

SOUTH AFRICA / JUDGMENT

Gomba v Member of the Executive Council: Gauteng Department of Human Settlement (J1360/19) [2019] ZALCJHB 149; (2019) 40 ILJ 2355 (LC) (19 June 2019) [2019] ZALCJHB 149

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J1360/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1360/19

In the matter between:

DINEO
GOMBA
Applicant
and
MEMBER OF THE

EXECUTIVE COUNCIL:

GAUTENG DEPARTMENT OF
HUMAN SETTLEMENT
Respondent
Heard: 4
June 2019

Delivered:

19 June 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant (Advocate Gomba), was employed as a Senior Legal Advisor and Deputy Information Officer of the Department of Human Settlement: Gauteng Provincial Government (the Department). She approached this Court for urgent relief pursuant to the termination of her services on 8 March 2019 on account of absconsion.
- [2] In her Notice of Motion, she seeks an order declaring the termination of her services as wrongful and unfair. She further seeks an order that she be re-employed into her former position with the exact same full remuneration and benefits retrospective to the 8th March 2018.
- [3] The respondent (the MEC) opposed the application on various grounds, including that the application does not deserve the urgent attention of this Court, and further that Gomba had not satisfied the requirements for final relief in view of her dismissal by operation of the law, and in particular, the provisions of section 17(3)(a)(i) of the Public Service Act (PSA).[1]

Background:

- [4] Gomba commenced her employment as a Senior Legal Advisor on 1 October 2008. A fire occurred in the Lisbon Building in the CBD of Johannesburg which housed the Department of Human Settlement on 4 and 5 September 2018, necessitating the complete evacuation of the building and relocation of employees to alternative buildings. As a result, the Department created a WhatsApp communication group for employees to inform them of logistics and where they should report for duty. Legal officers and members of the legal section of the Department, including Gomba, were directed to report for duty at another building at No. 11 Diagonal Street.
- [5] At the time that the fire occurred, Gomba was on leave since August 2018 and was due to return to work on 16 September 2018. The Department's contention is that Gomba failed to report for

duty thereafter. With effect from 15 March 2019, Gomba was not paid her monthly remuneration. Upon enquiries as to the reason she was not paid her salary, she was informed by Mr Shibambo of the Labour Relations Unit that she was dismissed on account of having absconded, and that communication in that regard was sent to her via her official Departmental email address.

[6] Gomba contends that the Department was at all material times aware that she did not have access to her work-email, owing to her work-laptop having been left at the Bank of Lisbon Building when she went on leave; and further that she was not telephonically contacted prior to any registered letter being delivered to her residential

address, contrary to prior practice in respect of her previous litigation with the Department.

[7] The Department however contends that despite its communication subsequent to the fire via the WhatsApp group communication, Gomba had since 16 September 2018, not returned to work, and had only resurfaced when her remuneration was not paid on 15 March 2019.

[8] Central to Gomba's complaint in approaching the Court on an urgent basis is that the Department failed to comply with the requirements of section 17(3) of the PSA in implementing the termination. She contends that the Department never communicated to her or the other employees on the said WhatsApp platform that they were required to report for duty after being excused from doing so subsequent to the safety concerns at the Bank of Lisbon Building.

[9] Gomba averred that on 1 April 2019, she launched an appeal with the MEC in respect of her dismissal. The Department on the other hand denied that any written representations as contemplated by the provisions of section 17(3)(b) of the PSA were received by the MEC. It referred to an email of Mr Mokoko, the Chief of Staff in the MEC's office, who had denied Gomba's allegation that his (Mokoko's) email mailbox was full on 1 April 2019, which resulted in her representations not being received.

Urgency:

[10] The principles applicable to urgent applications are trite. An applicant in such applications in accordance with the provisions of Rule 8 of the Rules of this Court must set out explicitly, the circumstances which she avers makes the matter urgent, and must also state the reasons why she claims that she cannot be afforded substantial redress at a hearing in due course.[2] Equally important is that urgency claimed must not be self-created due to inter alia, the applicant having been lax in approaching the court for relief.

[11] As already pointed out, the MEC opposed the application on a variety of grounds, including that Gomba had not complied with the provisions of paragraph 12.3 of the Practice Manual of this Court in bringing the application. It is my view that it is not necessary for the Court to deal with these contentions since the matter was initially set down for 31 May 2019 by Gomba, but was subsequently removed from the roll to enable the MEC to file a replying affidavit. Thus

any prejudice caused as a consequence of setting the matter down on that date can be mitigated with a costs order to the extent that such an order would be deemed appropriate.

[12] The MEC further contended that Gomba had not set out on the facts why this application should be heard as one of urgency; and that on the whole, she had not shown in her founding affidavit why the matter should be treated with urgency.

[13] The MEC further contended that Gomba was notified on 15 February 2019 that she had been absent from work. This was followed by a letter of termination sent to her dated 08 March 2019. It is common

cause that the salary payment of Gomba's was stopped on 15 March 2019, and that this application was only launched

on 27 May 2019, setting the matter down for 31 May 2019.

[14] Gomba averred that the matter is urgent on the grounds that;

- a) Her contract of employment was wrongfully and unfairly terminated, causing her to suffer severe psychological trauma
- b) She was on the brink of losing her residential property in which she lived with her minor daughter due to non-payment of her monthly bond;
- c) She recently discovered that she was pregnant and suffered from some other ailments including high blood pressure.
- d) She had no alternative remedies
- e) Her circumstances were exceptional.

[15] I am in agreement with the MEC that Gomba has not set out the facts requiring this application to be treated as urgent. My conclusions in this regard are as follows;

15.1 Having become aware of the non-payment of her salary on 15 March 2019, Gomba only approached this Court on 27 May 2019, some 10 weeks since the cause of the complaint. It is not necessary to dwell into the dispute as to whether she had received the correspondences of 15 February 2019 and 08 March 2019 or not.

15.2 It further took Gomba until 1 April 2019 to submit a notice of appeal. Despite it being apparent that her appeal was not being attended to, on 13 May 2019, she had addressed a letter to the Department, threatening to approach this Court on an urgent basis if her notice of appeal was not attended to within two days. Despite not getting a response within the two days, she only approach this Court on 27 May 2019.

15.3 It is apparent from the above that Gomba did not act with the necessary haste in approaching the Court, and the invariable conclusion to be reached is that the urgency claimed is self-created.

15.4 Even if there is a semblance of attempts by Gomba to have her appeal attended to, other factors she had raised in submitting that the matter is urgent does not assist her case. The first is that, insensitive and uncaring as it may sound, financial hardship is ordinarily not regarded as a ground of urgency.^[3] It is a natural consequences of a loss of a job, and it would be untenable for the Court to treat financial hardship as a ground of urgency in each and every dismissal case in the light of the clear scheme of labour dispute resolution as contained in the LRA. All litigants that have had their services terminated, irrespective of status, financial means or financial hardship, are required to await their turn on the litigation queue. Gomba is not an exception, nor has she shown exceptional circumstances as shall be dealt with below.

15.5 It is accepted that the above general principle may be departed from if exceptional circumstances exist. Even then however, the applicant must demonstrate detrimental consequences that may not be capable of being addressed in due course.^[4]

15.6 In this case, I am not satisfied that the factors pleaded by Gomba raise exceptional circumstances compelling the Court to treat the matter as urgent. Her averments in relation to financial hardship amounts to generalised statements, with no effort being made to make specific, factual averments related to the nature and extent of any immediate hardship that she says she will suffer. As it was correctly pointed out on behalf of the MEC, Gomba's averments in regards to losing her house are not supported by

anything to demonstrate that there is a pending action in respect of her property. In the end, Gomba failed to place any material before the Court to convince it that the degree of financial hardship alleged is so exceptional that it requires the urgent intervention of this Court.

15.7 In any event, the Court should be slow in according a matter urgency on the basis of financial hardship in circumstances where the applicant did not act with the necessary haste in approaching it^[5].

15.8 Furthermore, the Court should be slow to grant urgent relief particularly in view of a consideration that any detrimental consequences arising from Gomba's dismissal would not be capable of redress in due course. Again, it was correctly pointed out on behalf of the MEC, Gomba has not set out facts to establish why she will not obtain substantial redress at a hearing in due course.

^[16] Ordinarily, and in the light of the above conclusions, Gomba's application ought to be struck off the roll. For the sake of completeness however, it is trite that in such applications where an applicant seeks final relief, he or she must further establish a clear right to the relief that is sought; a reasonable apprehension of irreparable harm; and the absence of alternative and adequate remedies.

^[17] Gomba in her pleadings does not indicate what clear right she seeks to protect. In fact, no mention is made of that right, other than to mention that the termination of her contract of employment was wrongful, unlawful and unfair due to abuse of power by the MEC or the Department. She however sought to rely on *Mmatli and Others v Department of*

Infrastructure Development (Gauteng Province)[6] for the proposition that the Court may intervene on an urgent basis to interdict an unfair dismissal. The facts of that case are in any event distinguishable in that the employees in that case were not dismissed at the time of the hearing of their application, whilst Gomba in this case has since been dismissed. In any event, to the extent that she questioned the procedure adopted in terminating her services, it is trite that an averment of a breach of procedure, irrespective of the egregious nature of that breach, is not in itself a basis upon which an

application may heard as a matter of urgency.[7]

[18] In this case, it was common cause that Gomba's services were terminated in accordance with the provisions of section 17(3)(a)(i) of the PSA, and by all accounts, Gomba does indeed have access to alternative remedies. To this end, it has been held that a declaratory order for reinstatement or re-employment as sought in this case, would be inappropriate in circumstances where an applicant has access to alternative remedies under the provisions of the LRA. Furthermore, a final declaration of unlawfulness on the grounds of unfairness (as pleaded in this case), will rarely be easy or prudent in motion

proceedings. [8]

[19] Insofar a clear right was not pleaded nor established, there will be no basis upon which the Court can determine whether there is a reasonable apprehension that irreparable harm would ensue, and accordingly, this requirement of final relief was equally not met.

[20] The issue of alternative remedies has already been dealt with in part. Gomba does indeed have alternative and adequate remedies, and it is not clear from her pleadings why these remedies are inadequate for her. It was pointed out on behalf of the MEC that two essential remedies are available to Gomba, being the provisions of section 158(1)(h) of the LRA, and Clauses 9.5 and 10 of the internal Abscondment Policy.

[21] In conclusion, Gomba has failed to establish the reason the Court should hear this matter on an urgent basis, and worst still, she has failed to satisfy the requirements of the final relief that she seeks, and her application accordingly ought to be dismissed.

[22] The MEC seeks a punitive costs order against her. It is common cause that Gomba has since been dismissed and had brought this application on her own and represented herself in these proceedings. Inasmuch as the application was ill-conceived, it is my view that the considerations of law and fairness militate against any costs order against her.

[23] Accordingly, the following order is made;

Order:

1. The applicant's urgent application is dismissed.
2. There is no order as to costs

E. Tlhotlhlamaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In

Person

For the Respondent: X

Mofokeng, instructed by H.M Chaane Attorneys

[1] Act 103 of 1994 (as amended) Section 17 Termination of employment (1)

- (a) Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act. (b) The power to dismiss an employee on account of misconduct in terms of subsection
- (2) (d) shall be exercised as provided for in section 16B (1). (2) An employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of- (a) incapacity due to ill health or injury; (b) operational requirements of the department as provided for in the Labour Relations Act; (c) incapacity due to poor work performance; or (d) misconduct. (3)
- (a) (i)

An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty. (ii) If such an employee assumes other employment, he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not. (b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.

[1] Act 103 of 1994 (as amended)

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(a) incapacity due to ill health or injury;

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An employee, other than a member of the services or an

educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

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duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.

[2] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others

[2012] JOL 28244 (GSJ) at para 6.

[3] See *Jonker v Wireless Payment Systems CC*

(2010) 31 ILJ 381 (LC) at para 16, where it was held that; ‘The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in *Malatji v University of the North* [2003] ZALC 32 (LC) and *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO en Andere* (1990) 11 ILJ 971 (T).’

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[4] *Harley v Bacarac Trading 39 (Pty) Ltd*

(2009) 30 ILJ 2085 (LC) at para 8.

[5] See *Ledimo and Others v Minister of Safety and Security and Another* (2242/2003) [2003] ZAFSHC 16 (28 August 2003) at para 33 – 34 where it was held that; ‘Let me assume in favour of the applicants that their financial hardship was caused by the withholding of their salaries, as they claimed, that it was sufficient to establish urgency and that such urgency justified the extra-ordinary urgent procedure they have chosen in casu. This is the first hurdle they had to jump. But there was yet another important hurdle they also had to jump. By conduct they swiftly had to demonstrate the urgency they were relying upon. In my view they have hopelessly failed to display any sense of urgency. They took their own time to launch these proceedings. By failing to take appropriate steps timeously against the respondents, they have certainly allowed the passage of time to effectively destroy whatever merits their averment of urgency might have had. By the time they woke up and rushed to court to launch this application any measure of urgency that there was originally in their matter had gradually dissipated and had virtually evaporated into thin air. I have already commented adequately on the adverse impact of their procrastination. It is enough. Ms Van Zyl’s contention that the applicants had, on their own papers, been aware of the alleged wrong for a considerable period prior to their launching these proceedings on 30 June 2003 has indeed substance. It is crystally clear, and there is no allegation or suggestion to this effect, that the respondents have committed no fresh offensive acts or wrongs which in any way may be regarded as having rekindled the urgency this matter had long lost.’

[5] See *Ledimo and Others v Minister of Safety and Security and Another* (2242/2003) [2003] ZAFSHC 16 (28 August 2003) at para 33 – 34 where it was held that;

‘Let me assume in favour of the applicants that their financial hardship was caused by the withholding of their salaries, as they claimed, that it was sufficient to establish urgency and that such urgency justified the extra-ordinary urgent procedure they have chosen in casu. This is the first hurdle they had to jump. But there was yet another important hurdle they also had to jump.

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[6] (2015) 36 ILJ 464 (LC) at para 13

[7] See *Solidarity v South African Broadcasting Corporation* 2016

(6) SA 73 (LC); (2016) 37 ILJ 2888 (LC); [2017] 1 BLLR 60 (LC) at para 67

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

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