IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1387/19

In the matter between:

MASHALA ALETTAH BOGOSHI **Applicant**

and

SERVEST SECURITY **Respondent**

Heard: **4 June 2019**
Delivered: **19 June 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] In approaching this Court on an urgent basis, the applicant seeks an order directing the respondent to immediately reinstate her full pay in the sum of R10 000.00 with effect from April 2019 to the position of reliever in Waterfall, and a further declaratory order that she shall remain in the position of a reliever with a full salary until such time that the respondent has appointed her to a position of permanent controller in compliance with the terms of the settlement agreement entered into between the parties at the Commission for Conciliation Mediation and Arbitration (CCMA) under case number GAEK 10828-17. She further seeks that the respondent be ordered to effect payment of her outstanding salary for the month of April 2019 in the sum of R5 400.00.

[2] The background to this application is fairly common cause and can be summarised as follows;

2.1 The applicant is in the employ of the respondent as a security guard. Between March 2017 and July 2017, she took maternity leave. Upon her return, the respondent allegedly reduced her monthly salary and she had referred a dispute to the CCMA. The dispute resulted in a settlement agreement reached on 1 June 2018, which agreement was made an arbitration award in accordance with the provisions of section 142A(A) of the Labour Relations Act.

2.2 The terms of the settlement agreement are that;

1. *'The company will place the employee in a permanent post at Redefined Denver as a security officer on signing this settlement agreement (Chilvers Street Denver) until 26 June 2018.*

2. *The employer undertakes to appoint the employee to a permanent controller position as soon as a vacancy becomes available at NCC in Wayerfall Park (Tugela Lane Servest Building Cnr R101 and Bridal Veil Road ext 78 Jukskeiview Midrand), reporting to the Control Room manager Alex Behr.*

3. *The employee will act as reliever at the NCC in Waterfall from 27th June 2018 until such time all the Controllers (between 3 – 6 staff) have been on annual leave for the current leave period or cycle. During this period as a reliever the employee will earn a basic wage of R10 000.00 per month.*

4. *Should she return to the Gauteng South Branch due to a post at the NCC not being available immediately, her rate of pay will revert to a basic of R4668.00 a month, with an allowance of R500.00 a month, until such time a permanent capacity controller or an alternative position is secured. She will report to Branch manager Mr. T Hlabangani during this time.*

5. *Should the employee wish to apply for alternative positions whilst working as a reliever mentioned in points 2,3 and 4 above, she will be free to do so and the company will assist in setting up interviews. Should she secure an alternative post she will serve two weeks' notice before taking up her new role.*

6. *The company will cancel the disciplinary hearing currently pending against the employee for dishonesty and gross negligence. The employee will receive a Final Written Warning instead.'*

2.3 On 19 April 2019, the applicant was informed in writing that the reliever post she had occupied in accordance with the settlement agreement had lapsed, resulting in her rate of pay reverting to a basic salary of R4668.00 a month, with an allowance of R500.00 a month in accordance with paragraph 5 of the settlement agreement.

[3] The applicant's case is that the respondent failed and/or neglected to comply with clause 2 of the agreement as it had failed to appoint her to a permanent post in accordance with the terms of that agreement. She averred that the respondent acted unlawfully by unilaterally terminating the reliever position, which had led to her monthly salary being reduced to almost half in April 2019. She further contends that the termination of the reliever position constitutes a breach of contract of employment and the terms of the settlement agreement.

[4] The respondent in opposing the application pointed out that the applicant's claim is based on specific performance in view of the settlement agreement being incorporated into her contract of employment. The respondent however contends that the applicant either misunderstood or wrongly interpreted the terms and conditions of the settlement agreement, and submitted that;

4.1 In accordance with paragraph 1 of the settlement agreement, it had appointed the applicant as a security officer at Redefined Denver between 1 and 26 June 2018.

4.2 From 27 June 2018, the applicant was appointed in an acting position as reliever controller at NCC Waterfall until all the controllers returned from their annual leave in the 2018/2019 leave cycle. She was paid R10 000.00 per month whilst she occupied that position.

4.3 The applicant failed to apply for any alternative position whilst she acted as reliever controller.

4.4 The position of reliever controller lapsed at the end of the 2018/2019 leave cycle.

4.5 No vacancies existed for a controller at NCC Waterfall Park.

4.6 The applicant was advised in writing that the arrangements as reliever acting duties came to an end, and she was to revert to her original rate of pay. Consultations in this regard were held with the applicant on 22 March 2019

4.7 The applicant had to return to the Gauteng South Branch at a salary of R4668.00 plus an allowance of R500.00.

The legal framework:

[5] The requirements for urgent relief as contemplated in Rule 8 of the rules of this Court are trite. A party seeking urgent relief must make out a cogent case in the founding affidavit as to the reason the Court should indulge his or her application and grant relief on an urgent basis. Furthermore, any urgency claimed must not be self-created in the sense *inter alia* that the applicant acted with the necessary haste in approaching the Court[1]. Other than the requirement that the reasons that render the matter urgent ought to be set out, the Court needs to be satisfied that the applicant would not be afforded substantial redress in due course. [2]

[6] To the extent that the applicant seeks final relief, three essential requirements must be satisfied, *viz*: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy[3].

Evaluation:

[7] In contending that this matter deserves the urgent attention of this Court, the applicant simply relied on the financial hardship she and her dependants

[1] *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 26
[2] *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32
[3] Setlogelo v Setlogelo 1914 AD 221 at 227;

suffered or continue to suffer as a consequence of the alleged breach of her contract of employment and the terms of the settlement agreement.

[8] The respondent's contention is that the matter is not urgent, as the applicant knew as far back as 22 March 2019 of the changes and the end of her reliever duties, and yet had only approached this Court on 31 May 2019. It was submitted that there was no explanation of what the applicant did between 22 March 2019 and 7 May 2019 when her attorneys of record sent correspondence to the respondent.

[9] To the extent that the applicant had relied on financial hardship as a basis for urgency, it has been held that as a general principle, financial hardship does not establish a basis for urgency.[4] As it was held in *Ledimo and Others v Minister of Safety and Security and Another,* [5] the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient to ground the requisite urgency necessary to justify a departure from the ordinary court rules.

[10] Inasmuch as it is appreciated that a reduction in salary as a consequence of the applicant being reverted to her old position had devastating effect, that in itself however is not on its own, the basis upon which this matter can be accorded urgency.

[11] Aligned to the above is the question whether the applicant acted with the necessary haste to mitigate against the hardship or prejudice she complained of. In this case, it was the respondent's contention that the applicant knew as early as 22 March 2019 that she would be reverted to her old position. The applicant in her replying affidavit did not address these contentions, other than to indicate that the respondent failed to appoint her to a position of controller that was advertised before 25 March 2019 despite having applied for the position.

[12] Two central issues emerge from the answering and replying affidavits, which put paid to any allegation that the matter should be treated as urgent. The first

[4] *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16.
[5] (2242/2003) [2003] ZAFSHC 16 (28 August 2003) at para 32

is that in the light of inaction on the part of the applicant between 22 March 2019 when she was advised of the changes and 31 May 2019 when this application was launched, or from 16 April 2019 when the changes were to take effect, the urgency claimed herein is clearly self-created. An applicant cannot claim urgency in circumstances where he or she did nothing when the cause of the complaint first surfaced.

[13] The second issue is that on the applicant's own version, she was not, after having applied, appointed on or after 25 March 2019 to the position of controller, which issue was covered by the same settlement agreement relied upon. There is however no indication that the applicant did anything to assert any rights either in terms of the provisions of that settlement agreement or whether by way any other means when her application for the post was unsuccessful. In the end, I am satisfied that the applicant has not placed any cogent facts that dictate that the matter be treated as urgent.

[14] It was submitted on behalf of the applicant that she had demonstrated a clear right as the respondent was or had acted unlawfully by unilaterally terminating the reliever position which led to her salary being reduced. It was submitted that the termination of the reliever position constituted a breach of contract of employment and the terms of the settlement agreement.

[15] A determination of whether any clear right has been demonstrated requires an examination of the full text of the settlement agreement rather than the nick-picking or piecemeal approach adopted by the applicant. To the extent that the applicant alleged the respondent had breached paragraph 2 of the agreement, which required her to be appointed to a position of permanent controller as soon as a vacancy arose, the issue is whether in fact any such vacancy arose.

[16] The respondent's case was that no such vacancy arose, and thus the suspensive condition was not fulfilled . As it was correctly pointed out on behalf of the respondent, not a single averment was made in the founding affidavit by the applicant as to whether any such vacancy was available. Only in the replying affidavit did the applicant make mention of a position that was advertised on or about 25 March 2019, which she had applied for without

success. Other than the fact that a case cannot be made out in the replying affidavit, the conclusion that the urgency claimed in this case is fortified by the fact that since the available post was advertised in March 2019, the applicant did nothing when her application was unsuccessful.

[17] It is inevitable that any clause in a settlement agreement that provides that employment into a *'position as soon as a vacancy becomes available'* is doomed to create uncertainties and disputes. In this case however, it is apparent that any appointment to a permanent post of controller envisaged in the settlement agreement depended on whether such a position became available. If not, then the provisions of paragraph of the settlement agreement were to take effect, meaning that the applicant was to revert to her basic salary with an allowance.

[18] In the end, the applicant has not in my view made out a case that indeed a post of permanent controller was available, nor can it be read from the agreement that she was entitled to any post in the light of the provisions of paragraph 5 of the agreement. Ultimately, there is no basis for any conclusion to be reached that the respondent had breached the terms of the settlement agreement.

[19] Aligned to the issue of urgency is a further consideration in such applications, which is that an application brought on an urgent basis should not succeed if the applicant fails to show that there is no satisfactory remedy available that addresses his or her dispute[6]. For reasons that are not clear, the applicant in both the founding and replying affidavit failed to deal with this important issue, which is tied to the question whether the requirements for final relief have been met.

[20] The issue of alternative remedies available to the applicant is in my view dispositive of this matter. First, the applicant's case is predicated on specific

[6] See *Minister of Law and Order v Committee of the Church Summit* (1994 (3) SA 89 (BGD) at 99F-G, where it was held that:

> 'Concerning the alternative remedy, the Courts have determined that it must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and also grant similar protection to a party... Generally and applicant will not obtain an interdict if he can be awarded adequate compensation or amends by way of damages.'

performance in relation to a contract of employment. She claimed breach of that contract and clearly there is no reason why this matter should be indulged by this Court on an urgent basis, when the provisions of section 77 of the Basic Conditions of Employment Act[7] are available, and for the matter to be dealt with on the ordinary roll like hundreds of other similar matters that come before this Court.

[21] A second consideration is that the basis of this dispute is the settlement agreement, with the principal complaint being that the respondent has failed to comply with its paragraph 2. That settlement agreement was made an arbitration award, and it is still not clear why the applicant rushed to this Court on an urgent basis, when all other similar cases are dealt with via the provisions of section 158(1)(c) of the LRA, and when all else fails, through contempt proceedings.

[22] In the end, there is nothing exceptional about the facts of this case that entitles it to jump the proverbial litigation queue, and no need arises for this Court to even consider issues surrounding the balance of convenience. This Court is overburdened with section158(1)(c) of the LRA applications, where litigants, who find themselves in even more indigent and desperate positions than the applicant in this case, wait for their turn on the ordinary motion roll. I therefore see no reason why the applicant's case ought to be dealt with any differently.

Costs:

[23] An award of costs is made in this Court upon a consideration of the requirements of law and fairness. The parties in the settlement agreement had agreed that the defaulting party would be liable if legal costs had to be incurred to enforce the terms of the settlement agreement. In this case however, there is no basis upon which it can be concluded that the respondent had acted in breach of the terms of the settlement agreement.

[7] Act 75 of 1997 (as amended)

[24] Further in the light of the conclusions reached in regards to the lack of urgency, the alternative remedies available to the applicant, and the overall failure on the part of the applicant to satisfy the requirements of the relief sought, this application was clearly ill-conceived, and there is no reason in law or fairness why the respondent should be burdened with its costs.

Order:

[25] In the premises, the following order is made;

1. The applicant's urgent application is dismissed with costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M Marweshe of Marweshe Attorneys

For the Respondent: JP Prinsloo, instructed by De Villiers & Du Plessis Attorneys