

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ YES ☐ NO.

(2) OF INTEREST TO OTHER JUDGES: ☒ YES ☐ NO.

(3) REVISED: ☐ YES ☒ NO.

18/09/23
DATE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no. J1109/23

In the matter between:

ISAAC TSIETSI SHEMA

Applicant

and

DITSOBOTLA LOCAL MUNICIPALITY

First Respondent

**THE ACCOUNTING OFFICER
(DITSOBOTLA LOCAL MUNICIPALITY)**

Second Respondent

Date heard: 17 August 2023

Date delivered: **18 September 2023** (This judgement was handed down electronically by circulation to the party's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 12:00 on 18 September 2023)

JUDGMENT

BALOYI AJ

Introduction

1. The applicant's urgent approach to this Court is precipitated by the respondents' failure to pay his salaries for the months of May, June and July 2023 with the following relief sought:

- "1. The requirements of Rule 7 of the Rules for the Conduct of Proceedings in the Labour Court are dispensed with and this application is heard as one of urgency in terms of Rule 8 of the abovementioned Rules;*sic*
2. The first respondent's failure to effect payment of the applicant's remuneration for May, June and July 2023 is in contravention of Section 32 of the Basic Conditions of Employment Act 75 of 1997 ("bcea") and in breach of the applicant's contract of employment;
3. The respondents are ordered to:
 - 3.1 Pay the applicant his outstanding remuneration for May, June and July 2023, forty-eight (48) hours from the date of this Order,
 - 3.2 Forthwith comply with the applicant's conditions of service (contract of employment) and effect payment of his future remuneration in terms thereof; and
 - 3.3 Effect payment of the applicable contributions toward benefit funds, as contemplated by Section 34A of the BCEA, which the applicant is entitled to be a member of as a result of his employment.

- 4 The first respondent is ordered to pay the costs of this application on a party and party scale, alternatively, if this matter is opposed, to pay the costs of this application on a scale as between attorney and client;
- 5 The applicant is granted such further and/or alternative relief as this Honourable Court deems fit and appropriate."

Background

2. On 01 June 2021 the first respondent appointed the applicant as its Legal Manager. The terms and conditions of employment of the applicant are regulated in terms of the collective agreements concluded within the scheme of the South African Local Government Bargaining Council (SALGBC). The applicant was dismissed on 24 April 2023 following a guilty finding on charges of misconduct.
3. He referred an unfair dismissal dispute to the Bargaining Council which was successfully conciliated as the settlement agreement was reached. In terms of the settlement agreement, he was reinstated with back pay. The settlement agreement was concluded on 14 June 2023 with a specific term that the applicant should report for duty on 03 July 2023. On 13 July 2023, the Acting Municipal Manager Mr. SS Nnete addressed a letter to the applicant informing him that his salaries for May and June 2023 were to be paid on 25 July 2023.
4. The first respondent did not pay the outstanding salaries as undertaken in the letter of 13 July 2023. The applicant's attorneys were instructed to demand payment through a letter dated 03 August 2023, failing which, this Court will be approached for urgent relief. There was no response to the

letter of demand. The applicant went on to file this application on 08 August 2023 and was scheduled to be heard on 15 August 2023. The respondents were required to file the notice of intention to oppose and the answering affidavit on 11 August 2023 at 12h00 and 17h00 respectively.

5. On 11 August 2023 the first respondent filed an application under case number JR1540/23 seeking to review, correct and set aside the settlement agreement. The review application forms part of the basis for the opposition of this application. When this urgent application came before the Court on 15 August 2023, the respondents had not filed the answering affidavit and requested a postponement on reasons that the attorney and counsel were not available to take instructions immediately after the filing of this application. The matter was then postponed to 17 August 2023 and the answering affidavit together with the replying affidavit were accordingly filed.
6. The basis of the respondents' opposition is that the settlement agreement which the applicant relies upon to claim the outstanding salaries has been entered into unlawfully. It is the outcome of a corrupt relationship between the applicant and the former Acting Municipal Manager, Mr. Nnete. There was no resolution passed by the Municipal Council authorizing Mr. Nnete to conclude the said settlement agreement. The applicant has been involved in corrupt activities which led to the High Court setting aside certain Supply Chain Management decisions he made.
7. The opposition was accompanied by preliminary points to the effect that the applicant's reinstatement is not compliant with 57A1 of the Local Government: Municipal Systems Act. Secondly, there is a dispute of facts over the lawfulness and legitimacy of the settlement agreement. Thirdly, non-joinder of Mr. Nnete and lastly, this Court lacks of jurisdiction. The

applicant posted a challenge to all these points in the replying and during arguments intimating that they are misplaced.

- 8 The respondents further challenged urgency on the basis that the enforcement of an illegal settlement agreement cannot by any account give rise to urgency. Furthermore the applicant laid no factual basis to establish the reasons why the matter should be heard on an urgent basis.

Legal framework and caselaw

- 9 It is a well-settled principle that the determination of urgency lies within the Court's discretion. It is not in dispute that the applicant acted with necessary swiftness. This on its own is not an absolute factor for the determination of urgency. The underlying issue in this regard is the financial hardships that the applicant is facing due to non-payment of salaries. The issues that are most likely to cause irreparable harm are failure to meet his financial obligations in respect of travelling to work at the end of his leave, household expenses, motor vehicle instalments, mortgage bond, municipal services, life cover policies, maintenance of his brother who is on chronic medication and blacklisting arising out of defaulting on financial obligations.
- 10 This Court has on many occasions considered this point not as a ground for urgency and similarly depending on the circumstances of each case found urgency in this regard. In *Tshwaedi v Greater Louis Trichard Transitional Council*¹ the Court had this to say in paragraph 10:

[10] It was common cause between the parties that the rules which have been adopted by the High Court in relation to urgent applications apply equally to this Court. Those rules are to the effect that an applicant who comes to court for urgent relief must explain the reason for his departure

¹ [2000] JOL 6197 (LC); [2000] 4 BLLR 469 (LC).

from the ordinary rules regarding service and time periods and show that such departure is justified. He must depart from the rules as little as possible under the circumstances. If an application is brought as a matter of urgency, there must be facts as to show why relief at some later date or in the ordinary course would not have sufficed. In other words, in the present case the applicant must show that he will suffer harm which cannot be cured if relief is granted in the ordinary course.'

- 11 In *Harley v Bacarac Trading 39 (Pty) Ltd*² this Court per Van Niekerk J held at paragraph 8 as follows:

"None of these cases, it seems to me, establishes that financial hardship and loss of income can never be grounds for urgency. 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".

- 3 It appears to be a well-settled principle that a case pleaded based on financial hardship in support of urgency does not receive an outright rejection. In simpler terms, the underlying issues advanced by an applicant have to overcome a high hurdle to establish exceptional circumstances. The above *dicta* was followed with approval in *Wenum*

² (2009) 30 ILJ 2085 (LC)

*v Maquassi Hills Municipality*³ and in *Buthelezi v Rurik McKaiser Attorneys Incorporated & Another*⁴.

- 4 I have also taken into account other considerations, most particularly that the first respondent is a troubled municipality that is heavily embroiled in litigation founded on internal wrangles that have nothing to do with service delivery. It is a matter that draws public interest and deserve prompt finalization for the benefit of the recipients of service owed to the residents of the first respondent. In this regard, coupled with reasons given for urgency, I do not find any reason suggesting that the matter does not deserve hearing on an urgent basis. I accordingly allowed the matter to proceed on the urgent Roll.

Analysis

- 5 As already established above, the applicant relies on a settlement agreement that effectively restores the employment relationship with the first respondent. The conclusion of the said settlement agreement was followed by a tender of services. The respondents are not reciprocating by remunerating him despite a promise for payment of his salaries on 02 August 2023. The demands for payment were not acceded to as no payment was made on or before the date and time stipulated in the letter of demand.
- 6 Now, it is of utmost importance to look at the preliminary points raised by the respondents and this Court will consider them in a sequence preferred by the respondents. The first is a legislative bar to reemploy the applicant. The respondents allege that he was dismissed for financial misconduct as set out in Section 54A(1) of the Local Government:

³ (2017) 38 ILJ 1213 (LC)

⁴ (2023) 44 ILJ 1512 (LC)

Municipalities Systems Act. This point did not take off as Mr Nyanyiwe for the respondents conceded that the applicant was not reemployed but reinstated as envisaged in the Labour Relations Act. This point is a consequence of a misplaced interpretation of the law and should accordingly fail.

- 7 Regarding the non-joinder of Mr. Nnete who according to the applicant has interest in the matter, this Court is without hesitation in agreement with the applicant that Mr. Nnete acted as the representative of the Municipality and within the scope of his legislative powers by virtue of his position as the accounting officer of the first respondent. He cannot be isolated from the actions performed on behalf of the first respondent so long as those functions fall within his legislative mandate. The settlement agreement remains final and binding with or without Mr. Nnete. This application is not about the validity of the settlement agreement but the applicant's right to enforce the terms of the settlement agreement in which an order for specific performance is sought. On this note, this point has no basis in law and should similarly fail.
- 8 It is not uncommon for Courts to find themselves faced with disagreements between the parties. It would be naïve to look at any conflict in motion proceedings as a dispute of facts. The deponent was not present when the settlement agreement was concluded. The referral of the matter to oral evidence as suggested by the respondents will not give rise to resolving anything because the respondents are obviously not in a position to field a witness with personal knowledge of the circumstances that led to the conclusion of the agreement.
- 9 The respondents are distancing themselves from Mr Nnete as well the decision he took in reaching a settlement with the applicant. Without evidence from a person with personal knowledge of what happened when

the settlement agreement was concluded, the applicant's version remains unchallenged. The respondent's claim that it was concluded without the Municipal Council resolution is not disputed. This issue is comprehensively discussed below. It appears that the respondents are having difficulties in diagnosing what constitutes a dispute of facts. This point is without doubt not sustainable and is bound to fail.

- 10 That the applicant is a dismissed employee is the only contention advanced by the respondents to argue that this Court lacks jurisdiction. It is noted that the respondents do not acknowledge or recognize the applicant's contract of employment as revived by the reinstatement clause in the settlement agreement. The respondents' attitude in this regard does render the settlement agreement non-existent. The settlement agreement as placed before the Court remains valid and the applicant is entitled to assert his right arising out of its terms before this Court. Under the circumstances, there is nothing placing a bar on this Court's jurisdiction to make a determination on this application. This Court is well loaded with the necessary jurisdiction to the effect. This point also fails.
- 11 Turning onto the merits of this application. The settlement agreement has the effect of restoring the contract of employment as if the dismissal has not taken place. The applicant tendered the services, and he was assured in writing that his salaries were to be paid on 02 August 2023. This application is brought on account of the respondents' failure to pay in terms of the restored contract of employment as undertaken.
- 12 It is now established through the opposition of this application that the respondents have since the appointment of the second respondent on 07 August 2023 taken a position not to honour the settlement agreement and to pay the arrears salaries. The refusal is founded on the respondents'

assertion that the settlement agreement was concluded in a corrupt manner. Secondly, Mr. Nnete in his capacity as Acting Municipal Manager was not authorized by the Municipal Council to conclude the agreement. Thirdly, the settlement agreement is now a subject matter of the review application before this Court and cannot be enforced until the review is finalized. Finally, the applicant was dismissed after being found guilty of serious charges of financial improprieties. The High Court has a result taken a dim view of his conduct and/or the conduct of the parallel Municipal Council that appointed him to the position of the Acting Municipal Manager that was ultimately set aside.

- 13 The allegation that the settlement agreement was concluded in a corrupt manner is a mere say which is not accompanied by evidence that may on proper scrutiny render the settlement invalid or unlawfully obtained and unenforceable. Regarding the absence of Municipal Council resolution authorizing Mr. Nnete to conclude a settlement agreement, the Court was at pains in establishing from Mr. Nyanyiwe on whether the position of legal services manager falls within the category of Senior Managers appointed in terms of Section 56 of the Municipal Systems Act. Mr. Nyanyiwe submitted that the applicant was indeed a Senior Manager.
- 14 This submission crumbles when regard is had to the fact that the applicant was not charged in accordance with the regulations of the Systems Act but in terms of the Disciplinary Code incorporated in a South African Local Government Bargaining Council collective agreement. Furthermore, his dismissal was not effected or endorsed through a Municipal Council resolution. The facts placed before this Court certainly reveal that the applicant was not a Senior Manager and Mr. Nnete had necessary powers to make a decision on the terms and conditions of the applicant's employment contract with the Municipality. The absence of a

resolution does not give rise to any irregularity as it was not a prerequisite for Mr. Nnete to deal with the matter.

- 15 It is trite that a review application does not stay the execution of the arbitration award. There is no reason why same should not apply in respect of an enforceable settlement that forms a basis for a claim of breach of contract. Whether a settlement agreement is reviewable in terms of Section 145 of the Labour Relations Act as if it is a decision of a Commissioner is a question that this Court will not attempt to deal with in this application. What is pertinent to the determination of this application is that the filing of the review application in question is no bar to the enforcement of the settlement agreement. This Court's hands are as such not tied.
- 16 In terms of Section 77(3) of the Basic Conditions of Employment Act, this Court has concurrent jurisdiction with the civil Courts to hear and make a determination on any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of contract. Furthermore, Section 77(e) of the Basic Conditions of Employment Act clothes this Court with jurisdiction to make a determination which it considers reasonable including an award for specific performance as well as an award for compensation or damages⁵.
- 17 Under these circumstances, this Court is constrained to find that the case has been made for the relief sought by the applicant. The application must succeed. As already pointed above that the second respondent is with no doubt a troubled municipality, the Court is loath to make a cost order against the first respondent. If submissions were made for a personal cost order against anyone perpetuating injustices, the court would not have hesitated to consider same.

⁵ Naidoo v React Solutions J56/2011 [2011] ZALC JHB 194 (24 January 2011) and HOSPERSA And Another v MEC for Health Gauteng Province Government (2008) 9 BLLR 86 (LC).

Order

18 In the premises, the following order is made:

1. The prescribed times, forms and procedures are hereby dispensed with and the matter is heard as one of urgency in terms of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court.
2. The first respondent's failure to effect payment of the applicant's remuneration for May, June and July 2023 is in contravention of Section 32 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") and in breach of the applicant's contract of employment.
3. The respondents are ordered to:
 - 3.1 Pay the applicant his outstanding remuneration for May, June and July 2023, within forty-eight (48) hours from the date of this order;
 - 3.2 Forthwith comply with the applicant's conditions of service (contract employment) and effect payment of his future remuneration in terms thereof; and
 - 3.3 Effect payment of the applicable contributions toward benefit funds, as contemplated by Section 34A of the BCEA, which the applicant is entitled to be a member of as a result of his employment.
4. The first respondent is ordered to pay the costs of this application.



MM BALOYI AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. Van Graan SC
Instructed by Scholtz Attorneys

For the first respondent: Adv. Nyanyile
Instructed by Morathi Mataka Attorneys