

SOUTH AFRICA / JUDGMENT

Miyambu and Others v Steve Tshwete Local Municipality and Another (2025/002049)

[2025] ZALCJHB 40 (5 February 2025)

[2025] ZALCJHB 40**COURT**

Labour Court Johannesburg

BEFORE

Seedat

CASE / FILE NUMBER

2025/002049

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Source record**THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable
case****no: 2025-002049****In****the matter between:**

KHAZAMULA SAMUEL
MIYAMBU
First Applicant
JOEY DE
BRUIN
Second Applicant
RAZIA
GOOLAM
Third Applicant
BUSISIWE NONHLANHLA
MASHININI
Fourth Applicant
and
STEVE
TSHWETE LOCAL MUNICIPALITY
First Respondent
MPUMALANGA
DEPARTMENT: COMMUNITY SAFETY,
SECURITY
AND LIAISON
Second Respondent

Heard:	30 JANUARY 2025
Delivered:	05 February 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 05th of February 2025 is deemed to be the date of delivery of this judgment).
Summary:	The licensing function performed by the First Respondent was transferred to the Second Respondent. The Applicants employed in the licensing department sought clarity on the terms of the transfer particularly in respect of their employment contracts. The First Respondent did not give the details and stopped paying their salaries from 1 July 2024 although the Applicants continued to attend their work. The Applicants sought payment of their salaries and other documents. Held, because this was a transfer in terms of s 197 the services of the Applicants were not interrupted and they are entitled to their salaries.

JUDGMENT

SEEDAT, AJ

Background

- [1] In 2023, the Second Respondent (Mpumalanga Department: Community Safety, Security and Liaison (the Province)) gave notice to the First Respondent (Steve Tshwete Local Municipality (the Municipality)) that it intended to take over the licensing department from the Municipality.
- [2] On 31 January 2024, Mr Vuma, a director from the Province held a meeting with staff at the Municipality to discuss salary offers to the individual employees.
- [3] The Municipality transferred the Licensing Department to the Province on 30 June 2024.
- [4] The Applicants had some misgivings about their contracts of employment and attempted to engage with Mr Vuma and senior employees of the Municipality. These attempts were not successful.
- [5] The Applicants continued to tender their services to the Municipality after 30 June 2024 but were not paid.
- [6] The Municipality contended that the Applicants' presence on its premises was unlawful.

[7] On 7 January 2025, the Municipality gave the Applicants notice to immediately vacate from the municipal premises.

[8] The applicants then sought relief before this court on an urgent basis seeking:

8.1 Payment of outstanding salaries from July 2024 to December 2024;

8.2 details of the Municipality's assets and liabilities immediately prior to the transfer;

8.3 the transfer agreement between the Municipality and the Province.

[9] The application was not opposed by the Province.

Preliminary points

Confirmatory Affidavits

[10] The first point raised by Mr Makhubele, appearing for the Municipality, is that the founding affidavit of the First Applicant

was not supported by confirmatory affidavits by the other applicants.

[11] The applicants attributed this failure to attach the confirmatory affidavits to the founding affidavit to a clerical error and filed the confirmatory affidavits of the applicants subsequently. Interestingly all the affidavits were deposed to on 8 January 2025. This gives credence to the explanation that it was an omission by the attorneys to attach the confirmatory affidavits to the founding affidavit. Besides, the Municipality could not have been in any way prejudiced by this lapse.

[12] Mr Makhubele was also unhappy with the fact that the full names of the commissioner of oaths were not inscribed in the affidavit of the Third Applicant.[1]

[13] Rule 4(2) of the regulations promulgated under s 10 of the Justices of Peace and Commissioners of Oaths Act[2] requires the commissioner of oaths to sign the declaration and print his full name and business address below his signature.

[14] The rules of the regulations have been held to be not imperative but directory.[3] In *S v Munn*[4] Van den Heever delivering the judgment of the full court, stated:

‘Compliance with the regulations [of the Justices of Peace and Commissioners of Oaths Act] provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith... Where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator...’

- [15] In *Van As N.O. and Others v Jacobs N.O. and Another*[5] where the commissioner of oaths had neglected to place his full names, designation ex officio and address on the founding affidavit, the full bench of the North Gauteng High Court held that “courts regularly exercise a discretion to condone non-compliance if there is substantial compliance with the Regulation”.^[6]
- [16] The confirmatory affidavits are in substantial compliance with the regulations and I would allow them into evidence. This preliminary point is, accordingly, dismissed.

Failure to comply with the Rules of the Labour Court

- [17] Mr Makhubele takes issue with the fact that this application does not meet the general requirements of applications. More specifically, he contends that the application was filed on 7 January 2025 which fell within the period between 16 December and 15 January as defined in the Rules of the Labour Court. The application should be dismissed because it was filed in the proscribed period.
- [18] Mr Makhubele conveniently ignores the fact that urgent applications are just that – urgent and the period of the dies non would not apply to matters that have to be dealt with under compellingly pressing circumstances. Otherwise, the need for urgency in courts would fall away.
- [19] He also complained that the respondents were only given seven court days (fourteen ordinary days) to file their answering affidavit.
- [20] In urgent matters, invariably, there would be a contraction of the period prescribed for ordinary applications for the filing of pleadings with a concomitant imploration for condonation. This the applicants did.
- [21] Again, given the nature of the claim (without making a determination on urgency), this was not prejudicial to the respondent. This point, too, is dismissed.

Urgency

- [22] The applicants aver that they did not want to sign the new contracts of employment because they did not have sufficient details of the terms of the contracts.
- [23] For this reason, they met with senior management, in particular, Mr Moetanalo, the Acting HR Director, and Ms Tshabalala, the Acting Municipal Manager, either separately or together, at various times. In perceiving a lack of willingness to attend to their concerns, the applicants lodged a grievance but to no avail.
- [24] Subsequently, a dispute was referred to the bargaining council where the commissioner found that he lacked the authority to determine a salary dispute.

- [25] On 6 November 2024, the applicants, together with their union, met with Mr Moetanalo and Ms Tshabalala. In that meeting, Ms Tshabalala was unable to advise on the status of the applicants. In a letter of 20 November 2024 to Ms Tshabalala, confirming the discussion in this meeting, the applicants were emphatic that there should be no interruption of their services with the Municipality if they were to be transferred to the Province. The Municipality admitted that the Municipal Manager did receive this letter.[7]
- [26] Not having been paid for six months, the applicants were financially depressed and had to rely on the goodness and generosity of others to sustain them.
- [27] The Municipality's position is that the applicants had waited for six months before approaching this court. The urgency, it maintains, was self-created.

The test for urgency

- [28] Mr Makhubele is not correct when he submits that the “test for urgency begins and ends with whether the applicant can obtain substantial redress in due course”.
- [29] In assessing the urgency of a matter, the court has to consider if the reasons that make the matter urgent have been set out with sufficient cogency in the founding papers, whether the applicant will not obtain relief at a later stage and if it would be in the interest of justice to entertain the urgent application. This may include a consideration of whether the applicant has a clear or prima facie right, apprehension of irreparable harm and the balance of convenience.[8] Not all these factors have to be present and even the prominence of a single one can bolster urgency.
- [30] It is trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules. In *National Police Services Union & others v National Negotiating Forum & others*[9] this court held that the latitude given the 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 seek relief.
- [31] Here, the parties were not inactive. They attempted to liaise with the senior executives of the Municipality who did not respond to their concerns. Critical to their deliberations was whether their past service with the Municipality would remain if they were to be transferred to the Province. The Municipality has admitted that the attempts to resolve the impasse were unsuccessful.[10]
- [32] The Municipality agrees that the transfer of the licensing function from the Municipality to the Province is a transfer of a business in terms of section 197[11] of the Labour Relations Act (the LRA).[12]
- [33] Section 197(2) states that if a transfer of a business takes place –
- ‘(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

- (b) all rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- (c) ...
- (d) the transfer does not interrupt the employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[34] Ngcobo J in the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and others*[13] held that the effect of section 197 is that the new employer takes over the employees and all rights and obligations flowing from their contracts of employment. Van Niekerk AJ (as he then was) in *Douglas & others v Gauteng MEC for Health*[14] confirmed that section 197 governs the terms of a transfer of a business without any variation of the existing contracts of employment.[15]

[35] The Municipality gave the applicants new contracts of employment that were to commence on 1 January 2025. This was repugnant to the imperative of a transfer in terms of the LRA and had the effect of disregarding the rights and obligations between the Municipality and the Applicants and obliterating the long service that each applicant had with the Municipality.[16] The fact that the Applicants were to receive a higher remuneration from the Province does not detract from its lack of compliance with a statutory requirement.

[36] Given the behaviour of the Municipality to brazenly disregard the provisions of section 197 and for the applicants to endure financial hardship, it would not be in the interest of justice to deny them relief just because they could seek substantial redress in an application in due course. In the context of the case load of this court, due course is a speculative concept. As Van Niekerk J said in *National Union of Metalworkers of SA on behalf of members & another v SA Airways (SOC) Ltd (in business rescue) & others*[17] the "one factor that weighs most heavily in favour of the applicants [who were claiming arrear salaries] is that relief will not be readily

available to them in the ordinary course". And in *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others*[18] the court confirmed that 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".

[37] The applicants had attended the premises of the Municipality and the senior executives particularly were aware of their presence. The applicants had tendered their services. Weiner J in *Matshazi v Mezepoli Melrose Arch (Pty) Ltd & another*; *Nyoni v Mezepoli Nicolway (Pty) Ltd & another*; *Moto v Plaka Eastgate Restaurant & another*; *Mohsen & another v Brand Kitchen Hospitality (Pty) Ltd & another*[19] said:[20]

'It is trite that the duty to pay, and the commensurate right to remuneration, arises not from the actual performance of work, but

from the tendering of services.’

[38] This was cited with approval by the court in *Buys v Oasis Group Holdings*.^[21] In *HOSPERSA & another v MEC for Health, Gauteng Provincial Government*^[22] Basson J in ordering that the applicant be paid past and continued remuneration held:

‘... in the light of the fact that [the applicant] has tendered her services at her workplace, she is entitled to her salary... and a unilateral withdrawal of her salary is in breach of the Basic Conditions of Employment Act 75 of 1997.’

[39] The Applicants’ founding affidavit detailing the attendance and work done by the Applicants has been answered by a bare denial by the Municipality in circumstances where the municipality was aware of the presence of the Applicants on its premises and even engaged with them.

[40] Ordinarily, not receiving remuneration is not considered a ground for urgency. However, said LaGrange J in *Marques & others v Group Five Construction (Pty) Ltd (Under Supervision) & others*^[23] in instances where the court has been given details of “exceptional economic hardship... [it] might warrant the court from deviating from the normal rule”.

[41] Tlhotlhamaje J in *Munthali v Passenger Rail Agency of SA*^[24] wrote:

‘I agree ... 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.’

[42] In *National Union of Metalworkers of SA on behalf of members & another v SA Airways (SOC) Ltd (in business rescue) & others*^[25] Van Niekerk J agreed that as a general rule, claims sounding in money are not regarded as urgent but this rule is not absolute.

[43] Given the fact that because of the Municipality’s obstinacy in not disclosing the status of the Applicants with regard to their past service, the applicants have suffered and continue to suffer extreme economic hardship. The circumstances are exceptional so as to approach the matter on the basis of urgency.

[44] The Municipality holds the intractable view that the Applicants were unlawfully on its premises. If their presence was unlawful, access to the premises was not denied. In fact they had the keys to the buildings and continued to occupy their offices. The Municipality made no attempt to evict them either through a legal process or with the engagement of the South African Police Services. The Acting Municipal Manager, Ms Tshabalala and the Acting Director: HR, Mr Moetanalo continued to hold meetings with the Applicants sometimes even coming to their offices. At no stage was the unlawfulness of their presence raised. The

Municipality gave no indication that the applicants had ceased to be employees. This was only done on 7 January 2025.

[45] Section 32(3) of the Basic Conditions of Employment Act[26] is unequivocal that an employer must pay remuneration not later than seven days after completion of the period for which the remuneration is payable.

[46] The Applicants had tendered their services, the Municipality gave them access to its premises and allowed them to occupy their offices. They continually sought clarity from the Municipality on the status of their contracts of employment and met with the senior executives of the Municipality. In these circumstances, the failure to pay their salaries burdened the Applicants to strongly suggest an urgent intervention.

Variation of the Order

[47] After listening to the arguments of both counsel at the hearing on 30 January 2024, I issued an order from a draft that had been prepared by the legal representatives of the Applicants.

[48] On reflection, I now accept that prayers 2, 3 and 4 of the order were granted in error.

[49] In terms of section 165(b) of the LRA, I therefore excise prayers 2, 3 and 4 from the original order.

Costs

[50] The applicants asked that costs be reserved.

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

Order

1. The non-compliance with the forms and service contemplated in the rules of this court is condoned and the matter is heard as one of urgency in terms of rule 38 of the Rules of the Labour Court.
2. The First Respondent is ordered to immediately pay to the Applicants outstanding salaries from July 2024 to December 2024 and to continue to do so pending the determination of Part B to the Notice of Motion which application will be instituted within 30 days of this order.
3. Costs are reserved.

S Seedat

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant:

Advocate AB Omar

Instructed by:

Omar Attorneys

First Respondent: Advocate DF Makhubele

Instructed by:

Nkgadima & Associates Attorneys Inc

[1] Mr Makhubele did not mention that the founding affidavit of the First Applicant suffered from the same weakness in that it also did not reflect the full names of the commissioner of oaths.

[2] Act 16 of 1963.

[3] R v Sopete 1950

(3) SA 769 (E); Swart v Swart 1950

(1) SA 263 (O); Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd 1981

(1) SA 697 (O).

[4] 1973 (3) SA 734 (NC) at 737.

[5]

[2022] ZAGPPHC 928.

[6] Ibid, at para 13.

[7] Paragraph 115 of the Answering Affidavit.

[8] Setlogelo v Setlogelo 1914 AD 221 at 227; Webster v Mitchell 1948

(1) SA 1186 (W) at 1188.

[9]

(1999) 20 ILJ 1081 (LC) at para 39.

[10] Paragraph 121 of the Answering Affidavit.

[11] Paragraph 86 of the Answering Affidavit.

[12] Act 66 of 1995.

[13] 2003 (3) SA 1 (CC).

[14]

(2008) 29 ILJ 1499 (LC) at para 31.

[15] The new employer may vary the employment contracts so long as the changes are no less favourable than the original contract.

[16] First applicant: 28 years; Second Applicant: 15 years; Third Applicant: 28 years; Fourth Applicant: 18 years.

[17]

(2021) 42 ILJ 1256 (LC) at para 11.

[18]

[2011] ZAGPJHc 196 at para 6.

[19] (2021) 42 ILJ 600 (GJ) at para 39.

[20] See too, Johannesburg Municipality v O’Sullivan 1923 AD 201.

[21]

(2022) 43 ILJ 1112 (LC) at para 29.

[22]

(2008) 29 ILJ 2769 (LC) at para 18.

[23]

(2020) 41 ILJ 677 (LC) at para 5.

[24]

(2021) 42 ILJ 1245 (LC) at para 9; Buthelezi v Rurik McKaiser Attorneys Incorporated & another (2023) 44 ILJ 1512 (LC).

[25]

(2021) 42 ILJ 1256 (LC) at para 11.

[26] Act 75 of 1997.

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