REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR315/13

In the matter between

VERMAAK, M **Applicant**

and

TAUNG LOCAL MUNICIPALITY **Respondent**

Heard: **12 March 2013**

Delivered: **12 March 2013**

JUDGMENT

MOSHOANA, AJ

[1] This is an urgent application brought against various respondents. In brief the facts of this matter are that the applicant Maartin Phillip Vermaak was appointed as the chief financial officer of the Greater Taung Local Municipality, effective 16 January 2012.

[2] After a disciplinary hearing, which the applicant contends is unlawful, the applicant was dismissed on 29 January 2013.

[3] On 15 February 2013 the applicant launched this application.

[4] On 25 February 2013 the applicant referred a dispute of alleged unfair dismissal to the CCMA, which dispute is still pending before that forum.

[5] In opposing the application, the respondents raised a number of points *in limine*. The one argued before me, to which this judgment relates, is one of lack of urgency. The contention of the respondents are that this application is not urgent and ought to be struck off the roll on that basis alone.

[6] It is important to mention at this stage that urgency is a matter for discretion, which ought to be exercised judiciously. Rule 8 of the rules of this court provides that in an application brought on an urgent basis, a party seeking an urgent relief ought to set out the reasons why an urgent relief is necessary.

[7] Mr Olua, appearing for the respondents, argued that such reasons why the matter should be entertained on an urgent basis are absent, therefore this Court ought to refuse as it were, to exercise its discretion for hearing the matter.

[8] I agree with Mr Ellis for the applicant that when it comes to urgency there are two considerations, firstly whether the reasons that makes the matter urgent, have been set out and secondly whether the applicant seeking a relief will not obtain a substantial relief at a later stage.

[9] The applicant before me deals with urgency as contemplated in rule 8 of the rules of this court, in paragraph 18 of the founding affidavit which reads:

> 'I received a dismissal letter on 29 January 2013. I also referred an unfair labour practice dispute relating to my unfair suspension, to the CCMA, which dispute was set down for con-

> arb proceedings in Vryberg on 31 January 2013. My legal representatives had to prepare for the proceedings and could not attend to the present application at an earlier stage. The first available date for consultation with my legal representatives in Pretoria was on Thursday 07 February 2013. Counsel was involved in a trial in the Johannesburg High Court, which was only finalised on Wednesday, 06 February 2013. I duly handed them copies of all the relevant documentation in my possession, and instructed them to prepare the present application on an urgent basis. The application was prepared over the weekend of 08 February 2013, and I was presented with a draft application on Monday, 11 February 2013. The application was finally settled on Tuesday, 12 February 2013. It is humbly submitted that I have taken all reasonable steps in the preparation of the application on an urgent basis, and the delay in bringing the application is not unreasonable under the circumstances. The respondents are provided sufficient time and opportunity to prepare for their response to the application, and they cannot claim any prejudice as a result of this application being brought on an urgent basis. My post was already advertised in the Rapport newspaper on 03 February 2013, a copy of the advertisement is annexed hereto as Annexure 'L'. I submit that I would not be able to obtain appropriate relief if this matter is only heard in the normal course, since by the time the application would be enrolled a new appointment will most likely have been made.'

[10] It is clear from the above quoted evidence that what the applicant tells the Court is simply the reasons why he delayed in launching the application on an urgent basis.

[11] However, what a party is required to deal with is the reasons why an urgent relief is necessary. When I raised this issue with Mr Ellis, he then referred me in particular to the date of 03 February 2013, which is the date on which the post was advertised, and contended as already alleged in the founding papers, that if the

position is filled the applicant will be without a relief of reinstatement as it were.

[12] 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.

[13] With the matter before me all I have is that if the relief is not granted as it were, today, since an application would not be enrolled in the normal course much earlier, by the time the applicant comes to court an appointment would have been made. In the course of the submissions I drew Mr Ellis' attention to some authorities of this court and the LAC, that an employer who is faced with a claim for unfair dismissal, if the employer fills that position, albeit still under contention, it does so at its own risk.

[14] In any event, reinstatement is a primary remedy in terms of section 193 of the LRA, the Act sets out certain circumstances under which reinstatement would not be an appropriate remedy. The reasoning of this Court and the Labour Appeal Court has always been that the fact that the position has been filled is not one of those circumstances that will exclude the remedy of reinstatement being awarded by this Court and/or the CCMA.

[15] Therefore in my view, the applicant has not set out in its papers, or given the Court reasons why it should be assisted as quickly as today and not the other day.

[16] What I had contemplated as I was hearing the matter was a relief to the effect that if this Court does not interdict the filling of the post, the applicant would be somehow subjected to some form of

illegality.

[17] I then inquired from Mr Ellis whether an interdict is being sought in the papers, to stop the respondent to fill the post. He informed me that that was the case.

[18] In reply he mentioned that the relief is implied in paragraphs 4 and 5 of the notice of motion. Paragraphs 4 and 5 of the notice of motion reads as follows:

> '4. That the applicant shall remain employed by the second respondent as its chief financial officer on the terms and conditions of employment contained in the written contract of employment, Annexure 'A' to the founding papers.
>
> 5. That the second respondent be ordered to continue to give effect to the terms of the applicant's written contract of employment, Annexure 'A' to the founding papers until such time as the contract of employment is lawfully terminated.'

[19] I cannot agree that out of those paragraphs it is implied that the applicant is specifically seeking an injunction to fill in the post.

[20] As I had indicated to Mr Ellis that what would ordinarily happen, which may happen, is as he is currently arguing in court, the employer continues to fill in the post, running the same risk that was contemplated in the judgments that I had referred to earlier. There is nothing that would have stopped the respondents to do so unless if there was a specific prayer in the papers seeking an injunction for them not to do so.

[21] Reference was made to the decision of this court in the *IMATU v The Department of Health*[1] where my brother Molahlehi J had

[1] 2011 (4) BLLR 366 (LC)

dismissed an application that was seeking an interim relief. At paragraph 23 of the judgment he said the following:

> '…. In the same way as the first application this matter turns on two aspects of the requirements of urgency which are interrelated. The first issue is whether, the facts as presented mainly by the applicants support the contention that the matter is urgent and therefore justify jumping the queue. The second aspect which is also an aspect of the urgency concerns the issue of whether there are no other satisfactory remedies available to the applicants in the event that the respondents effect the transfer in contravention of the provisions of section 197 of the LRA.'

[22] At paragraph 24[2] the learned judge went further to state:

> 'In my view, this matter is not urgent firstly because the applicants have been aware for the past three years what the intentions and plans of the respondents were regarding the transfer of the health services to the first respondent. And secondly, because on their own version they were already aware of the plans of the fifth and sixth respondents since the meeting of the South African Local Government Bargaining Council (the "SALGBC") which was held on 24 January 2010. At that meeting the applicants raised their concerns about the stand taken by the two respondents but did nothing since then until the launch of their first application.'

[23] Regarding the applicant's views of alleged unlawfulness, it is clear from the papers that the applicant was at all times aware of what was happening, and to the point that he held a view that the employer was busy with an unlawful action. The question is why did he not approach the court then to interdict the alleged and apparent unlawful action?

[2] id para 24

[24] Mr Ellis for the applicant contended, rightly so, that this Court is loath to intervene in incomplete proceedings. However, the LAC, in the *Booysens* judgment made it very clear that unless a party shows exceptional circumstances, this Court has no powers to intervene. In one of the recent judgments of this court it was pointed out that unlawfulness or continuation thereof serves as exceptional circumstances for this Court to intervene.

[25] In my view the applicant ought to have, if there was any unlawfulness, taken steps. The fact that he did nothing until 15 February 2013 counts against him.

[26] On 03 February 2013 he becomes aware of another angle that will affect his relief in the long-run, that is the filling of the post. He does nothing until 07 February when he went to consult the legal team. More so he does not seek to interdict the filling of the post, that part of the relief, in my mind, if it was specifically sought, might have been perhaps urgent. I do not agree that that kind of relief ought to be implied from paragraphs 4 and 5.

[27] The applicant finds himself in the same position as millions of employees who are dismissed, whether fairly, unfairly or lawfully or unlawfully, on a daily basis. The question is what makes the applicant special to have his case determined quickly. That is the reason why rule 8 requires a party to set out the reasons why the relief is necessary. His relief is still there on another day, like millions of dismissed employees. The fact that the applicant chose to peg his claim as one of unlawfulness as opposed to unfairness is of no moment.

[28] In the premises I am not persuaded that the application is urgent. That brings me to the question of costs. Mr Olua had pressed on me to make a costs order at a punitive scale. The reason behind that being that the applicant was warned in advance. To my mind this application was ill-conceived. The applicant had already

sought a remedy in another forum, the CCMA, as to why he came to this court, albeit under the banner of unlawful dismissal, it baffles me.

[29] I know that I am not to deal with the merits of the other points raised, and I have read the heads filed by the applicant's counsel with care. I do not believe that the applicant is to be considered at any different level than any employee who had been dismissed.

[30] The *Fedlife* judgment that has been relied on, its position was properly clarified in the *McKenzie* judgment by the Supreme Court of Appeal, that the only relief a party facing dismissal has is the one in the LRA. Besides *Fedlife* dealt with a fixed term contract whereas in this matter the applicant was a permanent employee.

[31] *En passant* I must just mention that the alleged unlawfulness by the applicant is doubted. In any event as I am considering the matter on the basis of whether there is urgency, it might be an issue for another court at another time.

[32] In the result I make the following order:

1. The application is struck off the roll.

2. The applicant is to pay the respondents' costs on attorney and own client scale.

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Moshoana, AJ

Acting Judge of the Labour Court

Appearances

For the Applicant:	P Ellis SC
Instructed by:	Nislen Steenkamp & Koen Inc
For the Respondent:	A Olua
Instructed by:	Phungo Attorneys Inc