IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 244/23

In the matter between:

BANKING, INSURANCE, FINANCE AND ASSURANCE WORKERS UNION **Applicant**

and

OLD MUTUAL INSURE (PTY) LTD **Respondent**

Heard: **1 March 2023**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 14 March 2023**

JUDGMENT

TLHOTLHALEMAJE, J

[1] In this opposed application, the applicant seeks various final orders on an urgent basis including *inter alia*; interdicting the respondent from terminating and withdrawing the Organisational Rights acquired under the old Labour Relations Act[1] (The 1956 Act); directing the respondent to reinstate the stop order facilities it had withdrawn and to continue to make deductions of trade union subscriptions in terms

[1] Act 28 of 1956.

of section 13 of the new Labour Relations Act (LRA)[2]; directing the respondent to withdraw an email dated 14 September 2022 informing it of the termination of the rights and withdrawal of stop order facilities; and making to it certain outstanding amounts in the form of union subscription fees for the period between October 2022 and January 2023.

[2] For the purposes of determining this application, and to the extent that the rights relied upon by the applicant arise from the 1956 LRA, (The collective agreement relied on was concluded in 1986), I will purposely refrain from revisiting the effects of various provisions of section 212 of the LRA on the collective agreements concluded in terms of the 1956 Act. One can only refer to these provisions read in conjunction with those of Schedule 6[3]; Items 5 and 12 of Schedule 7[4], which are by now self-explanatory.

[3] Other than contending that the applicant has not satisfied the requirements of the nature of the relief sought, the respondent in opposing the application, further pointed out that the matter lacks the necessary urgency; that the Court has no jurisdiction over the matter, and further raises issues surrounding misjoinder.

[4] The applicant is a registered trade union. The respondent contends that the union's membership in the workplace is under 50 out of plus 2000 employees, and further that it is not a party to current collective agreements concluded with other unions. The respondent's further contention is that the applicant is neither a majority union, nor 'sufficiently represented' at its relevant workplace, hence it is not entitled to any of the organisational rights contained in sections 13 to 16 of the LRA.

[5] On 13 September 2022, the applicant sent correspondence to the respondent enquiring about where it could forward certain membership forms. This was in regards to the union's newly recruited members. It complained about the financial burden caused on it resulting from the non-processing of its members' stop orders.

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[2]Act 66 of 1995, as amended.
[3] Laws repealed by section 212 of the new LRA.
[4] Part C.

[6] On 14 September 2022, the respondent in its response informed the applicant that there was no recognition agreement between the parties and that the applicant did not enjoy any organisational rights within the respondent which would entitled it to stop-order facilities. Moreover, it was recorded that the stop-order facilities were previously granted erroneously, and that to this end, notice was being issued to terminate any rights including the stop-order facilities which the union used to enjoy. Significantly, the applicant was advised to utilise the provisions of section 21 of the LRA should it hold the view that it was sufficiently representative within the respondent to claim organisational rights. This is the very same correspondence through an email, that the applicant now seeks to have withdrawn on an urgent basis.

[7] On 7 October 2022, the applicant approached the Commission for Conciliation Mediation and Arbitration (CCMA) to make a settlement agreements concluded at that forum on 26 October 2016, an arbitration awards in terms of section 142A of the LRA. In that agreement, it was recorded between the parties that they were to determine which areas in the workplace the union was representative, and had to further confirm which areas the Union had gained access since 1986. It was further agreed that the union would continue to enjoy stop order facilities and access to the workplace. Significant was that the parties further agreed to continue with discussions regarding an agreement on organisational rights.

[8] On 4 November 2022, the respondent filed its answering affidavit opposing the applicant's section 142A of the LRA application before the CCMA. On 14 November 2022, the CCMA issued an award making the settlements agreement under case numbers GAJB 6379-16 and GAJB 11020-16 arbitration awards of the CCMA. On 22 February 2023, the respondent filed an application in terms of section 145 of the LRA seeking to review and set aside the aforesaid arbitration awards which were issued in terms of section 142A of the LRA.

[9] Before the Court can consider whether the applicant is entitled to the relief it seeks, it must be satisfied that the application deserves its urgent attention. The urgency claimed by the applicant essentially relates to its alleged financial harm and

prejudice resulting from the non-processing of its members' stop orders. In this regard, it had complained that if the stop-order facilities were not reinstated, it will not meet its financial obligations, including the payment of salaries and rent which would in effect render it bankrupt. It was contended that the respondent's review application manifested an unwillingness to reinstate the stop-order facilities. This in turn exposed the applicant to a risk that it might cease to operate owing to the non-collection of subscription fees.

[10] In disputing that the matter is urgent, the respondent contended that the applicant had not articulated the reasons that renders this matter urgent. This is so since the only discernible reason for urgency is that the applicant would suffer financial hardship. The contention was that the amount that the applicant seeks to recover from the respondent is a mere R29 900.00. Furthermore, the applicant only has 50 members within the workplace, in circumstances where it has other members within the banking sector. This therefore meant that the applicant's claim of financial hardship was not genuine. The respondent further contended that the applicant failed to set out the reasons why it could be said it would not receive substantial redress in due course.

[11] The respondent further contended that the urgency was self-created. This is so since the termination of the stop-order facility occurred in September 2022, which is a period of some five months, prior to the applicant approaching the Court on an urgent basis, and further without providing reasons for this delay in seeking urgent relief.

[12] In determining whether a matter deserves the urgent attention, the Court will consider whether the applicant in the founding affidavit, has set out explicitly the circumstances which renders the matter urgent; and further whether the reasons why substantial redress cannot be attained in a hearing in due course have been set out.[5]

[5] See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 6 and 7, where it was held: -

> "The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. 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 readdress 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

In *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd & another*[6] it was held that a party which seeks urgent intervention must approach the court with the necessary haste. Thus, where there was an undue delay in bringing the application, urgency might in those circumstances evaporate.

[13] In *National Police Services Union & others v National Negotiating Forum & others*[7] it was held that the provisions of rule 8 of the Rules of this Court permit the dispensing with the peremptory timeframes which govern the filing of applications in circumstances where the adherence to the timeframes would otherwise result in injustice. However, this departure from the ordinary timeframes ought not to be available to parties that unduly delay to an extent that it is the delay itself that results in the harm which is sought to be remedied by the urgent relief.

[14] In this case, I am in agreement with the contention on behalf of the respondent that the urgency claimed in this matter is indeed self-created, even on the applicant's own version. The conduct complained of arose on 14 September 2022, when the respondent terminated the stop order facilities. To the extent that the applicant seeks that the email in terms of which these rights were withdrawn be set aside, I truly fail to appreciate the purpose of such an order. It is not for the Court to set aside correspondence between the parties simply because a party does not like its content.

[15] What can be discerned from the reasons for urgency is that on 7 October 2022, the applicant approached the CCMA in terms of section 142A of the LRA, and that application was finalised on 14 November 2022, with the issuance of an arbitration award in its favour.

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by the issue of absence of substantial readdress in the application in due course. The rules allow the court to come to the assistance of a litigant because of the latter, were to wait for the normal course laid down by the rules, it will not obtain substantial readdress. It is important to note that the rules require absence of substantial redress. This is not equivalent to irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in this regard."

[6] (2016) 37 ILJ 2840 (LC) at para 26; see also *National Association of South African Workers obo Members v Kings Hire CC* [2020] 3 BLLR 312 (LC) at para 24.

[7] (1999) 20 ILJ 1081 (LC) at para 39.

[16] Even if it can be accepted that prior to approaching the Court a litigant must take steps to remedy the conduct complained of, in this case however, there is nothing that was done after the arbitration award of 14 November 2022. Effectively, the applicant remained supine since 14 November 2022 until 18 January 2023 when it held a meeting with the respondent. From that meeting, the respondent did not change its stance related to the termination of stop order facilities. This stance continued into 30 January 2023, with the respondent further indicating that it was persisting with its review application related to the arbitration award. Thus, even if it can be accepted that the necessity to seek urgent relief arose from 30 January 2023, it nevertheless took the applicant a further two weeks before filing this application. There is no explanation for this delay in circumstances where it is contended that the conduct of the respondent has the potential to cause irreparable harm.

[17] It is therefore apparent that the harm that the applicant complains of is brought about as a result of its own undue delay in bringing the application. It is five months since the rights were withdrawn. What the applicant instead elected to do was to pursue a 'Settlement Agreement' concluded in October 2016. Based on this agreement, which has since been turned into an arbitration award some five years later, the applicant sought to argue that the matter was *res judicata*, in the sense that it was impermissible for the respondent to not only terminate the old recognition agreement but to also terminate the stop order facilities.

[18] There is fundamentally nothing from that settlement agreement concluded in October 2016, that can be construed as putting an end to the dispute between the parties, even if it had culminated in an arbitration award. If a provision is made in the agreement that the 'parties *will consider*, or will *determine*, or will *continue to discuss* something in relation to that dispute since 2016, and nothing had been done in that regard since then, it is clear that the dispute cannot be said to be finally settled for the purposes of a defence of *res judicata*.

[19] Equally flawed with the applicant's argument is the contention that the provisions of section 23(4) of the LRA are not applicable since the agreement arises from the 1956 Act. The collective bargaining rights arising from that Act can definitely

not be immune from the provisions of section 23(4) of the LRA. From a mere reading of those provisions, it is apparent that they apply to all collective agreements including that that have an indefinite duration[8].

[20] The respondent correctly pointed out that the applicant's remedies lay in the provisions of section 21 of the LRA through a referral to the CCMA. The applicant was told of that fact since September 2022 when the stop order facilities were terminated. It failed to act, let alone approach this Court at the time. Incidentally, the applicant in its heads of argument continuously and liberally makes reference to those provisions and the authorities in this regard, yet it fails to understand its import. It has to date, refused to follow those procedures, and instead persisted to claim rights that have since been withdrawn. It further seeks to convince the court that its rights were fortified with the 'Settlement Agreement', and I have already expressed a view of flaws in that agreement to the extent that it does not give rise to any rights let alone those accruing to the applicant arising from the 1986 recognition.

[21] Even if there was something to hang on to in the settlement agreement, approaching the urgent Court in the manner that the applicant did, does not assist it. Thus, since the applicant effectively complains of non-compliance with the arbitration award, this would have necessitated contempt proceedings rather than seeking urgent final relief. I any event, the principal enquiry remains why the applicant had remained supine at least from 12 April 2016 when the settlement agreement was concluded, and from September 2022 when the rights claimed were terminated.

[22] To this end, I agree that the applicant clearly rushed to this Court on an urgent basis, when it was in a position to obtain substantial redress through the provisions of section 21 of the LRA. The mere fact that the applicant suddenly finds itself in a financial quandary does not give rise to urgency, especially in circumstances where it foresaw that harm and did nothing despite being advised as to what procedures it ought to follow to continue to be granted the rights in question.

[8] Section 23(4) of the LRA provides:
'Unless the *collective agreement* provides otherwise, any party to a *collective agreement* that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.'

[23] It follows that the applicant has not satisfied the requirements of urgency contemplated in Rule 8, and as a consequence, the application ought to be struck off the roll, without the need to even consider all the other preliminary points raised on behalf of the respondent. Even if the Court were to consider the merits of this application, it is clear that no cause of action has been established by the applicant, and the requirements of final relief sought are not even close to being met.

[24] I further agree that this application was frivolous and ought not have burdened this Court's urgent roll. Notwithstanding, and further having had regard to the circumstances of this case, I am of the view that an order of costs ought not be made.

[25] In the premises, the following order is made:

Order:

1. The applicant's application is struck-off the roll on account of lack of urgency.
2. There is no order as to costs.

Edwin Tlhotlhalemaje
Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	M.T. Nhlapho, union official of BIFAWU.
For the third Respondent:	J.J. van der Watt, of Cliffe Dekker Hofmeyr Incorporated.