



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE No: J-2025-067794

In the matter between:

HERMAN MDUDUZI VILAKAZI

Applicant

and

**THE MPUMALANGA TOURISM AND PARKS
AGENDY (MTPA)**

First Respondent

VICTOR MASHEGO

Second Respondent

SALOME SITHOLI

Third Respondent

WILLIAM LUBISI

Fourth Respondent

ERIC KHUMALO

Fifth Respondent

NOXOLO OYIYA

Sixth Respondent

LUNGILE MLABA-DLUDLA

Seventh Respondent

THENJIWE NKOSI

Eighth Respondent

DR MDLULI

Ninth Respondent

LINDIWE DIPUTLA

Tenth Respondent

BETHUEL SIBANYONI

Eleventh Respondent

RATHELELE MASIPHA (ADV)

Twelfth Respondent

Delivered by email: 13 June 2025

JUDGMENT

AH SHENE, AJ

Introduction

[1] This is an opposed urgent application wherein the applicant seeks the following relief:

- 1.1 That the forms and service provided in Rule 38 of this Court are dispensed with and the application is heard as one of urgency;
- 1.2 That the continued suspension of the applicant for a period exceeding 227 days, without any disciplinary hearing, is irregular and unlawful;
- 1.3 That the said irregular and unlawful suspension is hereby uplifted with immediate effect at the granting of this order;
- 1.4 That the first and second respondents are ordered to allow and facilitate the return to duty by the applicant without any hindrance to their official duties;
- 1.5 That the respondents who oppose this application be ordered to pay the costs of this application.

Background

[2] On 5 August 2024, the applicant, who is the Chief Executive Officer, was served with a letter of precautionary suspension by the first respondent. No specific allegations of misconduct were contained in the letter of suspension. As a result, the applicant's attorney of record dispatched a letter demanding to be furnished with specific allegations on 5 August 2024. The respondents acknowledged receipt thereof on 13 August 2024, yet the second respondent neglected to make the allegation available to the applicant. The applicant approached this Court in October 2024 seeking to declare the suspension for a period exceeding 60 days as irregular and unlawful. The Court dismissed the application. In February and March 2025, the applicant participated in an interview on two separate occasions as part of the said investigations. The applicant has been on paid suspension for a period in excess of 277 days. The 60-day period lapsed on 6 October 2024, yet the applicant was not allowed to resume his duties and remains on suspension. The applicant submits that such suspension is irregular and unlawful and stands to be set aside.

[3] The respondents, on the other hand, aver that this Court lacks jurisdiction to entertain the dispute as the 'unlawful suspension', relates to an unfair labour practice dispute that should have been referred to the CCMA or bargaining council for arbitration. The first respondent also raises the fact that this matter came before this Court on 24 October 2024 and was subsequently dismissed.

[4] As a result, the first respondent pleads that the issue has finally been determined and that this application falls to be dismissed on the basis of *res judicata*.

[5] During argument, the applicant's representative, Mr Mataka, argued that this Court has jurisdiction to entertain the dispute in terms of s157(1) and/or (2) read with s158(1)(h) of the Labour Relations Act¹ (LRA). He further contended that this Court may also order specific performance in terms of s77A(e) of the Basic Conditions of Employment Act² (BCEA).

¹ Act 66 of 1995, as amended.

² Act 75 of 1997.

[6] The applicant relies on the provisions of the disciplinary code and procedure dated 26 January 2024, clause 7.6.2 thereof, which is headed as 'Suspension with pay'. The applicant relies on the following two clauses:

'Suspension shall be with full pay. The following shall be explained to the employee suspected of misconduct prior to suspension:

...

e) the consequences of interference with the investigation

The following factors must be considered before an employee is suspended

....

e) that the employer will convene a disciplinary hearing within 60 days of the date of suspension, except where the case is complex the employer shall notify the employee of the extension.'

[7] The respondents raised the following legal points :

7.1 Lack of urgency;

7.2 res judicata ;

7.3 that this Court lacked jurisdiction to entertain an application in respect of an unlawful suspension.

Urgency

[8] The basis on which the applicant contends that the suspension is unlawful is apparent from the founding affidavit in that he has been suspended for a period in excess of 277 days. The 60-day period had lapsed on 6 October 2024

[9] The respondent contends that the application is not urgent and that such urgency is self-created. The courts have made it clear that self-created urgency cannot be entertained by an urgent court. In considering the old Rule 8, the court in *Jiba v Minister: Department of Justice and Constitutional Development and others*³ 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

³ (2010) 31 ILJ 112 (LC) at para 18.

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

[10] In terms of Rule 38(2) of the Rules of the Labour Court, it is required that the applicant's affidavit in support of the application must contain the reasons for urgency and why urgent relief is necessary.

[11] The applicant has set out the reasons for urgency in the founding affidavit and is of the view that there is no other legal recourse. The applicant seeks this court's intervention as the respondent has refused to allow the applicant to resume his duties.

[12] In this application, the issue of urgency must be considered with the legal points raised by the respondent.

Applicable legal principles relating to *res judicata* and unlawful suspension

[13] The respondents plead *res judicata* and contend that the application relating to unlawful suspension before this Court has already been decided on 24 October 2024. Accordingly, the respondents plead that the applicant relies on the same cause of action, between the same parties, and the same relief is being demanded.

[14] The relief the applicant seeks is that the continued suspension of the applicant for a period exceeding 227 days, without any disciplinary hearing, be declared irregular and unlawful. Further, that the irregular and unlawful suspension be uplifted, and the applicant be allowed to return to work.

[15] The applicant attaches the judgment of Itzkin AJ dated 24 October 2024 to the founding affidavit. It is evident that the applicant approached this court on an urgent basis on 24 October 2024, seeking an order declaring the applicant's suspension in excess of 60 days 'irregular and unlawful', and sought an order uplifting the

suspension and permitting the applicant to return to work. At paragraph [18] of the judgment, the court concluded:

[18] the upshot of this is that an unlawfulness claim pertaining to suspension beyond the 60 day period is not sustainable. A claim based on unfairness is not before the Court. Such claim (in the form of an unfair labour practice dispute) would in any event fall within the purview of the CCMA. ‘

[16] Itzkin AJ accordingly dismissed the application.

[17] In *Feni v The Commission for Conciliation, Mediation and Arbitration and others*,⁴ at paragraph [12], Davis JA concluded:

‘The doctrine of *res judicata* encompasses a matter that has already been decided; that is the same dispute had been finally adjudicated upon in proceedings between the same parties and therefore cannot be raised again. According to Voet 42.1.1 this *exceptio* was available in the common law, if it was shown that the judgment in the earlier case was given in a dispute between the same parties for the same relief on the same ground or on the same cause. See *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 159, 2001 (2) SA 232 (SCA) at 239 as well as the cases cited therein.’

[18] In *Yellow Star Properties v MEC, Department of Development Planning and Local Government, Gauteng*⁵ the Court amplified on this *dictum* in *SA National Defence Union and Another v Minister of Defence and Others; SA National Defence Union v Minister of Defence and Others*⁶ as follows:

‘.... it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.’

⁴ (2020) 41 ILJ 1899 (LAC).

⁵ 2009 (3) SA 577 (SCA) at para 22.

⁶ (2003) 24 ILJ 2101 (T) at 2109H.

[19] The relief sought in this application is that the '*continued suspension of the applicant for a period exceeding 227 days, without any disciplinary hearing, is irregular and unlawful*'. On closer analysis, it is evident that Itzkin AJ has already disposed of this issue on 24 October 2024. The relief may be couched slightly differently, but it is in essence the same relief, between the same parties, arising from the same cause of action. As a result, this application stands to be dismissed on this basis.

[20] If I am wrong in respect of the above, the second point raised by the respondent is that the LRA does not make provision for relief relating to the unlawfulness of a suspension. Section 186(2)(b) of the LRA relates to an unfair suspension of an employee, which is ultimately categorised as an unfair labour practice.

[21] In the Constitutional Court decision in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA Intervening)*⁷, the majority of the Constitutional Court contended that it had no jurisdiction to determine the lawfulness of a dismissal. The Court observed that there was no provision in the LRA in terms of which an order could be sought declaring a dismissal unlawful or invalid.

[22] In *Botes v City of Johannesburg Property Company SOC Ltd and others*⁸ Moshwana J stipulated:

'I do not agree with a submission that *Steenkamp* is confined. The principle in *Steenkamp* can be summarised as follows: where an employee alleges unlawfulness and not unfairness, the Labour Court lacks jurisdiction.'

[23] Given the above, this court also lacks jurisdiction in respect of an application relating to unlawful suspension. Despite the applicant contending that the claim is based on s77(3) of the BCEA, the averments necessary to sustain such cause of action are lacking. An offer of employment was annexed to the founding affidavit, but no contract of employment has been annexed. No reference is made to specific contractual clauses which have been breached. The applicant makes reference to

⁷ (2016) 37 ILJ 564 (CC).

⁸ (2021) 42 ILJ 530 (LC) at para 20.

the disciplinary code and procedure and various legislative prescripts regulating suspension, but on closer scrutiny, the real complaint is, in fact, an unfair suspension.

[24] In *Phahlane v SA Police Services and Others*⁹, this Court stated the following:

‘[9] Ordinarily, pleadings in a claim of this nature [contractual claim] would assert that term of the contract relied upon, alleged breach of that contract by the employer, record an election to enforce the contract by way of specific performance, and seek consequential relief. The cause of action in the present instance is clearly one of unlawfulness, in the form of an alleged breach of Regulation 9, and no more.’

[25] Having considered the authorities, I am of the view that this Court does not have the jurisdiction to entertain an application relating to unlawful suspension.

[26] Taking into account that the applicant was already advised that an unlawful suspension falls within the realm of the CCMA or bargaining council, I am of the view that this matter was not urgent. As a result, the application should be dismissed for all the reasons advanced.

Costs

[27] The Constitutional Court has recently reiterated in *Zungu v The Premier of the Province of KwaZulu-Natal and Others*¹⁰ that costs orders should be made in accordance with the requirements of law and fairness.

[28] In terms of s162 of the LRA, costs may be awarded after considering law and fairness.

[29] I have considered the fact that the applicant has brought this matter before court on an urgent basis yet again. The applicant had ample opportunity to refer the

⁹ (2021) 42 ILJ 569 (LC).

¹⁰ (2018) 39 ILJ 523 (CC).

dispute to the appropriate forum, yet failed to do so from October 2024. As a result, I am of the view that a cost order is warranted.

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

Order

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the respondents.

L. Ah Shene

Acting Judge of the Labour Court of South Africa

Appearances:

For Applicant: Mr. R Mataka of Morathi & Mataka Attorneys

For the Respondents: Mr. MM Baloyi of MM Baloyi Attorneys