

SOUTH AFRICA / JUDGMENT

Van Wyk v Khewija Engineering and Construction (J 859/2022) [2022]

ZALCJHB 238 (23 August 2022)

[2022] ZALCJHB 238

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 859/2022

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J 859/2022

In

the matter between:

CHRIS
VAN WYK
Applicant
And
KHEWIJA
ENGINEERING AND CONSTRUCTION
Respondent

Heard:

26 July 2022

Order:

26 July 2022

Date

of Reasons: 23 August 2022

(This

judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour

Court's website and released to SAFLII. The date for hand-down is deemed to be 11 August 2022.

JUDGMENT

PRINSLOO, J

Introduction

- [1] On 26 July 2022, this matter served before the Court as an opposed urgent application.
- [2] After considering the merits of the application and the submissions made, the following order was granted:
1. The Respondent is ordered to pay the Applicant his monthly salary for May and June 2022, less any statutory deductions and amounts already paid, within 48 hours of granting of this order;
 2. The Respondent is ordered to pay the Applicant his monthly salary for July 2022, less any statutory deductions, by no later than 31 July 2022;
 3. The Respondent is ordered to pay the Applicant his monthly salary, less statutory deductions, by no later than the last day of every month and to continue to do so until the Applicant's employment contract is lawfully varied or alternatively terminated;
 4. The Respondent is ordered to pay the Applicant's cost on a party to party scale.
- [3] The Respondent subsequently requested reasons for the order granted on 26 July 2022.

Background

- [4] The Applicant is employed by the Respondent as a senior project manager, engineering and he has been so employed since February
2009. The parties had entered into a written contract of employment in terms of which it was agreed inter alia that the Applicant would be paid his salary on or before the 25th of each month and that a contribution to medical aid and pension fund was included as benefits.
- [5] The Applicant's current salary amounts to a cost-to-company of R 152 714,47 per month and after all lawful deductions are made, he receives a net salary of approximately R 72 000 per month, depending on inter alia his fuel usage and overtime.
- [6] During the Covid-19 pandemic, the Respondent implemented cost-cutting measures, which resulted in a reduction of the Applicant's salary and benefits. The averments made in respect of those reductions and measures implemented by the Respondent are not relevant for purposes of this application and this Court makes no finding on any of the issues so raised.
- [7] On 26 April 2022, the Respondent addressed a letter to the Applicant wherein it recorded that due to the impact of the Covid-19 global pandemic and resultant hardship, the Respondent was forced to implement retrenchment and cost-cutting reduction initiatives in

July 2020. The implementation of the cost reduction initiatives was based on a 15% reduction in salary and a 15% reduction in pension fund contributions. The Respondent communicated inter alia that: “[e]ffective 1 April 2022 we confirm that the pension fund contribution portion of the cost reduction initiative has been suspended and we will resume the pension fund contributions including all insured risk premiums to Sanlam”.

- [8] In the Respondent’s answering affidavit, it is confirmed that “[t]he Respondent intended to restore the employees to their terms and conditions of employment from April 2022 onwards after the end of the State of National Disaster”.
- [9] The relevant period for the purposes of this application is May – July 2022. The Applicant’s case is that for the said period, the Respondent had failed to make full payment of his salary, notwithstanding undertakings to do so.
- [10] The Applicant’s case is that for the aforesaid period (May to July 2022) he had been paid the total amount of R 17 689,75, which is a fraction of his salary. Furthermore, for the period May and June 2022 the Respondent failed to pay the Applicant’s pension fund contributions and his medical aid contributions, which resulted in the suspension of his medical aid.

Urgency

- [11] The Applicant approached this Court on an urgent basis for relief, seeking an order that he be paid his monthly salary, with benefits, for May, June and July 2022.
- [12] The relevant portion of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court[1] provides that:

‘(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...’

- [13] An applicant that approaches the Court on an urgent basis essentially seeks an indulgence and to be afforded preference, in order to prevent the prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has in the founding affidavit, set forth explicitly, the circumstances which

render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary[2].

[14] 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*,^[3] the Court referred with approval to the following dictum from *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others*^[4]:

‘...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.’

[15] In deciding whether a matter is urgent, two considerations are involved. 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.

[16] In *Vermaak v Taung Local Municipality*,^[5] this Court has held that:

‘The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.’

[17] The Respondent opposed the application primarily on the grounds of urgency.

[18] It is evident from the Respondent’s opposition that urgency was challenged in respect of the averments relating to the events that dated back as far as April 2020. The Respondent submitted that the Applicant was well aware of the events since April 2020 and that he had at all material times agreed to the reduction in his monthly remuneration. I already alluded to the fact that the period between April 2020 and April 2022 is of no relevance for purposes of this application and that this Court, sitting as an

urgent Court, will not concern itself with the events that transpired during the said period.

[19] It is unfortunate that the parties burdened this Court with averments relating to issues that the urgent Court cannot decide on. However, I reiterate: this Court will only concern itself with the period May to July 2022, and the claim for remuneration in respect of the said period.

[20] The Applicant submitted that this application is urgent because he has a right to be paid his remuneration and the Respondent has a duty to pay him in accordance with the provisions of his employment contract. The Respondent has no defence in law and no other basis for its failure to pay him the remuneration due to him, and as a result of the Respondent's failure to pay him, the Applicant has suffered severe financial and emotional trauma and stress as the main provider for his family.

[21] It is trite that this Court has a wide discretion to determine the urgency with which applications should or should not be treated. I was satisfied that this

application was urgent and proceeded to deal with the merits of the application on that basis. I was satisfied that a case for urgency was made out, considering the applicable requirements.

Reasons for urgency

[22] The first requirement to consider is whether the reasons that make the matter urgent have been set out.

[23] The Applicant has set out the reasons for urgency in detail in his founding affidavit. The Applicant's case is that he has a clear right to be remunerated for the services he had rendered and to be paid timeously, as agreed to between the parties. The Respondent's failure to pay him his remuneration has left him financially destitute and has caused him trauma.

[24] The Respondent made numerous undertakings to pay his salary but still failed to do so. It is evident that the Respondent sent email communication to its employees on 31 May 2022, providing feedback on the May 2022 salaries and stating that "[f]eedback from funder is that they are still busy processing the payment and another update will be provided tomorrow morning. I sincerely apologise for the delay..."

[25] On 2 June 2022, there was another email update from the Respondent regarding the payment of the May 2022 salaries, stating that "[f]urther feedback from funder is that they are still planning to release the funds as soon as possible but we are not able to confirm a payment date but it should not be later than Tuesday the 7th June 2022. I sincerely apologise for the delay..."

[26] On 17 June 2022, there was another email update from the Respondent stating that "[f]ollowing from our positive meetings with our client today, funds should be released during next week but not later than Friday the 24th June 2022. I sincerely apologise for the delay..."

[27] On 25 June 2022, there was another email update from the Respondent regarding the payment of May and June 2022 salaries, stating that "[r]egretfully the funds from our client have not yet been received. We are communicating with the client to have the funds before month end. Upon receipt of the funds the salaries for May and June will be released to all staff. I sincerely apologise for the delay..."

- [28] On 30 June 2022, the Respondent communicated that funds have not been released, that the earliest payments will be around 6 or 7 July 2022, that medical aid contributions for May and June 2022 will be paid and that 25% of the May salaries will be paid next week. The Applicant was paid R 17 689,75 on 6 July 2022 and he launched this urgent application on 13 July 2022. The Applicant's case is that notwithstanding undertakings to pay, the Respondent failed to do so, thereby placing him in an impossible financial position.
- [29] The Applicant further submitted that he is the main breadwinner of his family. He has a two-year-old toddler and two minor children from his previous marriage, to whom he is liable to pay maintenance in terms of a Court order. The Applicant takes care of his elderly mother by paying her expenses. His mother's only income is a state pension, which is utilized for her food expenses. The Applicant is responsible to pay the remainder of her expenses, which include her accommodation at a retirement village and medical aid contributions.
- [30] Furthermore, the Applicant has tendered his services for the months of May, June and July 2022 and as such, he has a contractual entitlement to be paid his remuneration.
- [31] The Respondent's case, attacking the issue of urgency, is that if the Applicant disagreed with the May 2022 reduction, he ought to have approached this Court immediately and because he had not done so, he is not entitled to relief on an urgent basis.
- [32] There is no merit in this. The Applicant delayed instituting litigation, in view of the numerous undertakings made by the Respondent to pay his remuneration. These undertakings obviously created the expectation that the Respondent will honour its own undertakings and make the payment accordingly. Only when the last undertaking was made in July 2022, indicating that only 25% of his May 2022 salary would be paid in July 2022, did the Applicant realise that the undertakings given would not be honoured. The Applicant instructed his attorneys to address a letter to the Respondent on 11 July 2022, requesting an undertaking that payment of the balance of his May and June 2022 salaries and his July 2022 salary would be made by 25 July 2022. The Respondent did not respond to the attorney's letter and no undertaking was provided, whereafter this application was launched. In my view, the Applicant took a sensible and cautious approach, before running to this Court for urgent relief.
- [33] The Respondent further submitted that this application was not urgent because it was premised on the Applicant's financial position only, and the Respondent took it upon itself to dispute his financial position.
- [34] This Court must express its shock and displeasure with the manner in which the Respondent disputed the Applicant's averments about his financial position and it is difficult to accept that those averments made their way into Court papers, more so where the Respondent is legally represented and should have been advised differently.

- [35] Be that as it may, instead of acknowledging the Applicant's dire financial position due to its failure to pay him a salary for three months, the Respondent, in a despicable manner, disputed his financial position and made the most bizarre averments, for instance: the Applicant has recently divorced a chartered financial accountant, who earns extremely well and he would be entitled to seek a variation of his maintenance payments in the event that he could not afford same, the Applicant is in a relationship with an attorney who earns a substantial income and ought to be able to support the home during this period, the Applicant can enter into a payment holiday with his bank insofar as his mortgage bond is concerned and he has other family members who are of significant means and that he has not given any reason why no one else would be able to assist in the facilitation of payments towards the elders in the family.
- [36] Let it be clear, averments such as those made by the Respondent have no place in an application such as this one, more so where the Respondent is wholly incapable of providing a reason in law not to pay the Applicant his remuneration. The Respondent is not the Applicant's legal representative and was not invited nor asked to provide alternatives or advice to the Applicant as to how best to deal with his financial situation.
- [37] The Respondent submitted that there is a plethora of decisions by this Court that held that financial hardship and loss of income are not considered grounds for urgent relief. The approach by this Court in respect of financial hardship has been developed and in *Harley v Bacarac Trading 39 (Pty) Ltd*[6] (*Harley*), when considering the authorities submitted by the respondent in arguing that the matter was not urgent, the Court (per Van Niekerk J) held that:
- 'None of these cases, it seems to me, establishes that financial hardship and loss of income can never be grounds for urgency. If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this Court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'
- [38] In *Mthembu v Mpumalanga Economic Growth Agency*[7] (*Mthembu*), the applicant approached the Court on an urgent basis seeking an order declaring that the agreement of employment concluded between

herself and the respondent to be extant and further ordering that the respondent abides by the terms of the agreement. The applicant, in setting out the grounds for urgency, alleged that inter alia the loss of employment would result in severe irreparable financial harm, her ability to financially support her family and future career opportunities and financial commitments. The Court referred to *The Democratic Nursing Organisation of South Africa and Another v Director General of Health and Others*,[8] and *Harley* and stated that –

‘I nevertheless align myself with the view that the court should not as a rule of thumb, throw out urgent applications brought mainly on the grounds of financial hardship or loss of income, and should rather look at the merits of each case, ascertain whether compelling or exceptional circumstances exist for it to intervene on an urgent basis, and then exercise its discretion accordingly. In line with this approach, I further accept that an employee should be entitled to urgent relief if she can demonstrate detrimental consequences that may not be capable of being addressed in due course and if she is able to show that she will suffer irreparable hardship if the Court did not intervene on an urgent basis.’

[39] Further, the Court considered the right to fair labour practices (section 23) read together with the right to administrative action which is lawful, reasonable and procedurally fair (section 33)[9] and held that these rights are further amplified by section 185 of the Labour Relations Act[10]. The Court stated that “[i]t therefore follows that if the employer in circumstances that appear grossly unfair or unlawful infringes these rights, the subsequent consequences of financial hardship and loss of income are factors that ordinarily arise from the infringement of these rights, and these factors should persuade the court to intervene on an urgent basis.[11]”

[40] In *Munthali v Passenger Rail Agency of SA*[12] (*Munthali*), the applicant sought urgent relief declaring her employment contract with the respondent as extant and ordering the respondent to comply with the terms of their agreement by retrospectively reinstating her in its employ. Tlhotlhemaje, J agreed with the position taken in *Ledimo and others v Minister of Safety and Security and Others*,[13] and held that “...there is no immutable rule that financial exigencies cannot be invoked to lay a basis for urgency.”[14]

[41] In my view, a claim for payment of salary and benefits brought by an applicant, still employed and still rendering services, is different from a similar claim by a dismissed employee. The fact that the employment relationship remains intact, is a factor that weighs in favour of the employee in considering whether the matter should be heard on an urgent basis. This was alluded to in *Police and Prisons Civil Rights Union on behalf of Sephanda and another v Provincial Commissioner: South African Police Services, Gauteng Province and another*,[15] where it was held that:

‘[5] The respondent cited a number of cases in which financial or pressures were deemed insufficient to justify urgency, on the basis that alternative mechanisms existed for a party to recover financial loss and financial pressure, as such, was not deemed to be a valid reason for treating the matter as urgent, such as *Hultzer v Standard Bank of SA (Pty) Ltd* (1999) 20 ILJ 1806 (LC) and *Democratic Nursing Organisation of SA & Another v Director-General, Department of Health & Others* (2009) 30 ILJ1845 (LC). In those cases the employees claiming payment of remuneration or continuation of benefits had already been dismissed when they initiated urgent proceedings. It stands to reason that granting relief in the form of remuneration or other benefits of employment when the very employment status of the individual is in issue, would be an extraordinary remedy.

- [6] However, the circumstances in this case are not strictly comparable. The applicants currently remain employees of the respondent. The drastic measure taken by the employer of stopping the applicants' salaries whilst they remained employed is the exercise of an extraordinary power which makes a serious inroad into an employee's common-law employment right to be remunerated so long as one remains in employment and tenders one's services. To my mind, this is the type of situation in which a claim for payment of salary can be raised on an urgent basis, in the same way that any failure to pay wages to an employee who remains in service could give rise to an urgent application for specific performance. An employer's obligation to remunerate an employee is a fundamental component of the reciprocally rendered obligations of the employment contract.'

Absence of substantial relief

- [42] The second requirement to consider is whether the applicant seeking relief will not obtain substantial relief at a later stage.
- [43] The Applicant explained that he is unable to afford his medical aid contributions in the absence of receiving his full salary, which resulted in the suspension of his medical aid and which leaves him at severe risk. He further stated that the Respondent's failure to pay him his salary and benefits left him unable to service his monthly financial obligations, which difficulty will only escalate further. He had to use his credit card facilities, utilised funds accessible from his universal loan and had to withdraw money from his access bond in order to stay afloat and make ends meet, awaiting the payment of his salary. He is no longer able to withdraw money from his loans as he had withdrawn all the available funds and his funds are completely depleted.
- [44] The Applicant is required to make payments on the bond over his primary residence and should he fail to make such payments, Absa Bank will be able to call up the entire amount and take action against him, which places him at risk to lose his primary residence and to be sequestered.
- [45] In my view, the Applicant was able to demonstrate detrimental consequences that may not be capable of being addressed in due course. The Applicant made it clear that he had depleted the funds he had access to, he has no medical aid cover, and he will not be able to honour his obligations in respect of his two minor children, which is an obligation in terms of a Court order, he faces the risk of losing his primary residence and the risk of being sequestered. These are consequences so severe and detrimental that this Court cannot expect the Applicant to suffer them and wait for redress in due course.
- [46] The alternative is for the Applicant to issue summons based on a breach of contract. Such litigation will take a long time to be finalised, by when the Applicant could have already been sequestered, lost his primary residence and was unable to provide for his family. Those consequences would not be reversed if he successfully claims his money from the Respondent in future litigation.

[47] The Applicant was able to demonstrate that he will suffer undue hardship if the Court were to refuse to come to his assistance on an urgent basis. I reiterate: the Applicant is a serving employee of the Respondent, he is entitled to his remuneration and his

position is different from that of a dismissed employee who seeks urgent relief solely on the grounds of financial hardship.

[48] It was for the aforesaid reasons, based on the merits of the case and the exceptional circumstances presented, that this Court exercised its discretion to deal with the matter urgently.

The merits

[49] The Applicant seeks the payment of his monthly salary, with benefits, for May, June and July 2022.

[50] It is not disputed that the Applicant was only paid a fraction of his May 2022 salary on 6 July 2022 and that no payments were made in respect of the remainder of his salary for May 2022. It is also not disputed that no payments were made in respect of the Applicant's salary, including benefits, for June and July 2022.

[51] The Respondent did not dispute the Applicant's entitlement to his remuneration of the amounts claimed by the Applicant. The only defence put up by the Respondent is that its inability to make full and timeous payments of its employees' salaries is an ongoing issue, but one the Respondent is addressing as and when it has the necessary cash flow. The Respondent further submitted that it treats its employees across the board the same, including the Applicant, and where monies are available to make payment in full or in part, it is apportioned to the various employees in accordance with that which is owing to them and that which is available to make payments with.

[52] The Respondent's case is that the institution of this application and requiring the Court to make an urgent order for payment to the Applicant would be detrimental to the operational challenges which the Respondent currently faces. It must treat its employees equally and make payments to them.

[53] It is trite that where an employee has rendered his or her full time services, he or she is entitled to a full salary. To withhold an employee's salary makes inroad into an employee's common-law employment right to be remunerated so long as one remains in employment and tenders one's services. The fact that the Respondent is unable to pay salaries due to financial constraints, is a different issue with different remedies and is not a defence in a case such as the present.

[54] In argument, Mr Munsamy for the Respondent conceded that the Applicant was entitled to the relief sought in prayers 2 and 3 of the notice of motion and that he was entitled to his remuneration, as reflected in the salary advices. Mr Munsamy submitted that the Respondent will make payments to the Applicant as soon as funds are available to do so.

[55] Considering the facts and the concession made by Mr Munsamy, the Applicant has made out a case for the relief that was ultimately granted to him on an urgent basis.

Costs

[56] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[57] In *Zungu v Premier of the province of KwaZulu-Natal and others*,^[16] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[58] This is a case where the Court has to strike a balance. The generally accepted purpose of awarding costs is to indemnify the successful

litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*,^[17] it was emphasized that:

‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded its costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this Court, whether as applicant in launching proceedings or as respondent opposing proceedings.’

[59] Ms Coetzee for the Applicant submitted that the Applicant is entitled to costs. He made many attempts prior to approaching this Court to get the Respondent to pay his remuneration and in the end, he was left with no other option but to approach this Court for relief. Ms Coetzee argued that a punitive cost order should be awarded in favour of the Applicant.

[60] Mr Munsamy submitted that a punitive cost order was not warranted as the Respondent opposed this application with clean hands. He submitted that the Applicant sought relief in terms of prayer 1 – 7, some of which the Applicant was not entitled to and therefore the Respondent had to oppose the application. Mr Munsamy further submitted that a cost order against the Respondent would cause it further financial hardship and that the Respondent is not unwilling to pay the Applicant, but is merely unable to do so.

[61] In my view, this is a case where it is appropriate to make a cost order. The Respondent conceded the relief that was ultimately granted to the Applicant and the remainder of the relief sought, was not sought against the Respondent and there was no reason to defend it.

[62] The Applicant is an individual, who has not been paid what he is entitled to and due to the conduct of the Respondent, he was left

with no other option but to approach this Court for relief. He is entitled to costs, but in my view, no case has been made out to justify a punitive cost order.

[63] I deemed it just and equitable for the Respondent to pay the Applicant's cost.

[64] It was for these reasons that the order was granted on 26 July 2022.

Connie Prinsloo

Judge of the Labour Court of South Africa

[1] GN 1665 of 1996: Rules for the conduct of proceedings in the Labour Court.

[2] See: *Transport and Allied Workers Union of SA v Algoa Bus Company (Pty) Ltd and others* (2015) 36 ILJ 2148 (LC).

[3]

(2015) 36 ILJ 1331 (LC) at para 17.

[4]

[2012] JOL 28244 (GSJ) at para 6.

[5] Unreported judgment under case no JR 315/13 delivered on 12 March 2013 at para 12.

[6] (2009) 30 ILJ 2085 (LC) at para 8.

[7] Unreported judgment under case no: J991/15 delivered on 17 June 2015 at para 19.

[8] (2009) 30 ILJ 1845 (LC).

[9] Sections 23 and 33 of the Constitution of the Republic of South Africa, 1996.

[10] Act 66 of 1995, as amended.

[11] Mthembu at para 20.

[12] (2021) 42 ILJ 1245 (LC).

[13] Unreported judgment under case no 2242/2003 delivered on 28 August 2003.

[14] Munthali at para 9.

[15] (2012) 33 ILJ 2110 (LC) at paras 5 – 6.

[16] (2018) 39 ILJ 523 (CC) at para 24.

[17] (2012) 33 ILJ 2117 (LC) at para 176.

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