

SOUTH AFRICA / JUDGMENT

Puma Energy South Africa (Pty) Ltd v Sekete (J1190/23) [2023] ZALCJHB 298 (24 October 2023) [2023] ZALCJHB 298

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

J1190/23

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: J1190/23****In**

the matter between:

PUMA
ENERGY SOUTH AFRICA (PTY) LTD
Applicant
And
BOITUMELO
SEKETE
Respondent

Heard:

5 October 2023

Delivered:

24 October 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 24 October 2023.)

JUDGMENT

PHEHANE, J

Introduction and

background

[1] The applicant brings this application on an urgent basis, seeking relief akin to an Anton Pillar order, which the applicant terms a “search and seizure”, essentially, to recover its personal information recorded by the respondent on her private electronic device/s. The applicant seeks an order that the respondent’s electronic device/s be subjected to forensic examination and any personal information of the applicant that is found on the device/s be permanently removed and stored and may be accessed by the respondent in circumstances where she is able to demonstrate to the applicant that she is entitled to the use of such information for litigation that she intends to launch.

[2] Whilst in its employ, the respondent admits that she recorded work-related conversations between herself and erstwhile employees of the applicant, namely, Mr Mohamed Carrim, the applicant’s then Cluster General Manager and Mrs Leonie Wolhuter, the applicant’s

then Regional Human Resources Executive while they were unaware that they were being recorded, as she wanted evidence to use in litigation she would institute or defend involving the applicant. The respondent contends that such recordings taken by her are in terms of the provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act[1] (RICA) – she is a party to the conversation and the recording is to be utilized in litigation and in the circumstances, her conduct is lawful. The applicant has no quarrel with this contention by the respondent.

[3] The applicant is uncertain what the recorded conversations entail.[2] What the applicant contends, is that the information in the recordings comprises of personal information of its erstwhile

employees. It is thus exposed to the risk of litigation against its erstwhile employees and needs to keep their personal information

(including voice recognition) confidential in terms of the provisions of the Protection of Personal Information Act[3] (POPIA).[4]

Urgency

[4] The applicant contends that the application is urgent, although it states that there has been no curtailment of the time periods for services.[5] The applicant avers that with every day that passes, it is at risk that the respondent will divulge the information on the recordings and this in essence, is the basis of its urgency. Barring the conversation between the respondent and Mrs. Wolhuter, as set out below, the applicant does not dispute the

respondent's averment that she has not disclosed further recordings in her possession but asserts that the risk that she may do so remains.

- [5] The respondent, on the other hand, contends that the application is not urgent and that urgency is self-created.
- [6] The chronological sequence of events is largely common cause and follows below.
- [7] During August 2022, the respondent lodged a grievance against Mr. Carrim. Investigations regarding the grievance ensued in September 2022, during which, it came to light that the respondent recorded conversations between herself and employees of the applicant. The applicant states that the first time it became aware of the recordings was during the investigation in September 2022.[6]
- [8] The investigation report dated October 2022 mentions the recordings.[7]
- [9] One of the recommendations of the investigation report flowing from a finding that the respondent breached the provisions of the POPIA when she recorded conversations with colleagues without their knowledge was that the respondent committed an act of misconduct. Consequently, the respondent was placed on precautionary suspension pending the outcome of the disciplinary enquiry. During the disciplinary hearing held on 3 and 4 July 2023, the respondent intimated that she would use the recordings against the applicant. The applicant viewed this as a threat.
- [10] The respondent was dismissed on 6 July 2023. She was required to return her work devices, which she did on 17 July 2023. The respondent subsequently lodged an unfair dismissal dispute at the Commission for Conciliation, Mediation and Arbitration.
- [11] The respondent admits to recording conversations between herself and Mr. Carrim and between herself and Mrs. Wolhuter without their knowledge. She avers that she did not trust Mr. Carrim and recorded their conversations to safeguard herself and to use the recordings for future litigation. The respondent avers that the recordings are work-related, pertain to the trained working relationship with Mr Carrim and contain no confidential information of the applicant. She contends that she made the recordings in terms of the provisions of RICA and this is lawful.[8] The respondent started recording Mr. Carrim in May 2022 on her personal mobile device. The last recording was in July 2022.
- [12] The respondent recorded the conversation between herself and Mrs. Wolhuter on 12 October 2022. It transpired that Mrs. Wolhuter approached the respondent on 11 and 12 October 2022 on behalf of the applicant and enquired if the respondent would, in exchange for a mutual separation agreement, furnish the applicant with the recordings that she had in her possession of their conversations in order that the applicant could use them in disciplinary proceedings against Mr. Carrim. Further, that Mrs. Wolhuter assured her that should she make the aforesaid recordings available to the applicant, no action would be taken against her in terms of POPI or RICA. Barring the lamentation that the conversation between the respondent and Mrs. Wolhuter was published by the respondent, the applicant

does not deny that the conversation took place, the purpose of the conversation and the timing thereof, approximately a year before this application was launched. A year prior, the applicant wanted to use the recordings for its own purpose, fully aware that the relationship between the respondent and Mr. Carrim was acrimonious and the risk the applicant now complains about existed at that point in time, yet, a year later, it approaches this Court seeking to seize these recordings.

- [13] In an email correspondence dated 13 July 2023,[9] The applicant required the respondent to return all recordings in her possession and to provide a written undertaking by 14 July 2014, that no work-related recordings remain in her possession, failing which, the applicant would launch urgent proceedings in this Court without further notice. In an email response dated 14 July 2023, the respondent refused to furnish the required undertaking and unequivocally stated that she would not make such an undertaking as, in her view, she is legally entitled to the recordings. She further provided an email address for the service of the urgent application.[10]
- [14] Despite stating that it would approach the Court on an urgent basis if no undertaking was provided, this application was launched by the applicant on 4 September 2023, approximately a month and a half later.
- [15] In light of the afore-going, in my view, the applicant delayed in approaching this Court immediately, and in the circumstances, urgency is therefore self-created.[11]
- [16] The applicant was aware of the recordings in September 2022, but did not approach the Court for the relief it now seeks, a year later. The now perceived contravention and risk in relation to POPIA existed in 2022 - the investigation report dated October 2022 states this, yet, the applicant did not approach this Court for urgent relief then. In that same month (October 2022), the applicant wanted to be possessed of the recordings and sought to make a deal with the respondent to use the recordings for its own purposes. The risk in relation to POPIA existed then, hence the promises that no action in terms of POPIA would be taken against the respondent if she danced to the applicant's tune. When nothing came of this, the applicant did not approach this Court at that point in time. The applicant was aware in early July 2023 that the respondent intimated that she would use the recordings, yet still, the applicant did not approach this Court on an urgent basis. Given its own assertion that it would approach this Court on an urgent basis if no undertaking was furnished by the respondent, still, it did not.
- [17] The applicant, on its own version, states that the time frame for service is not curtailed. This, in my view, demonstrates that the application is not urgent, as the procedure that characterises approaching the Court on an urgent basis is on truncated time frames, hence the first prayer in the notice of motion seeking condonation for not complying with the time frames for service in application as provided in rule 7. Further, not curtailing the time frames is indicative that the application may be heard in the normal course and on the ordinary roll.

[18] The applicant has not demonstrated that it will not obtain substantial relief should this matter not be heard on an urgent basis. Barring alleging that every day that passes poses a risk to it, it did not curtail the time frame for service of pleadings and did not approach this Court at the earliest opportunity.

[19] Rule 8 provides as follows:

‘8. Urgent relief

- (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; and
 - (c) ...’ [Own emphasis]

[20] In *Mohlala-Mulaudzi v Property Practitioners Regulatory Authority*,^[12] this Court per Moshoana J stated as follows regarding the peremptory provisions of rule 8:

‘...Accordingly, I am not satisfied that Mohlala has provided adequate reasons why an urgent relief is necessary today and not tomorrow or the other day. This court in *Maqubela v SA Graduates Development and others*^[13] correctly stated thus:

“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 the circumstances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency.” [Own emphasis]

[21] In view of the afore-going, the applicant has not made out a case for urgent relief.

[22] In the premises, the following order is made:

Order:

1. The application is struck off the roll for lack of urgency.
2. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Adv. C Whitcutt SC and Adv. S Saunders (Ms)

Instructed by:

Edward Nathan Sonnenbergs Inc.

For the respondent:

Adv. T. Mofokeng

Mntfomusha Methula Inc.

[1] Act 70 of 2002.

[2] Applicant's heads of argument at para 43.

[3] Act 4 of 2013.

[4] Applicant's heads of argument at paras 40 to 42.

[5] Applicant's heads of argument at para 50.

[6] Founding affidavit at para 56, p 26.

[7] p 39.

[8] Answering affidavit at para 26, p 127.

[9] Annexure "FA2" at p 90.

[10] Annexure "FA3", p 91.

[11] See: *Jiba v Minister of Justice and Constitutional Development and others*

[2009] ZALC 57; (2010) 31 ILJ 112 (LC). See also: *Baloyi and others v Passenger Rail Agency of South Africa* (J158/21) [2021] ZALCJHB 26 (3 March 2021), where this Court stated thus: 'It is trite 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 action by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. However, the longer it takes for the applicant 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'. [Emphasis added]

[11] See: *Jiba v Minister of Justice and Constitutional Development and others*

[2009] ZALC 57; (2010) 31 ILJ 112 (LC). See also: *Baloyi and others v Passenger Rail Agency of South Africa* (J158/21) [2021] ZALCJHB 26 (3 March 2021), where this Court stated thus:

‘It is trite 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 action by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. However, the longer it takes for the applicant 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’. [Emphasis added]

[12]

[2023] JOL 57988 (LC) at para [37].

[13] (2014) 35 ILJ 2479 (LC).

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