IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J2042/19

In the matter between:

CLEM LOCKHART SIMPSON **Applicant**

and

SISONKE BUDPOL CONSTRUCTION CC **Respondent**

Heard: **16 October 2019**
Delivered: **18 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] With this urgent application, the applicant seeks a variety of orders including payment of statutory monies due to him and continued payment of such amounts until the finalisation of this dispute, and an order prohibiting the respondent from evicting him from his housing. In the alternative, he seeks a declaratory order that his dismissal was unfair or in the alternative, automatically unfair and payment of compensation in that regard; and an order that the limited duration contract of employment entered into between the parties is cancelled, and that he should be entitled to damages in the amount that he would have earned had that contract endured until June 2020.

[2] The respondent opposed the application on two basic grounds, *viz*, urgency and lack of jurisdiction. The above urgent relief is sought against the following background;

2.1 The respondent is a closed corporation and based in Durban. The applicant, who is also from Kwazulu-Natal was employed by the

respondent with effect from 30 May 2019 as its Health and Safety Officer in terms of a limited duration contract. The applicant was however to be based at one of the respondent's sites in Belfast, Mpumalanga Province.

2.2 In accordance with the provisions of the contract, the respondent was required to provide the applicant with accommodation and basic requirements related to such accommodation.[1] The applicant raises various disputes surrounding the nature of the accommodation he was offered and a lack of basic necessities to make the accommodation habitable.

2.3 The applicant contends that he raised complaints with the respondent about the state of his accommodation and lack of basic necessities that he was promised. He further deemed the respondent to have made misrepresentations in regard to his terms and conditions of employment. He had on 21 July 2019, sent correspondence to it indicating the cancellation of the contract of employment, and sought damages.

2.4 The applicant further alleges that subsequent to his letter of 21 July 2019, he nonetheless reported for duty on 22 July 2019 and was informed by the site manager that he was dismissed because he 'made trouble'. His written response was that he would report the matter to the Commission for Conciliation Mediation and Arbitration (CCMA), and thereafter, the respondent's attorneys addressed a letter to him, and indicated that attempts should be made to settle the matter. He had rejected attempts at any settlement, and advised the respondent's attorneys that he would proceed with his dispute at the CCMA.

2.5 On 22 July 2019, the applicant referred an unfair labour practice dispute, unfair discrimination and alleged dismissal disputes to the CCMA. Upon receipt of the referral, the respondent's attorneys advised

[1] Clause 5.3 of the Limited Duration Contract (Page 41 of the applicant's founding affidavit)

the applicant that he should report for duty as he was not dismissed, and that should he fail to do so, disciplinary action against him might follow.

2.6 Following a meeting between the applicant and the respondent's representative on 23 July 2019, certain undertakings were according to the applicant, made in respect of complaints he had raised regarding his accommodation. There is a dispute as to whether the complaints were attended to or not. Conciliation proceedings before the CCMA took place on 16 August 2019 and a certificate of outcome was issued. The respondent did not attend those proceedings and the applicant has yet to refer the dispute for arbitration.

2.7 On 26 August 2019, the applicant referred another dispute related to unfair labour practices. Conciliation was scheduled to take place on 12 September 2019. Despite the presence of the respondent's representatives, the dispute could not be resolved and the applicant referred the dispute for arbitration on 18 September 2019. On 20 September 2019, the applicant was served with a notice to attend a disciplinary enquiry to answer to four allegations of misconduct, and was further informed of his suspension. The enquiry was to take place in Umhlanga in Durban.

2.8 It is common cause that the applicant was dismissed in his absence as per the findings made on 1 October 2019. Arising from the outcome, the applicant's salary was stopped and he was advised that he should vacate the accommodation provided on or before 6 October 2019

[3] In summary, the applicant complains of alleged misrepresentations made by the respondent in regards to the terms and conditions of the contract of employment. He has already referred two disputes to the CCMA and has also lodged complaints at the Department of Labour in regards to deductions and non-payment of his salary. He complains of having been victimised and discriminated against for exercising his rights, and contends that the charges of misconduct were fabricated against him.

[4] At the commencement of these proceedings, the applicant had raised preliminary points essentially related to the manner of service of the respondent's answering affidavit. He contended that the answering affidavit was served on him *via* email which is impermissible, and that he was not given sufficient time to file a replying affidavit.

[5] As it was correctly pointed out on behalf of the respondent, when a party approaches a Court on an urgent basis, it *inter alia* seeks that the rules of the Court be dispensed with, inclusive of the manner of service and time frames. To the extent that urgent relief is sought, the Court can refuse to dispense with such requirements if it is of the view that the manner of service and the time frames set for the respondent party to file pleadings is such that it is prejudicial to that party, in the sense of depriving it of having its case heard.

[6] In this case, the applicant delivered his founding affidavit on 7 October 2019 and enrolled the matter for 11 October 2019. The matter was removed from the roll as Mahosi J was not satisfied that proper service of the founding papers was effected on the respondent. An affidavit of service was submitted by the applicant on 11 October 2019 with the request to enrol the matter on 15 October 2019. The answering affidavit was filed and delivered in the late afternoon of 14 October 2015, and on the hearing date, the matter had to be removed from the roll as the applicant required time to file a replying affidavit.

[7] In the light of the above events, the applicant cannot complain of any prejudice in the light of being *dominis litis* in this matter. The answering affidavit was properly served on him; he was afforded an opportunity to file a replying affidavit, and his case was properly ventilated at these proceedings. To this end, there is no merit to the preliminary points he had raised.

[8] To the extent that the applicant seeks urgent relief, the requirements to be met for such relief under Rule 8[2] of the Rules of this Court are well-

[2] Which provides;

(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;

established. A determination of whether a matter deserves the urgent attention of this Court entails a considerations of whether the reasons that make the matter urgent have been set out succinctly in the founding papers and secondly, whether the applicant seeking relief will not obtain a substantial relief at a later stage. These provisions were interpreted in *Jiba v Minister: Department of Justice and Constitutional Development and others* as follows;

> "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"[3].

[9] The respondent contends that the application is not urgent. Central to the grounds of urgency as crystallised in the applicant's heads of argument is that the matter is urgent on the grounds that he had sought redress on two previous occasions at the CCMA and that on both occasions, crucial members of the respondent failed to arrive at conciliation proceedings. The argument is further that the absence of these individuals prevented him (applicant) from seeking meaningful resolution of the dispute at the CCMA, and that the respondent's conduct as a whole indicates that it would not attend to any further disputes referred to the CCMA.

[10] A further ground upon which urgency is relied upon is that the respondent has not paid him statutory monies due to him to enable him to sustain himself, and that by the time the dispute is determined by the CCMA, his rights would have been destroyed and any harm he had suffered is irreparable. He further contends that his approach to the Department of Labour did not yield any results.

[11] As it was correctly pointed out on behalf of the respondent, the grounds relied upon by the applicant for urgency do not come close to satisfying the

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(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"

[3] (2010) 31 ILJ 112 (LC) at para 18

requirements under Rule 8 of the Rules of this Court. The first issue is that depending on which date the dismissal or the cancellation of the contract of employment took place, it can be accepted that the dismissal by the respondent took place on 1 October 2019. To the extent that the Notice of Motion and the founding affidavit were delivered on 7 October 2019, the applicant fails to proffer an explanation for the delay in respect of that period. Even if it can be accepted that he had acted with due haste, that in itself does not give rise to urgency, as it is more the facts upon which urgency is relied upon that are paramount. This is even moreso in circumstances where he seeks final relief. In this regard, it has been held that an applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief.[4]

[12] The facts relied upon by the applicant for urgency hardly establish a right to urgent relief. This is so in that the mere fact that a party to a dispute fails to attend a conciliation meeting cannot be a ground for urgency. There is no obligation on the respondent party to attend a conciliation meeting, as what ordinarily follows from those meetings is a certificate of outcome, which entitles the referring party to take the dispute further.

[13] Circumstances would obviously be different where the matter is set down as a con/arb under section 191(5A) of the Labour Relations Act (LRA)[5]. If there is no objection to those proceedings, once a certificate of outcome is issued, the Commissioner can then proceed to arbitrate the dispute in the absence of the respondent party. In this case, it is not clear as to whether the certificate of outcome issued on 16 August 2019 in relation to the alleged unfair dismissal dispute followed upon a con/arb process, and if so, the reason why the arbitration was not proceeded with. In a nutshell, the fact that a dispute was referred to the CCMA and could not be resolved due to the absence of the other party to the dispute, or the fact that the CCMA did not set down the dispute for arbitration at a pace sought by the applicant cannot give rise to urgency.

[4] *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11
[5] Act 66 of 1995 (as amended)

[14] The applicant further seeks urgent relief on the grounds that he is to be evicted. He seeks an order interdicting the respondent from evicting him from the dwellings secured for him whilst in its employ. This issue relates to the jurisdiction of this Court as shall be further elaborated upon in this judgment. In a nutshell, it is trite that any person may not be evicted from premises he or she occupies without a Court order. As at the hearing of this matter, no such eviction order was issued, or at least brought to the attention of the Court.

[15] Insofar as the contention that urgency arose as a result of the applicant not having been paid his salary, this relates to the debate as to whether financial hardship can give rise to urgency. This Court or any other Court for that matter may be accused of having an empathy deficit when considering such arguments. The reality however is that the circumstances that the applicant finds himself in (*i.e.*, lack of funds to cater for the bare necessities of life) are no different from those of other multitudes of employees, who on a daily basis suddenly find themselves without employment. Those employees in similar if not worst positions refer their disputes to appropriate forums and ordinarily wait for their turn in the litigation queue. In essence, the general scheme of the labour dispute resolution as contained in the LRA knows no preference, as all degrees of hardship suffered by all employees are immeasurable and incapable of comparison. It therefore makes sense to have as a general principle, that financial hardship on its own cannot be a basis for granting urgent relief, because to hold otherwise would imply that each and every case of a dismissal or withholding of a salary, that invariably ends with financial hardship, will end up in the urgent roll of this Court.

[16] The Courts have accepted that the general rule that financial hardship and loss of income are not considered to be grounds for urgent relief is not immutable, and that this rule may be departed from where exceptional circumstances are demonstrated.[6] As to what would constitute exceptional

[6] See *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8, where it was held;

> '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

circumstances will depend from case to case, with the primary consideration being whether the detrimental consequences complained of are not capable of redress in due course. Clearly this is aligned to the question of alternative remedies, and the issue remains whether these are not open to the applicant in this case.

[17] The applicant is clearly aware of his alternative remedies and has to a large extent exercised his options in that regard by referring various disputes to the CCMA and further seeking the assistance of the Department of Labour in regards to his alleged unpaid salary or deductions made to his salary. This is a typical case of an applicant who is impatient with the slow moving litigation process and wants favourable solutions at a pace dictated by him. This unfortunately is untenable. A matter cannot be deemed to be urgent simply because an impatient applicant seeks that it be treated with urgency. That would be a typical case of self-created urgency.

[18] To the extent that the respondent also raised the lack of jurisdiction of this Court, it gets worse for the applicant insofar as he relies on different causes of action leading to various forms of relief he seeks. The starting point is that to the extent that the applicant seeks declaratory orders in respect of the alleged unfair dismissal or automatically unfair dismissal, the difficulty is that it has long been held that such orders would be inappropriate in circumstances where he has alternative remedies.[7]

[19] It is trite that a claim of automatically unfair dismissal cannot be brought by way an application, let alone an urgent application. Equally so, a claim of unfair dismissal is not within the competence of this Court to deal with. The provisions of section 191 of the LRA are clear in regards to processes to be followed before such matter can be determined by this Court. Equally so, it is not within the jurisdiction of this Court, notwithstanding its powers under the provisions of sections 157 and 158 of the LRA to consider and grant relief in every given case that comes before it. As it was said in *Mohlomi v*

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and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.

[7] See *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC)at para 46

Ventersdorp / Tlokwe Municipality and Another[8] the fact that the Labour Court has jurisdiction / power does not mean that the Court should exercise this power. Thus, even though the Court may have jurisdiction to consider a dispute, it does not mean that it is appropriate for it to exercise such power, especially where there are other specifically prescribed alternative means by way of which the issue can be resolved.

[20] Effectively, the jurisdiction and powers of this Court is not without boundaries. It would be impermissible for it to grant urgent relief in circumstances where the dispute to be determined, has its own prescribed dispute resolution procedures set out in the LRA. This conclusion therefore makes it unnecessary for me to even consider whether cases have been made out for an automatically unfair dismissal claim, the alleged unfair dismissal claim, and the non-payment of salaries. Those disputes at this stage, are at appropriate forums where they should be, and it is only under the provisions of section 191 (5) (b) and 191 (11) (a) of the LRA that they can find their way to this Court. Effectively, those disputes are *lis pendens*, thus barring the Court from their consideration.

[21] In summary, the applicant has not laid a basis for this matter to be treated as urgent, and any urgency claimed is clearly self-created. Furthermore, the applicant has suitable alternative remedies which he has already utilised. To the extent that the causes of action upon which urgent relief is sought are the same in regards to the claims/referrals before the CCMA, there is no basis for such relief to be granted, particularly since the applicant seeks final relief. In the end, no point will be served by striking the matter of the roll as it will find itself back to this Court's roll, and in circumstances where the Court would in any event, not have jurisdiction over those disputes in their current form. Consequently, it follows that the application ought to be dismissed.

[22] I have had regard to the requirements of law and fairness in respect of a costs order as sought by the respondent. The applicant had drafted his own pleadings and represented himself in these proceedings. I am of the view that notwithstanding the ill-fated nature of this urgent application, a costs order

[8] [2018] 4 BLLR 355 (LC); (2018) 39 ILJ 1096 (LC) at para 34

given the applicant's personal circumstances is not warranted. Accordingly, the following order is made;

Order:

1. The Applicant's urgent application is dismissed.

2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In Person

For the Respondent: C Vabaza of Garlicke & Bousefield INC