

SOUTH AFRICA / JUDGMENT

Union for Police security and Corrections Organisation obo Members and others v South African Custodial Management and Another (J2895/17) [2017] ZALCJHB 430 (24 November 2017)

[2017] ZALCJHB 430

COURT

Labour Court Johannesburg

BEFORE

E Tlhotlhlamajje

CASE / FILE NUMBER

J2895/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: J 2895/17

In

the matter between:

UNION
FOR POLICE, SECURITY AND
CORRECTIONS
ORGANISATION obo MEMBERS
First
Applicant
THE
INDIVIDUALS LISTED IN ANNEXURE 'A1'
Second
To Fourteenth Applicant
INDIVIDUALS
LISTED IN ANNEXURE 'A2'
Fifteenth
To Eighteenth Applicant
and
SOUTH AFRICAN
CUSTODIAL MANAGEMENT
First Respondent

KENSANI CORRECTIONS
MANAGEMENT
Second Respondent

Heard: 14
November 2017

Delivered: 24
November 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] In this opposed urgent application, the applicants seek an order setting aside the second to fourteenth applicants' suspension from the first respondent; and setting aside the suspension of fifteenth to eighteenth applicant's suspension from the second respondent. In the alternative, the seek an interim order setting aside notices of suspensions pending the finalisation of the disciplinary proceedings against them.
- [2] In a further alternative, they seek an order essentially directing the respondents during their suspension, to recognise the union's

leadership as legitimate, and thus grant them access to its facilities for the purposes of conducting legitimate union activities, to represent its members at disciplinary hearings, and to allow them to consult with their members.

Background:

- [3] The first applicant, the Union For Police, Security And Corrections Organisation (UPSCO), was until 6 August 2017, known as Kutama Sinthumule Correctional Workers Organisation (KSCWO). Its members are primarily the respondents' employees. The second to further applicants comprise of the General Secretary, Chairperson, other Executive Committee members, and ordinary members of UPSCO.
- [4] The South African Custodial Services (Pty) Ltd (SACS) has a public private partnership with the National Department of Correctional

Services (DCS) to operate the Kutama Sinthumule Correctional Facility in Louis Trichardt, Limpopo. The first respondent (SACM) and second respondent (Kensani) are both sub-contracted to SACS and are responsible for the security and administration of rehabilitation programmes at the prison. They also render maintenance services to the prison.

- [5] SACM, Kensani and other subcontractors jointly employs about 600 employees, 580 of which are UPSCO members. UPSCO has separate recognition

agreements with both SACM and Kensani. The second to further applicants are employed mostly as prison guards.

The events leading to the dispute and the urgent application:

- [6] The events leading up to the dispute between the parties and the ultimate suspension of the applicants dates back to September 2015, when the parties negotiated wages and other conditions of employment. The Union had complained about salary disparities amongst employees employed by SACM and Kensani as compared to other employees under the DCS.
- [7] Central to the dispute was the demand that the pension benefits enjoyed by the DCS' employees should be replicated by SACM and Kensani to its employees. It is not necessary for the purposes of this judgment to deal with the details surrounding the dispute, save to state that since the employees are regarded as essential workers, they are not permitted to embark on any industrial action in pursuance of their demands in respect of the pension benefits.
- [8] The applicants did not file a replying affidavit despite their acknowledgement in the founding affidavit that factual disputes were

anticipated. In the founding affidavit, they had also reserved their rights to supplement their papers, but had omitted to do so. The general allegations against the applicants are that the Union has not referred the disputes for arbitration, but has consistently resorted to orchestrating unlawful and unprotected industrial action, and made threats to destabilise the operations of the prison in order to compel the respondents to concede to their demands, especially in respect of the pension benefits. The consequences of these unprotected actions on the part of the employees were that the respondents had to incur financial penalties imposed by the DCS.

- [9] The respondents further averred that over-time, the Union had in the midst of attempts to resolve the dispute, added more demands.

Attempts at resolving these issues involved setting up task teams and securing the involvement of the DCS. A protracted attempt to resolve the issues also involved the engagement of legal teams to map out an agreement. That process nonetheless ended badly, as according to the respondents, the Union Officials involved in those negotiations had made unlawful attempts at soliciting a bribe from the respondents' legal team, with a promise that the settlement would be concluded. Other than these factors, the Union according to the respondents, has refused, despite generous overtures in an attempt to resolve the various disputes, to deal with management, and had in the process, marginalised SACM's nominated representatives.

[10] The Union has since referred a dispute to this Court on 1 September 2017 in respect of these on-going demands. That matter is still pending. Matters came to a head on 29 September 2017, when 15 employees interrupted a management meeting held off site between SACM, Kensani and officials from the DCS. The Union demanded that the Group COO of Kensani, Ms Starke, must address their issues surrounding salaries in respect of clerks and managers, and the outstanding issue of pension fund.

[11] On 26 October 2017, a meeting was convened to discuss the pension fund issue. The meeting was scheduled for 10h30 in the

Training area. The second to eighteenth applicants (Union leaders) attended a meeting with prison management. The Union officials were not satisfied with the responses to their demands and they then asked management to convey its position to all the employees in a meeting.

[12] The meeting with staff where management was to state its position was scheduled for 13h30 at the prison's Waste Management area. Management had informed workers that it could not agree to pay 16% contributions to the pension fund as it did not have a mandate in that regard, nor could it afford that increase. After management had made attempts to contact other senior people who could take decisions on the matter, the director of SACM in Cape Town, Ms. Starke-Dow, then made an undertaking to arrange a meeting with other directors, and indicated that this could only be done on 30 October 2017 at 16h00, where a decision on the matter would be taken.

[13] The meeting of 26 October 2017 had continued into the afternoon, as the Union officials and other employees were not satisfied with having to wait until 30 October 2017. According to the respondents, the employees then announced that they

would stay at the Waste Management Area together with management until Monday, 30 October 2017.

[14] It is common cause that a prison riot broke out and had extended into the early hours of the next day. According to the respondents, the riot was precipitated by the fact that after the afternoon meeting of 26 October 2017 came to an end, the employees seized control of the Central Control Room of the prison at about 16h00. The second to eighteenth applicants had also occupied the Control Room at varying times. The Central Control Room is the nerve centre of the prison. It houses monitor screens with live video feeds from cameras surveilling the entire prison. It also houses joysticks used to open and close doors and access points around the prison, the inmates' cells, and access points into and outside of the prison premises. The Room also houses the switches and systems for the electrical fence erected around the prison. The Room has strict access and only authorised hand-picked individuals are allowed in it. The inside of the Room is also under camera surveillance, and according to the respondents, various employees not permitted to be inside were recorded as having entered it and causing disruptions to the prison operations.

[15] As a result of these events, staff had abandoned their duties, resulting in prisoners not having access to their medication and food, and basically left unattended and unsupervised. At some point, the employees even prevented the Green Prison Manager from serving food to the inmates by utilising the prison's intercom system from the Control Room, and instructing the individual concerned to stop serving food to inmates.

[16] In the course of the violent riot which broke out in the prison, prisoners broke out of their cells, set fire to offices and the

gymnasium, looted kiosks and broke serveries. The respondents' contention was that the breaking out of prison cells could only have been facilitated by employees who had taken control of the Control Room and opened the prisoners' cells. At about 1930, the electric fence surrounding the prison was switched off. Several inmates attempted to escape by scaling over the now switched off electric fence.

[17] Seven inmates managed to escape. According to the respondents, more prisoners could have escaped but for the intervention of Neighbourhood Watch and members of the Public Order Policing Unit, who had arrived at the time that the prisoners had gone on a rampage and attempted to escape. The employees who were in the Control Room are accused by the respondents of having orchestrated the escape, watched on security monitors as the events unfolded, and even called Starke to the control room to watch what was happening. Starke was

further told by the applicants that the mayhem could be stopped if management agreed to meet the employees' demands.

[18] As the prison riots continued into the night, prisoners set fires in various parts of the prison and the employees refused to intervene,

let alone help douse out the fires. They instead watched as events unfolded. The inmates continued to roam around prison premises and broke into the maintenance areas, looted and removed tools from it. They also raided the food storage area. It was only at about 01h30 that the respondents had finally regained control of the central room and the prison, and after the intervention of outside law enforcement agencies. The employees, who had remained on the premises as at about 05h00 had to be removed by private security personnel in view of the next shift having to resume its duties. As at the hearing of this application, five of the seven inmates had been recaptured. The other two remained at large.

The suspensions:

[19] On 30 October 2017, management had called the applicants to a pre-suspension meeting, to afford them an opportunity to make representations on why they should not be suspended on full pay. The respondents aver that at that meeting, complaints of misconduct made against the applicants were outlined and they were asked to make representations. The charges against the applicants were;

- a) Orchestrating an unlawful and unprotected strike which took place on 26 and 27 October 2017;
- b) Holding senior managerial employees, including the managing directors of the respondents in prison and preventing them from leaving the prison at their own free will;
- c) Failing to keep their members under control for the duration of the unlawful and unprotected strike which resulted in significant damage to property, violence and the escape of seven prisoners;
- d) Compromising the safety and security of the prison, including prisoners and staff members
- e) Taking control of the prison Central Control Room thereby hampering the normal operations of the prison;
- f) Preventing the night shift from accessing the facility to conduct their duties or rendering their services which led to damage to company property, escalated the situation and led to the subsequent escape of seven dangerous prisoners.

[20] It is common cause that the applicants had refused to make representations and requested more time. They were given one hour to

consider their representations. After three hours, they were called upon to make their representations and they had again refused. Five hours had passed since the applicants were requested to make representations, and when they further refused to do so, they were then issued with suspension notices, in terms of which they informed of their suspension with full pay with immediate effect, pending an investigation into the complaints and a notice to attend a disciplinary enquiry to be issued in due course.

[21] The respondents holds the view that the amount of time afforded to the applicants to make representations was reasonable as it was not feasible to have them remain at work in the light of the events of 26 and 27 October 2017, and further that their presence on the premises posed a huge risk as it would also undermine on-going investigations.

[22] The applicants' attorneys of record sent correspondence to SACM on 31 October 2017 and complained that the suspensions were procedurally and substantively unfair on the grounds that the applicants were not afforded sufficient time to make representations,

and further since some of the applicants were shop stewards who were on leave at the time of the incident. The respondents'

attorneys responded on 1 November 2017, and informed the applicants that they were again afforded an opportunity to make

representations to show cause why they should not remain suspended. The applicants' attorneys rejected the offer in a response on 2 November 2017, reiterated that the suspensions were unlawful, and complained about the conditions attached to the

suspensions. The attorneys further threatened to approach the court on an urgent basis.

[23] Notices to attend the disciplinary hearing were issued to the applicants on 7 November 2017. Copies of the notices were also sent to the applicants' attorneys, advising them that the applicants will be granted the right to legal representation in those proceedings. Advocate Michael Van As was appointed as the external chairperson for the hearing scheduled for 13 November 2017.

The applicants' attorneys' response was that they would serve an urgent application on that day, and requested that the disciplinary proceedings be suspended pending the outcome of the urgent application.

[24] The respondents' attorneys' response was that they would await the service of the urgent application, which would be opposed with an appropriate cost order, and further that the disciplinary hearing would proceed as scheduled. On 7 November 2017,

this urgent application was launched. On 8 November 2017, the applicants' attorneys sent further correspondence to the respondents' attorneys, objecting to the venue and chairperson of the hearings, and the failure to provide information for the purposes of the hearings. A response thereto was that transport would be provided to the applicants to and from the venue where the enquiries would be held; that there was no merit to the objection of the chairperson, and that they could raise the issue with the chairperson at the hearings.

The applicants'

submissions:

[25] The applicants' contention is that the suspensions are unlawful, unfair and constitute a grave injustice. They contend that the unlawfulness arises in that the Union's members' freedom to associate, organise and bargain with the respondents have been limited, and that the allegations of misconduct leading up to the suspensions were spurious.

[26] In regard to the events that led to their suspensions, they contend that management had invited them to a meeting on 26 October 2017

without making provisions for the fact that employees would not be stationed at their normal posts. They contend that 150 employees

attended the meeting at 13h30 at the invitation of management, waited for the Managing Director of SACM, Bahula to address them, and to get the necessary mandate on the issues raised. They conceded having joined Bahula and Starke in one of the boardrooms whilst they tried to contact shareholders. They believe that Bahula and Starke were playing for time whilst attempting to get hold of shareholders, including the American shareholders.

[27] The applicants blame Bahula and Starke for simply agreeing to their demands that they should contact and find the shareholders who would take a decision on the issues that led to the dispute, and had failed to take consideration of the fact that employees were not at their

workstations. In essence then, the applicants blame the respondents for the fact that employees had deserted their posts, and believe that since the operational management and safety of the prison's occupants was exclusively the prerogative of prison management and the chief of security, employees had the right to assume that they had been permitted to stay in the waste management area, and that management had made sufficient alternative arrangements for the security of the prison.

[28] The applicants further confirmed that attempts to obtain a mandate from shareholders were unsuccessful, and Starke had made an undertaking

and advised them that management would revert to the employees on Monday of 30 October 2017. When Bahula and Starke informed

the Union leaders that they had to leave in order to catch their flight, they were in turn informed that they had to address the

employees and tell them why they were leaving. The Union leaders wanted an assurance that they would be met on 30 October 2017

as promised.

[29] According to the applicants, before Starke and Bahula could address the employees, information came through that a prison riot had broken out. The applicants alleged that they had then suggested to Starke and Bahula that the meeting should be abandoned and that the Union leaders should inform their members to return to work and try to contain the riot, to which Starke and Bahula had agreed to.

[30] Employees could however not be able to contain the situation immediately as they did not have defensive weapons. Management took an hour prior to reaching the armoury as the person in charge of the area could not be located. It was only at about 18h30 that the employees, together with the police, private security firms and the emergency services that attempts commenced in earnest in containing the riots.

[31] The applicants confirmed having been given an hour on 30 October 2017 to make representations as to why they should not be suspended. They contend that the one hour was not sufficient, especially since some of the Executive Committee members were not present at the time they were informed of the intended suspensions. They had informed management after an hour that they could not make those representations. Management had a few hours later reverted to them and issued notices of suspension to 17 of them, with the allegations against them outlined therein.

[32] In regard to having met the requirements of the relief they seek, the applicants' contention was that they had a clear right/prima facie right as the suspensions were unlawful, interfered with their right to freely associate, organise and bargain with the respondents. They complained that the Union's Executive Council, of which its leadership comprised of 17 of the 20 members was now defunct.

- [33] The applicants further complained that the Union's entire constituency was based at Kutama Prison, and the suspensions of the elected leadership meant that it was not allowed to contact members, and to represent them in disciplinary proceedings. They lamented the fact that they were now obliged to vacate their positions and offices in order to allow by-elections to take place. This was nonetheless not possible as there were no ordinary members with the necessary skills and training to defend other ordinary members during disciplinary proceedings. The applicants are concerned that the Union's ability to organise and assist ordinary members was nullified, and it could no longer pursue the pension fund issue, nor could it consult with members concerning the pending litigation.
- [34] The applicants denied having been on strike and contended that the allegations of misconduct were fabricated as the union leadership was always cooperative and went out of its way to assist management. They regarded the allegations against them that they held management in the prison against their will as laughable, as is the allegation that they took control of the Control Room. The applicants further contended that their suspensions were unlawful as only the Correctional Centre Director had authority to effect them against Union leaders, and further that the conditions of the suspensions were unlawful as they prevented the Union leadership from coming within 1 km of the prison, thus limiting their constitutional right to freedom of movement.
- [35] Where the Court were to find no basis to conclude that the suspensions were unlawful, the applicants contend that the suspensions are in the alternative unfair, as they were not afforded reasonable time to make representations before they were effected. They further contend that they would suffer irreparable harm if relief was not granted, on the grounds that the Union members would not be assisted in respect of disciplinary proceedings to be instituted against them, and the Union's credibility and support from its constituency would consequently suffer.
- [36] The applicants appreciated that an unfair labour practice dispute could have been referred to the CCMA in respect of their suspensions. They however contended that they had no other alternative remedy, as the CCMA functions too slowly to allow it to be a proper alternative

remedy in the circumstances. A further argument in this regard was that part of the relief sought related to the union's access to its members, a dispute over which the CCMA lacked jurisdiction.

The respondents'

submissions:

- [37] SACM opposes the application on variety of grounds including that;
- i. The issues arising in the application do not warrant the urgent intervention of the court;
 - ii. There are no exceptional circumstances or grave injustice warranting the court's intervention;

- iii. To grant the relief the applicants seek would result in a grave injustice;
- iv. The contention that the allegations against the applicants are fabricated is false, in that on 26 October 2017, and during the early hours of 27 October 2017, the applicants orchestrated an unprotected wildcat strike which included a campaign of violence, mayhem and lawlessness at the maximum security prison which the respondents operate. The prison facilities are designated as an essential service.
- v. The applicants' conduct complained of included holding the prison and management hostage in order to unlawfully extract an agreement in respect of the on-going dispute about improved terms of employment; causing dangerous convicted criminals including serial rapists and killers to set fire to parts of the facilities, and to escape from prison into the town of Louis Trichardt;
- vi. The applicant's conduct put management, their fellow employees and the general public at risk. The applicants could not ask for the courts' assistance in circumstances where they had started the incident, and watched as it unfolded. The disciplinary enquiries were already scheduled to commence on 13 November 2017;
- vii. The employees' continued presence in the prison posed a serious risk to the respondents' continued operations and to the safety of the staff and the public.
- viii. To permit the applicants to return to work was untenable, as it will come at enormous risks; would undermine the stability of the operations of the prisons, undermine disciplinary proceedings, and would result in them resuming their campaign of mayhem and lawlessness at the prison.
- ix. The fact that the employees may be trade union officials did not detract from the fact they remain employees, and like all other employees, they are not immune from being suspended or subjected to disciplinary action
- x. The employees/union officials in any event are not legitimate recognised office-holders of the Union, as they were elected as an interim committee in 2013

Evaluation:

- [38] It needs to be said at the outset that the applicants in this case face insurmountable hurdles, in that they have not established the grounds upon which the relief they seek, whether final or interim, should be granted. Crucial however is that the starting point with this application is whether it deserves the urgent attention of this Court.
- [39] In explaining the provisions of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court[1], the Labour Appeal Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[2] held that;

“Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules”.

- [40] Applicants seeking urgent relief must adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. In determining urgency, a court will be guided by considerations of whether the reasons that make the matter urgent have been set out succinctly in the papers and secondly, whether the applicant seeking a relief will not obtain a substantial relief at a later stage.
- [41] Thus, the basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court[3]. It therefore follows that where the court is not satisfied that sufficient reasons have been advanced for the matter to be treated as one of urgency, the application ought to be struck off from the roll on that ground alone[4].
- [42] The applicants’ contention was that the matter was urgent as they would not obtain substantial relief in the normal course, as the Union leaders and members of the union would have been denied their right to freely associate and to engage in trade union activities, thus causing them irreparable harm.
- [43] The starting point in determining whether this matter should be accorded any urgent attention is that the applicants were suspended with effect from 30 October 2017. Notices to attend the disciplinary hearings were issued on 7 November 2017, with such hearings scheduled to commence on 13 November 2017. Only on 7 November 2017 did the applicants approach this court on an urgent basis, setting the matter down for 14 November 2017, a day after the disciplinary enquiries had commenced.
- [44] Amongst the factors to be considered by the court in determining whether an application should be treated as urgent is whether the applicants acted with the necessary haste in approaching it. Thus, urgency must not be self-created in the sense that the applicant failed to bring the application at the earliest available opportunity, and then sought the urgent intervention of the Court[5]. The applicants in this case failed to demonstrate that indeed they had acted with the necessary haste in approaching the court upon being informed of their suspensions. Other than the correspondence between the attorneys between 31 October 2017 and 7 November 2017, and an empty threat made on 2 November 2017 by the applicants’ attorneys to bring

this application, there is nothing of substance that indicates that the applicants acted with the necessary haste until 7 November 2017.

Even then, there is no explanation in the founding papers as to the reason the applicants took their time in approaching the court. I appreciate that the delay about 8 days since between the suspensions being effected and the launching of this application is not egregious. However, if so, there is still a need for the applicants to proffer a reasonable explanation as to the reason they had twiddled their thumbs during that period, and a further explanation as to they chose to set the matter down a day after the commencement of the disciplinary proceedings. In the absence of such an explanation, the only invariable conclusion to be reached is that the urgency claimed in this case is clearly self-engineered.

[45] Given the events that took place, which the respondents clearly blame on the conduct of the applicants, it was indeed expected of the respondents to refuse to yield to the applicants' demands that the suspension be lifted. It was apparent as at 2 November 2017

that the respondents dared the applicants to approach the court on an urgent basis at the time, and the latter had backed off until The objections surrounding the appointment of the chairperson of the enquiry and the venue of the enquiry were matters to be dealt with at the enquiry itself, and it was apparent that the respondents were not going to indulge the applicants any further in that regard.

[46] A further crucial consideration is that the disciplinary hearings scheduled for 13 November 2017 had commenced on that date as scheduled. As at the time this application was heard, the proverbial horse had bolted, and clearly there is no urgency in granting the relief sought. There cannot be any grounds to believe that the applicants will be prejudiced as they had alleged if the suspensions are not uplifted in that first, they are suspended with full pay, and second, they will be afforded the right to legal representation in the disciplinary proceedings as scheduled and be afforded an opportunity to state their cases, and be vindicated if they are not in the wrong. Thus, any unfairness complained of in respect of the suspensions will be sufficiently dealt with in those hearings.

[47] The applicants' further complaint that they will not be able to consult with members of the Union for the purposes of the

disciplinary enquiries because of the conditions attached to their suspension is equally without merit and cannot be a basis for urgent relief. These conditions as I understood from the submissions made on behalf of the respondents, are not cast in stone. There is a reason behind the barring of the applicants from the respondents' premises as the facts summarised elsewhere in this judgment indicate. To allow them back into the premises without restrictions when they are facing serious allegations of misconduct would definitely not be in the interests of the respondents or its operations. Thus, all the applicants need to do, especially since they have been allowed legal representation, is to make the necessary arrangements with the respondents to relax the conditions of suspension for a specific purpose, i.e., to allow them access to the union members who need assistance, or who need to be contacted as witnesses in the disciplinary proceedings. In a nutshell, the applicants will be allowed reasonable access to the respondents' premises and its members, as and when the need arises, especially in relation to the matters

surrounding disciplinary enquiries. There is therefore no basis for the court to intervene.

[48] The applicants' contention that the conditions of their suspensions are unreasonable on the basis that they have now been barred from exercising their rights as a Union can also not be a basis for treating the matter as urgent. This is so in that the Executive Committee members of the Union on suspension are not immune from any disciplinary process that the respondents seek to initiate against them, as they also remain employees of the respondents. A position in the Union in whatever capacity cannot be a free-pass especially in circumstances where it is common cause that the allegations against the applicants are extremely serious. Thus the Union's and its leadership's rights to exercise organisational rights cannot trump over the respondents' rights to initiate disciplinary proceedings. Until such time that the Union officials are exonerated from any wrong doing, they cannot be allowed to exercise any organisational rights.

[49] It is trite that an application cannot be treated as urgent in circumstances where the applicants have access to an alternative

remedy[6]. The applicants' contention that the wheels of labour dispute resolution at the Commission for Conciliation Mediation and Arbitration (CCMA) are slow is indeed contrived and self-serving. In effect, what the applicants are saying is that because of their positions as Union leaders and the circumstances surrounding their suspensions, they are entitled to jump the proverbial litigation queue and be accorded priority in this Court. This contention is clearly misplaced as illustrated in *North West Provincial Government v Gradwell*[7], in the following terms;

"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."

[50] In this case, the applicant sought final relief, and in the event that this was not granted, interim relief, pending the finalisation of the disciplinary proceedings. Final relief in this case cannot be granted in view of the merits and the facts surrounding the suspensions. Thus, the applicants must answer to the serious allegations made against them, and motion proceedings cannot be an avenue for that particular purpose. Interim relief on the other hand is equally inappropriate in this case in view of the conclusions reached that the presence of the applicants

at the prison premises can only be counterproductive to the respondents' operations in view of the events of 26 and 27 October 2017, and the applicants' role in those events.

[51] The applicants have not referred an unfair labour practice dispute to the CCMA as at the hearing of this application to challenge their suspensions. The interim order they seek is for the lifting of the suspensions pending finalisation of the disciplinary proceedings. As already indicated,

those proceedings have commenced, and thus no purpose would be served by granting interim relief, especially for the purposes contended for by the applicants. It follows from the above that there are no extraordinary or compelling circumstances demonstrated by the applicants as to why the suspensions should be lifted in the interim[8]. Furthermore, this application is not urgent, and thus ought to be struck off the roll without the need to consider its merits.

Costs:

[52] The respondents sought an order of costs in the event that the applicants were unsuccessful. This court would ordinarily consider the requirements of law and fairness in awarding costs. In this case, and in the light of the events of 26 and 27 October 2017, and the subsequent suspensions, I am satisfied that this application was clearly ill-conceived. There was no need to pursue it immediately after the notices of the disciplinary hearings were issued, particularly in the light of the nature of the interim order sought. The fact that the parties have a recognition agreement and some form of relationship is not a license to subject the respondents to legal costs that could have been avoided. Accordingly, the applicants, and in particular, the Union should be burdened with the costs of this application.

Order:

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

1. The Applicants' application is struck off the roll on account of lack of urgency.
2. The First Applicant is ordered to pay the costs of this application.

E. Tlhotlhalemaje

Judge of the Labour Court of South Africa.

APPEARANCES:

On behalf of the Applicants:

Adv. M Sekhethela with Adv. IM Khosa

Instructed by:

S. O. Ravele Attorneys

On behalf of the 1- 2nd Respondents: Adv. N A Cassim SC

Instructed by:

Norton Rose Fulbright South Africa INC

[1] Which reads; (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) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted”.

[1] Which reads;

- (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) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted”.

[2]

2010) 31 ILJ 112 at para 18

[3] See National Police Services Union v National Commissioner of the National Police Services and Others (1999) 20 ILJ 2408 (LC); Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another Case no: 379/2005 at para 9 and Vermaak v Taung Local Municipality (JR315/13) [2013] ZALCJHB 43 (12 March 2013)

[4] See Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another (supra) where it was held that: “Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it ‘as to it seems meet’ (Rule 6(12) (a)).

This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (See *Republikeinses Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972(1) SA 773 (A) 782A-783H) which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12) (a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance".

- [4] See *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* (supra) where it was held that:

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- [5] See *Golding v HCI Managerial Services (Pty) Ltd & others* [2015] 1 BLLR 91 (LC) at para 24, where it was held that; 'As Prest points out, a matter which is inherently urgent may be rendered not urgent and fall outside the provisions of the [High

Court] rules where an applicant delays in bringing the application as one of urgency. A delay of nine days may not appear to be lengthy, given the deplorably slow pace at which the wheels of justice often turn; but in circumstances where the applicant knew when the disciplinary hearing was due to commence and yet gave the respondents less than one day before this application was to be heard to file answering papers, having taken nine days to draft his own lengthy founding papers, I agree with Mr Pretorius that the urgency is self-created.'

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[6] See *AMCU v Northam Platinum Ltd* (2016) 37 ILJ 2840 (LC) at paras [21] – [22], where it was held that; “What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and Others*, the Court referred with approval to the following dictum from the judgment in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*: “... An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. 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.””

[6] See *AMCU v Northam Platinum Ltd* (2016) 37 ILJ 2840 (LC) at paras [21] – [22], where it was held that;

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[7]

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

[8] See *Booyesen v Minister of Safety & Security* (2011) 32 ILJ 112 (LAC) para [54].

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