Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1710/2015

In the matter between:

THEMBA ZULU **Applicant**

And

HOTEL, LIQUOR, CATERING, COMMECIAL & ALLIED WORKERS UNION OF SOUTH AFRICA ["HOTELICCA"] **First Respondent**

GETRUDE KHOZA (NATIONAL PRESIDENT) **Second Respondent**

Heard: 28 August 2015

Delivered: 28 August 2015

Summary: (interdict-unlawfulness-lack of urgency-costs)

JUDGMENT

LAGRANGE J

[1] This is an urgent application seeking a final declarator that the applicant's suspension on 6 August 2015 is ultra vires the first respondent's Constitution and that his suspension be set aside and he would be allowed to resume his duties as general secretary of the first respondent. The respondents raised preliminary objections relating to urgency and jurisdiction.

[2] During the course of argument, the respondents rightly conceded that this court does have jurisdiction to deal with the lawfulness of a suspension as opposed to simply the unfairness thereof. Consequently the only other preliminary point to be determined is that of urgency.

[3] The applicant was suspended by the first respondent on 6 August 2015 as a precautionary measure to investigate allegations of misconduct which were set out in the letter of suspension. The following day the applicant issued a letter to all structures of the union, NEC and BEC members as well as ordinary members and NACTU affiliates and members. The letter calls on intervention not by the union but by NACTU CC members and affiliates to save the union "from the destructive program" of a certain Mr N Moloto, the general secretary of NACTU, BCAWU and PAC. It also states in one line that the so-called suspension "is rejected" and "does not hold water". No direct appeal was made to any structure of HOTELLICA to rescind or revoke the actions of the President in suspending the applicant.

[4] There is no evidence in the founding papers that the applicant took any steps to appeal against his suspension internally to any appropriate union structure, but he claims that he learnt, at some unspecified time, that the issue of his suspension would be raised and dealt with during the NEC's ordinary meeting scheduled for 22nd to 23rd of August 2015. He states that: "I was then relieved of the NEC would successfully deal with the issue of my suspension in my favour."

[5] He then says that he learnt to his shock and surprise that the meeting had been postponed without a new date been set which placed him in limbo and meant that the issue of his suspension would "not to be remedied by the NEC on 22nd to 23rd of August 2015." No attempt was made to find out if and when an NEC meeting would take place. Instead an ultimatum by way of a letter from the applicant's attorney was written to the respondents on 18 August 2015 demanding that his unlawful suspension been lifted by no later than 10 H00 the following day. It is common cause that by the following day the second respondent refused to comply with the demand. The next step taken by the applicant was to launch this urgent application on Friday 21 August, calling upon the respondents to file any opposing papers by 14h00 on 24 August 2015 and setting the matter down for Tuesday, 25 August 2015. No reasons of any substance were advanced in the founding papers why the matter had to be enrolled for that date and why the respondents had to be placed under such a short timetable for filing of answering the affidavits.

[6] It is a trite principle in urgent applications that a party must justify the degree to which it wishes to abbreviate the rules of court in bringing an urgent application. In this instance, the time period in question is the abbreviation of the 15 court days that would normally be required to finalise pleadings. If one considers what prompted the application being brought on 21 August rather than a week or so after the applicant was originally suspended, the only explanation apparent from the papers is that he learnt that the NEC, which he believed was the appropriate forum to deal with his issue would not be sitting. If the respondent had refused to notify him of the next date on which the NEC would sit, or if that date was unreasonably far away, that might have justified him launching the application when he did. However, even if he felt the absence of an imminent NEC meeting was sufficient reason to launch the application, that does not explain why the respondent's had to be given the short notice they were given, nor does it explain why the matter had to be set down on Tuesday this week.

[7] The applicant argued that in so far as the matter might have been set down earlier than necessary that is simply an issue which goes to the

question of costs. I disagree. It is an issue that goes to the very essence of justifying expedited proceedings. I do not for a moment suggest that the applicant would not have been justified in seeking urgent redress if he was unable to obtain any substantial relief from the structure of the union which he claims is the only one that can deal with issues of discipline and suspension, within a reasonable time. The first time he ever raised the importance of the NEC addressing his suspension was in the founding affidavit. In reply the respondents agreed that the previously scheduled NEC had been postponed, but pointed out that a special NEC meeting was scheduled for 29 August 2015 at which the very issue of his suspension and charges, amongst other things would be discussed. The notice of this meeting was issued on the day before the applicant launched this application.

[8] At the hearing of this matter, it was suggested that what also made the matter urgent was that it was untenable for the applicant to remain unlawfully suspended when the decision to suspend him was in effect a nullity because the President did not have the power to suspend him in the first place. It was also argued that the NEC could not in fact remedy his unlawful suspension, even though in his own papers he clearly saw that body as the appropriate one to address his complaint. Even assuming the NEC cannot change the fact that an allegedly unlawful decision was taken at a particular time, there is no reason why it cannot simply reinstate the applicant so that he can perform his duties. Thereby the applicant could obtain substantial redress.

[9] Had the applicant simply demanded a hearing before the NEC, which it seems is what he was waiting for, instead of launching the application, he would have learnt that an NEC intended to deal with his suspension was already scheduled. Accordingly, he could then have demanded an opportunity to make representations at that meeting as to why he should be immediately reinstated and why no further suspension should be imposed. He jumped the gun and launched the application instead. Not only was his application premature but it also without justification sought to have the matter heard on extremely short notice.

[10] Whatever the merits of his claim that his suspension was unlawful are, I am satisfied that the applicant failed to meet the requirements of urgency for the reasons above, and the matter must be struck off the roll for lack of urgency.

[11] On the question of costs, the respondents are seeking punitive costs against the applicant. Given that there may be merit in his underlying claim and accepting that the application might have been launched on advice at extremely short notice, I am disinclined to award the respondents their costs of opposing the application on the first day. However, once the applicant had received the answering affidavit and realised that an NEC meeting was scheduled to be held tomorrow, he should not have persisted with this application but should at least have asked for it to be postponed pending the deliberations of that meeting. In those circumstances today's proceedings were unnecessary and the wasted costs associated with attendance and preparing for today's argument should be paid by the applicant.

Order

[12] The application is struck off the roll for lack of urgency.

[13] The applicant must pay the respondent's costs of today's appearance including the costs of preparing for today's hearing, which include the costs of counsel.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Adv. J S MPHAHLANE
Instructed by:	Baloyi Attorneys
RESPONDENTS:	Adv. T. Colyn
Instructed by:	Van der Merwe Associates