

SOUTH AFRICA / JUDGMENT

Mashabane v MEC for Provincial Department of Health Mpumalanga (J567/2015) [2015]

ZALCJHB 109 (25 March 2015)

[2015] ZALCJHB 109

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

J567/2015

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J567/2015

DATE: 25 MARCH 2015

Not Reportable

PETER KENETANI MASHABANE.....Applicant

And

MEC FOR PROVINCIAL DEPARTMENT OF HEALTH:

MPUMALANGA.....Respondent

Heard: 24 March 2015

Delivered: 25 March 2015

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed urgent application in terms of which the Applicant seeks a declaratory order that his suspension is unlawful,

alternatively, that the suspension be lifted, or alternatively that the suspension be set aside and he be permitted to return to work.

[2] This application turns solely on the issue whether it is urgent or not.

The background:

[3] On 2 May 2014, the Applicant was appointed by the Department as Deputy Director: Finance Management and stationed at the Ermelo

Regional Hospital. His responsibilities included being responsible for supply chain management and managing finances.

[4] On 30 November 2014 the Applicant was appointed as Acting Chief Executive Officer of the Ermelo Regional Hospital. The appointment

took effect from 1 December 2014. The Department on 12 January 2015 further confirmed this appointment.

[5] On 10 February 2015, the Applicant was issued with a letter of suspension. In the letter, the Applicant was informed that the

suspension was as a consequence of allegations pertaining to his act or omission of authorising, or causing to be authorised, the

procurement of goods for the Hospital with a service provider whom the Department did not have a service level agreement for such

purposes, contrary to prevailing supply chain procedures.

[6] The basis for contending that the application was not urgent was that the Applicant had approached the Court on an urgent basis on 16 March 2015, some 34 days after his suspension, and that no explanation was proffered for the delay in approaching the Court.

The legal framework- re: Jurisdiction and Urgency:

[7] Emanating from the Labour Appeal Court decisions in *Booyesen v Minister of Safety and Security and Others*[1] and *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[2], it is now accepted that this Court has the requisite jurisdiction to entertain urgent applications specifically relating to the challenge of suspensions which employees deem to be unlawful. In *Gradwell* however, the LAC had placed emphasis on the proviso that the court's intervention should only be permissible in cases of extraordinary or compellingly urgent circumstances[3]. In *Booyesen*, the LAC also held that the intervention of the court is permissible, but only in exceptional cases[4]. As to what constitutes extraordinary, compelling or exceptional circumstances is ordinarily determined by the facts of each case.

- [8] The Respondent in the light of the provisions of section 158 (1) (4) of the Labour Relations Act and the principles set out in Booyesen had not persisted with its challenge that the Court lacked jurisdiction to determine the application, and as already indicated, the primary attack on the application was on the basis of urgency.
- [9] Rule 8 of the Rules of this Court[5] deals with urgent applications, and requires an applicant to provide cogent reasons why the matter is urgent and why the rules of this Court have not been complied with[6]. Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out, and secondly whether the Applicant seeking relief will not obtain substantial relief at a later stage.
- [10] 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[7]. In *National Police Service Union and others v National Negotiating Forum and others*[8], 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 be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely on to seek relief.

The submissions and evaluation:

- [11] In submitting that the application should be treated as urgent, the Applicant averred that upon perusing the letter of suspension issued to him on 10 February 2015, he had realised that the letter purported to suspend him from his duties as a Deputy Director: Finance Management, whereas he was at that stage no longer occupying his former position but was now the acting CEO of the Ermelo Regional Hospital. He had then brought the matter to the attention of the Chief Director and the Assistant Director of Labour Relations who had issued the letter to him, and was advised that the letter would be sent to the Department to be rectified.
- [12] Other than leaving the matter in the hands of the two above-mentioned officials, the Applicant had also made enquiries with the Head of the Department and was informed that the letter would be rectified. On 16 February 2015 he had then engaged the Chief Director to have the letter rectified, and also directly contacted the respondent by way of “sms” about the matter.
- [13] According to the Applicant, he sought clarity as to whether he was being suspended as acting CEO or not as he was no longer in the position of Deputy Director, and only once his position was clarified could he consider his legal options. On 20 February 2015 he had realised that the issue was not being resolved, and had then approached his attorneys of record on 25 February 2015.

- [14] As the Applicant did not have clarity on the matter and was also not in possession of a copy, he received a copy on 26 February 2015, and only issued instructions to his attorneys of record to proceed with this application on 27 February 2015 after being re-issued with the letter. His attorneys had then sent correspondence to the Respondent on 2 March 2015 to demand inter alia, that the letter of suspension be withdrawn. No response was received to the correspondence and only on 11 March 2015 was the application drafted.
- [15] A further basis for contending that the matter was urgent was that currently the position of CEO of the Ermelo Regional Hospital was vacant and was advertised in December 2014, and he had applied for the position. He contended that he could however not be considered for the position because of his suspension. Furthermore, the matter was urgent since even though he was suspended with emoluments, he was only being paid a salary of a Deputy Director whereas his position of acting CEO was still valid. He was thus not being paid a salary of acting CEO and it was apparent that his suspension was merely punitive in nature.
- [16] The Respondent's contention was that the Applicant had failed to set out explicitly the circumstances, which rendered the matter urgent and had made no attempts to comply with the requirements of Rule 8 (2) (a) of the Rules of this Court. In this regard, it was pointed out that having received and perused the letter of suspension issued on 10 February 2015, the Applicant had refused to sign for it and was aware that he was suspended in his capacity as Deputy Director. He had complied with the contents of the letter by handing in the keys to his office and the laptop issued to him. Furthermore, he did not report for duty after being suspended on 10 February 2015, and had only launched this application on 16 March 2015.

Evaluation:

- [17] It is trite that in demonstrating urgency, it is required of an applicant to indicate what steps he or she took on an urgent basis in dealing with the circumstances from which the urgency emanated. In this case, and as correctly pointed out on behalf of the Respondent, the Applicant has not demonstrated in explicit terms on what basis this court should intervene on an urgent basis, and it is apparent that he was dilatory in dealing with his suspension. No basis has been laid to show why the Applicant should be allowed to dispense with the normal Rules of this Court, nor has he convinced the Court that there are 'extraordinary, compelling or exceptional' circumstances that require its urgent intervention. These conclusions are fortified by the following considerations;

17.1 It was common cause that the Applicant was issued with a letter of suspension on 10 February 2015, which letter was addressed to him in his official permanent capacity as Deputy Director;

17.2 After hesitation, Mr Nsibande on behalf of the Applicant had conceded that from the letter of suspension, it was apparent that the Applicant was suspended in his capacity as Deputy Director, in view of the allegations levelled against him;

17.3 It therefore follows that the contention that the Applicant was seeking clarification as to whether he was suspended in his capacity as Deputy Director or as acting CEO is mere red-herring in that a copy of the very same letter he was waiting for clarification on was re-issued to him on 26 February 2015 without any changes;

17.4 Despite alleging to seek clarification on the matter the Applicant had nevertheless acted on the contents of the letter by vacating his office and not reporting for duty. It is clear therefore that the fact of his suspension could not have been in doubt, and he was clearly aware as of 10 February 2015 that he was officially on suspension;

17.5 The period between 10 and 26 February 2015 is unaccounted for, and if there is any inclination to hold otherwise, no specifics were provided in that regard to show that the matter was being treated as urgent by the Applicant;

17.6 The attorneys of record were instructed on 27 February 2015 on the Applicant's version and there is no explanation as to the reason it took from that period until 16 March 2015 when this application was launched;

17.7 The fact that the attorneys of record had sent a letter of demand to the Respondent on 2 March 2015 is neither here nor there as it was already some 20 days since the suspension took effect. Notwithstanding the fact that there was no response forthcoming, only on 11 March 2015 were the attorneys issued with instructions to proceed with the drafting of the application, which was filed some five days later. Still there is no explanation for the reason it took that long to finally launch this 'urgent' application;

17.8 The contention that the application is urgent because the Applicant was suspended and that this may jeopardise his chances of being permanently appointed to the position of CEO as advertised cannot be the basis of urgency. This is so in that for all intents and purposes, that position should be allocated to individuals whose integrity is untainted. In the light of the current allegations against the Applicant, his integrity remains tainted until after the investigations in respect of the allegations are completed. The Court cannot intervene in circumstances where the Applicant simply wishes to advance his career at the expense of clean governance;

[18] It cannot be re-emphasised enough that if an applicant seeks to have a matter treated as urgent, there is a need to demonstrate that the matter was indeed treated with urgency by him from the commencement of the cause of the urgency. It has often been repeated in this Court that urgency is not there for asking, and it is not for the applicants to decide when a matter is urgent. Where an application does not satisfy the requirements of urgency, it follows that the urgency should be deemed to be self-created, and that application should not be deserving of the Court's urgent attention.

[19] A further concern that has been raised continually in this court relates to urgent applications pertaining to suspensions of

employees. This court is inundated with such applications, which should never in the first place have come before it. Parties need to be reminded of what was said in Gradwell[9] by the Labour Appeal Court when dealing with the issues surrounding a referral of suspension disputes;

“Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the Applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The

determination

of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an Applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.”

[20] The Applicant therefore has alternative remedies available to him. In the light of the above considerations and authorities cited, there is no basis in this case as to the reason the Applicant should be allowed to jump the litigation queue and get special treatment. He has dismally failed to demonstrate why this application is urgent, nor has he demonstrated any compelling reasons why the Court should intervene. Like all other employees who feel hard done by with suspensions, whether fair or not, he should follow the dispute resolution procedures set out in the LRA and wait for his turn. In the light of these factors, the matter should accordingly be struck off the roll. Further in the light of the ill-conceived nature of this application, considerations of law and fairness dictate that the Applicant should be burdened with the costs of this application.

Order:

- i. The application is struck off the roll on account of lack of urgency.
- ii. The applicant is ordered to pay the costs of this application.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. VM Nsibande of TMN Kgomo & Associates Inc

For the Respondent: Adv. M Kgatla

Instructed by: State Attorney

[1]

(2011) 32 ILJ 112 (LAC) at para 54.

[2]

(2012) 33 ILJ 2033 (LAC).

[3] Id at para 46

[4] Id at para 54

[5] Which provide that; “(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 ...”

[5] Which provide that;

“(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 ...”

[6] Clause 12.5 of the Practice manual of the Labour Court equally obliges an Applicant to set out explicitly the circumstances which

render the matter urgent

[7] Jiba v Minister: Department of Justice and Constitutional Development and Others

(2010) 31 ILJ 112 (LC) at para 18.

[8] (1999) 20 ILJ 1081 (LC) para [39]

[9] [2012] 8 BLLR 747 (LAC) at para 46

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