Not Reportable

Case No: J 877/18

In the matter between:

TLALANE ELIZABETH TEFFO **Applicant**

and

SMALL ENTERPRISE DEVELOPMENT AGENCY **Respondent**

Heard: **19 March 2018**

Delivered: **22 March 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant, Ms Tlalane Teffo approached this Court on urgent basis in terms of the provisions of section 158(1)(a)(iii) read with subparagraph (iv) and subsection (b) of the Labour Relations Act (LRA)[1], for a declaration that the purported withholding of her remuneration was in conflict with the provisions of section 34(1) read with subsection (2) of the Basic Conditions of Employment Act (BCEA)[2], and accordingly constituted unlawful conduct.

[2] The respondent (the Agency) opposed the application on various grounds and in the main, it was contended that the application was not urgent and/or that

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[1] Act 66 of 1995, as amended

[2] Act 75 of 1997, as amended

the urgency claimed is self-created. The Agency further avers that the applicant's application constitutes an abuse of process.

Background:

[3] The applicant is employed by the Agency in the position of Sector Manager: Tourism, Trading and Auxiliary Services. The Agency is a state institution established in terms of the provisions of the National Small Business Act[3] and its main mandate is to provide non-financial business support, promote and develop small enterprises within the Republic.

[4] On 6 November 2017, the applicant received correspondence from her line manager Ms Kwati Koka (Koka) recording that she had had been absent from her place of employment for a period of at least 87 days from 1 March 2017 to 31 October 2017. The applicant was said to have exhausted all permissible leave of absence, including sick leave. The 87 days of extra leave taken were accordingly considered to be unauthorised leave of absence by the Agency.

[5] In the correspondence, Koka further lamented the applicant's pattern of absenteeism due to either taking sick leave or other leave without express permission from him as Line Manager and/or the Executive Manager: EDD, and further her failure to submit reasons for her absence. Koka further pointed out that she was reprimanded about her absenteeism and had in the past given assurances that she would show improvements in her attendance. She was further advised that in terms of clause 5.2.7 of the Agency's Leave Policy, there was an obligation to regard any sick leave as unpaid leave in the event that it was found that the sick and annual leave cycles had been exhausted. To that end, her cumulative 66 days of absence without permission would in terms of the Policy, be converted into unpaid leave, and the Agency would effect the deduction of the unpaid leave from her salary.

[6] In the answering affidavit, the Agency averred that the applicant was thereafter invited to a meeting with the view of resolving the situation. She had however failed to avail herself for that meeting. There is a dispute on whether

[3] Act 102 of 1996, as amended

the applicant reported for duty between 1 December 2017 and until the hearing of this matter, and whether the conduct complained of pertained to a deduction or withholding of the applicant's salary.

[7] It is not in dispute however that the applicant did not receive her remuneration from 19 November 2017. On 19 December 2017 she addressed a grievance letter to the Chief Executive Officer (CEO) of the Agency, complaining about the non-payment of her salary and service bonus for the 2016/2017 financial year.

[8] During December 2017, the CEO requested further information from the applicant, and in her response on 4 January 2018, she undertook to make the information available on 8 January 2018. At a meeting held on 22 January 2018 attended by the applicant, the CEO and the Agency's Employment Relations Consultant, it was resolved that the applicant would be offered an advanced remuneration. After that meeting, the applicant according to the Agency failed to report for duty. Despite her absence, she was nonetheless paid an amount of R29 923.47 by the Agency on 8 March 2018. She has not been paid her salary to date and had failed to report for duty.

The applicant's submissions:

[9] The applicant's contention in her founding affidavit that she was not paid on 19 October 2017 proved to be incorrect, as she conceded in her replying affidavit that she was indeed paid for that month. She confirmed that Koka's correspondence of 6 November 2017 followed upon a series of email correspondence between herself and relevant managers regarding her alleged absenteeism. She attributed her failure to attend work due to the reason that she had not been paid her salary since November 2017.

[10] She contended that the conduct of the Agency of withholding her remuneration was unlawful and contravened the provisions of section 34(1) and (2) of the BCEA, in that an employer was not entitled to deduct any amount from an employee's remuneration without having followed a fair procedure, and further that the deductions could not exceed one-quarter of the employee's remuneration. She further contended that there was no

justification for the Agency to withhold her salary as she had reported for duty, and that the Agency's conduct violated the provisions of the BCEA and her constitutional right to be treated fairly and with dignity. She further averred that she had a clear right to the relief sought as she had not agreed to any deductions and/or withholding of her salary.

Urgency:

[11] As already indicated, the Agency's main contention in opposing the application was that the matter was not urgent, and that any urgency claimed was in fact self-created. It further contended that the application was an abuse of court processes. In this regard, it was submitted that;

11.1. On the applicant's own version, the dispute arose in October 2017. A period of about five and a half months had since elapsed before the applicant could approach the court. This factor on its own was indicative of any urgency claimed being self-created.

11.2. The applicant first wrote to the Agency on 5 March 2018 through her previous attorneys of record seeking restoration of her remuneration. She sent further correspondence on 14 March 2018 and indicated her intentions to approach the bargaining council if the dispute was not resolved.

11.3. Moreover, on 14 March 2018, the applicant's attorneys of record requested that the grievance hearing scheduled for 15 March 2018 be postponed to 20 March 2018 to enable the applicant to secure union representation. On the same date, the Agency was served with this application. This was further indicative that she had alternative remedies available to her.

11.4. If the dispute was urgent as the applicant contends, she would not have postponed a grievance meeting scheduled for 15 March 2018. The purpose of the grievance meeting was to ventilate the same issues which were before the Court.

11.5. Moreover, the Agency contends that the provisions of section 34 of the BCEA were not applicable to the current dispute as it had not made any deductions to the applicant's remuneration. It was contended that rather it stopped paying her remuneration because of her failure to report for duty. The Agency further avers that there was no obligation on it to pay the applicant's remuneration in an event where she failed to tender her services.

[12] In contending that this matter was urgent, the applicant averred that:

12.1. The Agency withheld her remuneration unlawfully without following any legal process. On 14 March 2018, the applicant through her attorneys of record wrote to the CEO demanding that the Agency must desist from its unlawful conduct. The CEO however did not respond to those demands. In the result, the applicant was compelled to approach the Court.

12.2. Because of the non-payment of the remuneration, she has been unable to meet her financial commitments, including her accommodation and school fees for her children. She contended that she even had difficulties in transporting herself to work. In this regard, she attached threatening correspondence and final demands from the school and her landlord, as she could not meet her financial obligations.

Evaluation:

[13] The starting point, and to the extent that the Agency vehemently opposed the application on the basis that it was not urgent is to revisit the principles applicable in this regard.

[14] It is trite that an applicant seeking urgent relief as contemplated in Rule 8 of the Rules of this Court[4] must adequately and in detail, set out in the founding

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[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Other* 6 (2010) 31 ILJ 112 (LC) at para 18, where it was 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

affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause[5]. In determining urgency, a court will be guided by considerations of whether the reasons that make the matter urgent have been set out succinctly in the papers and secondly, whether the applicant seeking relief will not obtain a substantial relief at a later stage. Thus, 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 court[6]. 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 alone[7].

[15] Equally important as emphasised over time is that urgency must not have been self-created by an applicant, that in the same way that it is sought that

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

[5] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* 8 [2012] JOL 28244 (GSJ) at para 6, where it was held that;

> '…. 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.'

[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 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".

the matter should be dealt with promptly, an applicant must have acted in a similar fashion[8].

[16] Having had regard to the applicant's grounds for seeking the urgent intervention of this Court, it is apparent that these in a nutshell amounts to financial hardship because of the alleged unlawful conduct on the part of the Agency. The question whether financial hardship can establish the basis for urgent intervention has received attention from this Court over time, with other decisions subscribing to the view that as a rule, financial hardship and loss of income are not considered to be grounds for urgent relief[9].

[17] The Court in *Democratic Nursing Organisation of South Africa*[10], however appreciated that there may be circumstances where financial hardship may be a factor in considering whether to grant urgent relief. In *Garry Harley v Bacarac Trading 39 (Pty) Limited*[11], the Court rejected the approach that financial hardship and loss of income can never constitute grounds for urgency, and held that;

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[8] See *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* (C1173/01) [2001] ZALC 223 (7 December 2001), where it was held that;

"[8] Furthermore, if the applicant 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.

[9] It is clear from the above that the Courts do not easily grant urgent relief. This caution is justified given the exceptional and drastic nature of such relief. The Labour Court Rules set out the proper procedure through which applications to the Court should be pursued and these rules exist to ensure that due process is allowed to run its course. They have not been arrived at arbitrarily but after careful consideration as developed over years of practice. Thus, deviation from the usual rules should not be taken lightly, it is only in exceptional circumstances that the Court will deal with applications on an urgent basis. In order to succeed in an urgent application, the applicant must satisfy the Court that on balance the interests of justice outweighs the right of the parties to have a considered opportunity to place their case before this Court. Although the Courts recognise that financial consideration may be taken into account, the onus is on the applicant to show the prejudicial effect that will give rise to the injustice and plus the urgency of the situation. In particular, the applicant must show that he has launched the application at the first available opportunity; that special circumstances exist justifying the granting of the order; and there is no alternative remedy available to it."

[9] *Democratic Nursing Organisation of South Africa and Others v The MEC for Health: North Cape* (case number: J2386/08; *Hultzer v Standard Bank of South Africa (Pty) Ltd* [1999] 8 BLLR 809 (LC), at para [13]; *Malatji v University of the North* [2003] ZALC 32 (LC); and *National Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO & Ander* (1990) 11 ILJ 971 (T); *Jonker v Wireless Payments Systems CC* (2010) 31 ILJ 381 (LC)

[10] Supra fn 9

[11] (2009) 30 ILJ 2085 (LC) at para 8

> "The principle established in these cases is one that inclines this court to avoid granting what amounts to status quo relief in unfair dismissal disputes pending a final determination of the dispute by the appropriate dispute resolution body. None of these cases, it seems to me, establishes that financial hardship and loss of income can never be grounds for urgency. If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits"

[18] The issue in this case is whether the applicant has placed exceptional circumstances before this Court, which would not be capable of being fully addressed in the normal cause. Even if exceptional circumstances are demonstrated, a further issue is whether the requirements of urgency as called upon by the provisions of Rule 8 of the Rules of this Court have been met.

[19] It is accepted that the natural consequences of a loss of remuneration will lead to financial hardship. At the same time however, it is equally appreciated that based on ordinary principles of an employment contract, remuneration is only due where service has been rendered. For exceptional circumstances to be shown in this regard, it would *inter alia* be required of the applicant to demonstrate that she had indeed rendered her services for her remuneration to be due. Sadly, she had on her papers, failed to demonstrate this factor. My reasoning in this regard are fortified by the following factors;

[20] On her own version, Koka's correspondence of 6 November 2017 came about after several previous e-mails between herself and management regarding her alleged absence from work. This can only imply that she was warned of the consequences of her failure to report for duty and her failure to obtain the necessary permission in that regard.

[21] In her papers, she does not appear to dispute that she had indeed exhausted her leave and sick leave days. Even if it could be argued that she had disputed this fact, there is nothing in her papers that indicate that she had in fact reported for duty from 1 December 2017 to date. At best, it is not disputed that she was at work on 22 January 2018 to attend a meeting with the CEO, and on 28 February 2018 when she attended a work-related meeting. Other than these two occasions, her contentions that she had reported for duty were confusing to say the least. On the one hand, and on her own version, she had conceded that she had failed to report for duty and attributed that failure to a lack of funds to travel to work. In the same token, it was submitted on her behalf, *albeit* from the bar, that she had in fact worked from home. The details regarding the latter contention were nonetheless not forthcoming.

[22] I further accept that since the applicant had exhausted her annual and sick leave days, and further based on the Agency's own Policy, there was justification to withhold the applicant's salary, as that was an election that it could make rather than subjecting the applicant to a disciplinary process. To that end, the withholding of her salary for her failure to report for duty cannot amount to a breach of the provisions of section 34 of the BCEA. There were no deductions made to her salary. There was mere a withholding of that salary as a consequence of the applicant's unexplained absence from work.

[23] In my view, the detrimental consequences of the withholding of the applicant's remuneration for the period in question flow directly from her own conduct and are capable of being addressed in due course.

[24] Even if I may be incorrect in my conclusions reached above, the issue remains whether the applicant has made out a case for urgent relief, in the light of the basic principle that she ought to have acted with the necessary haste in approaching the Court. Aligned to that factor is that it is trite that urgent relief cannot be granted in circumstances where the urgency claimed is self-created, or where an applicant has alternative relief.

[25] The applicant approached this court with this application on 19 March 2018. On her own version, the issues surrounding non-payments of her salary dates

to 6 November 2017, when she was formally advised of the steps the Agency intended to take in the light of her unauthorised absenteeism and the fact that she had exhausted her normal leave and sick leave days. To be precise, she was warned in September 2017 that her salary and bonus might be withheld. It took the applicant at least four months prior to approaching the Court, which is indeed an inordinate delay, which in turn diminishes any urgency.

[26] The applicant despite claiming that the matter is urgent has nonetheless failed to adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. Other than addressing a grievance to the CEO on 19 December 2017 (at which point she had not reported for duty), upon the latter's response on 21 December 2017, she had only followed up on the matter on 4 January 2018, and even then, had not provided the CEO with the information requested.

[27] Despite the alleged urgency of the matter, and the Agency having re-opened after the festive season shutdown between 22 December 2017 and 4 January 2018, the applicant only went to work on 22 January 2018 for a meeting with the CEO, and there is no indication as to what it was that she had done since 4 January 2018. On her own version and emanating from the meeting with the CEO on 22 January 2018 where an undertaking was made that her January salary would be attended to, she did nothing until 8 March 2018 when she was ultimately granted a salary advance but had still failed to report for duty.

[28] A further factor raised by the Agency is that subsequent to the payment of the salary advance, the applicant secured the services of her first set of attorneys (Leistener Attorneys), who had sent correspondence to it on 5 and 14 March 2018. In the first correspondence, a threat was made to refer a dispute to a bargaining council if the issue of the salary was not resolved. In the second letter, a request was made to postpone the grievance hearing scheduled for 15 March 2018. The invariable inferences to be drawn from such correspondence is that first, it was appreciated that the applicant had an

alternative remedy to address her concerns, and second, she had, despite claiming urgency, rebuffed any attempts at finding a speedy internal resolution of the matter. The reasons for seeking a postponement of the grievance hearing were flimsy in the extreme, and had she been at work, she would have easily secured Union representation and sourced the documents she needed to prepare for that hearing.

[29] It further follows that when the applicant's current attorneys of record served this application on the Agency on 15 March 2018 setting the matter down for 19 March 2018, and when the grievance hearing had been postponed to 20 March 2018 at her request, this was a clear case of an abuse of court processes, which cannot be countenanced.

[30] In conclusion, counsel for the Agency had submitted that there was no basis for the Court to intervene in the light of the applicant's failure to comply with the provisions of Clause 12.3 of the Practice Manual of this Court[12], particularly since no explanation was proffered for setting down the matter on Monday at 14h00. I agree with this submission. Parties approaching this Court on an urgent basis are not at liberty to set down matters at their own convenience, and the Court ought to take a dim view of non-compliance with applicable provisions of the Practice Manual. These provisions are there for the convenience of the Court and all parties concerned.

[31] Other than the above and having had regard to the papers before the Court, I am not satisfied that the applicant has made out a case for the urgent intervention of this Court. She has not set out the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. On the contrary, the urgency claimed in this case is clearly self-created, and worst still, there is no basis for any conclusion to be reached that the applicant has

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[12] Clause 12**. URGENT APPLICATIONS**

"12.3 The normal time for the bringing of an urgent application, whether during term or in recess, is 10h00 on Tuesdays and Thursdays. If the urgent application cannot be brought at 10h00 on Tuesday or Thursday of any week, it may be brought on any other day of the week at any time, but the applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10h00 on Tuesdays or Thursdays."

no alternative remedies, or that she cannot obtain substantial redress in due cause. Further to the extent that the pleadings raised factual disputes in regard to whether the applicant had reported for duty or not since 1 December 2017, or whether there was a deduction or withholding of her salary, these are factors which she ought to have considered prior to persisting with this matter. In the light of these conclusions, it follows that the application ought to be struck off the roll.

[32] I have further had regard to the requirements of law and fairness insofar as the issue of costs is concerned. This application given the background of the matter was clearly ill-conceived. I appreciate that the applicant finds herself in financial difficulties, even though these have been found not to constitute grounds for urgency. Having taken these and other factors into account, it is my view that fairness dictates that no award of costs should be made. Accordingly, the following order is made;

Order:

1. The applicant's urgent application is struck-off the roll for lack of urgency.

2. There is no order as to costs

E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr M.P. Khumalo of Ntshebe Incorporated

For the Respondent: Adv. X.D. Matyolo

Instructed by: Werksmans Attorneys