

SOUTH AFRICA / JUDGMENT

Matshidiso v Chief Executive Officer - South African Social Security Agency and Another (J 1175/2022) [2022] ZALCJHB 365 (29 September 2022) [2022] ZALCJHB 365

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J 1175/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J 1175/2022

In

the matter between:

MATSHIDISO

MIYAMBO

Applicant

And

THE

CHIEF EXECUTIVE OFFICER – SOUTH

AFRICAN

SOCIAL SECURITY AGENCY

First Respondent

SOUTH

AFRICAN SOCIAL SECURITY AGENCY

Second Respondent

Heard:

28 September

2022

Delivered:	29 September 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 29 September 2022)
Summary:	(Preliminary issue – Urgency – Economic hardship as a ground of urgency – exceptional circumstances, such as plainly unlawful conduct, is required to depart from the general principle that economic hardship is not a basis for arguing urgency – applicant delaying unnecessarily in bringing application and no exceptional circumstances present)

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an urgent application launched on 20 September and enrolled on 27 September 2022.
- [2] The applicant seeks to interdict the second respondent ('SASSA') from "issuing threats of disciplinary enquiry for abscondment on the applicant without complying with the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR). She also asks the court to declare the non-payment of her salary and to order the upliftment of her suspension.
- [3] At the hearing of the application the parties agreed that it should first be determined if the application satisfied the requirements of urgency.

Background

- [4] The applicant has been undergoing regular clinical treatment for depression since February 2020 and continues to be treated for this. She claims that since November 2019 to June 2022 she has been receiving her salary in accordance with PILIR.
- [5] She had been admitted to hospital in 2020 and had applied for special leave for that period. However, in February 2022 she received notice that her application for special leave was not approved and that she owed the SASSA eighty-five days leave. On 7 February, SASSA sent a letter noting that according to its records she had not applied for

temporary incapacity leave from 1 June 2022 date contrary to the requirements of the PILIR policy which required such applications to be made within 5 days of the first day of absence. She was cautioned that she should return to work with immediate effect to perform her duties and she should furnish written reasons why disciplinary action should not be taken against her for the absence from 1 June 2020.

[6] On 21 February a further letter in the same vein was sent to her. On 31 May she was advised that her persistent absenteeism from work was contrary to the leave policy. In particular, the letter notes her failure to submit leave application forms, apart from the single application for incapacity leave for the period 7 January to 31 May 2020. The letter warned that she should report for duty and submit the necessary documentation otherwise SASSA would have no option but

to process unpaid leave for the unaccounted period and that disciplinary action might be instituted against her including stopping her salary.

[7] It was only on 24 June 2022 that she submitted a grievance over the refusal to grant her the incapacity leave she had applied for. On 30 June the respondent sent her a response to her grievance, noting that her previous application had been declined owing to insufficient information being provided. It also noted that she was asked to provide additional information to allow for reassessment of her application which SASSA claims she had not done. The letter also reminded her of the procedures to be followed for such applications. She was again urged to assist the district office to resolve the matters within five days of the letter facing which leave without pay would be instituted for the unaccounted period and disciplinary action could follow.

[8] The applicant alleges she has done everything necessary under PILIR and claims she submitted all the certificates by email to SASSA. However, although she attaches many medical certificates to her founding affidavit there is no documentary evidence of how those were conveyed to SASSA or when they were conveyed. In a letter dated 30 June 2022 responding to her grievance SASSA complains that despite advising her to submit missing documentation in respect of that claim she still has not done so and that the sick notes received from her do not provide a complete record apart from the fact that PILIR

application forms were outstanding. In that letter she is also warned to report back for duty bringing the required documents failing which a decision would be taken to stop her salary. The letter urged her to work with the district officer to resolve the issues failing which leave without pay would be applied to the unaccounted period of absence and disciplinary action could follow.

[9] It appears that SASSA stopped paying the applicant a salary from July this year.

[10] On 3 August 2022 she is asked to provide reasons why a disciplinary enquiry should not be instituted after she had failed to provide the outstanding documentation and PILIR forms and in the light of her failure to report for duty.

- [11] While all the correspondence from SASSA suggests that it is expecting the applicant to provide the necessary leave application documentation under PILIR, the applicant contends that it is SASSA that has not performed its obligations under the policy. This she sets out in her founding affidavit, but there is no evidence of her having sent any correspondence to SASSA expressing this view previously.

Urgency

- [12] In her founding affidavit, the applicant states that there are two reasons her application should be dealt with as a matter of urgency. Firstly, she argues that the employer's insistence that she report for work despite her medical condition and despite her claim that she has fulfilled all the prerequisites for incapacity leave under the policy is "unlawful and unconstitutional" and must be stopped.
- [13] Secondly, she alludes to her loss of salary, which she attributes to the employer failing to complete its obligations under PILIR and come to a decision. She mentions the impact which the loss of salary and associated medical benefits has on her ability to obtain medication and to meet her family obligations. These are not set out in any detail and she does not claim to be the only breadwinner in her family. Earlier in her affidavit, the applicant acknowledges that the general principle is that a loss of salary is not considered urgent, but she argues that this principle should be revisited.
- [14] SASSA disputes the urgency of the application. Firstly, it points out that the demands made on the applicant to return to work and the prospect of facing disciplinary action have been made on a number of occasions since early February this year. It is not as if the applicant has not had a very lengthy period of time to consider how to respond to the repeated warnings set out in the correspondence outlined above. Further, it contends that the applicant has not demonstrated any reason why the financial hardship she complains of should be treated as an exception to the general principle that financial hardship is not sufficient justification for urgency.
- [15] In argument, Mr Monnakgotla, SASSA's counsel referred to early labour court jurisprudence affirming the general principle that financial hardship is not generally considered a sufficient basis for establishing urgency. In *Veary v Provincial Commissioner of Police & others* (2002) 23 ILJ 2330 (LC), the court mentions the authorities relied on by SASSA and other cases:

The mere loss of income is not a good ground for granting urgent relief. Special circumstances must exist. (*University of Western Cape Academic Staff Union & others v UWC* (1999) 20 ILJ 1300 (LC) at 1304-17.) In *Koka v Director-General, Provincial Administration, North-West Government*

(1997) 18 ILJ 1018 (LC), Landman J was disposed to granting urgent relief where the employer refused to furnish details of the alleged misconduct. The employee was suspended without pay for misconduct in that case. There was also an extremely sensitive overseas trip that he had to undertake a few days after his suspension. Revelas J held in *Hultzer v Standard Bank of SA (Pty) Ltd*

(1999) 20 ILJ 1806 (LC); [1999] 8 BLLR 809 (LC) that the loss of membership of the medical aid scheme and serious financial embarrassment were not sufficient grounds to grant urgent reinstatement. A similar view was held in *SACWU & others v Sentrachem* (1999) 20 ILJ 1597 (LC); [1999] 6 BLLR 615 (LC) and *Tshwaedi v Greater Louis Trichardt Transitional Council*

[2000] 4 BLLR 469 (LC). [1]

[16] In *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) the court summarised other judgements grappling with the issue of ordering urgent relief where financial hardship was claimed:

'[15] In the case of *Democratic Nursing Organisation of SA & another v Director-General, Department of Health & others* (2009) 30 ILJ 1845 (LC), this court was confronted with the same issue of having to determine whether financial hardship constitutes a basis for seeking relief on an urgent basis. In that case the court in following the decision in *Hultzer v Standard Bank of SA (Pty) Ltd* (1999) 20 ILJ 1806 (LC); [1999] 8 BLLR 809 (LC) at para 13, held that financial hardship or loss of income is not regarded as a ground for urgency.

[16] 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 & andere* (1990) 11 ILJ 971 (T).

[17] In *Democratic Nursing Organisation of SA*, this court held that:

'In order to succeed when reliance is based on financial hardship, exceptional circumstances must be shown before urgent interim relief can be granted.'

[18] In the case of *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC), the court rejected the approach that financial hardship and loss of income can never be grounds for urgency. The court per Van Niekerk J accepted the general approach that an employee would be entitled to urgent relief if he or she was able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if the employee was able to show that he or she will suffer hardship if the court was not to intervene on an urgent basis. In my view the court in that case did not depart from the approach that as a general rule financial hardship and loss of income do not necessarily constitute a basis for urgency but where the special circumstances of a particular case indicate otherwise the

court should not hesitate in intervening and granting urgent relief.

[19] The case of *HOSPERSA & another v MEC for Health, Gauteng Provincial Government*

(2008) 29 ILJ 2769 (LC)[2008] ZALC 45; ; [2008] 9 BLLR 861 (LC) illustrates the circumstances where the court was willing to intervene and grant urgent relief. The court in that case found that the employee was entitled to urgent relief because the employer had unilaterally withheld her salary in breach of the Basic Conditions of Employment Act. It would seem to me that the court in that case in granting urgent relief was influenced more particularly by the unlawfulness of

the conduct of the employer and failure to afford the employee a fair hearing before effecting the deduction.’

(emphasis added)

In *Jonker* the applicant providing a reasonably detailed account of her monthly expenditure and family financial situation. However, the court found that the salary deductions she sought to prevent appeared to be lawful and declined her any relief.

The court stated:

‘[20] In the present instance, in my view, the applicant has failed to demonstrate that the financial hardship she will face as a result of the deduction from her salary is incapable of being addressed in due course if she was to institute proceedings in this court in terms of s 77 of the Basic Conditions of Employment Act or before any other tribunal that may have jurisdiction to entertain the matter. The applicant has also not made out a case of unlawfulness in the deduction as will appear in more detail below, where the right not to be faced with a deduction is discussed.’

[17] More recently in the case of *Munthali v Passenger Rail Agency of SA* (2021) 42 ILJ 1245 (LC), the labour court has revisited the significance of financial hardship in establishing urgency:

‘[7] The applicant’s principal grounds for seeking urgent relief mainly relate to her personal circumstances and financial hardship. She conceded that a loss of income was on its own insufficient to justify urgency. She further complained about the defamatory statements made by PRASA and its conduct in effecting the termination, the irreparable reputational damage caused by the public announcement, and the consequences on her prospects of securing alternative employment.

[8] The issue of whether financial hardship is a basis of seeking urgent relief has received attention in this and other courts. In other decisions, it has been held that as a general principle, financial hardship does not establish a basis for urgency. It has been held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to acquire the requisite urgency necessary to justify a departure from the ordinary court rules. In other decisions however, it has been accepted that the general principle may be departed from if exceptional circumstances are established, depending on the merits of each case.

[9] I agree with the proposition in *Ledimo & others v Minister of Safety & Security & others* that there is no immutable rule that financial exigencies cannot be invoked to lay a basis for urgency. This is so in that courts in any event enjoy a discretion in the overall determination of whether a matter should be accorded urgency or not. Inasmuch as factors surrounding financial hardship on their own are not a basis for according a matter urgency, these have to be determined together with other facts and circumstances pleaded in the founding papers, which point to a conclusion that those facts

and circumstances are exceptional, thus necessitating that the matter should be treated as urgent.’

(emphasis added – footnotes omitted)

[18] The importance of establishing something more than financial hardship to warrant the court’s intervention on an urgent basis, was emphasised in *Turro & others v Taxaid (Pty) Ltd* (2000) 21 ILJ 2719 (LC):

“It must be borne in mind that in all cases of lay-off and dismissal, financial hardship follows and if the applicants’ argument is to be accepted, then all cases of dismissal would be dealt with by way of urgent application and on affidavit which is clearly not what was intended by the drafters of the Labour Relations Act.”

This is a salutary observation and the logic of this proposition is unassailable. In *Munthali* the issue before the court was whether the applicant’s services had been lawfully terminated. The court found that her employment

contract was still intact and ordered the employer to reinstate her and to comply with the terms of the contract. Accordingly, the financial hardship the applicant had suffered was the result of her unlawful termination in breach of her contract of employment, which provided the context in which the economic hardship could not be justified until the dispute had been dealt with in due course.

Similarly, in *Harley* the court emphasised that the unlawful nature of the employee’s suspension without pay provided a context which justified departing from the general rule that financial hardship does not warrant granting urgent relief.[2]

[19] In this matter, the applicant’s claim for payment of her remuneration is premised on her allegation that she has complied with all the PILIR provisions and therefore is entitled to her salary. However, it is unclear from her own affidavit, why she would be entitled to her salary simply because she had provided medical certificates and had applied for leave under PILIR, assuming that she had met all these pre-requisites[3]. The fact that a previous application in 2020 had been declined demonstrates that it does not follow that the submission of medical

records and an application for leave on account of ill-health, necessarily means that leave is approved and that she is entitled to be paid during that period of absence. Had she set out a clear basis for her alleged entitlement to continue to be remunerated despite the evident contestation of her entitlement to remuneration, then the financial prejudice caused by such ongoing unlawfulness might be a weighty consideration in granting relief on an urgent basis, rather than expecting her to attempt to recover her salary in the ordinary course. She has not done this.

[20] Secondly I agree with SASSA that she had a number of explicit forewarnings of the possible consequences of not having her leave approved under PILIR. Apart from the fact that she must have realised that SASSA's complaint that her absence from work had not been approved for the period starting 1 June 2020, could mean her pay might be stopped, it was expressly conveyed to her in May this year that this was one of the consequences that could follow from the non-approval of her continued absence from work. That SASSA might cease paying her salary in the absence of approved leave of absence from work. Unlike Munthali's case, the cessation of her salary payment could not have only dawned on the applicant when it actually happened. Her failure to act until nearly two months after her salary was stopped seriously undermines her claim to have the application treated as one of urgency.[4]

[21] In the circumstances, I am not satisfied the applicant has established the application as urgent.

Order

[1] The application is struck off the roll for lack of urgency.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant:

K Pheto instructed by L Kabai Attorneys

For the Respondents: L Monnakgotla instructed by the State Attorney

(Johannesburg)

[1] At 2333A-E

[2] At para [32].

[3] See *Spies v National Commissioner of the SA Police Service & others*

(2008) 29 ILJ 2022 (LC) at para [32], in where the court held: “The applicant has in my view failed in his founding papers to show that he has a prima facie right to be paid his salary while on unauthorized leave.”

[3] See *Spies v National Commissioner of the SA Police Service & others*

(2008) 29 ILJ 2022 (LC) at

para [32], in where the court held: “The applicant has in my view failed in his founding papers to show

that he has a prima facie right to be paid his salary while on unauthorized leave.”

[4] See *Spies*, at para [21] where the court also held that the applicant had failed to establish urgency when he knew of the employer’s intention to stop paying his salary two months prior to it happening.

[4] See *Spies*, at para [21] where the court also held that the applicant had failed to establish urgency

when he knew of the employer’s intention to stop paying his salary two months prior to it happening.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF’s page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2022/365.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/matshidiso-v-chief-executive-officer-south-african-social-security-agency-and-others-unknown-topic-alcjhb-2022>

Prepared on 12 October 2026 · Esheria