

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J37/2024

In the matter between:

REIMETSE SALTIEL MATLHABE

First Applicant

PEGGY LEBELO

Second Applicant

And

MOGALAKWENA LOCAL MUNICIPALITY

First Respondent

TEBOGO MALAU N.O

Second Respondent

Heard: 23 January 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 24 January 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] This urgent application before the Court is yet another example of attempts by employees facing serious charges of misconduct at an internal disciplinary proceedings, to stall and frustrate the finalisation of those proceedings whilst they remain on paid precautionary suspension for prolonged periods. This Court has over

the years lamented the abuse of its urgent roll through these antics by applicants. Yet the abuse is unrelenting despite adverse costs orders being awarded against such applicants.

[2] In this opposed urgent application, the applicants seeks an interim order that the ongoing disciplinary proceedings against them be stayed pending the finalisation of their application for leave to appeal lodged under Case Number J 1655/23 and/or, the hearing of their Part B in the Notice of Motion, which pertains to a review application of the second respondent's (Chairperson) ruling.

Background:

[3] The applicants are employed by the first respondent (Municipality), and are currently on paid precautionary suspension. The suspension followed upon allegations of misconduct related to irregularities involving the awarding of tenders to a service provider. The allegations also emanated from investigations conducted by a Mr Mahlatse Thabane (Thabane) of the Special Investigations Unit (SIU).

[4] Following formal notices of the charges, the disciplinary enquiry commenced on 10 October 2023 and Thabane had testified before the Chairperson. The following day when the enquiry was to proceed, the applicants objected to the admission of the evidence of Thabane, inclusive of all documents he had relied on, and the applicants' own affidavits deposed to during the investigations. Having heard arguments, the Chairperson issued his ruling on 24 October 2023, and found that the evidence was admissible. The Chairperson further directed that the enquiry should proceed on 20 and 21 November 2023.

[5] The enquiry proceeded on 21 November 2023 and Thabane was excused having been cross-examined. The matter was then postponed to 25 and 26 January 2024.

[6] On 27 November 2023, the applicants approached this Court with an urgent application, seeking an order to stay the disciplinary enquiry scheduled for 25 – 26

January 2024, pending a review application of the Chairperson's ruling of 24 October 2023. The review application was launched simultaneously with the urgent application.

[7] The urgent application under case number J 1655/2023 came before Prinsloo J on 19 December 2023, and the matter was struck off the roll on account of lack of urgency.

[8] On 8 January 2024, the applicants launched an application for leave to appeal against Prinsloo J's order of 19 December 2023. On 15 January 2024, the applicants launched this application.

[9] In the light of the conclusions to be reached below, for the purposes of this application, I will not comment on the appealability of Prinsloo J's order in view of the nature and effect of an order that simply strikes a matter off from the roll on account of lack of urgency. The applicant's representative had after enquiries from the Court when the matter was heard, insisted that such orders are appealable. The Court took the matter no further at that point.

[10] I will equally refrain from commenting on the merits of the review application which forms the basis of the interim order sought. Of relevance for the purposes of the determination of this application is whether it deserves the urgent attention of this Court before it can even be determined whether the requirements¹ of interim relief have been satisfied.

Urgency and evaluation:

[11] The Court may at its discretion under Rule 8 of the Rules of this Court, relax or shorten the strict formal rules relating to the timeframes for service, and treat an application as urgent. In such applications, the applicants are required to first, set forth explicitly in the founding papers, the circumstances which they aver, renders the

¹ See the requirements as set out in *Setlogelo v Setlogelo* 1914 AD 221; Erasmus, *Superior Court Practice* RS 5, D6-16A; *Webster v Mitchell* 1948 (1) SA 1186 (WLD); *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC); *Magoda v Director-General of Rural Development and Land Reform and another* [2017] 12 BLLR 1267 (LC).

matter urgent and second, to explicitly advance the reasons why they claim that they could not be afforded substantial redress if they had brought the matter to Court by way of an ordinary procedure, instead of this extraordinary urgent procedure.

[12] Whether the applicants will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case². Of equal importance is that urgent relief may be refused in circumstances where the matter has become urgent owing to dilatoriness on the part of the applicant., and where an applicant had effectively created the urgency claimed³.

[13] The applicants' approach in seeking the urgent intervention of this Court is to posit that the urgency emanate from Prinsloo J's order of 19 December 2023. They contend that the matter is urgent in view of the scheduled continuation of the disciplinary enquiry on 25 and 26 January 2024. It was alleged that the application was moved with the necessary haste amidst the festive season, and further that the applicants' attorneys had to obtain Prinsloo J's order, the judgment and transcribed record for the purposes of prosecuting the leave to appeal.

² See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 6 and 7; See also *Export Development Canada and Another v Westdown Investments Proprietary and Others* (6151/2018) [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

"It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

³ See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11. See also Erasmus in *Superior Court Practice* at D6 – 23, where it is stated that:

"An interlocutory interdict may be refused if the applicant has delayed long before applying. An application for an interdict *pendente lite* from its very nature requires the maximum expedition from an applicant, who may forfeit his right to temporary relief if he delays unduly in bringing the interim proceedings to finality."

[14] They further plead urgency on the basis of what they consider to be a violation of their constitutional rights arising from the Chairperson's ruling of 24 October 2023, and equally complain about the substance of Prinsloo J's order.

[15] The respondents contend that the matter is not urgent in view of the timeline since the ruling of the chairperson was issued on 24 October 2023. They further submit that in any event, the issue of urgency was disposed of by Prinsloo J in her order.

[16] At the commencement of the proceedings, the Court had enquired from the applicant's legal representative as to what the difference was between the present application and the one that was before Prinsloo J on 19 December 2023. As far as the Court is concerned, the merits of both applications remained the same, other than the fact that the basis of seeking an interim order in this application was that there was an application for leave to appeal against Prinsloo J's order.

[17] In the light of no reasonable distinction being proffered, and further to the extent that Part B of this application pertains to the review of the Chairperson's ruling issued on 24 October 2023, clearly the issue of urgency was disposed of by Prinsloo J on 19 December 2023. The order of Prinsloo J cannot and could not have given rise to new grounds of urgency, and it would be illogical to conclude otherwise.

[18] Even if for some reason the Court were to accept that the order of 19 December 2023 gave rise to urgency, again, there is no explanation as to the reason the applicants were supine until 15 January 2024 when they effectively re-launched this application. The contention that they could not approach the Court during recess is nonsensical as matters were heard during that period. The fact that the initial application before Prinsloo J was heard during recess debunks the applicants' excuse for being supine.

[19] Applicants who launch urgent applications must indicate to the Court why they cannot be afforded substantial redress at a hearing in due course. In other words, urgency may be granted in circumstances where if the applicants were to wait for the matter to be heard in the normal course, they will not obtain substantial redress.

[20] At the core of this application is that the applicants do not want to proceed with the disciplinary enquiry in the light of the Chairperson's ruling, which they seek to have reviewed. Again, and without making any comments in respect of the application for leave to appeal, and to the extent that the striking off from the roll of the previous application in essence meant that the applicants could simply set the matter down again on proper notice in compliance with the Rules, clearly, they cannot seriously allege that they will not obtain substantial redress in due course (that is if there is merit in their Part B of the Notice of Motion).

[21] In the end and given the timeline of events as set out in this judgment, this application is an abuse of the Court's overburdened urgent roll. It is nothing but an attempt at a second bite of the proverbial cherry based on the same set of facts and the relief ultimately sought. The applicants cannot speak of being deprived of any substantial redress in due course when the Court refuses to intervene on an urgent basis in this case. This is so in that their previous application remains struck off the roll until re-enrolled. In the end, the applicants have not satisfied the requirements of urgency, and it follows that this ought to be the end of the matter as it ought to be struck off the roll.

Costs:

[22] The application before Prinsloo J was struck off the roll with costs. One would have assumed that the message was clear that the Court's urgent roll ought not be abused. Costs in this Court are determined by having regard to what the requirements of law and fairness dictates. As it has been repeated in *Tsibani*⁴, the general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[23] The facts of this case and the manner with which the applicant approached this Court in circumstances where it was apparent that the urgency claimed was self-created, and where they are aware or reasonably ought to have been aware that they

⁴ *Tsibani v Estate Agency Affairs Board and Others* [2021] ZALCJHB 150 at para 82.

are entitled to pursue the relief that they seek in the ordinary course makes this application unworthy of the Court's urgent attention. Neither the respondents nor the urgent Court ought to have been burdened with this application. The applicants' contention that they are entitled to approach the Court as a matter of right completely misses the point. Of course, parties are entitled to approach the Court, but only with matters that are properly before the Court and that are worthy of the Court's urgent attention, i.e., and not those that are frivolous⁵. This application in the light of the background material set out elsewhere in this judgment falls into the latter category, and thus, the applicants deserve censure.

[24] Accordingly, the following order is made;

Order:

1. The applicant's application is struck off the roll on account of lack of urgency
2. The applicants are ordered to pay the costs of this application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: TM Baloyi of Baloyi Ntsako Attorneys INC

For the First Respondent: NC Malumbete of Malumbete & Makhubele Attorneys INC

⁵ *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another* (DA16/05) [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC) at para 19 where it was held;

"...The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes..."