27th June 2012 bears reference.*

2. *The contents of your letter are dully noted. Please be advised of our view that you have not provided us with any compelling*

reasons as to why you are unable to take up the post of Mdantsane Crime Intelligence.

3. *We record that your continued refusal to take up your post seriously hampers the service delivery at Mdantsane Crime Intelligence. We further record that despite our office informing you of the consequences of your continued absence from work you elected not to tender your services as instructed. Our records indicate that you have been absent from work without authority for an unreasonably long period.*
4. *Accordingly you are hereby informed that the South African Police Service suspends, with immediate effect, its obligation to remunerate.*
5. *Please be further advised that in the event that you continue to absent yourself without authority and fail to take up your post as instructed, the South African Police Service will terminate your employment contract."*

Applicant states in paragraph 4.8 of his founding affidavit that this letter is the one that prompted these proceedings.

- [12] Respondents have raised points in *limine* in their answering affidavits as follows:-

JURISDICTION

- 5.1 *That this Court lacks jurisdiction to entertain this application. The issues in this dispute in the instant matter relate to employment*

relationship and, accordingly, fall under the exclusive jurisdiction of the Labour Court as envisaged in s 157 (1) of the Labour Relations Act 66 of 1995 (“the LRA”)

- 5.2 *Alternatively, it is not competent for this Honourable Court to grant the Order sought by the applicant in prayers 2.3, 2.4, 2.5, 2.6 and 2.7 of the Notice of Motion. The relief sought by the applicant in the afore-mentioned prayers relates exclusively to employment issues which must be referred either to the Bargaining Council or the Labour Court.”*

(b) **URGENCY**

“6.1 *The respondents contend that the application is not urgent. In an urgent application an applicant is required to set forth explicitly the circumstances which he avers renders the matter urgent and the reasons why he claims that he could not be afforded substantial relief at a hearing in due course.*

6.2 *The high-water mark of applicant’s averments in support of urgency appears at paragraphs 12 to 20 of the founding affidavit. Those averments are less than explicit as required by the Rule. They simply concern an alleged financial prejudice to the applicant and his siblings.”*

- (c) *Respondents further raise non-compliance with Rule 12 (a) (i) of the Court Notice 1 of 2012.*

[13] I will first deal with the respondents’ points in *limine* as set out above.

JURISDICTION

- [14] The question of jurisdiction that is raised by the respondents in this matter is, in my view, not the real dispute but an issue in a dispute.

In Johannesburg City Parts v Mphahlani NO & Others,¹ the Court explained the difference between a dispute and an issue in a dispute as follows:-

“Let me make an example to illustrate the distinction between a dispute and an issue in a dispute. One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement the employer was supposed to follow a certain procedure before dismissing the employee but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer may argue that although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement are applicable and or were complied with before the employee was dismissed is an issue necessary to be decided in order to resolve the real dispute.

¹ [2010] 6 BCLR 585 (LAC)

In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because prior to or in the course of resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of collective agreement must be decided. It would be different, however, where the main dispute, as opposed to an issue in a dispute is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute would be required to be resolved through arbitration in terms of the LRA.”

This dictum was quoted with approval by Zondo JP (as he then was) in Minister of Safety and Security v Safety and Security Sectoral Bargaining Council & Others.²

- [15] This explanation, in my view, applies to the present case. The real dispute is as contained in prayers 1 (ii) (a), (b), (c), (d), (e), (f) and (g) mentioned in paragraph 1 above.
- [16] The respondent has decided not to pay to applicant his salary for the reason that he has failed to take up his post where he has been placed i.e at Mdantsane Crime Intelligence Collection Office, East London. Respondent submits that applicant is not entitled to receive salary while not rendering services. Respondent states that applicant was placed at Mdantsane Crime Intelligence Collection Office in terms of the Safety and Security Sectoral Bargaining Council Agreement No. 3/2006 dated 7 September 2006.

² [2010] 6 BLLR 594 (LAC)

- [17] Applicant on other hand states that his placement at Mdantsane Crime Intelligence Collection Office should have been in terms of document with the title “*Restructuring of the South African Police Service: Placement of employees*” by the National Commissioner, South African Police Service on the 25th August 2008 issued to all Provincial Commissioners, all Divisional Commissioners at Head Office, all Heads at Head Office, all Commanders at SAPS Colleges and Training Centres, all Section Heads at Head Offices, all Deputy National Commissioners, the Chief of Staff at Ministry of Safety and Security, and the Secretary at National Secretariat for Safety and Security. Applicant further states that this transfer to Mdantsane Crime Intelligence Collection Office should have been made in terms of agreement reached by the Safety and Security Sectorial Bargaining Chamber No. 5/1999 dated 8 October 1999 and that agreement was not complied with.

In my view, if any applicable document or agreement mentioned above was complied within placing the applicant at Mdantsane Crime Intelligence Collection Office, the disputed issue of the consequences which applicant seeks to have rectified, would arise.

The issue whether any of the above-mentioned document or agreement is applicable to the said placement of the applicant or were complied with in placing the applicant as afore-mentioned is, in my view, an issue in a dispute, not a real dispute as set out above.

- [18] Mr Gqamana, Counsel for the respondent, in his argument did not pursue the point that “*the issues in dispute in the instant matter relate to empowerment relationship and, accordingly, fall under the exclusive*

jurisdiction of the Labour Court as envisaged in s 157 (1) of the Labour Relations Act, 66 of 1995 (“the LRA”).”

This objection challenged this entire application. He, instead, pursued the issue of lack of jurisdiction by this Court in respect of prayers 1 (ii), (c), (d), (e), (f) and (g) mentioned in paragraph 1 above.

THE LAW

[19] Section 157 (1) and (2) of the Labour Relations Act 66 of 1995 provides as follows:-

- “(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
- (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996 and arising from –*
 - (a) employment and from labour relations;*
 - (b) any dispute over the constitutionality of any executive or administrative act or conduct, by the State in its capacity as an employer;*

(c) *the application of any law for the administration of which the Minister is responsible.”*

[20] Discussing s157, Van der Westhuizen J, remarked as follows in Gcaba v Minister of Safety and Security³:-

“Furthermore, the LRA does not intend to destroy causes of action or remedies and s57 should not be interpreted to do so. Where a remedy lies in the High Court, s 157 (2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.”

[21] JURISDICTION ON THE BASIS OF THE PLEADINGS.

Langa CJ, concurring in his minority judgment in the outcome reached by the majority, remarked as follows in Chirwa v Transnet Ltd and Others⁴:-

“The finding, however, rests on the case as pleaded by Ms Chirwa. She formulated her case on the basis of PAJA, and a Court must assess its

³ 2010 (1) SA238 (CC) in para 73 (page 262)

⁴ 2008 (4) SA367 (CC) in para 169

jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction a proposition that this Court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the Court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.”⁵

[22] Van der Westhuizen J further remarked as follows in Gcaba’s case in paragraph 75:-

“In the event of the court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining 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 in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.”

⁵ See also *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) in para 71 where Nugent JA remarked as follows:- “ 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”.

- [23] Turning to the case at hand, the orders sought by the applicant in paragraphs 1(ii), (a), and (b) mentioned above, concern the termination of payment of salaries to the applicant. Further applicant, in paragraph 5.7 of his founding affidavit, states:-

"I therefore submit confidently that the termination of my salary in terms of paragraph 5 of annexure 'N21' is unlawful and of no force and effect as it does not enjoy the recognition of the law."

- [24] The applicant's case in respect of termination of payment of salary as set out in his founding affidavit is that there exists a contract of employment between him and the respondents, from which flow an obligation on the part of the respondents to pay him his salary.

Applicant seems to me to seek to enforce the said contract of employment and he attacks the respondents' act of terminating the payment of his salary on the ground of unlawfulness.

- [25] Dealing with the question whether the dispute was within the terms of s 191 of the Labour Relations Act of 1995, Nugent AJA (as he then was) remarked as follows in Fedlife Assurance Ltd v Wolfaardt⁶:-

"Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the

⁶ 2002 (1) SA49 (SCA) in para 27

dismissal, then the fact that it might also be, and probably is unfair, is quite coincidental for that is not what the employee's complaint is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a 'dismissal' as defined in chap 8). In those circumstances the respondent's action is not a 'matter' to be adjudicated by the Labour Court as contemplated by s157(1) and the special plea was correctly set aside."

[26] This Court, in my view, therefore, has a jurisdiction in respect of orders sought in paragraphs 1(ii)(a) and (b) above.

[27] I now proceed to deal with orders sought in paragraphs 1 (ii), (c), (d), (e), (f) and (g) above.

[28] Applicant in the afore-mentioned prayers seeks orders dealing with the termination of his contract of employment, placement or transfer to Mdantsane Crime Intelligence Collection Office.

Paragraph 11 of respondents' answering affidavit states. *"The applicant was employed by the SAPS and based at the Crime Intelligence Technical Support Services at East London. The SAPS and the recognised Unions in the Sector entered into an agreement on 7 August 2006. A copy of such agreement is attached hereto marked 'N21: Effectively in terms of the afore-said agreement employees were matched and placed in accordance with SAPS needs and based on service delivery'".*

Applicant admitted in his replying affidavit the contents of this paragraph. In fact in his replying affidavit applicant does not deny that his placement or transfer was to be implemented in terms of the agreement concluded between SAPS and the recognised unions in the Sector on 7 August 2006. The agreement is attached to respondent's answering affidavit and has heading reading: "*Agreement Safety and Security Sectoral Bargaining Council Agreement No: 3/2006 dated 07-09-2006*" and is signed on behalf of South African Police Service as employer, South African Police Union, and Police and Prisons Civil Rights Union, as employees at Pretoria on 7th September 2006.

Applicant also mentions in paragraph 9.2 of his founding affidavit an agreement that was concluded at a Safety and Security Sectoral Bargaining Chamber (SSSBC) No. 5/2009 between South African Police Service, SAPU, PSA and POPCRU which regulates the transfer of the employees. He further states that he is a member of POPCRU and therefore he was represented in concluding that agreement. That agreement is annexed to his founding affidavit and bears the title: "*Agreement reached by the Safety and Security Sectoral Bargaining Chamber (SSSBS) No 5/1999 dated 8 October 1999 and signed by the representatives of South African Police Services (as employer), SAPU, PSA and POPCRU.*"

- [29] In my view the determination of the issue of termination of applicant's contract of employment, placement or transfer will involve, *inter alia*, deciding as to which agreement or document should have been followed or was followed. The agreements in question here being collective agreements concluded between the employer and employee unions, will in all likelihood have to be interpreted and/or applied. The Labour Relations Act provide as for bodies (including bargaining councils) in which proceedings are held that are about all kinds of

disputes such as dismissal disputes, proceedings about disputes concerning the interpretation or application of collective agreements etc.

Van der Westhuizen J comments as follows on such bodies or structures:-

“As found in Chirwa, the Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged dismissals grounded in the LRA and not, for example, applications for administrative review. The High Court adjudicates the alleged violations of Constitutional rights, administrative review applications, and of course all other matters. This corresponds with a proper interpretation of s157 (1) and (2).”⁷

[30] The determination of the issue of the termination of applicant’s contract of employment, placement or transfer appears, in my view, to be a quintessential labour related issue as analysed above. To hold otherwise, in my view, would be to allow forum shopping⁸. Consequently I find that this Court has no jurisdiction in respect of orders sought in paragraphs 1(ii), (c), (d), (e), (f), and (g) above.

[31] I now proceed to deal with the second ground of respondent’s objection, viz, urgency.

⁷ Gcaba v Minister of Safety and Security, *supra*, at para 69

⁸ See also Gcaba, *supra*, at para 41 where Skweyiya J stated that:-

“The existence of purpose built employment framework in the form of the LRA and associated legislation infers that labour process and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. When alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanism established by the LRA that the employee should pursue her or his claims.”

[32] Mr Gqamana has argued strenuously that this application lacks urgency. He stated that a letter giving applicant notice to terminate his contract of employment and calling upon him to make representations is dated 15th May 2012. Applicant wrote to the respondent making representations per a letter dated 4 June 2012. A further letter from 3rd respondent dated 22 June 2012 also with heading “*NOTICE OF INTENTION TO TERMINATE YOUR EMPLOYMENT CONTRACT CAPTAIN N. ZONO: PERSAL NUMBER 0526605-0*” was copied to applicant. This letter calls upon applicant to take up his post at Mdantsane Crime Intelligence Office and also states that the “*service reserves the right to suspend its obligation to remunerate*” applicant. Applicant responded to this letter per his letter dated 27 June 2012 insisting that his representations be considered.

Me Gqamana further stated that applicant thereafter only launched this application on the 11 September 2012.

Mr Gqamana further contended that applicant has failed to set out explicitly in his affidavit the averments justifying for dispensing with the provisions of Rule 6 (5)(a) and (b) of the Uniform Rules.

[33] In reply Mr Zono argued that the objection as to urgency has been rendered moot by the order granted by this Court on the 18 September 2012 regarding the filing of further affidavits. He submitted that the respondents have not been prejudiced by the alleged non-compliance with Rule 6 (5) (a) and (b) of the Uniform Rules.

He further argued that the Rules are for the Court and not the Court for the rules. He submitted that for that reason formalism in the application of the Rules is not encouraged by Courts.

[34] I may point out at this stage that the applicant, however, states in paragraph 4.8 of his founding affidavit that it is the letter dated 18 July 2012, written by the 3rd respondent, which prompted these proceedings. Applicant received a copy of that letter on 17 August 2012. Paragraph 5 of that letter reads:

“Accordingly you are hereby informed that the South African Police Service suspends with immediate effect its obligations to remunerate you.”

A copy of that letter was received by the applicant on the 17 August 2012 and this application was launched on the 11 September 2012.

THE LAW

[35] Sub-rules (a) and (b) of Rule 12 of the Uniform Rules provide for urgent applications. These sub-rules read as follows:-

“(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 be as practicable be in terms of these rules) as to it seems meet.

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

- [36] Kroon J, discussing these sub-rules in Caledon Street Restaurants CC v D'Aviera,⁹ remarked as follows:-

*"Therefore, in the case of an urgent application which, it may be mentioned, involves not only the abridgement of times prescribed by the rules, but also the departure from established filing and sitting times of the court, an applicant is permitted to proceed by way of notice of motion without having full regard to the rules applicable to adjudication in the ordinary course. The applicant is allowed, depending on the circumstances of the case, to make his own rules but as far as practicable in accordance with the existing rules."*¹⁰

- [37] *It is also correct that courts are enjoined by Rule 6 (12) to deal with urgent application in accordance with procedures that follow the Rules as far as possible and that involves the exercise of a judicial discretion by a Court 'concerning which deviation it will tolerate in a specific case'*¹¹.

The degree or extent of relaxation of the rules and of the ordinary practice of the Court will depend on the demands of the urgency of the case. It must be commensurate therewith. Those exigencies must appear from the papers.¹² In other words, the applicant must set out averments of urgency in the affidavit and facts upon which such

⁹ [1998] JOL 1832 (SE) at pages 6 and 7

¹⁰ See also Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A); Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Markins furniture Manufacturers) 1977 (4) SA 135 (W); IL & B Marcow Caterers (Pty) Ltd v Gretermans SA Ltd and Another; Aroma Inn Lines (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA 108 (C); Gallagher v Normans Transport Lines (Pty) Ltd 1992 (3) SA 500 (W) at 441A

¹¹ Nelson Mandela Metropolitan Municipality v Grevenou CC, supra, at page 95 A-B and Caledon Restaurants CC, supra, at 8

¹² Luna Meubel Vervaardigers, supra at 137 G-G.

averments are based.¹³ In Sikwe v SA Mutual Fire and General Insurance,¹⁴ Kirk – Cohen AJ (as he then was) remarked as follows:

“In my opinion, an applicant who wishes to rely on the procedure provided for in Rule 6 (12) must set out sufficient facts in the founding affidavit to enable the Court to decide whether urgent relief should be granted. Specific averments of urgency must be made and facts upon which such averments are based must be set out in the affidavit where it is not otherwise apparent that matter is urgent. It does not follow that an application is necessarily defective if the form referred to in the Rule is not strictly addressed to. In my opinion, it is the substance of the affidavit, and not its form, which will weigh with a Court; if an affidavit set out facts upon which a Court can decide that an applicant is entitled to relief in terms of the sub-rule the Court will entertain the application. If the only reasonable inference from the facts set out in the affidavit is that the matter is one of urgency, then an applicant will have complied with requirements of the sub-rule, even though he does not make a specific averment that it is urgent.”

This remark was quoted with approval by Van Zyl J in *Cekeshe and others*, supra, at 948 C-D.

I fully agree with this view.

- [38] Turning to this matter, applicant states in his founding affidavit that if the interim relief is not granted he will suffer an irreparable harm or prejudice. He states that his salary is his only income and is the sole bread-winner at his home and has a number of dependants to take care of with his salary. They depend on him for food, clothing, school fees medical expenses and other requirements. His dependants include five

¹³ *Cekeshe and others v Premier, Eastern Cape and Others* 1998 (4) SA 935 (TKD) at 948 B

¹⁴ 1977 (3) SA 439 (WLD) at 440 H-441A

young children. He further states that a number of debit and stop orders for his motor vehicle and accommodation payments are met from his salary.

On the other hand, respondents contend that the financial prejudice or loss that the applicant seeks to rely upon as the basis and justification for dispensing with the provisions of Rule 6 (5)(a) and (b) of the Uniform Rules, has not been established. The basis advanced for this contention is that the applicant has not been rendering any services to the South African Police Service. They submit that receipt of salary is reciprocal in nature and if an employee is not rendering any services to the employer, such employee is not entitled to receive salary.

Mr Zono countered this argument by referring me to Regulation 20 (j) of the Regulations for the South African Police Service made under section 24 (1) of the South African Police Service Act 1995 (Act No-68 of 1995) (hereinafter referred to as SAPS discipline regulations). Regulation 20 of these Regulations deals with Misconduct and mentions specific acts or conducts as misconduct. Regulation 20 (j) creates the following misconduct: *“(j) absents himself or herself from work without reason or permission”*.

Mr Zono also referred to Regulation 5 which deals with the nature of misconduct. Regulation 5 (1) reads:-

“Employee conduct that may warrant disciplinary action is listed in regulation 20.”

He argued that a disciplinary hearing should have been first conducted in respect of the alleged misconduct of the applicant and only after he is found having committed the alleged misconduct, a sanction could be imposed on him as provided for in Regulation 14. Regulation 14 prescribes as to how a disciplinary hearing should be conducted. He further contended that Regulation 15, which contains sanctions which

can be imposed, does not contain a sanction to terminate an employee's salary.

[39] One of the purposes of the SAPS discipline regulations is described in Regulation 3 is to prevent arbitrary actions by supervisors towards employees in the event of misconduct. Regulation 4 provides that the SAPS discipline regulations are based on principles, one of which is mentioned in sub-regulation (d) (i) as "*the fair treatment of employees by ensuring that they enjoy a fair hearing in both the formal and informal proceedings.*"

[40] In my view, to summarily terminate applicant's salary without a prior finding and sanction of a disciplinary hearing, flagrantly flouts the purpose and principle of fairness espoused in the SAPS discipline regulations.

I tend to agree with the contentions by Mr Zono.

[41] Mr Gqamana also submitted that financial hardship or loss of income is not a basis of urgency and that applicant has to show exceptional circumstances before interim relief is granted. He referred me in support of his argument to Democratic Nurses Organisation of SA and Another v Director-General, Department of Health and Others.¹⁵ In this case Molahleki J followed the judgment in Malatji v University of the North [2003] ZALC 32 (LC) which within followed the decision in Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John No & Andere (1990) 11 ILJ 971 (T).

¹⁵ [2009] 30 ILJ 1845 (LC)

It may be mentioned that in the University of the Western Cape Academic Staff Union & Others case, *supra*, the applicant had been dismissed and the gravamen of the Court's decision was that: "*with regard to the notion of irreparable harm it needs to be mentioned that loss of income as a result of dismissal is the inevitable consequence and as such provides no ground for the granting of urgent relief.*" In the Malatji case, *supra*, the applicant's service had also been terminated and furthermore she failed to furnish in her papers sufficient information regarding her financial circumstances. In the Democratic Nursing Organisation of SA and Ano, *supra*, the applicant failed to show that there were special circumstances for granting the relief sought.

- [42] In *casu* the applicant's salary has been terminated without first conducting a disciplinary enquiry in respect of the alleged misconduct in which a decision would have been made and a penalty imposed, as prescribed by the SAPS disciplinary regulations. Furthermore, in my view, the applicant has shown financial hardship that he and his dependants will suffer as a result of the termination of his salary. For as long as the issues highlighted above in paragraph 18 above have not been resolved, the applicant's future would remain uncertain and his financial hardship will in all probabilities persist. It is clear to me that the applicant would not be afforded "*substantial redress at a hearing in due course*" as such disciplinary proceedings may take some time.

In Cekeshe & Others case, *supra*, Van Zyl J, also dealing with the aspect of non-payment of salaries as a ground for urgency, remarked as follows at 948 F-G:-

"I am of the opinion that, on the facts alleged in the applicant's founding affidavit in conjunction with the nature of the relief claimed, the matter is

one of urgency. By not receiving their salaries the applicants would be suffering financial prejudice.”

In the circumstances, in my view, the cases referred to by Mr Gqamana are distinguishable from this case.

- [43] The respondents also raised an objection that the applicant has failed to comply with Rule 12(a)(i) of the Rules of Practice of this Court in that he fixed, without the approval of a Judge, the date, time and place of the hearing of this application.

In reply the applicant states that the certificate of urgency was placed before Van Zyl J and on the 10th September 2012 he gave directions with regard to the hearing and further conduct of the matter.

- [44] From the papers Van Zyl J issued a directive in terms of Practice Rule 12(a) (i) of the Joint Rules of Practice on the 10 September 2012 as mentioned in paragraph 3 above.

- [45] The applicant's papers were served on the respondent s' attorneys on the 11 September 2012 and also issued on that day setting this application for hearing on the 18 September 2012 at 10H00. The 18th September 2012 was on a Tuesday which is our Motion Court day. A notice to oppose was delivered on the 17 September 2012 and on the 18 September 2012 Smith J, by agreement between the parties, postponed this application to 20 October 2012, putting the parties to terms as to filing of further affidavits and Heads of Argument.

In my view, this objection by the respondents has no merit at all and it falls to be rejected.

- [46] The respondents also raised an objection to the effect that the Notice of Motion is defective as it as it fixes a date for filing Notice to oppose which is 25 September 2012 while the date of hearing is 18 September 2012. I fully agree with Mr Gqamana that was not correct.

Nevertheless respondents' counsel appeared for them on the date of hearing and the matter was postponed by agreement to 2 October 2012. In my view it appears that no prejudice was caused to the respondents by the afore-mentioned error.

In any event, as Coetzee J says in *Luna Meubel Vervaardigers, supra*, at 136 H *"urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court."* And that is what Smith J did per his order dated 18 September 2012.

- [47] In the circumstances I am of the view that the applicant established the ground of urgency in this matter though of a lesser degree of urgency, which I regard as semi-urgency and this application was therefore correctly dealt with as such.

- [48] The applicant has in my view established a clear right to the payment of his salaries as highlighted above. The respondents have already terminated payment of his salary and are persisting in such conduct although applicant is still in employ. I am further satisfied that in the circumstances of this case the applicant has no other satisfactory remedy.

[49] Regarding costs I am of the view that applicant is substantially successful in this application and consequently I find no reason why I should depart from the general rule that costs follow the event.

[50] In the result, I make the following order:-

1. That the termination of applicant's salary is hereby declared invalid and set aside;
2. That 1st, 2nd and 3rd respondents are hereby ordered forthwith to re-instate and pay applicant's salary with retrospective effect;
3. That 1st, 2nd and 3rd respondents pay the costs of this application.

D.Z.DUKADA

JUDGE OF THE HIGH COURT

For the applicant : Attorney A.S.Zono of Attorneys
A.S.Zono and Associates

For the Respondents : Adv Gqamana

Instructed by

State Attorney

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