

SOUTH AFRICA / JUDGMENT

Isaac and Others v Tswaing Local Municipality and Others (J221/22) [2022]

ZALCJHB 323 (21 November 2022)

[2022] ZALCJHB 323

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

J221/22

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J221/22

In the matter between:

MORUTI MANOTO
ISAAC
First Applicant
MOGOJE, ERNEST
RAMOTSEKI
Second Applicant
NDONGENI, VASHTY
KHAMANYANE
Third Applicant
And
THE
TSWAING LOCAL MUNICIPALITY
First Respondent
CLLR TSHOMARELO PIET
JANUARIE
Second Respondent
CLLR MOTSEOTATA VICTOR
MOGUDU
Third Respondent
CLLR MATSHIDISO
MAGARET MOREO
Fourth Respondent
CLLR NOZEMANGA
WILHEMINAH THWANE

Fifth Respondent
CLLR RALEBATLA LEVY
TLHAGALE
Sixth Respondent
CLLRTEBOGO JAN
SEKGELO
Seventh Respondent
CLLR NKAGISANG PATRICK
MOLEBOGE
Eighth Respondent
CLLR GISIAME DAVID
GAEDIE
Ninth Respondent
CLLR
SHUPING JOEL
KGATITSWE
Tenth Respondent
CLLR JACOB PAPI
MOLATUDI
Eleventh Respondent
CLLR SALMINAH
KEDUMETSE MOLELEKI
Twelve Respondent
CLLR SIMANE MICHEAL
WILLIAMS
Thirteenth Respondent
CLLR THOMAS MPHO
SEHEMO
Fourteenth Respondent
CLLR PUSELETSO MERIAM
MOKOTO
Fifteenth Respondent
CLLR MMAMME EMMAH
MOLETE
Sixteenth Respondent
CLLR NKAGISANG JOSEPH
MOLEHABANGWE
Seventeenth Respondent
CLLR SORET
VILJEON
Eighteenth Respondent
CLR LINDA YVONEE
TAALJARD
Nineteenth Respondent
CLLR JOSEPH KAGISO
MANGWEJANE
Twentieth Respondent
CLLR MARLIZE ALISON
CALLGHAN
Twenty-first Respondent
CLLR MODISAOTSILE

ANDREW MOLAMUAGAE
Twenty-second Respondent
CLLR MERRIAM MMATLALA
MORUAPHEKO
Twenty-third Respondent
CLLR KABELO PETRUS
MATHIBE
Twenty-fourth Respondent
CLLR NOOINYANA REBECCA
BAITSUMEDI
Twenty-fifth Respondent
CLLR JURIE
BOTH
Twenty-sixth Respondent
CLLR NTOMBIZODWA NORAH
MAHLANGU (the
Mayor)
Twenty-seventh Respondent
THE SPEAKER: CLLR
MODISAOTSILE
SAM
LETLAKANE
Twenty-eighth Respondent
MEC FOR THE DEPARTMENT
OF COOPERATIVE
GOVERNANCE, HUMAN
SETTLEMENT AND

TRADITIONAL AFFAIRS: NORTHWEST PROVINCE
Twenty-ninth Respondent

Heard: 27 October 2022

Delivered: 21 November 2022
This

judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 November 2022.

Summary: Urgent application – urgency was squandered by a postponement of the matter for a period of more than four months.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] In this matter, the applicants seek to vindicate a contractual right to a pre-dismissal disciplinary hearing by way of urgency. They impugn the resolution of the first respondent's Council to terminate their services summarily on the basis of allegations of misconduct without affording them an opportunity to defend themselves in a disciplinary hearing. Their claim is pegged on section 77(3) read with section 77A of the Basic Conditions of Employment Act[1] (BCEA).
- [2] The matter served for the first time before Tlhotlhlalema J on 9 March 2022. The first respondent raised two points in limine; the first pertains to urgency and the second, pertains to non-joinder. The judgment was delivered on 22 March 2022 wherein Tlhotlhlalema J accepted that the matter was urgent and dismissed the first point in limine. He then upheld the non-joinder impugned and granted the applicants leave to join the Municipal Council, the Speaker of Council and the Member of Executive Council for the Department of Cooperative Governance, Human Settlement and Traditional Affairs: Northwest Province (MEC). The parties were granted leave to file supplementary papers and approach the Registrar of this Court to enrol the matter on the urgent roll.
- [3] On 3 June 2022, the matter was enrolled on the urgent roll but was struck off the roll due to non-appearance. On 17 June 2022, the matter was once more enrolled on the urgent roll and served before Radebe AJ. Prompted by Radebe AJ, the parties embarked on settlement discussions and sought a postponement to continue with the discussion. The matter was postponed to 27 October
2022. It would seem that the settlement discussions were unsuccessful. On 27 October 2022, the matter was enrolled on the urgent roll once more and served before me.
- [4] Two issues arose which relate to urgency and relief sought. The parties were directed to file supplementary heads of argument to deal with these two issues especially in light of the recent judgment of the Labour Appeal Court (LAC) in *South African Municipal Workers Union obo Morwe v Tswaing Local Municipality and Others*[2]. The supplementary heads of argument have been duly filed.
- [5] I deal first with the issue of urgency. The applicants staunchly contend that the issue of urgency is *res judicata* as Tlhotlhlalema J pronounced on it on 22 March

2022. Moreover, Radebe AJ postponed the matter to the urgent roll on 27 October 2022. The respondents, on the other hand, contend that urgency has dwindled when regard is had to the fact that nine months have passed since the dismissal of the applicants. Even though the matter was initially urgent, it has ceased to be urgent due to the passage of time and had to be dealt with in the normal course on the opposed roll, unless directed otherwise.
- [6] Admittedly, Tlhotlhamaje J accepted urgency and dealt with the matter as such. He further directed that the matter be re-enrolled on an urgent roll. Thereafter, there was no court order directing that the matter be re-enrolled on the urgent roll. Van Niekerk J struck the matter off the roll due to non-appearance by the applicants. It was the applicants themselves who sought a re-enrolment on the urgent roll. Radebe AJ did not deal with the issue of urgency as the parties decided to explore settlement options. Nothing in his order supports the applicants' contention that the matter had to be re-enrolled on an urgent roll in the event the settlement discussions reached a stalemate.
- [7] Tellingly, the applicants seem to have been alive to the fact the employment contracts they have invoked and sought to enforce were subject to fixed terms, one of which the expiry date was looming. Yet, on 17 June 2022, they agreed to postpone the matter to 27 October 2022. The first applicant's fixed term contract of employment expired by effluxion of time on 31 July 2022. While the second and third applicants' fixed term contracts of employment are due to expire on 31 May 2023 and 30 November 2022, respectively.
- [8] I struggle to understand why this matter is still urgent when the applicants themselves squandered the meagrely pleaded urgency consequent to Tlhotlhamaje J's munificent order. There is no merit in the applicants' contention that the issue of urgency is *res judicata*. A party that seeks urgent intervention by the Court is enjoined to proffer an explanation for urgency. The fact that urgency was upheld seven months ago does not necessarily support the contention that the matter is still urgent, especially since the applicants' claim pertains to a breach of contract.
- [9] It is a trite principle that an enquiry on urgency involves two considerations. Firstly, whether the reasons that make the matter

urgent have been adequately set out in the founding affidavit; and secondly, whether the applicant would not get substantial redress in the normal course.[3] Put otherwise, as observed by the court in *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others*[4], referred to with approval in *Mojaki v Ngaka Modiri Molema District Municipality & others*[5]:

'...An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid

down by the rules it will not obtain substantial redress.'

[10] The applicants failed to show that they would not get substantial redress in the normal course. In fact, their conduct in postponing the matter for a period of four months in order to engage in a settlement discussion is fatal to their claim for an urgent relief. This is the conduct that was decried by this Court, per Snyman AJ, in *Association of Mineworkers and Construction Union and others v Northam Platinum Ltd and another*,^[6] the observations therein are succinctly reprised in his recent judgment in *Maphalle v National Heritage Council and Others*^[7]; stating that:

'[1] This is yet another urgent application brought by a senior employee in the service of a State organization, seeking to urgently intervene in proceedings where there are clearly alternative specific dispute resolution processes prescribed by the Labour Relations Act (LRA). These employees, who are highly remunerated and can thus afford it, often rush off to this Court on the back of clever lawyering to try and secure an advantage over all the other thousands of litigants that patiently wait in the queue to have their cases of termination of employment decided.

[2] What makes it worse is that these litigants seek to classify what is in reality an ordinary unfair dismissal dispute as contemplated by Chapter VIII of the LRA as something else, namely a breach of contract, or unlawful dismissal. It is true that in the case of an alleged breach of contract, which is the cause of action on which the applicant's current application is founded, this Court would have jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA), as read with section 77A, to entertain such a claim. That being said, and as will be discussed in more detail below, there is nothing special or unique in such a breach of contract claim that propels it into the realms of urgency and so cause it to be heard immediately and ahead of the queue of other similarly fated litigants. In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* the Court held as follows:

"... as a result of the judgment in SABC, an unforeseen, and I am quite sure unintended, consequence has arisen. The judgment has been taken to now establish some sort of licence for litigants to approach the Labour Court on an urgent basis challenging dismissals as being unlawful. There seems to be a general view that the fact that the dismissal may be considered to be unlawful, and is challenged on that basis, is in itself a basis for urgency. It needs to be made clear that such an approach would be wrong. In fact, this was recognised by Lagrange J himself in SABC, where the learned judge said: 'The mere fact that the applicants have been dismissed in breach of their contracts of employment might not in and of itself warrant urgent relief. What makes the application urgent is related to a number of factors.'"

[3] It is my view that breach of contract claims seldomly warrant being dealt with on the basis of urgency. Ordinarily, this Court should be reluctant to entertain these kinds of urgent applications, considering the fact that there is no reason, in general, why a dispute concerning the breach of a contract of employment cannot be pursued in the ordinary course, as would the case where an ordinary

civil court is seized with such a contract dispute. If every breach of a contract of employment was per se urgent, then this Court would be flooded with urgent applications to overturn terminations of employment, which is simply not the kind of process fit for purpose.

- [4] All considered, the termination of an employment contract on notice is nothing else but a dismissal as defined in section 186(1)(a) of the LRA. Challenging such a dismissal under the LRA follows a prescribed dispute resolution process, and this does not include approaching this Court directly on an urgent basis to effect such a challenge. Whilst it is true that an employee has the election to challenge a termination of his or her employment contract either as an unfair dismissal under the LRA, or on the basis of a breach of contract, it must always be remembered that the preferred method to challenge such a termination of employment, from a general policy perspective, would be unfair dismissal proceedings under the LRA. The simple reality is that urgent applications based on alleged unlawfulness or breach of contract are often abused by litigants who seek to bypass these prescribed dispute resolution processes. As the Court held Northam Platinum supra:

“Whilst it may be so that a dismissal could in particular circumstances, and where the LRA is not relied upon, be considered to be unlawful and consequently invalid because of a specific provision in a contract of employment which has been breached, this cannot per se serve to jump the queue of all other dismissed employees relying on the provisions of the LRA waiting for their turn in court. This kind of situation is merely another cause of action upon which the termination of a contract of employment can be challenged in the Labour Court. But other than that it holds no particular magic.”

- [5] It must follow that any application to approach this Court directly to challenge a dismissal on the basis of a breach of contract, as a matter of urgency, would only be competent in truly exceptional circumstances. If there are no such exceptional circumstances, then this Court should decline to step in. As to what exceptional circumstances may be, there are of course no specific hard and fast rules. But it has been said that amongst the factors to be considered would be whether it would be impossible that justice be attained by other means, or if material irremediable prejudice or injustice is shown to exist.’ (Own emphasis)
- [11] The fallacy of the applicants’ contention that the matter is still urgent is heightened by the averments in their replying affidavit to respondents’ supplementary answering affidavit.[8] They assert that the respondents showed no interest in the settlement discussions after the postponement of the matter on 17 June
2022. The respondents failed to respond to the proposed settlement agreement that had been sent to their attorneys of record on 27 June 2022. A follow-up letter addressed to the respondents’ attorneys of record, dated 30 July 2022, was also not favoured with any response.
- [12] The final follow-up letter of 6 July 2022 obviously shows that the matter was never postponed to the urgent roll. In that letter, the applicants, inter alia, threatened to remove the matter from the roll on 27 October 2022 and to apply to the Registrar of this Court for “...urgent enrolment of the matter with an explanatory affidavit as to why the matter should be in

court as such...”[9] if no response was received by 11 July 2022. There was no response on 11 July 2022. Yet, the applicants failed to execute their threat. The respondents only responded to the proposed settlement agreement on 16 September 2022 and rejected the settlement offer.

- [13] The applicants failed to file an explanatory affidavit to explain urgency as vowed in its correspondence with the respondents. Instead, they opportunistically seek to rely on the judgment of Tlhotlhlalema J to justify urgency.
- [14] In my view, the matter is no longer urgent and stands to be dealt with in the normal course. Besides, given the turn of events consequent to the respondents’ conduct in raising technical objections and the stratagem to drag the matter by proposing the illusory settlement discussions, the appropriateness of relief sought by the applicants may have been sullied. Nonetheless, I don’t need to say much on this issue as the parties still have another opportunity to tidy out their pleaded cases.
- [15] In sum, the matter is not urgent and stands to be struck off the roll. On the issue of costs, the conduct of the respondents as alluded to above dictates that they be denied costs despite being successful.
- [16] In the circumstances, I make the following order:

Order

1. The application is struck off the roll for lack of urgency.
2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr M Ramothwala from Mafona Ramothwala Incorporated

For the Respondents: Advocate SD Mbeki

Instructed by:

Kgomo Attorneys Incorporated

- [1] Act 75 of 1997, as amended.
- [2] Reportable judgment under case number JA 12/21 delivered on 27 September 2022 (Tswaing).
- [3] See: Association of Mineworkers and Construction Union and others v Northam Platinum Ltd and another

(2016) 37 ILJ 2840 (LC) at paras [20] – [26]; National Education Health & Allied Workers Union & others v University of SA & another

(2022) 43 ILJ 2351 (LC) at paras [7] - [9].

[4] 2011 JDR 1832 (GSJ) at para [6].

[5]

(2015) 36 ILJ 1331 (LC) at para [17].

[6] Supra n 2 at paras [4] – [8].

[7] Unreported judgment under case no J 929/2022, delivered on 30 August 2022 at para [1] – [5].

[8] See: Replying Affidavit for the respondent's supplementary affidavit, pp 473 – 473 of the pleadings.

[9] Id pp 476-477 paras 6.1 – 6.2.

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