REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2986/2012

In the matter between:

BIFAWU **Applicant**

and

SOUTH AFRICAN FOOTBALL ASSOCIATION **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

Heard: **13 November 2012**

Order: **13 November 2012**

Summary : Urgent application dismissed. No case for urgency made out in the papers.

JUDGMENT-REASONS FOR ORDER

AC BASSON J

Introduction

[1] In these proceedings the applicant sought, *inter alia*, the following urgent relief:

1. Interdicting the first respondent (the South African Football Association – hereinafter referred to as "the respondent") from dismissing the applicant's members (the members of the Banking Insurance, Finance and Assurance Workers union "BIFAWU" are listed in Annexure A attached to the founding affidavit – hereinafter referred to as "the applicant") for refusing to accede to the demands of the respondent with respect to the implementation of a new business structure and changes to terms and conditions of employment. The applicant contended that the dismissals would be automatically unfair as contemplated by section 187(1)(c) of the Labour Relations Act 66 of 1995.

2. To stay all further proceedings pending the outcome or ruling by the CCMA in the matter relating to a labour dispute that exists between the two parties concerning the interpretation of application of the collective agreement that has been set down for hearing in November 2012.

3. Directing the CCMA to withdraw the letters of implementation of the new structure to the affected employees.

[2] The urgent application was heard on 13 November 2012 and was dismissed for lack of urgency.

[3] At the outset I must point out that the applicant makes out no case for urgency in the Founding Affidavit. In fact, urgency is not even addressed in the papers.

[4] It is trite that an applicant who approaches this Court on the basis of urgency must make out a case for urgent relief on papers in sufficient See in this regard: *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd*[1] where the legal position has been summarized as follows:

> '[11] It is trite that an applicant who approaches this court on an urgent basis must make out a case for urgent relief on the papers in sufficient particularity. This much is clear from rule 8 of

[1] (2007) 28 ILJ 2796 (LC).

the Rules of the Labour Court which expressly states that a party that applies for urgent relief must file an application that complies with the requirements of rule 7(1), 7(2), 7(3) and if applicable 7(7) of the rules. Rule 7(2) expressly requires that the affidavit in support of the application *must* contain the following:

(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 that that provided for in terms of s 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

[12] Urgency in itself does not relieve a party from this obligation and the applicant should, in as much detail as possible, place such facts that are necessary before the court and which will enable this court to decide whether the forms and service provided for in the rules should be dispensed with. Only once an applicant has persuaded the court that sufficient grounds exist which necessitates a relaxation of the rules and ordinary practice, will the court proceed to consider the matter as one of urgency. The extent to which the court will allow parties to dispense with the rules relating to time periods will depend on the degree of urgency in the matter. (footnote omitted)

[13] In the present matter the founding affidavit is devoid of any explanation of the reasons for urgency and why urgent relief is necessary. (footnote omitted) It is also not sufficient to rely on an argument based upon implications and deductions which may be made from allegations contained in the affidavit that the matter is urgent. (footnote omitted) In fact, the founding affidavit does not address the question of urgency at all: Apart from prayer 10 of the notice of motion in terms of which condonation is sought for the applicant's non-compliance with the relevant provisions of the LRA and the rules of this court, no case has been made out on

the papers as to why there should be a departure from the normal rules. More in particular the applicant does not even attempt to explain why this application was not brought to this court shortly after the lock-out notice was issued. It is trite that an applicant cannot create its own urgency by delaying bringing an application.(footnote omitted) This court will not come to the assistance of an applicant who has delayed approaching the court.(footnote omitted) See *National Police Services Union and Others v National Negotiating Forum and Others* (1999) 20 ILJ 1081 (LC) at 1092 para 39 where Van Niekerk AJ stated the following:

> "The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits or any time-limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court. For these reasons, I find that the union has failed to satisfy the requirements relating to urgency."'

[5] See the well-known and often quoted decision in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*[2] where the Court set out the principles as follows:

> 'Undoubtedly the most abused Rule in this Division is Rule 6(12) which reads as follows:

[2] 1977 (4) SA 135 (W) 136B-137G at paras 11-13.

"12 (a) In urgent applications the Court or a Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of the application under para *(a)* of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

Far too many attorneys and advocates treat the phrase ``which shall as far as practicable be in terms of these rules'', in sub-rule *(a)* simply *pro non scripto*. That this phrase deserves emphasis is apparent also from the judgment of Rumpff, J.A. (as he then was), in *"Republikeinse Publikasies (Edms.) Bpk. v Afrikaanse Pers Publikasies (Edms.) Bpk.*, 1972 (1) SA 773 (AD) at p. 782B. Once an application is believed to contain some element of urgency, they seem to ignore (1) the general scheme for presentation of applications as provided for in Rule 6; (2) the fact that the Motion Court sits on Tuesdays through to Fridays; (3) that, for matters to be on this roll on any particular Tuesday, the papers must be filed with the Registrar by 12.00 noon on the preceding Thursday; (4) that the time of day at which the Court commences its daily sittings is 10.00 a.m. and that, when it has adjourned for the day, the next sitting commences on the next day at 10.00 a.m.

These practitioners then feel at large to select any day of the week and any time of the day (or night) to demand a hearing. This is quite intolerable and is calculated to reduce the good order which is necessary for the dignified functioning of the Courts to shambles. Frequently one reminds counsel of certain basic matters, which I shall detail presently, only to be met with the answer that they and their attorneys are simply following practices which have arisen in the course of time. I am not convinced that this is so. I do not think that the majority of the members of the Bar or Side Bar follow such practices as I shall presently show with reference to the motion roll presently before Court.

For the sake of clarity I am going to set forth the important aspects of "urgency". In doing so I shall not deal with those *ex parte* applications which fall under Rule 6 (4). Urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court. The following factors must be borne in mind. They are stated thus, in ascending order of urgency:

1. The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b) Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.

2 Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.

3. Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10.00 a.m. or for the same day if the Court has not yet adjourned.

4. Once the Court has dealt with the cases for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.

> Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) *(b)* will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'

[6] The application in the present matter does not comply with the provisions of Rule 8 of the Rules of this Court which spells out in clear terms what is expected of an applicant when it approaches this Court on an urgent basis. The obligations in Rule 8 are couched in peremptory terms and must, therefore, be complied with. It is clear from the papers that there has been no compliance with the Rule. I am, therefore, of the view that the application falls to be struck of the roll on this basis alone.

[7] Furthermore, the facts in any event do not show any urgency. Firstly, the restructuring process which the applicant seeks to interdict commenced in July 2012 and has been on-going. As far back as 28 August 2012, the applicant had declared a deadlock with the respondent on the basis that there should be negotiations as opposed to consultations in respect of possible retrenchment of employees. On 26 September 2012, the respondent advised the applicant that it would proceed with individual consultations with the individual employees given the applicant's persistent refusal to participate in the consultation process. There is no explanation on the papers as to why the applicant had done nothing since 28 August 2012 when deadlock was reached between the parties. Furthermore, at the time of the hearing, the process has not yet been concluded and no employee has been dismissed as a consequence of the restructuring. Lastly, the applicant is seeking an interdict pending the outcome of a ruling in the CCMA relating to the interpretation of the collective agreement. I am in agreement that this is irrelevant to the restructuring process. In any event, the respondent has offered to go to

expedited arbitration on 26 September 2012 on the same issue that now awaits arbitration on 22 November 2012. The offer was, however, rejected by the application. The applicant, therefore, had more than sufficient time to refer the matter to the CCMA but has failed to do so. In the event I am of the view that the matter is not urgent.

[8] In the event, the following order is made.

8.1 The matter is struck from the role for want of urgency. I can see no reason why costs should not follow the result.

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AC BASSON J

Judge of the Labour Court

26 July 2013