

SOUTH AFRICA / JUDGMENT

Lephuthing and Another v Maluti a Phofung Water SOC Limited and Others (J507/24) [2024] ZALCJHB 209 (21 May 2024) [2024] ZALCJHB 209

COURT

Labour Court Johannesburg

BEFORE

Molotsi

CASE / FILE NUMBER

J507/24

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LABOUR COURT OF SOUTH

AFRICA, JOHANNESBURG

Not Reportable

Case No:J507/24

In the matter between:

PETER SOFONIA
LEPHUTHING
First Applicant
REFUWE EMANUEL
TWALA
Second Applicant
and
MALUTI A PHOFUNG WATER
SOC LIMITED
First Respondent
WILLIAM
LEFORA
Second Respondent
MALUTI- A- PHOFUNG
LOCAL MUNICIPALITY
Third Respondent
COUNCIL MALUTI –
A – PHOFUNG
LOCAL
MUNICIPALITY
Fourth Respondent
EXECUTIVE MAYOR MALUTI
A PHOFUNG
MUNICIPALITY

Fifth Respondent
MUNICIPAL MANAGER
MALUTI A PHOFUNG
MUNICIPALITY
Sixth Respondent

Heard: 16 May 2024
Delivered: 21 May 2024

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is another case in a series of similar cases wherein senior public service employees approach the urgent Court seeking specific

performance under the rubric of section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act[1] (BCEA). The question to be answered is whether the application is urgent for the applicants to be granted urgent relief.

[2] The jurisdiction of this Court is triggered by section 77(3) of the BCEA. As it was held by Moshwana J in *Mamodupi v Property Practitioners Regulatory Authority and Another*[2] (*Mamodupi*):

‘Once the foot is at the door of an urgent Court – jurisdiction is established... a party seeking a contractual relief must demonstrate that such an urgent relief is necessary at that time. Should a party fail to do so, the Labour Court cannot grant the relief sought. Litigants must be warned that assumption of jurisdiction does not in of itself magically morph into the need to grant an urgent relief, particularly in the Labour Court. Given the prevalence of the recent trend, it does appear that litigants suffer under a misapprehension that once section 77 (3) of the BCEA and the disavowal of the LRA remedies are alleged, a need magically emerges for the granting of an urgent relief.’

[3] I agree with the above passage and the applicants appear to suffer from the same misapprehension. In the urgent Court, the applicant must comply with the requirements of Rule 8[3]. The requirements of Rule 8 are not satisfied by allegations that the termination of employment was unlawful and that the applicant is seeking specific performance. Urgent relief is not there for the taking.

Background facts

- [4] The first applicant was appointed as a supply chain manager and the second applicant was appointed as a superintendent: network maintenance. They were both employees of the first respondent prior to the termination of their contracts of employment. Their employment was terminated on 2 May 2024.
- [5] On 30 March 2024, the applicants were served with notices to attend a disciplinary hearing. The disciplinary hearing was set down to proceed on 10 and 11 April 2024. On 4 April 2024, the applicants were served with the supplementary charges. The applicants' charges range from gross dereliction of duty, gross dishonesty and gross negligence.
- [6] The disciplinary hearing was postponed by the chairperson of the disciplinary hearing on 10 April 2024 after the applicants requested to be legally represented in the disciplinary hearing. The disciplinary hearing was postponed to 22 and 23 April 2024. On 22 April 2024, the applicants attended the disciplinary hearing with their legal representative. The applicants raised preliminary points and the points were dismissed by the chairperson. The applicants sought a postponement to go through the bundle of documents and/or to prepare their own bundle to be used during the disciplinary hearing. The postponement was refused by the chairperson of the disciplinary hearing.
- [7] The applicants then made an application for the recusal of the chairperson. The chairperson issued a written ruling refusing the recusal application. The written ruling was delivered on 23 April 2024. On 23 April 2024, the applicants attended the disciplinary hearing accompanied by their security protection services (the first respondent calls these individuals "contingent of unknown people who were armed"). Skirmishes involving these individuals caused a delay to the start of the disciplinary hearing on 23 April 2024. The disciplinary hearing was then adjourned to proceed at around 14h00 on 23 April 2024. Eventually, either the parties or the first respondent representative realized that it might be late in the day to start leading the first witness. A request was made to remand the disciplinary hearing to a further date.
- [8] After the initial disagreement regarding the availability of the applicants' legal representative, the chairperson of the disciplinary hearing directed that the disciplinary hearing would proceed on 30 May 2024.
- [9] The first respondent was of the view the applicants never intended to proceed with the disciplinary hearing. The first respondent was further of the view that the applicants employed a stratagem aimed at frustrating the expeditious continuation and finalisation of the charges against them, including intimidation tactics that were aimed at threatening the security of the first respondent's employees and persons present at the hearing venue.
- [10] The first respondent took a position that the applicants have rejected the procedural right to be heard and decided to terminate the employment contracts of the applicants on 2 May 2024.

[11] The applicants then launched an urgent application on 8 May 2024 seeking the following relief:

11.1. That the matter be heard as one of urgency and to dispense with forms and service provided for in the Rules of this Honourable Court and allowing the matter to proceed as an urgent application as is provided for in Rule 8 of the Rules of Court as per the directions of the Honourable Court.

11.2. That the termination of the first and second applicants' contracts of employment be declared unlawful and set aside.

11.3. That the first and second applicants be granted an order of specific performance in terms of section 77(e) of the BCEA, reinstating the applicants' contracts of employment with immediate effect from the date of the grant of this order.

11.4. For an order setting aside and declaring all decisions taken by the second respondent, subsequent to the expiry of the term given to the interim board of directors of the first respondent, on 23 July 2023, are null and void ab initio.

11.5. That the disciplinary proceedings instituted against the applicants on 22 and 23 April 2024 in terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010 (2010 Regulations) is declared unlawful and null and void.

11.6. That the first respondent is interdicted and restrained from continuing with the disciplinary proceedings instituted against the applicants on 22 and 23 April 2024 until the first respondent complies with the Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2024 (2014 Regulations).

11.7. That the respondents are to pay the costs of the application on an attorney and client scale, only in the event of opposition.

Submissions by the parties

[12] I directed the parties to address me on the issue of urgency. Urgency is the first hurdle that the applicants must overcome before the merits of the case can be entertained. This Court does not subscribe to the wrong practice of combining urgency with the merits of the case. If the applicants fail to satisfy the test for urgency, then the Court must strike the matter from the roll without a need to deal with the merits of the case. The merits of the case will be dealt with in the normal course.

[13] Mr Goldberg for the applicants submitted that the application is urgent in that:

13.1 The applicants came to Court urgently and did not waste time to approach the Court. The applicants were unlawfully terminated on 2 May 2024 and the application was launched on 8 May 2024;

13.2. The applicants' contracts of employment were terminated unlawfully. The CCMA or Bargaining Council does not deal with unlawful termination of contracts of employment;

13.3 The dignity of the applicants is impacted by the unlawful termination of their employment contracts and that the applicants cannot get employment anywhere at this stage;

13.4 That there is no board resolution terminating the employment of the applicants. Only the board of directors of the first respondent has the power to dismiss the applicants; and

13.5 The applicants must return to work, and they are seeking specific performance.

[14] In the heads of arguments, the applicants submitted that the circumstances of the matter, being a dismissal without a hearing, are inherently urgent. This meant that their constitutional right to be heard prior to being dismissed had been infringed. The summary termination of employment is inherently urgent in that there is a need to restore the status quo as soon as legally possible. The applicants will suffer harm if the interim interdict is not granted. The applicants will not survive a month without a salary.

[15] The first respondent opposed the relief sought by the applicants on a number of grounds which amongst others include: lack of jurisdiction

of this Court as the dispute is a quintessential labour dispute which must be adjudicated in accordance with the dispute resolution

procedure legislated in terms of the Labour Relations Act[4] (LRA); and that there is no urgency in the application as the disciplinary action against the applicants started in October 2023

when they were placed on precautionary suspension and that the applicants failed to launch this application when they were served

with the notice to attend the disciplinary hearing on 30 March 2024. The applicants delayed before coming to Court.

[16] The first respondent retorted that there are no circumstances which render the matter urgent and that the applicants can obtain substantial redress in due course at the South African Local Government Bargaining Council. The urgency in this application is self-created. The applicants have substantial redress in that they can claim damages in due course.

[17] Mr Masihleho for the first respondent submitted that, with reference to prayer 4 in the notice of motion, the applicants refer to the board of directors' term having expired in July 2023, and the applicants are only coming to Court now, therefore the applicants failed to approach the Court at the first reasonable opportunity.

Evaluation

[18] It is trite that 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.[5]

[19] In *Jiba v Minister: Department of Justice and Constitutional Development and Others*[6], this Court held that:

‘Rule 8 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 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.’

[20] It is important to note that Rule 8 of this Court does not elevate specific performance and/or breach of contract claims as inherently urgent relief which requires this Court to treat the relief of specific performance and/or breach of contract differently from other relief. It is the duty of a litigant seeking urgent relief to show why the matter is urgent. The cause of action or the nature of the relief sought by the litigant does not automatically attract urgency.

[21] In *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others*[7], it was observed that:

‘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 due course. The rules allow the court to come to the assistance of a litigant because if latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.’ [Own emphasis]

[22] The applicants failed to prove the absence of substantial redress in due course. Under the circumstances of this case, approaching the Court on an urgent basis seeking specific performance does not show an absence of substantial redress in due course.

[23] In the founding affidavit under the heading ‘urgency’, the reasons for urgency vary including: approaching the Court in haste; the decision to terminate the applicants constitutes administrative action which must be overturned by judicial decree; that the applicants have a prima facie right; if the application is not granted the applicants’ source of income will be taken away; unlawful salary deductions which commenced from July 2023; that the second applicant pays for medical costs for his spouse who has two chronic illnesses and his children are attending school; severe prejudice if removed from their positions; that the balance of convenience favours the applicants; and the absence of adequate remedy.

- [24] The founding affidavit is silent as to the reasons why the applicants would not obtain substantial redress in due course. It is not enough to merely state in the founding affidavit that there is an absence of an adequate remedy. This is just a general statement which is of no assistance to the Court. The applicants must provide proper and sufficient reasons why there is an absence of an adequate remedy. The applicants conflate the requirements of an interim interdict with the requirements for urgency. The requirements for urgency have nothing to do with the requirements for interim interdict. The fact that a litigant satisfies the requirements for interdict does not automatically follow that the requirements of urgency are complied with.
- [25] Furthermore, the fact that a litigant claims that the termination of employment is unlawful does not in itself attract urgency. Urgency must be proven. To accept that a mere allegation of unlawfulness automatically triggers urgency, will render the administration of justice to a halt. It will open the floodgates to the urgent roll of this Court. It will render the requirements of Rule 8 nugatory.
- [26] To throw around general statements regarding the dignity of the applicants and the fact that the applicants will suffer financially if the urgent relief is not granted does not come close to meeting the test for urgency. Such arguments are contrived. As previously stated, at the heart of proving urgency, the applicant must show an absence of substantial dress in due course.

[27] In *Maphalle v National Heritage Council & others*[8], *Snyman AJ* held that:

‘I am unconvinced that any explanation by the applicant concerning her financial prejudice is compelling or exceptional. None of what the applicant has set out in her founding affidavit makes the applicant’s case different to the thousands of other cases where employees have been dismissed, and as a result, lost their salaries. As harsh as it may sound, the applicant is in exactly the same position as anyone else who has not received a salary, and there is no reason why she cannot wait in the queue to obtain an order to secure payment of that which may be contractually due to her, just like everyone else.’

I agree with the sentiments expressed by *Snyman AJ*. Financial distress does not qualify as a basis for urgent relief. Financial difficulties by a litigant do not amount to prejudice when a matter is heard in the normal course. This is the reality faced by thousands of dismissed and/or terminated employees.

[28] There is nothing unique about a litigant claiming specific performance as compared to a litigant claiming unfair dismissal under the LRA. They are both unemployed, they both face the same financial difficulties, and their future is uncertain, and they both desire their cases to be attended to as speedily as possible. They both must prove urgency when they approach the urgent Court. I have yet to find any reason in law, why a litigant claiming specific performance must be treated differently in this Court to a litigant claiming unfair dismissal.

[29] In *Mosiane v Tlokwe City Council*[9] (*Moisane*), this Court stated:

[15] A worrying trend is developing in this Court in the last year or so where this Court's roll is clogged with urgent applications.

Some applicants approach this Court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief on an urgent basis.

[16] All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant bargaining councils and then approach this court for the necessary relief. Other employees would still approach this court for relief in the ordinary manner and not on an urgent basis.'

[30] Francis J delivered Mosiane in 2009. Regrettably, the same worrying trend has not stopped. On the face of it, it has become worse. I think the time has come for this Court to take a hard approach against urgent applications like the one before this Court, which amounts to an abuse of the urgent roll. Of course, each case must be judged on its own merits. Legal practitioners must take proper care before launching an urgent application. Hopeless urgent applications must be discouraged.

[31] In the present case, not a single averment is made in the founding affidavit which proves a clause in the contract of employment of the applicants which the first respondent is alleged to have breached. The contracts of employment of the applicants are not attached to the founding affidavit. Yet, a claim for specific performance is sought. This was fatal to the applicants' claim for urgency as no reasons are provided to show why urgent relief is sought. A litigant claiming specific performance as a relief must succinctly prove a breach of contract. Specific performance cannot be proven by making general statements in the founding affidavit regarding dignity, financial difficulties, that the decision to terminate applicants constitutes administrative action, unlawful salary deductions or the personal circumstances of a litigant.

[32] I agree with the following views expressed by Moshoana J in Mamodupi when he stated that[10]:

'The fact that a litigant opts to pursue cause of action A does not quintessentially mean that other available causes of action are

disqualified as adequate alternative remedies. Veritably, the question is, does the law provide substantial redress in due course?

If the answer is in the affirmative, a Court of law is not obliged to grant an urgent relief. A redress is a remedy or compensation for a wrong or grievance. Therefore, a redress is not dependent on the pursued cause of action, but on whether in due course a wrong or grievance may be adequately remedied. It bears mentioning that in a termination of contract context, the remedy of specific performance equates reinstatement in an unfair dismissal context. The fact that an employee elects to pursue a contractual claim does not morph remedies in the LRA to be non-remedies. They remain remedies to right the wrong termination of employment and adequately serve as alternative or substantial remedies in due course.'

[33] In the present case, the applicants have substantial and effective remedies available to them. On the breach of contract claim, they can sue for damages. The LRA remedies (compensation or reinstatement) are abundantly available to the applicants. The applicants will not suffer grave injustice if the urgent relief is not granted, considering the effective remedies available to them.

[34] It is the finding of this Court that the applicants failed to meet the test for urgency. The applicants must stand in the queue like the thousands of other litigants in the same position as them.

[35] To show this Court's displeasure for bringing such an ill-fated urgent application which amounted to an abuse of the urgent roll, costs must follow the result. Had the first respondent made out a case for a punitive costs order, I would not have hesitated to grant such an order to show this Court's displeasure for bringing such an unmeritorious urgent application. There were no justifiable and exceptional reasons why this application was brought on urgent basis.

[36] In the premise, I make the following order:

Order

1. The application is not urgent.
2. The application is struck off the roll due to lack of urgency.
3. The applicants must pay the costs.

H Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

A Goldberg

Instructed by:

Makhuni Inc

For the First Respondent: P Masihleho

Instructed by:

Phatshoane Henney Attorneys

- [1] Act 75 of 1997.
- [2] ZALCJHB 19 (13 February 2023) at para 1
- [3] Rule 8 of the Rules Regulating the Conduct of Proceedings in the Labour Court GN 1665 of 1996.
- [4] Act 66 of 1995, as amended.
- [5] See: Association of Mineworkers and Construction Union v Northam Platinum Ltd and another (2016) 37 ILJ 2840 (LC) at paras 20 – 26.
- [6] (2010) 31 ILJ 112 (LC) at para 18.
- [7] 2011 ZAGPJHC 196 (23 September 2011) at para 6.
- [8] (2023) 44 ILJ 579 (LC) at para 31.
- [9] (2009) 30 ILJ 2766 (LC) at paras 15 – 16.
- [10] Mamodupi supra at para 35.

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Prepared on 12 October 2026 · Esheria