

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J 01/2024

In the matter between:

DEPARTMENT OF HEALTH, GAUTENG PROVINCE

First Applicant

MEC FOR HEALTH, GAUTENG PROVINCE

Second Applicant

and

ELROY TENTENI

First Respondent

SAKHILE ZWANE

Second Respondent

TSHEPHISO MASOANE

Third Respondent

MPHO MAHLANGU

Fourth Respondent

NEHAWU obo SECOND TO FOURTH

RESPONDENTS

Fifth Respondent

Heard: 20 February 2024

Delivered: 27 February 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 27 February 2024.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicants approached this Court on an urgent basis for the following relief:

‘a. The decision made by the first respondent on 4 March 2022 to pronounce on the sanction of final written warning and two months suspension without pay against the second – fourth respondents in the disciplinary hearing is declared irrational, unjustified and unreasonable and is hereby reviewed and set aside;

b. The decision by the first respondent to pronounce on the sanction of final written warning and two months suspension without pay against the second – fourth respondents is replaced with the appropriate sanction of dismissal.’

[2] The Fifth Respondent (NEHAWU or the Respondent) filed an opposing affidavit wherein the urgency of this application was disputed. When the matter was argued, the only aspect argued was the issue of urgency.

Material facts

[3] In deciding the issue of urgency, it is prudent to set out the chronological sequence of events relevant to this application.

[4] The Second, Third and Fourth Respondents (the employees) are employees of the First Applicant (the Department). They are employed to render services as a driver and in the laundry department respectively, at the Chris Hani Baragwanath Academic Hospital (CHBAH).

[5] The employees were charged with different charges of misconduct relating to the theft of eight boxes of the Applicant’s personal protective equipment (PPE) on 8 December 2020. A disciplinary hearing was held on 28 February 2022 and at the disciplinary hearing, the employees pleaded guilty and asked for mercy and lenience. The First Respondent (chairperson) presided over the disciplinary hearings and on 4 March 2022 he issued a report, pronouncing on the sanction and he found that the most appropriate sanction would be a final written warning and two months’ suspension without pay.

[6] Upon receipt of the chairperson's decision on the appropriate sanction, the Deputy Director: Labour Relations prepared a submission to the Director: Human Resources, who approved the submission and submitted it to the Chief Executive Officer (CEO). The submission motivated for the review and setting aside of the sanction imposed by the chairperson as the employees were engaged in theft and selling the Applicant's PPE for their own personal gain. The motivation was *inter alia* that the sanction was irrational, unjustifiable, unreasonable, failed to appreciate the gravity of the misconduct and that the nature of the misconduct is such that it justifies dismissal. The submission was approved by the CEO on 14 March 2022.

[7] On 23 January 2024, the Applicants filed an urgent application for the review and setting aside of the chairperson's decision of 4 March 2022, which was enrolled for hearing on 20 February 2024.

Applicable legal principles: Urgency

[8] Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court¹ provides for urgent applications. An applicant that approaches the court on an urgent basis essentially seeks an indulgence and to be afforded preference, in order to prevent the prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has, in the founding affidavit, set forth explicitly, the circumstances which render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of an applicant to set out adequately in his or her founding affidavit the reasons for urgency and to give cogent reasons why urgent relief is necessary.²

[9] What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and others*³,

¹ GN 1665 of 1996.

² *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and others* [2015] ZALCJHB 107; (2015) 36 ILJ 2148 (LC).

³ [2014] ZALCJHB 433; (2015) 36 ILJ 1331 (LC) at para 17.

the court referred with approval to the following dictum from *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others*⁴:

‘...An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that 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 absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.’

[10] In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. In *Vermaak v Taung Local Municipality*⁵, this Court has held that:

‘The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.’

[11] The principles around urgency have been developed and considered by the courts and on numerous occasions, the courts have made it clear that self-created urgency is not to be entertained by an urgent Court.

[12] In considering Rule 8, the Court in *Jiba v Minister: Department of Justice & Constitutional Development & others*⁶, held that:

‘Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant

⁴ [2011] ZAGPJHC 196; [2012] JOL 28244 (GSJ) at para 6.

⁵ (JR315/13) [2013] ZALCJHB 43 (12 March 2013) at para 12.

⁶ [2009] ZALC 57; (2010) 31 ILJ 112 (LC) at para 18.

is not entitled to rely on urgency that is self created when seeking a deviation from the rules.’

[13] In *National Union of Metalworkers of SA and others v Bumatech Calcium Aluminates*⁷, the Court held that:

‘Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency. In *Collins t/a Waterkloof Farm v Bernickow NO & another* the court held that:

“if the applicants seeks this court to come to its assistance it must come to the court at the very first opportunity, it cannot stand back and do nothing and some days later seek the court's assistance as a matter of urgency”.’

[14] In *National Police Services Union and others v National Negotiating Forum and others*⁸, this Court held the view that the latitude extended to parties to dispense with the rules of the court in circumstances of urgency is not available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief.

[15] In *Soobedar and another v Minister of International Relations and Cooperation and another*⁹, the Court restated the principles applicable to urgent applications and held that:

‘[19] The principles applicable to urgency are trite as can be gleaned from various decisions of this and other courts. An applicant that approaches the court on an urgent basis essentially seeks an indulgence, and to be afforded preference in order to prevent prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is

⁷ [2016] ZALCJHB 329; (2016) 37 ILJ 2862 (LC) at para 26.

⁸ (1999) 20 ILJ 1081 (LC).

⁹ (2021) 42 ILJ 1761 (LC) at paras 19 – 20.

whether the applicant has in the founding affidavit set forth explicitly the circumstances which render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course.

[20] It is trite that urgent relief will not be granted in circumstances where it is apparent that the urgency claimed is self-created. Self-created urgency is apparent in circumstances where an applicant failed to bring the application at the first available opportunity. Thus, it is expected of litigants to react immediately to remedy or prevent harm and/or prejudice, rather than standing back and doing nothing until it is too late.'

[16] In *Sihlali and others v City of Tshwane Metropolitan Municipality and another*¹⁰ (*Shihlali*), the Court dealt with an urgent application to interdict and restrain the City from taking further steps in recruiting, interviewing and appointing candidates to the advertised posts, pending the final determination of another dispute between the parties. The court refused to entertain the application and held that:

'There is what is termed self-created urgency. The situation herein is a classic case of such. By the time the advertisements arose, the applicants had a gripe already, which gripe they expressed in no uncertain terms to the mayor on 8 November 2016. The applicants should have, if there was any urgency, approached this court then. Why they did not do so, is not explained. Instead what is apparent is that they sat back, took their time until they obtained a legal opinion after almost three months.'

Analysis

[17] Emanating from the provisions of Rule 8 and the principles set out in the authorities referred to, it is evident that urgency is not there for taking, and an applicant seeking urgent relief must adequately and in detail, set out in the founding affidavit, the reasons why the matter before the court should be treated with urgency.

¹⁰ (2017) 38 ILJ 1692 (LC) at para 21.

[18] *In casu*, the Applicants approached this Court in terms of the provisions of section 158(1)(h) of the Labour Relations Act¹¹ (LRA) to review the decision of the chairperson of the disciplinary hearing. There is no issue that this Court has jurisdiction to review the outcome of an internal disciplinary hearing where the employer does not have any other recourse, should the outcome be reviewable on any grounds permissible in law. There is also no issue that an application in terms of section 158(1)(h) could be brought on an urgent basis, provided that a case for urgency is made out and that urgent relief is warranted.

[19] The question *in casu* is whether the Applicants have made out a case for urgency.

[20] For any argument on urgency to be sustained, the applicant must have acted with due haste, when knowledge of the respondent's prejudicial behaviour or actions is gained, as it is trite that an applicant is not entitled to rely on urgency that is self-created.

[21] The Applicants submitted that the matter is urgent because an application in terms of section 158(1)(h) is the only remedy available to the Applicants, this Court is the only forum to be approached for relief and the Applicants have a duty in terms of the Constitution¹² to ensure access to health care services and to uphold the rule of law. If the matter is not dealt with as a matter of urgency, *“the executive authority would have failed to live up to the duty imposed upon the applicants by section 196(1)(f) and (2) of the Constitution”* and *“instances which may impact upon or have a threat to the rule of law must be considered by our courts as urgent”*.

[22] The Applicants submitted that *“the decisions of the presiding officer subjected [sic] to this review application has the potential to set a precedent that can erode the rule of law in CHBAH and all other similar health institutions in the country, the scheme and efficiency in this national institution (CHBAH) cannot be left to these circumstances. Therefore, for the benefits of maintaining an atmosphere conducive to the realization of the ideals envisaged by the Constitution and entrusted in the*

¹¹ Act 66 of 1995, as amended.

¹² Constitution of the Republic of South Africa, 1996.

State, this review application is inherently urgent.” According to the Applicants, “the delay in initiating this process, cannot change the fact that the matter is indeed urgent to wait for any longer period”.

[23] Let this be clear: the mere fact that the only available remedy is a review in terms of section 158(1)(h) of the LRA or the fact that this Court has exclusive jurisdiction to deal with the matter does not render the application automatically urgent. Furthermore, the fact that the Applicants have a Constitutional duty does not automatically entitle them to jump the queue. This Court has to consider the reasons for urgency and decide if a case for urgency has been made out – it is not urgent merely because the Applicants’ failure to comply with their Constitutional duty may have an impact on the rule of law.

[24] It is evident that on the Applicants’ own version, senior managers were aware in March 2022 that the Department was of the view that as the charges against the employees related to theft and gross dishonesty, the sanction imposed was irrational, unjustifiable, unreasonable and open to review because the employees ought to have been dismissed. Already on 14 March 2022 a submission to review the sanction imposed by the chairperson in terms of section 158(1)(h) of the LRA was approved.

[25] The question that leaps out is why was the application for review only filed in January 2024, notwithstanding the fact that its institution was approved in March 2022 and notwithstanding the Applicants’ constitutional duty to uphold the rule of law.

[26] The Applicants explained the delay as follows: during the period March 2022 – August 2023, there were *“the unexpected simultaneous resignations of two senior officers who were responsible for the facilitation of internal processes of matters such as this one in the in-house legal service sub-directorate. This was followed by processes of trying to fill up the relevant vacancies, which processes are first subject peremptory legislative and treasury prescripts. After all peremptory processes that the applicants were required to follow in terms of the legislative and treasury*

requirements, the matter was then ultimately referred to the acting director: Mr A Tuswa. On 12 September 2023, Mr Tuswa referred the matter to the State Attorney's office with an instruction to brief counsel."

[27] Counsel was briefed on 3 October 2023 and a consultation took place on 6 October 2023, whereafter further documents were requested. Mr Motimele, counsel so briefed, submitted during argument in Court that the application was not filed or enrolled during November and December 2023 to afford the Respondents an opportunity to enjoy their annual leave and the festive season.

[28] The explanation tendered is shocking and unbelievable. Firstly, it is impossible for two senior officers to resign 'simultaneously', which means at the same time, during a period covering 17 months. Secondly, no detail is provided as to who the senior officers were and why all proceedings came to a complete standstill upon their resignation on an unknown date. Government departments do not come to a standstill upon the resignation of two individuals, as processes are in place and should continue, even in the absence of certain individuals.

[29] Thirdly, it is not explained why, if the CEO approved the filing of a review application on 14 March 2022, no steps were taken to execute the approval. The explanation that the resignation of the two senior officers was followed by a process to fill the vacancies, does not hold water. It is standard practice in government to appoint another official to act in a critical vacancy, wherefore someone had to carry the responsibilities of the two unknown senior officials, whilst the recruitment process was ongoing. Furthermore, Mr Tuswa, who was acting in the position of director, referred the matter to the State Attorney, which is indicative thereof that there was an acting person and that such a person was able to refer matters to the State Attorney. The delay in dealing with this matter for the period between March 2022 and September 2023 is not adequately explained.

[30] Lastly, it took almost another four months to bring this application, after the State Attorney was instructed to brief counsel.

[31] The Applicants want this Court to take note of their Constitutional duty to uphold the rule of law and of the fact that the executive authority would have failed to comply with the said duty if this review application is not adjudicated urgently. It is astonishing that the Applicants, being acutely aware of their constitutional duties and their right to approach this Court for review in terms of section 158(1)(h) of the LRA, failed to take steps for almost two years and when they eventually approach this Court, they demand an urgent hearing or else 'they would have failed their constitutional duty'. The reality is that the Applicants already failed their Constitutional duty – not because this Court is not inclined to deal with the review application on an urgent basis, but because they failed to take the steps necessary since March 2022.

[32] Applying the principles relating to urgency to the facts of this matter, I cannot but find that this application cannot be entertained on an urgent basis as any urgency that may exist, is self-created.

[33] The facts placed before me show that there has been an inordinate delay and a laxity on the part of the Applicants in the bringing of this application, which is destructive of any consideration of urgency.

[34] The Applicants, on their own version, became aware in March 2022 that it was necessary to approach this Court in terms of section 158(1)(h) of the LRA. March or April 2022 was the very first opportunity for the Applicants to come to Court to seek its assistance, but they failed to do so. They also failed to provide an explanation as to why they did not approach this Court at the earliest and first opportunity to do so, but instead, they sat back and did nothing since March 2022, very well aware of their Constitutional obligations, the prejudice they now allege they suffer and the public interest they purport to protect. All the aforementioned existed since March 2022, yet it did not spark any urgent action. The applicable authorities referred to *supra* confirmed that an applicant cannot sit back and do nothing and later seek the court's assistance as a matter of urgency.

[35] The Applicants did not approach this Court for urgent relief when it was necessary to do so, notwithstanding the fact that they were aware since March 2022

that they have to do so. Instead, they waited until January 2024 to bring a review application in a knee-jerk reaction to their own delay and dilatoriness, they bring it as an urgent application.

[36] The issue giving rise to this urgent application was known to the Applicants and ongoing since March 2022. This can hardly be regarded as urgent, more so, as this application could have and should have been brought as far back as April 2022.

[37] An applicant who is well aware of the harm he or she alleges to suffer, who takes no steps over a protracted period of time, and then launches an urgent application, is likely to have his or her application struck from the urgent roll. Thus, to the extent that an applicant wishes its matter to be accorded urgency, in the same token it is expected of such an applicant to have acted with the same urgency that the matter deserves, failing which the invariable conclusion to be reached is that any urgency claimed is self-created.

[38] This application is a prime example of self-created urgency. It took more than 22 months to bring this application, and the Applicants offered no plausible or believable explanation as to why no urgent legal proceedings were instituted immediately after the CEO approved the institution of a review application in March 2022. They did not explain why an application was not brought at the very first opportunity. The Applicants' conduct shows that they took a laid-back approach to the litigation they now want to pursue on an urgent basis.

[39] In the normal course, a party has 6 weeks or a reasonable period to institute review proceedings. If a review application is filed outside the aforesaid periods, it is necessary to apply for condonation for the late filing of a review application. *In casu*, the review application was not brought within 6 weeks or a reasonable period but was filed one year and ten months after the decision, which is the subject of the review application, was made. The Applicants have not filed any application for condonation, on the contrary, they seek urgent relief.

[40] Another difficulty is that the Applicants seek an order in terms of which this Court has to review and set aside the chairperson's decision and to substitute it with 'the appropriate sanction of dismissal'.

[41] In the event that the outcome of the disciplinary hearing (the sanction imposed) is set aside on review, the Applicant seeks that this Court finally determine the matter and substitute the sanction by dismissing the employees. The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.

[42] The principles had been set out by the Labour Appeal Court in *Palluci Home Depot (Pty) Ltd v Herskowitz*¹³ as follows:

'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is "in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.'

[43] *In casu*, the Applicants failed to provide this Court with the entire record and this Court is in no position to make a decision on the merits and to decide and finally determine the matter on the record. The record has not been made available, notwithstanding the fact that the Applicants had waited almost two years to file the review application and seek the substitution of the sanction as relief in the review application.

[44] It is not sufficient for a party, when approaching a court on an urgent basis, to adopt the approach that it is of right entitled to preferential treatment failing which

¹³ (2015) 36 ILJ 1511 (LAC) para 58.

it would suffer prejudice in the event that its urgent application is not granted. A party needs to demonstrate that it had also in asserting its rights, acted diligently and with the urgency that the matter it seeks to pursue requires. The Applicants failed dismally in this regard.

[45] This is more so where the Applicants are a State Department and an Executive Authority, who have access to legal representatives and who have a duty to uphold the Constitution. This was confirmed by the Constitutional Court in *Member of the Executive Council for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institute*¹⁴:

‘...there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’

[46] In essence, the Applicants waited too long to bring this application and by the time they had approached this Court for relief, it became a matter of self-created urgency. This Court does not entertain matters of self-created urgency and for this reason alone, the application falls to be struck from the roll.

[47] In my view, this application is a serious abuse of process. Decisions to litigate in this Court should be taken with due consideration of the law and the prospects of success, more so where it is a review application filed on an urgent basis.

[48] In *Sihlali*, the Court held that:¹⁵

‘... It is good practice for practitioners practicing in this court to keep themselves abreast with the judgments of this court particularly those arising from the urgent court. There is a developing trend that points to the fact that the urgent court is being abused. Might I state, an urgent court is meant for urgent matters. This court should not be detained to use its scarce, valuable time entertaining self-created

¹⁴ 2014 (5) BCLR 547 (CC) at para 82.

¹⁵ *Sihlali supra* at para 29.

urgent matters. Practitioners should exercise greater care when considering approaching this court on urgency in matters where substantial redress is obtainable in due course.'

[49] The Applicants brought an urgent application at a time when any urgency that might have existed, was self-created. They did not come to Court as unrepresented laypersons, but they were legally represented by Mr Motimele and the State Attorney, who failed to advise them against bringing this urgent application.

[50] In the premises, I make the following order:

Order

1. The application is struck off the roll for lack of urgency;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate Motimele

Instructed by:

The State Attorney

For the Fifth Respondent:

Mr Phoko from NEHAWU