

SOUTH AFRICA / JUDGMENT

Masete v Transnet Bargaining Council and Others (J 554/2021) [2021] ZALCJHB 153 (16 July 2021) [2021] ZALCJHB 153

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 554/2021

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case

no: J 554/2021

In

the matter between:

EMMANUEL
MAMARU
MASETE Applicant
and
TRANSNET
BARGAINING COUNCIL
First Respondent
TRANSNET
ENGINEERING
Second Respondent
TOKISO
DISPUTE SETTLEMENT
Third Respondent

Heard:

14 July 2021

Delivered: 16 July 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 16 July 2021.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant approached this Court on an urgent basis for relief. The matter was enrolled for hearing on 14 July 2021 and due to the Covid-19 measures, the parties presented their arguments via Zoom.
- [2] The Second Respondent (the Respondent) filed an answering affidavit, wherein issue was taken with urgency.
- [3] As the Applicant came knocking on the door of the urgent Court, he has to show that his application is indeed urgent and that it should be entertained by this Court. The issue of urgency is to be decided first.

Background

facts and the chronological sequence of events

- [4] In deciding the issue of urgency, it is prudent to set out the chronological sequence of events relevant to this application.
- [5] The Applicant is employed by the Respondent as an engineering technician at Ermelo. The Applicant was dismissed on 4 March 2019 and after he had challenged the fairness of his dismissal at the Transnet Bargaining Council (TBC), an arbitration award was issued in his favour, in terms of which he was reinstated with effect from 16 September 2019.
- [6] On 12 March 2020 the Applicant was charged with misconduct and issued with a notice to attend a disciplinary enquiry to be held at the TBC. The disciplinary hearing is chaired by commissioner Nasreen Jajbhay (the commissioner).
- [7] On 17 September 2020 a jurisdictional point was raised regarding the jurisdiction of the TBC to adjudicate the matter between the Applicant and the Respondent. On 27 September 2020 the commissioner issued a ruling to the effect that the TBC is vested with the requisite jurisdiction to adjudicate the matter and the matter was referred to case management for purposes of having the matter set down for hearing. On 30 April 2021 the Applicant was served with a notice of set down, confirming that his disciplinary hearing was to be held

from 18 to 20 May 2021.

- [8] On 11 May 2021 the Applicant filed a review application under case number JR 818/2021, wherein he seeks to review and set aside the ruling of the commissioner, issued on 27 September 2020.
- [9] On 18 May 2021 the disciplinary hearing commenced. The Respondent's version that the Applicant participated in the proceedings, is undisputed. On this occasion the Applicant requested legal representation to be allowed, which request was refused.
- [10] The disciplinary hearing was subsequently postponed to 29 and 30 June 2021. The Applicant attended the Employee Assistance Program as he was not well and the hearing was again postponed to 21 and 22 July 2021.
- [11] On 9 July 2021 the Applicant served this urgent application on the Respondent and the application was enrolled for hearing on 14 July 2021.
- [12] The gist of the relief sought by the Applicant is that his disciplinary hearing should be stayed, pending the finalisation of his review application filed under case number JR 818/21.

Grounds for urgency

- [13] In his founding affidavit the Applicant stated the reasons for urgency as follows. The matter is of considerable importance to him, he has filed an application for review on 11 May 2021 and the Court has not yet decided his review application, in which the Court may arrive at a different decision other than that of the commissioner. If the Court does not intervene, it would lead to a grave injustice as his review application is pending.
- [14] The Respondent stated in its answering affidavit that the Applicant has not shown the existence of urgency and that this application was an abuse of process. The Respondent submitted that it is evident from the content of the Applicant's affidavit that the main relief he seeks is to interdict the proceedings set down for 18 to 20 May 2021 and the hearing the Applicant seeks to interdict, has already commenced as far back as 18 May 2021. The Applicant subjected himself to the disciplinary hearing and participated in it.

Applicable legal principles

Urgency

- [15] The relevant portion of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court provide that:

‘(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

(2) The affidavit in support of the application must also contain-

- a) the reasons for urgency and why urgent relief is necessary;

b) the reasons why the requirements of the rules were not complied with, if that is the case.’

[16] An applicant that approaches the Court on an urgent basis essentially seeks an indulgence and to be afforded preference, in order to prevent the prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has in the founding affidavit, set forth explicitly, the circumstances which

render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary[1].

[17] What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and others*[2] the Court referred with approval to the following dictum from *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others*[3]:

‘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.’

[18] In all instances where urgency is alleged, the applicant must satisfy the Court that indeed the application is urgent.

[19] In *Vermaak v Taung Local Municipality*[4] this Court has held that:

‘The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.’

[20] The principles around urgency had been developed and considered by the courts. On numerous occasions the courts have made it clear that self-created urgency is not to be entertained by an urgent Court.

[21] In considering Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and others*[5] 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 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.'

[22] In *National Union of Metalworkers of SA v Bumatech Calcium Aluminates*[6] the Court held that:

'Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first

available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency. In *Collins t/a Waterkloof Farm v Bernickow NO & another* the court held that:

'if the applicants seeks this court to come to its assistance it must come to the court at the very first opportunity, it cannot stand back and do nothing and some days later seek the court's assistance as a matter of urgency'.

[23] In *National Police Services Union and others v National Negotiating Forum and others*[7] this Court held the view that the latitude extended to parties to dispense with the rules of the court in circumstances of urgency is not available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief.

[24] Furthermore, as the Applicant seeks an order to interdict the proceeding of his disciplinary hearing, he has to show that there are exceptional circumstances that justifies intervention in the pending disciplinary proceedings.

[25] In *Jiba v Minister: Department of Justice and Constitutional Development and others*[8] the Court held that:

'Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145.'

Analysis

- [26] Emanating from the provisions of Rule 8 and the principles set out in the authorities referred to above, it is evident that urgency is not there for the taking. An applicant seeking urgent relief must adequately and in detail, set out in the founding affidavit, the reasons the matter before the Court should be treated with urgency.
- [27] In order for any arguments on urgency to be sustained, the applicant must have acted with due haste, when knowledge of the respondent's prejudicial behaviour or actions is gained. It is trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules[9].
- [28] The explanation for urgency tendered by the Applicant has to be considered with due consideration of the Respondent's challenge to urgency.
- [29] The sequence of events show that the Applicant was aware of the jurisdictional ruling and the fact that his matter was referred to case management in order to be set down for hearing since 27 September 2020. He was notified on 30 April 2021 that the disciplinary hearing was scheduled for 18 to 20 May 2021.
- [30] It is evident that between the period 27 September 2020 and 10 May 2021 the Applicant took no steps to challenge the jurisdictional ruling or to challenge the fact that his disciplinary hearing was to commence on 18 May
2021. He simply did nothing. The first step taken by the Applicant was on 11 May 2021, almost eight months after he became aware of the fact that there was a finding that the TBC has jurisdiction to adjudicate the matter and that the matter would be set down for hearing in due course. The Applicant failed to tender any explanation whatsoever for the period between 27 September 2020 and 9 July 2021 when this urgent application was eventually filed. The Applicant made no attempt to inform this Court why he had not approached the Court immediately or with due haste when he became aware of the fact that the setting down of his disciplinary hearing was merely a matter of case management and no more than an administrative formality.
- [31] When the Applicant received a notice of set down on 30 April 2021, he took no steps to approach this Court on an urgent basis and he also tendered no explanation for his failure to do so.
- [32] The urgent application was filed on 9 July 2021, almost ten months after he became aware of the jurisdictional ruling and almost two months after he had filed his review application. The disciplinary hearing has in the meantime commenced and is an ongoing process.
- [33] The Applicant provided absolutely no explanation as to why he did not approach this Court earlier and more urgently.

- [34] His case is that a review application is now pending and therefore the disciplinary hearing should be interdicted. The reality is that the review application was filed almost eight months late, the record has not even been filed as yet and the application will in all probability not be enrolled for hearing within the next 24 months.
- [35] The undisputed facts show that the Applicant was aware of the fact that his disciplinary hearing would be set down on any date since 27 September 2020. He has not shown why this application was not brought shortly after or within a reasonable time after he became aware of the jurisdictional ruling or after he was furnished with the notice of the disciplinary hearing on 30 April 2021.
- [36] The Applicant was served with the jurisdictional ruling in September 2020 and he ought to have taken appropriate steps to enforce his rights in terms of section 158 of the Labour Relations Act[10] (LRA) within the prescribed period, however, he waited almost eight months to file a review application out of time. The Applicant was served with a notice of the disciplinary hearing on 30 April 2021 and he ought to have taken appropriate steps to approach this Court, if he wished to do so on an urgent basis. It is simply not explained why this application was not brought much earlier.
- [37] The Applicant was aware of the Respondent's stance since September 2020, which was confirmed in April 2021 when he received notice that his disciplinary hearing was to proceed in May 2021. The disciplinary hearing has already commenced and more days have been committed to proceed with and finalise the hearing.
- [38] This application should have been brought much sooner and by the time the Applicant brought this application, urgency had passed.
- [39] Based on the chronological sequence of events, I cannot but conclude that this matter is not urgent and that the Applicant has failed to demonstrate or set out facts and circumstances that render the application urgent and justify the curtailment of the time periods in the Rules of this Court.
- [40] It is evident that the Applicant's review application is not only late in the day, but is a stratagem to obtain this interdict to stay the disciplinary proceedings for a period of 24 months. The Applicant has not filed his review application on an urgent basis, he has not approached the Judge President of this Court for a hearing on an expedited basis and he has not shown to this Court that he is prosecuting his review application expeditiously. In fact, he filed the review application in the ordinary course. The record had not yet been filed and the review application is not a single step away from the starting block.
- [41] It is not sufficient for a party when approaching a court on an urgent basis to adopt the approach that it is of right entitled to preferential treatment, failing which it would suffer prejudice in the event that its urgent application is not granted. A party needs to demonstrate that it had also in asserting its rights, acted diligently and with the urgency. The Applicant has failed in this regard.

- [42] The facts placed before me show that there has been an inordinate delay in the bringing of this application, which is destructive of any consideration of urgency.
- [43] An applicant that is well aware of the harm, and takes no steps over a protracted period of time, and then launches an urgent application, is likely to have its application struck from the urgent roll. Thus, to the extent that an applicant wishes its matter to be accorded urgency, in the same token it is expected of such an applicant to have acted with the same urgency that the matter deserves, failing which the invariable conclusion to be reached is that any urgency claimed is self-created.
- [44] This application is a prime example of self-created urgency. In *Jiba supra*[11] it was held that it is trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules.
- [45] The Applicant simply offered no explanation why no urgent legal proceedings were instituted immediately after he received the jurisdictional ruling or the notice of set down. He did not explain why an application was not brought at the very first opportunity. The Applicant waited until a few days before the continuation of his disciplinary hearing, which is to proceed on 21 and 22 July 2021, to approach this Court and urgently so.
- [46] In short: the Applicant waited too long to bring this application and by the time he had approached this Court for relief, it became a matter of self-created urgency. Any urgency that might exist, is self-created, which urgency this Court does not entertain.
- [47] For these reasons the application fails for the lack of urgency.

Costs

- [48] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.
- [49] Mr Nakedi for the Respondent submitted that the Applicant should be ordered to pay the costs of this application as any urgency that exists, is self-created. He submitted that this application is a tactic to delay the disciplinary process and that it constitutes an abuse of process.
- [50] The Applicant submitted that he should not be ordered to pay the costs as he is not well, he is stressed and this case is causing him suffering, which also affects his family.
- [51] In *Zungu v Premier of Kwa Zulu-Natal and Others*[12] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[52] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly

compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[13] it was emphasized that:

‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.’

[53] In my view this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success, more so where an application is filed on an urgent basis.

[54] This Court is ordinarily reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is however not an immutable or inflexible rule.

[55] In casu, the Applicant brought an urgent application at a time when urgency has passed, alternatively when the urgency that existed, was

self-created. He waited too long to rush to Court and such conduct cannot be condoned.

[56] Fairness dictates that the Respondent, and ultimately the taxpayers of this country, cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in before approaching this Court on an urgent basis.

[57] I am alive to the fact that the Applicant is an individual, but I cannot ignore the fact that he ultimately initiated this application in circumstances when he should not have done so. I am further alive to the fact that the Applicant is employed and that he is not a person without means.

[58] In the present circumstances, the interests of justice require that the Applicant pays at least a portion of the Second Respondent’s costs. In my view, a sum equivalent to 20% of the Respondent’s costs will best serve those interests.

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

Order

1. The application is struck from the roll for lack of urgency;
2. The Applicant is to pay the Second Respondent’s cost, limited to 20% of the taxed costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Masete in person

For the Second Respondent: Mr L B Nakedi from Ncube Incorporated Attorneys

[1] Transport and Allied Workers Union of SA vs Algoa Bus Company (Pty) Ltd (2015) 36 ILJ 2148 (LC).

[2] (2015) 36 ILJ 1331 (LC) at para 17.

[3] [2012] JOL 28244 (GSJ) at para 6.

[4] (JR315/13)

[2013] ZALCJHB 43 (12 March 2013) at para 12.

[5] (2010) 31 ILJ 112 (LC) at para 18.

[6] (2016) 37 ILJ 2862 (LC).

[7] (1999) 20 ILJ 1081 (LC).

[8] (2010) 31 ILJ 112 (LC) at para 17.

[9] Ibid.

[10] Act 66 of 1995, as amended.

[11] Id fn 8 at para 18

[12] (2018) 39 ILJ 523 (CC) at para 24.

[13] (2012) 33 ILJ 2117 (LC) at p 2119 I-J.

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