

SOUTH AFRICA / JUDGMENT

Munengani and Others v Bob Cuts Hair Saloon and Others (J 507/20) [2020] ZALCJHB 101 (23 June 2020) [2020] ZALCJHB 101

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J 507/20

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 507/20

In the matter between:

CAROLINE
MUNENGANI
First Applicant
NONHLANHLA
KHUMALO Second
Applicant
ROBERT
MAKOPO Third
Applicant
OTHER
APPLICANTS Other
Applicants
and
BOB CUTS HAIR
SALON
First Respondent
GERALDINE
KGANAKGA
Second
Respondent
UNEMPLOYMENT INSURANCE
FUND Third
Respondent
DEPARTMENT OF LABOUR

AND EMPLOYMENT Fourth
Respondent
Heard: 12
June 2020 (In Chambers via
Webex Meeting)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 23 June 2020 at 10h00

JUDGMENT

TLHOTLHALEMAJE, J

[1] With this urgent application, the individual applicants seek various orders including a declaratory that the first and second respondents

are in breach of their contracts of employment in respect of the non-payment of their salaries for the period February and March 2020.

They further seek an order that the first and second respondents must declare and make contributions to the third respondent (UIF Fund) in accordance with the provisions of Unemployment Insurance Act (UIF Act)[1], and that the third and fourth (Department) respondents must essentially ensure that the first and second respondents meet their obligations under the UIF Act, and process any contributions due and to be paid over to them within two days of this order.

[2] The first to the fourth respondents have opposed the application. The first respondent as its name suggests is a hair salon. The second respondent (Ms Geraldine Kganakga) is the sole director of the first respondent. The individual applicants contend that they are employed by the first respondent as hair stylists at its various branches, and were not paid their salaries for February and March 2020.

[3] The matter was initially set down for a hearing on 9 June 2020. It was postponed to 12 June 2020 in order to afford the respondents an opportunity to file answering affidavits and for the applicants to file and serve a replying affidavit. Upon the first to fourth respondents having filed and served their answering affidavits, and the applicants having filed a rely, it became apparent that there were various disputes of fact, related to inter alia, who amongst the individual applicants were still in the employ of the first respondent, who amongst the individual applicants were properly before the Court; whether any amounts in respect of February and March 2020 salaries were due and payable to any or all of the individual applicants; and whether the first respondent had complied with its obligations under the UIF Act.

- [4] In summary, the individual applicants' case is that they have not received a salary for the months of February and March 2020, and have effectively been unable to claim any UIF funds as the first and second respondents have not made any contributions to those funds. They alleged that despite numerous attempts to secure their outstanding salaries and further numerous undertakings by the second respondent, no payments have been forthcoming. As a result of unkept promises, they eventually publicised their dispute with the first respondent through a television programme on the ENCA Channel, and had their plight televised nationally. Their problems related to their inability to claim from the UIF was also highlighted.
- [5] In response to the individual applicants' claim, Kganakga disputed that there were any amounts owing to them, and had attached various copies of bank statements as proof that payments were made in respect of a number of the individual applicants listed in paragraph 7 of the answering affidavit. The employment status of the first and second applicants was also placed in dispute, with the second respondent contending that they were no longer in the employ of the first respondent.
- [6] The third and fourth respondents in opposing the application had through an answering affidavit deposed to by the Commissioner of the Unemployment Insurance Fund, Mr Teboho Maruping, raised various points in limine related to the defective nature of the founding affidavit, pointing out that the affidavit does not comply with the regulations contemplated in the Justice of Peace and Commissioners of Oaths Act[2].
- [7] The individual applicants in the replying affidavit denied that the affidavit was defective despite conceding that the deponent, the first applicant) did not indicate the date on which the affidavit was deposed to before a Commissioner of Oaths. She contended that the date appearing on the stamp used by the Commissioner of Oaths should be accepted as the date on which she and the Commissioner of oaths had signed the affidavit.
- [8] It can be accepted that the affidavit is clearly not in compliance with the regulations as other than the Commissioner of Oaths' dated stamp, Munengani had omitted to indicate the date on which she had deposed to it. That defect however is not in the light of the application before the Court, of such a nature that it can render the entire affidavit defective. As it was correctly pointed out on behalf of the applicants, the Court is in a position to exercise its discretion and permit the admissibility of the affidavit.
- [9] In regards to the jurisdiction, this Court ordinarily under the provisions of section 77 and 77A of the Basic Conditions of Employment Act[3], has jurisdiction to determine any dispute between an employer and employee related to the latter's contract of employment. To the extent that central to the individual applicants' complaints is that they were owed outstanding salary payments, the Constitutional Court in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another*[4] (*Amalungelo*) has since interpreted the provisions of section 77 of the BCEA to mean that since the Labour Court, subject to few specified exceptions, enjoys exclusive jurisdiction over all disputes and claims

arising from the provisions of that Act, as soon as a dispute

is ripe for litigation, the claimant is entitled to refer it to this Court without first having to submit disputes to labour inspectors.

Equally so, this Court enjoys jurisdiction under sections 66 and 67 of the UIF Act in respect of all matters in terms of that Act, with the exception of any offences in terms of the Act.

Evaluation:

- [10] Other than the defects complained of, the third and fourth respondents had contended that this matter did not deserve the urgent attention of this Court. The requirements for urgent relief as contemplated in Rule 8 of the rules of this Court are trite. The applicant seeking urgent relief must set out in the founding affidavit, the reasons why the matter deserves the urgent intervention of this Court. It is further trite that urgent relief will not be granted in circumstances where the applicant can obtain substantive relief in due course, and further where it is apparent that the urgency claimed is self-created.[5]. Aligned to these requirements is that the Court must consider the interests of the respondent party, and in particular, the prejudice the respondent may suffer if the matter is urgently disposed of[6]. Equally important is the consideration of whether the applicant acted with the necessary haste in approaching the Court for relief, which consideration is aligned to the mitigation of the alleged irreparable harm should the relief sought not be granted.
- [11] Turning to the facts of this case, it is trite that in an employment relationship, in the event of a failure by an employer to pay wages when they are due, this would amount to breach of contract. In such a case, the aggrieved employee whose wages have not been paid, may either to accept such a breach and terminate the employment relationship, or hold the employer to the terms of the contract and claim the outstanding wages.
- [12] To the extent that the individual applicants claimed unpaid salaries and approached the Court on an urgent basis, and further in the light of the disputed facts, clearly this matter ought not to have been brought before the Court by way of motion proceedings, and this conclusion is linked to the individual applicants' alternative remedies, which are clearly at their disposal, and more in particular in respect of their claim against the third and fourth respondents.
- [13] It is accepted that to the extent that the applicants sought final relief, the Court ordinarily in the face of disputes of fact would apply the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[7] . In terms of these principles, final relief may only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of such relief. The principles are however subject to two central exceptions, i.e., where the denial by a respondent of a fact alleged by the applicant is not such as to raise a real, genuine or bona fide dispute of fact, and second, where the allegations or denials of the respondent are so clearly untenable that the court is justified in rejecting them on the papers, or if respondent's version is "so improbable and

unrealistic that it can be considered to be fanciful and untenable”[8].

- [14] The denials raised by the first and second respondents can hardly be said to be not real, genuine or mala fide, and there is no basis for this court to reach a conclusion based on the pleadings, that the denials of the first and second respondents are so untenable that they ought to be rejected off-hand.
- [15] A further consideration however is that the applicants’ claim relates to alleged outstanding payments from February 2020, and this matter came before the Court on 2 June 2020. The basis upon which urgency is claimed by the applicants is that there was a breach of their contracts of employment, and that they were or are unable to receive financial relief from the UIF. They further claimed financial hardship consequent upon alleged non-payment of their salaries.
- [16] The difficulty however is that to the extent that the claim arose in February 2020, and since the individual applicants took at least three months prior to approaching the Court, clearly they have not approached the court with the necessary haste. An assertion that the applicants have relentlessly pursued their rights is not sufficient. As of 15 March 2020, and on their own version, it was apparent that despite alleged undertakings by the second respondent, they had still not been paid. The declaration of the state of disaster by the President of the Republic and the implementation of the national lock-down with effect from 26 March 2020 cannot serve as an excuse for not approaching the Court earlier as even during the initial stages of the lockdown, this Court could accept service of urgent applications. There can be no doubt that a lack of a salary invariably leads to financial hardship. At the same time however, and to the extent that the applicants were of the view that the matter had reached a tipping point, there was an obligation on them to approach the Court on an urgent basis.
- [17] A further difficulty however relates to the individual applicants’ claims insofar as they seek certain relief from the third and fourth respondents. It was the latter’s contention that the relief sought against them was impractical to achieve in the light of the applicable statutory requirements. For the individual applicants to be able to benefit from the UIF, the provisions of section 12 of the UIF Act, PART A are relevant. It must first be established that the employee seeking to benefit must have been or was employed, and must satisfy the Commissioner that he/she had made contributions. In this case, and as already indicated, there are glaring disputes of fact as to whether the individual applicants are still in the employ of the first respondent, and if so, whether they have made contributions. Furthermore, there are dispute of fact in regard to whether such contributions if made, were forwarded to the UIF by the first respondent, who it was common cause was registered with the fund since April 2017. Furthermore, there are disputes of fact as to whether the first respondent owes any contributions to the UIF.

- [18] Aligned to the above is that section 17 of the UIF Act makes provision for the administration of unemployment benefits, which requires any claimant (employees) to make an application for such benefits in a prescribed form. Once such a claim was made, it would then be for a claims officer at the Fund to investigate and process the application, and in particular, investigate the claimant's any period of unemployment. In the absence of any such formal application, it would clearly be impossible for the third respondent to determine whether any claim should be successful.
- [19] Central however to the individual applicants' difficulty in respect of the relief that they seek against the third and fourth respondents is that they have not anywhere in their papers, pleaded that they are unemployed, and again, there is no evidence to suggest that they have approached the UIF with any applications contemplated under section 17 of the UIF Act to have their claims investigated or processed. The fact that the Fund has conceded that the first respondent is not in good standing in regards to its contributions and compliance is neither here nor there in the absence of a formal application to the Fund in order for it to initiate its own investigations in accordance with its own prescripts. As it was correctly pointed out by Mr Khaukanani on behalf of the third and fourth respondents, the Court cannot be used for the purposes of bypassing the applicable regulations and processes of the Fund.
- [20] To the extent that the individual applicants may have sought and were unable to claim from the UIF funds made available resulting from relief granted by national government under that Fund, a further difficulty arises in that nowhere in the pleadings is it stated that they had approached the first respondent to apply for such relief on their behalf as required.
- [21] In summary, the applicants have not satisfied the requirements of urgency. This application was not brought before the Court with the necessary haste to justify the Court's urgent intervention, and I am further satisfied that not only would they be able to obtain substantial redress in due course, but also that the remedies available to them in the light of the disputes of fact, would be much more effective than a Court order, more particularly in respect of their claims against the first and second respondents. Even more appropriate, Mrs Oliphant on behalf of the first and second respondents had even suggested that a reconciliation process be embarked upon by all the parties, with a view of determining or resolving the factual disputes already highlighted.
- [22] Even on the principles set out in *Amalungelo*, and to the extent that the applicants may be entitled to approach this Court without first having lodged a complaint with the Department in respect of unpaid salaries, the Court in the light of the disputed facts is constrained to make any order their favour. To this end, it is appropriate that the individual applicants' claim against the first and second respondents be struck off from the roll, whilst the claims against the third and fourth respondents ought to be dismissed for lack of merit, particularly since the requirements of the relief they seek have not been met.

[23] I have further regard to the requirements of law and fairness in relation to the issue of costs, and I am satisfied that the facts and circumstances of this case do not call for any award of costs to be made.

Order:

[24] In the premises, the following order is made;

1. The applicants' application in respect of the relief sought against the first and second respondents is struck off the roll on account of lack of urgency.
2. The applicants' application and relief sought against the third and fourth respondents is dismissed.
3. There is no order as to costs

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr M Marweshe of Marweshe Attorneys

For the 1st and 2nd Respondents: Mrs J Oliphant, of DMO Attorneys

For the 3rd and 4th Respondents: Adv. S Khaukanani, instructed by the State Attorney

[1] Act 63 of 2001

[2] Act 16 of 1993

[3] Act 75 of 1997. Section 77(3) provides; "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract." Section 77(a)(e) provides that the Labour Court may make any appropriate order, including an order – "making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation."

[3] Act 75 of 1997. Section 77(3) provides;

"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

Section 77(a)(e) provides that the Labour Court may make any appropriate order, including an order –

"making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation."

[4] (CCT20/18)

[2019] ZACC 45; 2020 (2) BCLR 125 (CC); [2020] 3 BLLR 225 (CC);

(2020) 41 ILJ 863 (CC)

[5] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*

(2016) 37 ILJ 2840 (LC) at para 26; *Minister of Law and Order v Committee of the Church Summit*, 1994 (3) SA 89 (BGD) at 99F-G; *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32, where it was held; '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. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. ...'

[5] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*

(2016) 37 ILJ 2840 (LC) at para 26; *Minister of Law and Order v Committee of the Church Summit*, 1994 (3) SA 89 (BGD) at 99F-G; *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32, where it was held;

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[6] *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* [2016] ZALCJHB; [2016] BLLR 1151 (LC); (2016) 37 ILJ 2840 (LC) at para 26

[7] 1984(3) 623 (A) at 634-5, where it was held that; “... where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”

[7] 1984(3) 623 (A) at 634-5, where it was held that;

“... where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”

[8] See Rail Commuters Action Group v Transnet Limited t/a Metrorail

[2004] ZACC 20; 2005 2 SA 359 (CC) para 35; Wightman t/a JW Construction v Headfour (Pty) Ltd

[2008] ZASCA 6; 2008 3 SA 371 (SCA) para 13: Soffiantini v Mould 1956 4 SA 150 (E) at 154G Truth Verification Testing Centre CC v PSE Truth Detection CC 1998 2 SA 689 (W) at 699F-G.

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