

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 3320/18

In the matter between:

MASIXOLE T SINTO

Applicant

and

MINTEK SOC LTD

Respondent

Heard: 14 September 2018

Judgment: 14 September 2018

Edited: 8 February 2019

EX-TEMPORE JUDGMENT

MAHOSI. J

[1] This is an urgent application in terms of which the applicant seeks an order in the following terms:

- ‘1. Dispensing with the forms and service provided for in the rules of this court and disposing this matter in such a manner and in accordance with the procedure as seems made in terms of rule 8 and permitting that this matter to be dealt with as an urgent application.
2. The respondent is ordered to make the applicant’s benefit to attend a study tour in Germany scheduled for the 16th to the 22nd of September 2018.
3. The respondent’s decision to withdraw the applicant’s benefit to attend the study in Germany scheduled for the 16th of September 2018 is set aside.
4. And the respondents are ordered to pay cost in this application jointly and severally; one paying the other to be absolved, granting the applicant further and/or alternative relief.’

[2] The relevant facts in this matter may be summarised as follows:

- 2.1 The applicant is employed by the first respondent as a Manager: Graduate Development and Support.

2.2 On 11 of September 2018, the applicant was suspended with full remuneration and benefits; save for the benefits to travel on study tour scheduled for 16 to 22 September 2018.

[3] Dissatisfied with the respondent's decision, the applicant launched this application. What the applicant seeks is a final order directing the first respondent to reinstate his benefit to attend the study tour in Germany scheduled for 16 to 22 September 2018 and that the first respondent's decision to withdraw the said benefit be set aside.

Urgency

[4] I first deal with the issue of urgency. Rule 8(2) of the Rules of this Court which governs urgent applications provides as follows:

- '(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; and
 - (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.'

[5] The first and second respondents opposed this application for its lack of urgency and merit. In *Jiba v Minister of Justice and Constitutional Development and Others*¹, this Court considered rule 8 and stated as follows:

¹ (2010) 31 ILJ 112 (LC); [2009] 10 BLLR 989 (LC) at para 18.

‘Rule 8 of the rules of this court require 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 ordinary 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.’

- [6] In this matter the applicant submitted that he was suspended on 11 September 2018 on which date he became aware of the decision to withdraw the benefit in question. He consulted his attorneys on 12 of September 2018 and filed the papers on 13 September 2018.
- [7] As stated above, rule 8 of the rules of this Court requires the applicant to set out an explanation why the relief is sought on an urgent basis and why the timeframes set out in the rules should be abridged. The applicant is required to show why the rules of this Court relating to forms and service should be dispensed with.
- [8] In this regard, I agree with the respondent’s submission that the applicant has not made out a case to justify an expedited hearing and has not set out the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The applicant has, in my view, failed to make out a case for urgency in this case.

Relief

- [9] Even if I were to accept that this application is urgent, for this Court to grant the final interdict, the applicant must establish three requisites, all of which must be present. These are: a clear right, injury actually committed or reasonably apprehended and the absence of an alternative legal remedy.
- [10] In order to establish a clear right, the applicant has to prove, on balance of probabilities, the right that he seeks to protect. As aforesaid, the applicant

seeks an order to have his benefit to participate in a study tour reinstated and to have the first respondent's decision to withdraw such a benefit set aside.

- [11] The applicant seeks the orders as stated above on the basis that he has a clear right to attend the course. His clear right to attend the course seems to have been derived from the fact that there was an approval for him to attend the course and that he already completed the course relating to same. He further submitted that he meets all the requirements to attend the course and that this course is part of improving his skills in order to be effective in executing his duties efficiently for the benefit of the first respondent.
- [12] In opposing this matter, the respondents submitted that the applicant's benefit only relates to his enrolment onto the Master's programme. Further that the study tour to Germany is not a compulsory part of the Master's programme. The first respondent further submitted that the tour is not a requirement for graduation and that it would not in any way impact the applicant's date of completion of the Master's programme.
- [13] In this regard, the first respondent submitted a confirmatory affidavit from Dr Timothy Harten, who is the director of Short Course and Consulting at Witwatersrand University, who confirmed that no marks will be awarded or deducted for attending or not attending a tour. The first respondent further submitted that it is greatly risky to allow the applicant, who has already threatened his managers with physical violence, to accompany the very same managers to a foreign destination. In this regard, the applicant chose not to put his version in a replying affidavit.
- [14] The applicant does not dispute that the study tour is not compulsory, that no marks will be allocated for attendance and further that non-attendance would not have an impact on his date of completion of the Master's programme. He further does not dispute that it would not be risky for him to be allowed to undertake the tour with his managers whom he had already threatened.

[15] Therefore, his submission that should this Court not order the first respondent to reinstate his benefit to attend the tour, he would lose an opportunity to complete his studies timeously and that he would not qualify for senior management position is actually baseless. The fact that he was already approved to participate in the study tour and that he has already completed courses relating to same does not in itself give him a clear right to go on a study tour. His benefit only relates to his enrolment onto the Master's programme, which will not be affected by non-participation of the study tour. It follows that the applicant has failed to show that he has a clear right to attend the tour or at least to establish injury actually committed or reasonably apprehended. He has further failed to show that he will suffer irreparable harm should he not attend the said tour.

Alternative remedy

[16] It is apparent that the applicant has an alternative remedy. His claim relates to provision of a benefit and defined in section 186(2)(a) of the LRA as an unfair labour practice. In *MEC for Education, North West Provincial Government v Gladwell*,² where the Court per Murphy, AJA had the following to say:

[46] Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of section 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or

² (2012) 33 ILJ 2033 (LAC) at para 46.

compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings. (Footnote omitted)'

[17] In the current matter, the applicant submitted that he had no option but to approach this Court as the respondents refused to reverse their decision after he had instructed his attorneys to address a correspondence to them. There is no reason why the applicant cannot approach the CCMA in terms of section 191 of the LRA where the matter would be resolved through conciliation or ventilated in an arbitration.

[18] In relation to his application to set the first respondent's decision to withdraw his benefit, the applicant has failed to state the ground on which this Court should review and set aside that decision.

[19] In the premise, I make the following order:

Order

1. The applicant's application is dismissed with costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate L Kalashe

Instructed by: Poyo Attorneys

For the Respondent: Advocate H Mutenga