



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1803/17

In the matter between:

PIOTRANS (PTY) LTD

Applicant

and

BEULAH HEPHZIBAH TAUNYANE

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

EUGENE MTILENI N.O

Third Respondent

Heard: 16 August 2017

Delivered: 17 August 2017

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant approached the Court on an urgent basis to seek an order 'staying the preliminary ruling' issued by the Third Respondent (Commissioner) dated 13 July 2017 under case number GAJB26953/17. The

applicant further seeks an order that the Second Respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) should postpone the arbitration proceedings set down for 18 August 2017 at 09h00. The application is unopposed. Mr T. Mohapi, an attorney representing Taunyane however appeared in court and raised an issue regarding the mandate of Mr. Vilakazi to represent the applicant. Even though I was not required to indulge Mr. Mohapi in the light of the application being unopposed, I was satisfied at the end that the applicant's attorneys of record were duly appointed to represent it in this matter.

Background:

- [2] The First Respondent (Taunyane) had referred a dispute to the CCMA on 8 December 2016 in terms of the provisions of section 186 (2) (b)¹ of the Labour Relations Act (LRA)², and alleged that he was unfairly suspended. Conciliation proceedings held on 13 January 2017 failed to resolve the dispute, and Taunyane subsequently referred the dispute to arbitration.
- [3] At the arbitration proceedings held on 28 June 2017, the applicant had raised a preliminary point with regards to the *locus standi* of the Taunyane. The argument was that the CCMA did not have jurisdiction to determine the dispute since Taunyane had resigned from the applicant's employ on 15 November 2016. The Commissioner had issued a ruling on 13 July 2017 and had found that Taunyane had not resigned from her employ with the applicant, and that the CCMA therefore had jurisdiction over the dispute.

¹ Section 186: **Meaning of dismissal and unfair labour practice**

(1) ...

(2) 'Unfair labour practice' means an unfair act or omission that arises between an employer and an *employee* involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an *employee*;

(b) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;

(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act.

² Act 66 of 1995

- [4] Aggrieved at the above outcome, the applicant believed that the ruling ought to be reviewed and set aside on the grounds that the Commissioner had allegedly committed misconduct in relation to his duties, committed a gross irregularity, and exceeded his powers. On 20 July 2017, the CCMA issued notices setting the dispute for arbitration on 18 August 2017. A review application in respect of the ruling of the Commissioner was filed and served on 21 July 2017.
- [5] The applicant filed and served the current application on 4 August 2017, setting the matter down for 16 August 2017. As already stated, this application remained unopposed as at its hearing. I had nevertheless raised concerns with Mr. Vilakazi of the applicant in regard to this application, particularly in respect of the urgency of the matter and the relief sought.

Evaluation:

- [6] The principles relating to urgent applications are fairly trite³. In explaining the provisions of Rule 8 of the Rules for the Conduct of Proceedings in the Labour

³ See *Mimmo's Franchising CC v Spiro, Harry David (JA58/00) [2002] ZALAC 7 (29 March 2002)* at para 29 where it was held that;

"A party applying for relief on an urgent basis must in the founding papers set out the reasons for urgency; state why urgent relief is necessary; and also set out why the requirements of the rules of court have not been complied with, if that is the case (sub-rules 8(2)(a) and (b)). The purpose of those sub-rules is self-evident. Considerations of fairness dictate that litigious matters should be heard in more or less the sequence in which they have become ripe for hearing. If it were to be otherwise, it will bring about additional delays in the hearing of matters already awaiting their turn and result in self-evident unfairness and the potential for prejudice. Sub-rule 8(2) requires an applicant to place such facts before the court as would be sufficient to enable it to exercise a judicial discretion in regard to whether sufficient and satisfactory grounds have been shown to exist to justify giving the particular matter preference. Urgency usually entails a deviation from the forms, time-limits and procedures prescribed by the rules or a departure from the established sitting times of the court (Cf: *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135 (W)* at 136 H). The factors that are usually taken into account in the exercise of such a discretion are a) any prejudice that an applicant might suffer if the application had to be dealt with in the ordinary course; b) any prejudice other parties awaiting the hearing of their matters might suffer if the particular application were to be given preference; and c) any prejudice that the respondent might suffer as a result of any deviation from the prescribed forms and procedures, the abridgement of any prescribed time-limits and an acceleration of the hearing (See: *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another: Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981(4) SA 108 (C)* at 112 H – 113 A; 114 A – B). The provisions of Rule 8 clearly apply to all urgent applications, irrespective of whether the relief claimed is of an interim or final nature".

Court⁴, the Labour Appeal Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*⁵ held that;

“Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules”.

[7] It therefore follows that an applicant seeking urgent relief must adequately set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and whether substantial relief cannot be obtained at a later stage.

[8] It has further been stated that the basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court⁶. It therefore follows that where the court is not satisfied that sufficient reasons have been given for the matter to be treated as one of urgency, the application ought to be struck off from the roll on that ground alone⁷.

⁴ Which reads;

- (1) “A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
- (2) The affidavit in support of the application must also contain-
 - (a) the reasons for urgency and why urgent relief is necessary;
 - (b) the reasons why the requirements of the rules were not complied with, if that is the case;

And

- (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted”.

⁵ (2010) 31 ILJ 112 at para 18

⁶ See *National Police Services Union v National Commissioner of the National Police Services and Others* (1999) 20 ILJ 2408 (LC); *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* Case no: 379/2005 at para 9 and *Vermaak v Taung Local Municipality* (JR315/13) [2013] ZALCJHB 43 (12 March 2013)

⁷ See *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* (supra) where it was held that:

“Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it ‘as to it seems meet’ (Rule 6(12) (a)). This in effect permits an urgent applicant, subject to the court’s control, to forge its own rules (See *Republikeinses Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972(1) SA 773 (A) 782A-783H) which must ‘as far as practicable be in accordance with’ the rules). Where the application lacks the requisite

- [9] In the applicant's founding affidavit as deposed to by its Human Resources Manager, Anneline Atthea Smidt, and as it was further submitted in Court by Mr. Vilakazi, the basis of the urgency is *inter alia* that the matter at the CCMA is to be heard on 18 August 2017. It was further contended that Taunyane's attorneys of record had refused to consider a request for a postponement, and that the CCMA was not in a position to consider a request to stay proceedings pending the determination of the review application. It was further submitted that the applicant would be severely prejudiced if the ruling is not stayed pending the determination of the review application as the review might prove to be academic when ultimately heard.
- [10] One of the factors to be considered in determining whether a matter should be accorded any urgent attention is the haste with which a party approached the Court in order to ameliorate the consequences of the harm that may be caused if the matter is not treated as urgent. In this case, the CCMA notified the parties of the set-down on 20 July 2017. The applicant as already stated, only approached this court on 4 August 2017. Thus, twelve days had gone by prior to the applicant approaching this Court, with the primary basis for that urgency being alleged to be the set-down date of the arbitration proceedings. At the same time, as of 13 July 2017 when the ruling was issued, the applicant was made aware that the matter was to be set-down for arbitration as directed by the Commissioner.
- [11] One of the primary reasons for any delays in approaching the Court was that the applicant made attempts to persuade Taunyane's attorneys of record to have the arbitration proceedings postponed, and was further waiting for a response in that regard. As already stated, the applicant knew as at 13 July 2017 that the matter was to be set down for arbitration, and in my view, a non-cooperative party to litigation cannot be the basis of an excuse as to the reason the Court was not timeously approached.

element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12) (a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance".

- [12] In the light of the above, I am not satisfied that the applicant acted with the necessary haste in approaching this Court. There is no adequate explanation proffered for the reason that this application could not have been launched immediately after the ruling was issued, or at worst, upon receipt of notice of set-down from the CCMA. Furthermore, and as pointed in court, the mere fact that the matter was set-down for a hearing was not in itself the basis upon which this application can be accorded urgency. To that end, I am not satisfied that the applicant has placed before this Court, any material or submissions as contemplated in Rule 8 and the authorities referred to, that compel it to treat this matter as urgent.
- [13] It is further trite that aligned to the issue of urgency is whether the applicant does not have an alternative remedy, or whether the matter in dispute cannot be dealt with in the ordinary course. One of the concerns I had raised with Mr Vilakazi of the applicant was the fact that the provisions of section 158 (1B)⁸ of the LRA in essence discouraged parties from approaching this Court midstream arbitration proceedings. The rationale behind these provisions are equally obvious in that the objective of arbitration proceedings is to expedite the resolution of disputes. Furthermore, in instances where the review application lodged midstream arbitration may be dismissed at some point, the prejudice to the other party to the dispute is immeasurable, particularly since the parties would now be compelled go back to the CCMA to complete the matter.
- [14] In the light of the above, this Court, in consideration of the provisions of section 158 (1B) of the LRA holds the firm view that the applicant in any event, and to the extent that urgency has not been established, has an alternative remedy. The applicant is particularly aggrieved by the ruling of the third respondent (Commissioner), and to the extent that the dispute at the CCMA is ultimately resolved and still in favour of Taunyane, the applicant has

⁸ Which provides that;

'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

available to it, the provisions of section 145 of the LRA, which it can utilise in due course.

Order:

[15] Accordingly, the following order is deemed to be appropriate;

1. The applicant's application is struck off the roll on account of lack of urgency.

E Tlhotlhemaje

Judge of the Labour Court of South Africa.

APPEARANCES:

On behalf of the Applicant:

Mr. M Vilakazi of Nomaswazi Maseko INC

LABOUR COURT