



Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

CASE NO: 2025-211381

In the matter between:

JACK'S DIVE CHEST CC

Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR

First Respondent

**CHIEF INSPECTOR: OCCUPATIONAL HEALTH
AND SAFETY, DEPARTMENT OF EMPLOYMENT
AND LABOUR**

Second Respondent

Date of Hearing: 12 November 2025

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and

release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 11 December 2025.

Summary: Application for an urgent interdict – rule nisi requested to suspend prohibition notices issued in terms of the Occupational Health and Safety Act 85 of 1993 – application dismissed as *prima facie* right not articulated and relief sought is contrary to s35(5) of the Occupational Health and Safety Act.

JUDGMENT

BOSCH AJ

INTRODUCTION

[1] The applicant in this matter seeks the following relief:

1.1. That the application be deemed to be an urgent application and that the non-compliance with the provisions pertaining to time periods, service, form and process be condoned;

1.2. That a *rule nisi* shall issue calling on the respondents to show cause why the following relief should not be confirmed:

1.2.1. That the prohibition notices served on the applicant by the OHH Principal Inspector on 7 October 2025 be suspended pending the finalization of an appeal against such notice in terms of s35(1) and, if indicated, s35(3) of the Occupational Health and Safety Act, 85 of 1993;

1.2.2. That the prohibition notice served on the applicant by the OHH Principal Inspector on 28 October 2025 be suspended pending the finalization of an appeal against such notice in terms of s35(1) and, if indicated, s35(3) of the Occupational Health and Safety Act, 85 of 1993;

1.2.3. That the costs of the application be paid by the First Respondent;

1.3. That the relief in paragraphs 1.2.1 and 1.2.2 shall operate as an interim interdict with immediate effect pending the return date.

[2] Although the founding affidavit indicates that the application was brought on an *ex parte* basis, the respondents were served with a notice of motion at 16h00 on 10 November 2025 and given until close of business on 11 November 2025 to file an answering affidavit. On 11 November 2025, the second respondent filed a notice of its intention to oppose the application, but it filed no opposing papers. The second respondent submitted that I should determine the application and dismiss it.

[3] The applicant points out that in terms of the Uniform Rules of Court when an application is brought against any Minister, Deputy Minister, Member of an Executive Council, officer or servant of the State, in such capacity, the State or the administration of any province, the respective periods referred to in paragraph (b) of subrule 6(5), or for the return of a rule nisi, shall be not less than 15 days after the service of the notice of motion, or the rule nisi, as the case may be, unless the court has specially authorised a shorter period. There is no similar directive in the Rules of this Court.

THE NATURE OF THE APPLICATION

- [4] The applicant is a commercial diving academy, established in September 1993. It employs 32 employees including 8 supervisors (of which 5 are dive instructors) and 4 are standby divers. The applicant alleges that if it is closed down for any reason, all of these employees will lose their jobs.
- [5] The applicant provides training for students to be accredited as class II, III and IV commercial divers and students come from all over the world to receive that training. Obviously, commercial diving is an extremely dangerous occupation. The applicant estimates that at least 20 divers die annually in the execution of their profession. The applicant alleges that because of the inherent danger associated with the work, it takes all reasonable care to ensure the safety of its students.
- [6] Since its inception, the applicant has experienced only two fatalities. The first was in 2020 when a student committed suicide when, while diving, he removed his dive helmet at a depth of 7m and drowned himself.
- [7] Then, on 29 August 2024 a student diver being trained by the applicant passed away while conducting a 40m deep dive at Blue Rock Quarry. The incident was initially investigated by Ms Nozi Maphoto of the Department of Employment and Labour's head office after she and several other delegates had paid numerous visits to the applicant's premises and the dive site at Blue Rock Quarry.
- [8] The applicant points out that prior to the second incident, the Department from time to time carried out inspections at the applicant and (in October 2023) issued it with notices. Those were addressed to the satisfaction of the Department and required no further assessment.

[9] On 30 August 2024, principal inspector Morne Kruger issued a prohibition notice in terms of the Occupational Health and Safety Act prohibiting the applicant from training class II commercial divers. The prohibition notice reads as follows: "I hereby prohibit you from continuing or commencing with the following, effective immediately: All physical Class II dive training including the use of the equipment on the barge at Blue Rock Quarry at Sir Lowry's Pass Road, Somerset West until such time that the cause of the incident on 29 / 08 / 2024 was established.

[10] The applicant understood and accepted the reasoning for the prohibition notice and expected that the Department would expedite the finalisation of its investigation. However, to date to the knowledge of the applicant, the Department has not established the cause of the incident or published a report on the incident.

[11] The Department carried out an inspection on 6 & 7 October 2025 and thereafter issued prohibition, contravention and improvement notices. The applicant referred to a number of concerns relating to the inspection. These included the fact that two of the people participating in it were not inspectors designated by the first respondent in terms of s 28 of the Occupational Health and Safety Act and to the best of the knowledge of the applicant on 6 & 7 October 2025 they had not been furnished with a certificate by the first respondent to act as inspectors. Neither of them produced their certificates on demand during the inspection.

[12] The expertise of the inspectors was also apparently questionable. In addition, a statement by the inspectors that the applicant had not provided to the appointed commercial dive supervisor a copy of the operations manual and relevant procedure for the intended operation was simply false and deceitful.

[13] The applicant supplied an affidavit from a Mr Ashely Buckle, a diving instructor employed by the applicant, stating that there were numerous irregularities in the inspection conducted in his presence, and which led to the issuing of the prohibition notice.

[14] In response to the prohibition notices the applicant wrote to one of the inspectors, Ms S Charlie on 15 October 2025 and submitted to Ms Charlie that all the prohibition notices could be closed out and lifted with immediate effect. Ms Charlie was asked to consider the action plan and to inform the applicant if she required further information. The applicant also raised a number of other concerns.

[15] The applicant received no response to its letter. Instead, late in the afternoon of 28 October 2025, much to the applicant's surprise the Department of Employment and Labour served on the applicant a 'nonsensical' notice advising that the applicant was prohibited with immediate effect from conducting training for both class II and III diving until the identified issues had been fully rectified and verified by the Department.

[16] According to the applicant, the second respondent has an internal policy to respond to appeals submitted to her in terms of s 35(1) of the Act only on the sixtieth day after receipt of the appeal. Therefore, even if the intended appeals were lodged by 31 October 2025, the applicant would remain prohibited from continuing with the training of class II and III commercial divers for at least until the end of December 2025.

[17] If the appeals in terms of s 35(1) were to fail, as the applicant anticipates they will, despite its complete and proper response, it may take at least another six

months before the appeal would come before this court. That being the case, the applicant is doomed to collapse and go bankrupt.

[18] The applicant alleges that it is in the process of training 61 commercial divers who should finish their course during November. Fifty-two of these students are foreigners who are in the country in on 90-day visas. If the applicant is closed down, those students would not only lose the fee they had paid to the applicant but will have to leave the country when their visas expire. Worst of all they will have to start another diving course at another diving academy.

[19] There are 5 students on their way to South Africa to commence with their class II & III diving courses with the applicant, having already paid US\$9 130 per student for the course. The loss to these students if they were prohibited from commencing with the course is tangible.

[20] There are also 12 or 13 students waiting in Egypt for their visas to come to South Africa to commence with the training. The period from October to April is the busiest time on the calendar for the training of diving students. The decision to prohibit the applicant from conducting training of class II & III commercial divers was allegedly clearly taken without consideration of the applicant's letter dated 16 October 2025.

[21] The Department did not again inspect the premises nor did it deny the applicant's response.

[22] The applicant asserts that unless this court, upon consideration of the applicant's letter of 16 October 2025, were to grant the urgent relief sought in the notice of motion, the applicant will be shut down and will not be capable of being resurrected.

Such is the effect of the allegedly draconian prohibition issued by the Department on 28 October 2025.

[23] The applicant states that unless this court comes to its rescue it will suffer irreparable loss. The applicant cannot approach this court in due course – by then it would be too late to save the business of the applicant.

[24] The applicant stated that the appeal served on the second respondent on 30 October 2025 proves that it has satisfactorily addressed all the complaints in respect of which notices have been issued by the inspectors. Accordingly, it is submitted that at present there exists nothing that threatens or is likely to threaten the health or safety of any person nor is there plant or machinery being used that threatens or is likely to threaten the health or safety of any person who works with the plant or machinery or may come within the vicinity thereof.

Urgency

[25] It appears from the applicant's papers that it will not be able to obtain substantial redress in the normal course and the court is prepared to accept that the matter should be regarded as urgent.

The merits of the application

[26] The applicant seeks a rule nisi which is an order issued by a court, at the instance of the applicant calling on another party or parties to show cause why relief as claimed should not be granted. Although it is usually used in *ex parte* applications

“the practice relating to rules nisi has been used in various contexts. The essential character and purpose of the procedure, however, remains to ensure that (a) notice is given to an affected party; (b) a *prima facie* case is made out for the relief sought; and (c) such relief may be granted unless cause is shown why it should not be granted.”¹

[27] The rule nisi sought in this case will operate as an interim interdict and is not simply there for the taking. As Harms points out² in discussing the case of *Ex parte Saiga Properties (Pty) Ltd*³:

“It is implicit in this decision that a rule nisi cannot be issued unless a cause of action is made out. A rule does not serve as a remedy for a bad cause.”

[28] In that case the court stated⁴:

“After all, a rule *nisi* is not without consequences and, in a case such as this, should only be granted where, *prima facie*, final relief will probably be granted.”⁵

[29] And this court has made it clear that when applying for rule nisi an applicant must establish a *prima facie* right, albeit one open to some doubt.⁶

[30] The applicant has not properly articulated the right which it seeks to protect

pending the conclusion of the appeal process. It is in the process of exercising its

right to appeal the prohibition notices but approaches this court because the delay in

¹ *Member of the Executive Council for the Department of Health, Eastern Cape v BM* (213/2021) [2022] ZASCA 140 (24 October 2022) at para 14

² Harms, *Civil Procedure in the Supreme Court* p195 fn 1

³ 1997 (4) SA 716 (E)

⁴ At 720A-E

⁵ See also *Ex parte St Clair Lynn* 1980 3 SA 163 (W) where the court ruled that applicant must be entitled to the ultimate relief sought.

⁶ *Moya v Standard Bank of South Africa (Pty) Ltd* (J2010/10) [2010] ZALC 147 (12 October 2010)

the appeals process would, it says, cause catastrophic and irreparable financial harm to its business. It does not allege a right which entitles it to be free of financial harm pending the conclusion of the appeal process. And, while the applicant sets out why it considers the prohibition notices to be problematic, it does not say in terms that the inspectors acted unlawfully in issuing the prohibition notices. The court is thus left to speculate as to the right the applicant seeks to protect by way of interim interdictory relief and the application could be refused on that basis.

[31] Be that as it may, the more fundamental obstacle to granting a rule nisi in this case lies in the provisions of s35 of the Occupational Health and Safety Act. That section provides as follows:

“(1) Any person aggrieved by any decision taken by an inspector under a provision of this Act may appeal against such decision to the chief inspector, and the chief inspector shall, after he has considered the grounds of the appeal and the inspector’s reasons for the decision, confirm, set aside or vary the decision or substitute for such decision any other decision which the inspector in the chief inspector’s opinion ought to have taken.

(2) Any person who wishes to appeal in terms of subsection (1), shall within 60 days after the inspector’s decision was made known, lodge such an appeal with the chief inspector in writing, setting out the grounds on which it is made.

(3) Any person aggrieved by a decision taken by the chief inspector under subsection (1) or in the exercise of any power under this Act, may appeal against such decision to the Labour Court, and the Labour Court shall inquire into and consider the matter forming the subject of the appeal and confirm, set aside or vary the decision or substitute for such

decision any other decision which the chief inspector in the opinion of the Labour Court ought to have taken.

(4) Any person who wishes to appeal in terms of subsection (3), shall within 60 days after the chief inspector's decision was given, lodge the appeal with the registrar of the Labour Court in accordance with the Labour Relations Act, 1995, and the rules of the Labour Court.

(5) An appeal under subsection (1) or (3) in connection with a prohibition imposed under section 30(1)(a) or (b) shall not suspend the operation of such prohibition." (underlining added)

[32] The relief the applicant seeks is directly contrary to s35(5) and it asks this court to grant it what that section clearly precludes. Section 35(5) obviously serves a purpose, namely to ensure that businesses whose safety standards have been found wanting cannot operate until such findings have been set aside by a competent authority. The risk of allowing a business to continue to operate despite prohibition notices is significant. In addition, in this case, because the applicant elected to approach the court with such urgency, the court did not have the benefit of the input of the second respondent and is no position to form a proper view on the applicant's assertion that it is safe to allow it to continue to operate while the interim relief is being determined or until the applicant's appeals have been determined.

[33] In the court's view, while exceptional circumstances may warrant its intervention despite s35(5) that should only happen in the clearest of cases. This case is not one of them and the application therefore falls to be dismissed.

[34] That said, the applicant obviously finds itself in a very difficult position and the court is not unsympathetic to it. One would hope that the second respondent will deal with the applicant's appeal as expeditiously as possible.

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

35.1. The application is deemed to be an urgent application and the non-compliance with the provisions pertaining to time periods, service, form and process is condoned.

35.2. The application is dismissed.

35.3. The applicant is to pay the second respondent's costs, such costs to include the costs of counsel.

A handwritten signature in black ink, appearing to read 'Craig Bosch', is written over a black rectangular redaction box.

Craig Bosch
Acting Judge of the Labour Court of South Africa

APPEARANCES:

Applicant:

Adv Kruger SC

Instructed by KMG & Associates Inc

Second Respondent:

Adv Roseline Nyman SC

Instructed by the State Attorney

LABOUR COURT