IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

NOT REPORTABLE
Case Number P578/17

In the matter between:

NOMZINGISI TUKELA **APPLICANT**

and

MINISTER OF PUBLIC WORKS **First Respondent**

DIRECTOR GENERAL: NATIONAL DEPARTMENT OF PUBLIC WORKS **Second Respondent**

Heard: 19 December 2017
Delivered: 19 December 2017

JUDGMENT

POTGIETER, AJ

[1] This is an urgent application for an order –

(i) condoning the applicant's non-compliance with the time frames set by the rules directing that the application is urgent;

(ii) declaring that the First Respondent's decision to permanently transfer the Applicant from her place of work in Mthatha to the Second Respondent's offices in Pretoria to be unlawfull, void, unfair and of no force or effect.

(iii) declaring the First Respondent's instruction pursuant to the purported decision to transfer the Applicant permanently to Pretoria unlawful, void, unfair and of no force and effect;

(iv) interdicting and restraining the Respondents from taking any action, disciplinary or otherwise, arising from her refusal to accept transfer to Pretoria which will prejudice the Applicant in her employment for so long as she tenders service as Chief Director: Regional Head of the Mthatha Regional Office in terms of her contract of employment

(v) interdicting and restraining the Respondents from appointing anyone else to the position of Chief Director: Regional Head for the Mthatha Office unless and until the applicant is lawfully removed from the post.

(vi) Directing that the order sought in prayers i, ii. iii, iv and v to be final in effect.

[2] Alternatively hereto, the Applicant also sought an order that the prayers ii to v operate as an interim order pending a return date for the Respondents to show cause why the orders should not be made final

[3] The respondents opposed the applicant's application on the basis that the applicant did not show urgency; This Court does not have the required jurisdiction and the application for the relief sought had no merit.

BACKGROUND TO THIS DISPUTE

[4] I do not intend referring to the background to this dispute in much detail in light of my conclusion that the matter is not urgent and that it should accordingly be struck of the roll. Suffice to briefly point out that the applicant's special leave she was placed on was uplifted on 18 February 2016 subsequent to her horizontal transfer (placement) from Mthatha to Head Office with a choice of two positions on 6 January 2016. The applicant failed to make a selection

[5] Further correspondence ensued relating to the applicant's conduct and the decision to transfer the applicant and the procedure followed with final confirmation of the transfer to the applicant's attorney on 15 August 2017.

[6] The notice of a disciplinary hearing is dated 18 August 2017.

URGENCY

[7] From the afore going it is clear that the administrative action the applicant is complaining about was confirmed to the applicant's representative, (Mr. Vlok) on 15 August 2017 and notice of the disciplinary enquiry was given in August 2017. What is, however, also clear is that the present urgent application was only filed with this Court on 12 December 2017 which is approximately four months after the administrative decision was confirmed and disciplinary steps instituted.

[8] 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 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; and
(b) the reasons why the requirements of the rules were not complied with, if that is the case.

[9] It is also trite that administrative action stands until reviewed and set aside.

[10] Urgency in itself does not relieve a party from this obligation and an 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.[1] Only once an applicant has persuaded the Court that sufficient grounds exist which necessitate 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.[2]

[1] See *Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 *ILJ* 372 (W) at 387I: "An applicant who seeks relief by way of notice of motion should put all the facts, in as much detail as possible, before the Court. The mere fact that an application is urgent and urgent relief is sought does not relieve an application of this duty."

[2] See the well-known and often quoted decision in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) 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:
"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

[11] The applicant states that the matter is self-evidently urgent. This contention is not supported by the facts. It is clear from the correspondence relied on by the applicant that there could not be any doubt that the Respondents had made up their minds that the applicant

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(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 F 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 causes 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."

will be transferred in the letter dated 15 August 2017. This administrative action was not taken on review then or now.

[12] The threats complained of existed for approximately four months before the applicant decided to bring this application

[13] 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.[3] In fact, the founding affidavit does not properly address the question of urgency at all: Apart from prayer 1 of the Notice of Motion in terms of which condonation is sought for the Applicant's non-compliance with the relevant provisions of 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. It does not suffice to say the matter is self-evidently urgent. More in particular the Applicant does not even attempt to explain why this application was not brought to this Court shortly after the events in August 2017. She in fact says on 18 August 2017 that she will seek legal advice to challenge the transfer in court. It is clear to my mind that

[3] See *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 493A – G: "Sub-rule (12) provides that the Court may dispense with the ordinary notice generally required for applications by way of notice of motion in urgent applications. The Rule requires the applicant seeking such indulgence to set forth explicitly the circumstances which he avers render the matter urgent and also to forth explicitly the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. The practice in this Division, and in my experience also in other Divisions, has been for a petitioner seeking to rely on the provisions of this Rule to include a reference in his affidavit to the urgency of the matter and to ask the Court explicitly to dispense with the requirement demanded of an ordinary notice of motion. **It has not been the practice to rely simply on arguments based on implications and deductions which may be made from allegations contained in the affidavits, and to my mind the Rule contemplates a request to the Court to treat the matter as one of urgency and to condone the non-compliance with the normal procedure on notice prescribed earlier in the Rule.** True, a mere request for the matter to be treated as one of urgency is not in itself sufficient, but facts must also be laid before the Court to support the allegation that the matter is one of urgency……. I am not persuaded on the papers presently before the Court that I should accede to this argument, more particularly when Mr Smalberger has pertinently taken the point of non-compliance with the Rule. I regard it as desirable that an applicant seeking to dispense with the ordinary procedure should set out in his affidavit that he regards the matter as one of urgency, and should refer explicitly to the circumstances on which he bases this allegation and the reasons why he claims that he could not be afforded substantial relief at the hearing in due course." (my emphasis.)

she at that stage contemplated if not decided to take legal action to challenge her transfer (and disciplinary action)

[14] It is trite that an Applicant cannot create his or her own urgency by delaying bringing an application.[4] This Court will not come to the assistance of an applicant who has delayed approaching the Court.[5] See *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 *ILJ* 1081 (LC) at 1092 paragraph [39] where Van Niekerk, AJ (as he then was) 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."

[4] See *Schweizer Reneke Vleis Mkpy (Edms) Pbk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T) at F11 - 12: "Volgens die gegewens voor die Hof wil dit vir my voorkom dat die applicant alreeds vir meer as 'n maand weet van die toedrag van sake waarteen daar nou beswaar gemaak word. Die aangeleentheid het slegs dringend geword omdat die applikant getalm het en omdat die tweede respondent, soos die applikant lankal geweet het of moes geweet het…. Al hierdie omstandighede in ag genome is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die Hof op hierdie stadium as 'n saak van dringendheid moet ingryp nie. Ek is dus, in die omstandighede, nie bereid om af te sien van die gewone voorskrifte van reël 6."

[5] See in this regard *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV* 2006 (3) SA 92 (C) at paragraph 47.

[15] I am in light of the afore going of the view that the Applicant has created her own urgency by the substantial delay. I am of the view that the application falls to be struck of the role.

COSTS

[16] In respect of costs it was argued by the Respondent that costs should be awarded including the costs of senior counsel. The applicant argued that costs should follow the result

[17] In the event the following order is made:

Order:

1. The application is struck off the role with costs (including the costs of senior counsel).

POTGIETER, A J

Appearances

For the Applicant: Advocate Grogan

Instructed by Nosindwa Attoneys Inc.

For the Respondent: Advocate Sassim SC

Instructed by the State Attorney