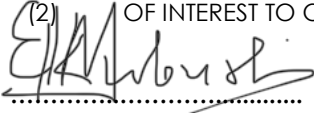




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2022/35255

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
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E.M. KUBUSHI	DATE: 04 November 2022

In the matter between:

MPHATHIWEZWE NKABINDE

APPLICANT

and

ESKOM

1st RESPONDENT

HEAD OF SIU

2nd RESPONDENT

SIU

3rd RESPONDENT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 04 November 2022.

[1] This matter appeared before this Court in the urgent court where the Applicant sought interdictory relief in terms of which two orders should be granted. The first order is in regard to the stay of the disciplinary hearing that is underway, instituted by the 1st Respondent against the Applicant. The order is sought to be granted pending the institution by the Applicant of proceedings that will *inter alia* request this Court to declare the disclosure made by the Applicant to the 1st and/or 2nd Respondents and/or persons representing the 1st and/or 2nd Respondents, as a "protected disclosure", as contemplated in terms of the provisions of the Protected Disclosures Act, No. 26 of 2000 ("the Act").

[2] The second order sought is for the discovery by the 1st and/or 2nd and/or 3rd Respondents of various documents and evidence that forms part of the said disciplinary hearing.

[3] Only the 1st Respondent is opposing the application on the merits and has in addition raised the issues of urgency and jurisdiction, as points *in limine*. The 1st Respondent contends in the points *in limine* that there is no case made out for urgency in the applicant's founding papers and that this Court has no jurisdiction to entertain this matter.

[4] On the reasons set out hereunder, it is this Court's view that the matter ought to be struck from the roll for lack of urgency.

[5] The starting point for a matter to be heard in Court on an urgent basis, is Uniform Rule 6(12)(b) which stipulates that

“In every affidavit or petition filed in support of any application under paragraph (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.”

[6] There are two requirements that the Applicant must satisfy in order to have her/his matter heard in the Urgent Court. These requirements are that the applicant shall set forth explicitly (a) the circumstances which she/he avers render the matter urgent; and (b) the reasons why she/he claims that she/he could not be afforded substantial redress at a hearing in due course.

[7] In the papers before this Court, the urgency of this matter is said to be created by the 1st Respondent's unreasonable refusal to stay the disciplinary proceedings against the Applicant, despite request by the Applicant to do so. This reason is linked to the main relief which is sought in prayer 2 of the Notice of Motion, that is, to stay disciplinary proceedings pending the protected disclosure relief.

[8] There is no indication in the papers to show when the Applicant became aware of his rights in terms of the Act (what the 1st Respondent's counsel referred to as the 'trigger event'), as such it cannot be determined from the papers whether the matter is urgent or not. Counsel for the Applicant, conceded as much in his oral argument that from the papers as they stand it cannot be determined when the Applicant came to know of his contended rights, which in turn impacts on his contention that the matter is urgent.

[9] In trying to salvage the Applicant's case, counsel contended, in oral argument that it should be assumed, based on the evidence proffered by the Applicant viewed as a whole, that as a lay person and being represented by a labour/employee representative at the hearing, he did not know of his rights and/or could not have known of his rights in accordance with the Act, until he was informed by his attorneys.

[10] Yet, the Applicant does not in his founding affidavit state when he employed the services of an attorney. Nonetheless, there is a letter on record to which this Court was referred to as proof that the Applicant did request the list of evidence from the 1st Respondent, that is dated 9 May 2022. This letter is written by Elliot Attorneys who are the attorneys of record for the Applicant. If the submission by counsel that the Applicant was informed by his attorneys of the rights that are being infringed in the disciplinary hearing, is to be accepted, then it would mean that as far back as May 2022 the Applicant was aware of his rights. That, to this Court would be the date of the 'trigger event', which means that, without any explanation provided why the matter is only brought to court now, the urgency, in such circumstances, is self-created.

[11] Furthermore, in an attempt to save the Applicant's case, counsel, in turn relied on the evidence contained in the 1st Respondent's answering affidavit that the matter should be regarded as urgent because the disciplinary hearing is nearing finalisation. The 1st Respondent's counsel objected to the use of such evidence by the Applicant, contending that it is completely wrong for the

Applicant to rely on what the 1st Respondent say in its answering affidavit, to justify urgency.

[12] Even if this Court were to accept that indeed the disciplinary proceedings are coming to an end and the application before this Court is as a result thereof urgent, the difficulty, as it would be shown later in this judgment, is that the Applicant has not been able to get passed the second hurdle of the Uniform Rule 6(12) requirements, that is, he will not be afforded substantial redress in a hearing in due course.

[13] As far as prayer 2 sought by the Applicant in the Notice of Motion, is concerned, that is the stay of the disciplinary hearing, the evidence show that only one letter was written to the 1st Respondent requesting the stay of proceedings which it appears was never answered. The letter is dated 4 October 2022 and was send *per* email on the same date. The disciplinary hearing that was sought to be stayed, was scheduled to be heard on 24 and 25 October 2022.

[14] Save to say that the 1st Respondent is proceeding with the hearing and refuses to stay the proceedings, despite his request to stay same, and that he is waiting for the next hearing date, the Applicant says nothing about what transpired on the date of hearing and why if there was a hearing did the Applicant not inform the presiding officer of the predicament he found himself in. Of great concern is that he fails, as conceded by his counsel, to inform this

Court when he came to the knowledge that his rights are being infringed and that he requires to approach the Court for a determination of those rights.

[15] As regards prayer 3 sought in the Notice of Motion, that is, the discovery of evidence, the evidence on record establishes that the Applicant requested the 1st Respondent to provide him only with the Bowman Report, bank statements and the recording of the hearings that occurred during 2021, for transcription (“the Recording”). The Bowman Report was requested as far back as 20 April 2022, in an email the Applicant sent to the 1st Respondent on that day, which email appears not to have been answered. Since that day, the Applicant has done nothing about that request.

[16] In his founding papers, the Applicant states that he has not been provided with a list of the evidence which he requested the 1st Respondent to provide him with. In this regard, he referred this Court to a letter written by his attorneys of record to the 1st Respondent dated 9 May 2022 and sent *per* email on the same date (“Annexure D”). There is no list of evidence requested in that letter except bank statements and the Recording. Included in Annexure D, are copies of internal email correspondence of the 1st Respondent, dated 2 June 2022, that shows that the 1st Respondent did not possess any other documents except the charge sheet and all the evidence that have already been provided to the Applicant. Even in this regard, no other request has been made.

[17] The Applicant further mentions in his founding affidavit that he seeks an order disclosing all evidence exchanged between the 1st Respondent and the

2nd Respondent, pertaining to himself, and a confirmation filed under oath, of how his bank statements were obtained by the 1st and 2nd Respondents, within 14 days of date of this order. There is no evidence on record indicating that the Applicant has ever requested such evidence from the 1st Respondent and that if ever he required this information, when did he become aware of such exchange of evidence.

[18] The 'trigger event' in respect of both prayers, is not visible from the papers, to provide sustenance to the Applicant's claim that this matter is urgent. In the first place, there is no evidence, on the papers filed of record, indicating when the Applicant became aware of his rights contemplated in the Act or when he became aware that he should institute action for the determination of those rights. Secondly, there is no evidence that indicates why he did not follow up on the requests for evidence and/or documents that he made and to which the 1st Respondent did not respond to. Except for the evidence that is alluded to in the above paragraphs of this judgment, there is no evidence that establishes that the Applicant ever requested the 1st Respondent to provide him with any other documents and/or information and/or evidence. The fact is, it cannot be ascertained from the papers why it is now urgent that these documents and/or information and/or evidence should be provided on an urgent basis.

[19] The Applicant failed to pass the first hurdle for the requirement of urgency as set out in Uniform Rule 6(12), and on this requirement alone the application falls to be dismissed.

[20] It is this Court's view that the Applicant has, also, failed in the second requirement. As argued by the 1st Respondent, correctly so, the Applicant has not made out a case to demonstrate as to what would happen to him, which in law should not happen to him, if the application is not heard on an urgent basis.

[21] It is trite that the question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in due course. As such, the rule allows the court to come to the assistance of a litigant because if the latter were to wait for the normal course she/he will not obtain substantial redress.

[22] The Applicant has not made out a case in the founding papers why he cannot get substantial redress at a hearing in due course. In one line in his founding affidavit, the Applicant states that 'Unfortunately, it will take many months to be heard in the normal course and it will take many months for the aforesaid proceedings to be finalised.' The allegations he makes are unsubstantiated. He leaves it to the Court to figure out why it will take months for the aforesaid proceedings to be heard and to be finalised. Thus, on this requirement, the Applicant's case of urgency, falls flat.

[23] It is a trite principle of our law that urgency is not there for the taking. An applicant who wants her/his case to be heard on the basis of urgency must make out a good case in her/his founding affidavit as required in terms of Uniform Rule 6(12). The Court should not be swayed to grant a hearing in the

urgent court by sympathy where the Applicant has failed to make out her/his case.

[24] It is on all this reasons as afore stated that this Court makes a ruling that the application should be struck from the roll for lack of urgency.

[25] The Applicant's counsel requested this Court to apply the *Biowatch* principle¹ in the event that this Court does not rule in favour of the Applicant. The Court in *Biowatch* held that the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs, unless the application is frivolous or vexatious or in any other way manifestly inappropriate.

[26] Counsel submits that the principle is applicable because the Applicant is contending, in these proceedings, for his rights as contemplated in the Act and was litigating on a *bona fide* basis. The order contended for by counsel is that even if the Applicant is not successful the order for costs should be made against the 1st Respondent, as an organ of State.

[27] Save to request that the application be dismissed with costs of two counsel on a punitive scale, the 1st Respondent has not made out an argument, either in its papers or in oral argument, specifically pertaining to the *Biowatch*

¹ *Biowatch Trust v Genetic Resources and Others* 2009 (6) BA 232 (CC).

principle, nor argued whether the matter involved the constitutional rights of the Applicant.

[28] Whether *Biowatch* is applicable or not depends on the facts of each case. In the circumstances of this matter, this Court holds a view that the case presented constitutional rights of the Applicant, in that he alleges that his rights in accordance with the Act are being trampled on in the disciplinary hearing. There is, also, no evidence on record that the application is frivolous or vexatious or manifestly inappropriate. The complaint by the 1st Respondent's counsel is only that the matter is clearly not urgent and that the Applicant did not approach the correct forum. This does not amount to the application being frivolous or vexatious or manifestly inappropriate, thus, the *Biowatch* principle is found to be applicable.

[29] Consequently, the 1st Respondent should be ordered to pay the Applicant's costs on a party and party scale.

[30] The following order is made –

1. The application is struck from the roll.
2. The 1st Respondent is order to pay the Applicant's costs on a party and party scale.



E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANTS' COUNSEL: ADV. G LOUW

APPLICANTS' ATTORNEYS: ELLIOT ATTORNEYS

FIRST RESPONDENT'S COUNSEL: ADV. K TSATSAWANE, SC
ADV. HUMBULANI SALANI

FIRST RESPONDENT'S ATTORNEYS: RAMATSHILA — MUGERI INC.