THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1671 / 16

In the matter between:

AMCU **First Applicant**

INDIVIDUALS LISTED IN ANNEXURE "XPL1" **Second to Further Applicants**

and

NORTHAM PLATINUM LTD **First Respondent**

NUM **Second Respondent**

Heard: **18 August 2016**

Delivered: **19 August 2016**

Summary: Urgent application – requirements for urgency – principles set out

Urgency – applicant must make out case for urgency – urgency self created – application struck from the roll

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter is an illustration that where it comes to employment law, ingenuity shows little bounds. But even ingenuity, no matter how noble the objective, must still be applied within the parameters of certain prescripts.

[2] The applicants brought an urgent application in terms of which the applicants sought relief to the effect that the dismissal of the individual applicants by the first respondent on 5 July 2016 be declared to be invalid and/or unlawful in that such dismissal:- (1) was in breach of Section 23 as read with Section 83 of the Mine Health and Safety Act[1]; (2) was in breach of the individual applicants' constitutional rights to dignity, integrity and freedom and security of person; and (3) was in breach of their contracts of employment based on an implied term relating to insuring of the health and safety of the individual applicants.

[3] The matter was strenuously opposed, with a plethora of points *in limine* raised. It was disputed there was any unlawful dismissal. One of the points raised also specifically was that the application was not urgent. When the matter was argued before me on 18 August 2016, only the issue of urgency was addressed.

[4] Before I deal with the issue and requirements of urgency itself, it is necessary to deal with the judgment in *Solidarity and Others v South African Broadcasting Corporation*[2]. This judgment was given pursuant to an urgent application in which the applicants equally sought relief that their dismissals be set aside on the basis that it was unlawful and in breach of their contracts of

[1] Act 29 of 1996.
[2] [2016] ZALCJHB 273 dated 26 July 2016 per Lagrange J.

employment. After referring to two earlier Labour Court judgments[3], Lagrange J held:[4]

> '…. The SABC advanced no authority why either of these judgements were wrong either with respect to the power of the Labour Court to hear and determine contractual disputes or to make orders pronouncing on the lawfulness of a breach of contract or granting relief in the form of specific performance in the exercise of jurisdiction under s 77(3) of the Basic Conditions of Employment Act ('the BCEA'). …. Consequently, the Labour Court is entitled to entertain the applicants' claims based on any alleged invalid termination of their contracts of employment and to make orders which are competent in claims based on breach of contract ….'

This reasoning is in my view clearly correct.

[5] But, and as a result of the judgment in *SABC*, an unforeseen, and I am quite sure unintended, consequence has arisen. The judgment has been taken to now establish some sort of licence for litigants to approach the Labour Court on an urgent basis challenging dismissals as being unlawful. There seems to be a general view that the fact that the dismissal may be considered to be unlawful, and is challenged on that basis, is in itself is a basis of urgency It needs to be made clear that such an approach would be wrong. In fact, this was recognized by Lagrange J himself in SABC, where the learned judge said:[5] 'The mere fact that the applicants have been dismissed in breach of their contracts of employment might not in and of itself warrant urgent relief. What makes the application urgent is related to a number of factors. ….'.

[6] Whilst it may be so that a dismissal could in particular circumstances, and where the LRA is not relied upon, be considered to be unlawful and consequently invalid because of a specific provision in a contract of employment which has been breached, this cannot per se serve to jump the queue of all other dismissed employees relying on the provisions of the LRA waiting for their turn in Court. This kind of situation is merely another cause of action upon which the termination of a contract of employment can be

[3] *Ngubeni v National Youth Development Agency and Another* (2014) 35 *ILJ* 1356 (LC) and *Dyakala v City of Tshwane Metropolitan Municipality* (J 572 / 15) [2015] ZALCHB 104 (23 March 2015).
[4] Id at para 47.
[5] Id at para 68.

challenged in the Labour Court. But other than that it holds no particular magic.

[7] The application by the applicants is certainly founded on this alternative cause of action for challenging a dismissal. To call it novel is an understatement, and it would certainly be tempting for any Judge to grapple with these novel concepts. But novelty does not urgency make.

[8] There is no reason why the adjudication of an invalid dismissal in the Labour Court cannot be dealt with in terms of the provisions of either Rules 6 or 7 of the Court Rules, as the case may be, depending on the scope and extent of possible factual disputes. If a litigant seeks to have the matter determined as one of urgency, a proper case of urgency as contemplated by Rule 8 still has to be made out. The question is whether the applicants have made out such a case for urgency.

Facts relating to Urgency

[9] This matter has its foundation in tragic events that occurred on 6 June 2016, when, in an altercation between members of the first applicant and the second respondent, a member of the first applicant was tragically killed. The upshot of these events is that the individual applicants, as members of the first applicant, did not return to work at their workplaces at the first respondent.

[10] On 15 June 2016, the first respondent informed the individual applicants by SMS that a desertion process would be applied to the individual applicants if they did not return to work. These messages were repeated on 21 and 22 June 2016.

[11] On 20 June 2016, Nkome Inc, representing the applicants, sent correspondence to inter alia the first respondents, setting demands for the individual applicants to return to work. In this correspondence, it is recorded that a failure to adhere to these demands would result in an urgent approach to the Courts. An answer was demanded by 24 June 2016.

[12] The first respondent did not accede to these demands. Rather, it said on 21 June 2016 that until the individual applicants returned to work, the principle of no-work-no-pay would apply.

[13] On 24 June 2016, the individual applicants were informed that since they had not returned to work, they were instructed to resume their normal duties at their next shift and that the desertion process was now applicable.

[14] On 28 June 2016, the first respondent dispatched a notification to the applicants, calling on them to attend a disciplinary enquiry to be held on 4 July 2016 on a charge of being absent without permission for longer than 5 days.

[15] The individual applicants were then dismissed on 5 July 2016, after boycotting their disciplinary inquiries the previous day.

[16] On 8 July 2016, Nkome Inc again wrote to the first respondent. In this letter, the services of the individual applicants were tendered to the first respondent. It was demanded that the first respondent answer by 8 July 2016 to this tender of services, failing which the High Court will be approached on an urgent basis for relief.

[17] On 11 July 2016, the first respondent's attorneys wrote to Nkome Inc, inter alia indicating that it would oppose any such relief.

[18] Nkome Inc then withdrew as attorneys of record for the applicants, and the applicants' current attorneys were appointed on 22 July 2016. These newly appointed attorneys sought to explore settlement, but on 28 July 2016, it was made clear by the first respondent that it had no intention of settling this matter.

[19] On 29 July 2016, the applicants referred an automatic unfair dismissal to the CCMA as a result of their dismissal on 5 July 2016. The application now before me then also followed on 4 August 2016.

<u>Principles - Urgency</u>

[20] As stated above, urgent applications are governed by Rule 8. In considering Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[6] said:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily 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 a deviation from the rules.'

[21] 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*[7] 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*:[8]

> '…. 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.'

[22] Similarly, and in *Maqubela v SA Graduates Development Association and Others*[9] dealt with the consideration of urgency as follows:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later

[6] (2010) 31 ILJ 112 (LC) at para 18. See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).
[7] (2015) 36 ILJ 1331 (LC) at para 17.
[8] [2012] JOL 28244 (GSJ) at para 6.
[9] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

> stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshoana AJ aptly put it in *Vermaak v Taung Local Municipality*:
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> '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.''

[23] Where an applicant seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established.[10] In simple terms, the applicant must make out an even better case of urgency. In *Tshwaedi v Greater Louis Trichardt Transitional Council*[11] the Court said:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ….'

[24] But it is not just about the applicant. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.[12]

[25] Also, urgency must not be self created been self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[13]

[26] A final consideration where it comes to urgency is expedition when taking action. In other words, the more immediate the reaction by the litigant to

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[10] [2002] JOL 9452 (LC) at para 8.
[11] [2000] 4 BLLR 469 (LC) at para 11.
[12] *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) SA 108 (C) at 113D-114C.
[13] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd & Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50; *Association of Mineworkers and Construction Union v Lonmin Platinum (comprising Eastern Platinum Ltd & Western Platinum Ltd) and Others* (2014) 35 *ILJ* 3097 (LC) at paras 30-44.

remedy the situation by way of instituting litigation, the better it is for establishing urgency.[14] But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* the Court held:

> '… if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency.'

Analysis

[27] I applying the above principles relating to urgency to the facts of this matter, I have little hesitation in concluding that the applicants' application is not urgent, for the reasons I now set out.

[28] Firstly, there has been an inordinate delay in the brining of this application by the applicants, which diminishes urgency. At best for the applicants, their dismissal on 5 July 2016 should have been the catalyst for the brining of an urgent application. But it took the applicants one month to bring the application. The applicants, if their situation was such as described in their founding affidavit, should have taken immediate action and have brought an application immediately following their dismissal. In *Mashiya v Sirkhot NO and Others*[15] the Court dealt with a period of delay from a period of delay from 25 July to 19 August was considered to be unacceptable. And in *Ngcongo v University of South Africa and Another*[16] the Court found a five week delay in seeking to urgently challenge a ruling, without any proper explanation for it, to be not urgent. In my view, the same considerations apply in casu.

[29] The applicants simply offer no explanation why no urgent legal proceedings were instituted immediately after 5 June 2016, and why no urgent action was taken as threatened in the letters by Nkome Inc on 20 June and 8 July 2016. The failure to offer such an explanation weighs heavily against the applicants

[14] See *University of the Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) at para 15.
[15] (2012) 33 ILJ 420 (LC).
[16] (2012) 33 ILJ 2100 (LC) at para 9.

where it comes to urgency. This situation is exacerbated by the fact that the first respondent consistently throughout June 2016 informed the applicants that abscontion proceedings were underway in which they faced dismissed. The applicants should have been proactive, and acted immediately.

[30] But the issue of expeditious action taking has an added nuance in this matter. The first respondent has been threatening dismissal of the individual applicants by way of abscontion proceedings since 15 June 2016. The circumstances giving rise to the ultimate termination of employment of the individual applicants has not changed since then. In other words, and even when these abscontion proceedings were initiated, the violation of the Mine Heath and Safety Act and the constitutional rights of the individual applicants as they are now raised, existed. In the context of urgency, it would have been far better for the applicants to try and prevent this termination of employment form taking place, provided of course they would be able to satisfy the stringent requirement of 'exceptional circumstances'.[17]

[31] As touched on above, the applicants must make out a case for urgency in the founding affidavit. In *Mashiya*[18] the Court held that: 'Rule 8 requires that the applicant sets out in his founding affidavit the reasons for urgent relief. This was not adequately done in this case. On that basis alone, the application should be dismissed or removed from the roll.' The applicants' case on urgency, as set out in the founding affidavit, is very sparse. The entire period of about a month leading to the bringing of this application is curtly explained on the basis of a 'debate' between the first applicant's president and counsel about launching the application on an urgent basis in the first place. Why such a debate would last a month remains a mystery.

[32] If the first applicant's president was advised by counsel of the calibre and competence of Mr Boda, who argued the matter for the applicants in Court, I am quite sure that all the difficulties with regard to urgency and what needs to be established would have been fully, and properly, addressed. The lack of particularity where it comes to urgency, in the founding affidavit, is thus

[17] *Booysen v Minister of Safety and Security and Others* (2011) 32 *ILJ* 112 (LAC) at para 54; *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2033 (LAC) at para 46; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 17.
[18] (*supra*) at para 17.

concerning, and may even serve to draw an inference that the applicants knew that they in effect had no explanation for the delay in bringing this matter and sought to avoid addressing it.

[33] The substance of the applicants' case on urgency bears out what I consider to be the situation in the aforesaid paragraph. It is a case based squarely on considerations of hardship, sympathy and merits of the case itself. In simple terms, it is said that urgency is established by the alleged unlawfulness of the first respondent's conduct which will cause the individual applicants extreme hardship. In my view, this approach is squarely founded on the kind of 'licence' assumed by practitioners following the judgment in *SABC*, as I have discussed above. The applicants in fact say it in so many words in the founding affidavit. But, and as I have already said, the judgment in *SABC* does not support such an approach. It is not the 'licence' the applicants believe it to be, and the allegations of unlawfulness of the conduct of the first respondent cannot in itself serve to establish urgency.

[34] I may mention that in SABC, Lagrange J actually considered the urgency requirements referred, and found that matter was urgent because the unlawfulness of the dismissal was conceded, it was important at a time because the role of the SABC will be in the spotlight in the course of the imminent local elections, and it was of critical importance that the applicants return to work without delay so that they would actually be able to perform their work as journalists in the context of the immanent elections.[19] I add that the application in SABC was brought a few days after the dismissal. The distinctions form the matter in casu are in my view clear.

[35] Where it comes to the issue of financial hardship, the case made out in the founding affidavit is once again sparse and completely lacking in particularity. Certain general statements are made as to the individual applicants being without accommodation, causing a social crisis, which would simply serve to compound tension and frustration. There kind of general submissions are of little assistance when deciding urgency. In *CWIU v Sasol Fibres*[20] the Court held:

[19] *SABC* (*supra*) at paras 69 – 70.
[20] (1999) 20 *ILJ* 1222 (LC) at 1227B – C.

> 'As far as the issue of irreparable harm is concerned, the applicants state that they will suffer substantial reduction of income. I accept that that is correct but the Court is not told what effect that situation will have on the union's members. It is simply not acceptable for parties to make bald allegations and leave it to the Court to fathom consequences of the conduct complained of.'

[36] What the facts do show is that he vast majority of the individual applicants receive living out allowances and provide for their accommodation. It follows that the true cause of hardship is the loss of remuneration (which would include the living out allowance). This makes the individual applications no different from any other of the thousands of dismissed employees pursuing their cases in the normal course. Any dismissed employee would have no salary and would not be able to pay for accommodation, food and other necessities as a result. The individual applicants are no different, and deserve no preference on this basis.

[37] In any event, the general principle is that financial hardship does not establish a basis for urgency. In *Jonker v Wireless Payment Systems CC*,[21] where the Court said:

> 'The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in *Malatji v University of the North* [2003] ZALC 32 (LC) and *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO en Andere* (1990) 11 ILJ 971 (T).'

This general principle may be departed from if exceptional circumstances exist.[22] In the case *Harley v Bacarac Trading 39 (Pty) Ltd,*[23] the Court held:

> '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.'

[21] (2010) 31 ILJ 381 (LC) at para 16.
[22] Jonker (*supra*) at paras 17 – 18.
[23] (2009) 30 ILJ 2085 (LC) at para 8.

The applicants unfortunately made out no such case where it comes to financial hardship. The applicants have simply not shows why their circumstances are exceptional, and would not be capable of being fully addressed in the normal course. I accept that the individual applicants will suffer financial hardship, but there is no demonstration of undue hardship. I thus remain unconvinced that a departure from the normal principle that financial hardship does not substantiate a case of urgency is justified *in casu*.

[38] One final consideration remains. On 29 July 2016, the applicants referred an automatic unfair dismissal in terms of Section 187(1)(f) to the CCMA. The factual basis for this referral is exactly the same as the factual basis that serves as the foundation to this application. Equally, the parties are the same. I accept that one set of facts may give rise to separate causes of action, and in principle, there is nothing standing in the way of a litigant to pursue each of these causes of action. But that is not the point where it comes to the consideration of the issue of urgency. As I have set out above, an important consideration in the case of urgency is whether the applicants are able to obtain proper substantive relief at a later state. In my view, the CCMA referral is an indication that this is the case.

[39] No matter what the cause of action may be, it is what the applicants want, and require, at the end of the day, that is the important consideration. Whether relying on breach of contract, unlawful dismissal, or automatic unfair dismissal, the end result will always be the same, if the applicants are successful. In the unfair dismissal case, an order of fully retrospective reinstatement will be competent, which is exactly the same as restoring the status quo ante prior to dismissal. And in the case of an unlawful termination or breach of contract of employment, the relief of specific performance restores the status quo ante. The applicants can thus get proper substantial redress in the normal course, without having to resort to these urgent proceedings.

[40] Mr Boda suggested in argument that the reason why the applicants referred the automatic unfair dismissal dispute to the CCMA was so that the applicants could ‘cover their bases’, so to speak, considering the novelty of this application. The argument was that because this application was novel, it was

unprecedented, and as such, carried with it unmanageable risk of being unsuccessful. This being the case, the applicants did not want to be left remediless if this novel application was decided against them. I have little hesitation in saying that this is prudent litigation practice. It is unwise to all one's eggs into one basket. However, and as prudent as this may be, it still negates urgency. It shows that the applicants can still come right, so to speak, in the normal course, and it simply cannot be accepted that if this application is not heard, now, what happened to the applicants cannot ever be remedied.

[41] In the end, and as I have said on several occasions in the past, this is one of these matters that forms part of the worrying trend of litigation in the Labour Court to jump the queue and try to get matters heard as urgent matters, when there is no justification for this. I once again reiterate the following *dictum* in *Mosiane v Tlokwe City Council*[24] which I consider to be applicable in casu:

> 'A worrying trend is developing in this court in the last year or so where this court's roll is clogged with urgent applications. Some applicants approach this court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this court with fanciful arguments about why this court should grant them relief on an urgent basis. ….'

[42] Therefore, the applicants have failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied. This is clearly a matter of self created urgency. The application falls to be struck form the roll.

[43] This then only leaves the issue of costs. The applicants have elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. Certainly, and on their own version, the applicants contend there was a debate about bringing this application, which must have highlighted the risks associated with it. The applicants were legally assisted from the outset. I also consider the complete failure to make out a proper case of urgency, and the fact that the applicants approached the matter on the basis that they in essence have a licence to urgency because of the

[24] (2009) 30 ILJ 2766 (LC) at paras 15 – 16

cause of action they chose to articulate. Whilst it may be so that the parties have a continuing relationship, I do not believe it to be a sufficient consideration standing in the way of making a costs order in the circumstances of this matter. In any event, and in terms of Section 162 of the LRA, I have a wide discretion where it comes to the issue of costs, and in this instance, I exercise this discretion in favour of making a costs order against the applicants.

Order

[44] I accordingly make the following order:

1. The applicants' application is struck from the roll for want of urgency.

2. The applicants are ordered to pay the costs of the first respondent occasioned by such striking off, which costs shall include the costs of two counsel.

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S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants: Adv F A Boda SC together with Adv Z Navsa

Instructed by: Valley Attorneys

For the First Respondent: Adv A Myburgh SC together with Adv J Partington

Instructed by: ENS Africa