



**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable  
Case no: D 277/22

In the matter between:

**MTHOKOZISI PIUS DUZE**

**Applicant**

and

**MHLATHUZE WATER**

**Respondent**

**Heard: 30 June 2022**

**Delivered: 30 June 2022**

**Reasons:** In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 31 August 2022.

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**REASONS FOR ORDER**

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MAHOSI, J

## Introduction

[1] The applicant, Mr Mthokozisi Pius Duze (Mr Duze), brought an application for an order in the following terms:

- '1. Condoning any non-compliance with the rules of this Honourable Court relating to service, notice and form and directing that this application be enrolled and heard on an urgent basis.
2. That the rule nisi do issue calling upon the respondent to show cause on the \_\_day of \_\_2022 at 10h00 or so soon thereafter as the matter may be heard why an order in the following terms should not be confirmed:
  - 2.1 That the suspension of the applicant by the respondent, first imposed on him by notice dated 07 December 2021, as extended from time to time by notices dated 28 January 2022, and 05 May 2022 is declared to have expired and have lapsed on the 8<sup>th</sup> June 2022;
  - 2.2 Declaring that the respondent's continuing attempt to keep the applicant under suspension pending the outcome of a disciplinary enquiry as reflected in the notice dated 2 June 2022, to be contrary to the prescripts of the respondent's Disciplinary Policy, invalid and unlawful;
  - 2.3 Directing the respondent to allow the applicant to resume his duties forthwith as the chief executive of the respondent;
  - 2.4 Directing the respondent to pay the costs of this application on such punitive scale as this Court deems appropriate, including the costs of two counsel where so engaged.
3. That the orders in paragraph 2.1, 2.2 and 2.3 above shall operate as interim orders forthwith pending the final determination of this application.
4. Further and alternative relief.'

[2] The application was opposed by the respondent, Mhlathuze Water.

- [3] The application served before me on 30 June 2022 and having determined the issues, I issued the order in terms of which it was struck off the roll for lack of urgency with costs.
- [4] Mr Duze has requested reasons for the aforementioned order, which will follow hereunder.

### Background

- [5] The facts giving rise to this dispute are not disputed and are outlined in the founding and the answering affidavits.
- [6] Mhlathuze Water, is a water board, which is a wholly state-owned entity established in terms of section 28 of the Water Services Act<sup>1</sup>. Mr Duze was appointed as the Chief Executive of Mhlathuze Water from 1 July 2019, for a period of five years.
- [7] It is common cause that following a report of certain serious allegations into alleged irregularities at Mhlathuze Water by an undisclosed whistle blower, the board resolved, on 6 December 2021, to investigate the allegations and also to place the implicated officials on precautionary suspension with effect from 8 December 2021 to 31 January 2022. Accordingly, on 7 December 2021, Mr Duze was furnished with a letter placing him on precautionary suspension with effect from 8 December 2021.
- [8] Aggrieved by the decision to suspend him, Mr Duze referred a dispute, in terms of section 186(a)(b) of the Labour Relations Act<sup>2</sup> (LRA) to the Commission for Conciliation, Mediation and Arbitration (CCMA) challenging the fairness of his suspension on 19 January 2022. The dispute could not be resolved through conciliation. As a result, it was referred to arbitration, which was set down for 25 March 2022.

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<sup>1</sup> 108 of 1997.

<sup>2</sup> No. 66 of 1995, as amended.

- [9] On 26 January 2022, Mr Duze's attorneys wrote a letter to Ms Shange, the chairperson of Mhlathuze Water Board (the board), informing her that Mr Duze would be reporting for duty on 1 February 2022 as his precautionary suspension was coming to an end on 31 January 2022.
- [10] On 28 January 2022, Ms Shange wrote a letter to Mr Duze's attorneys informing them that the board resolved to extend Mr Duze's precautionary suspension for a period of three months with the option of an extension of up to six months, should it be necessary and appropriate in line with Mhlathuze Water's Disciplinary Policy. In addition, Mr Duze was invited, through an email dated 22 February 2022, to meet with the forensic investigators on 24 February 2022.
- [11] The arbitration that was scheduled to commence on 25 March 2022, could not proceed and the parties, by consent, adjourned the matter due to the unavailability of the applicant's representative in the matter
- [12] On 29 April 2022 Mr Duze's attorneys addressed a correspondence to the attorney's of Mhlathuze Water confirming that Mr Duze would report for duty on 3 May 2022 as his second precautionary term was about to expire. The response was that Mr Duze should not return back to work until he was instructed to do so.
- [13] On 4 May 2022, the CCMA sent the notice of set down to the parties inviting them to arbitration that was scheduled to be heard on 10 June 2022. On 5 May 2022, Mhlathuze Water extended Mr Duze's suspension to 8 June 2022.
- [14] On 3 June 2022, Mhlathuze Water served Mr Duze with the notice to attend the disciplinary enquiry and further informed him that he was suspended pending the outcome of the disciplinary enquiry. In response, Mr Duze's attorneys addressed a letter dated 06 June 2022 to Ms Shange and the Minister of Water and Sanitation indicating that Mr Duze would return to work on 09 June 2022. The letter further stated that if Mr Duze was not permitted to return to work, he

would approach this Court for an urgent relief. On the same day, Mr Duze was advised that he would not be allowed to return to work.

[15] On 13 June 2022, Mr Duze's attorneys wrote to Mhlathuze Water inquiring what legal basis it had to continue with Mr Duze's suspension and requested a copy of the board resolution that authorized his continued suspension. The attorneys of Mhlathuze Water responded by summarizing the events of the day when the notice of the disciplinary hearing was served on Mr Duze to what transpired at the CCMA on 11 June 2022. They further stated that to an extent that what Mr Duze sought from the CCMA was an upliftment of his suspension, his pending urgent application to this Court would amount to forum shopping as he would be seeking the same relief. This prompted Mr Duze to bring this application.

[16] As aforementioned, Mhlathuze Water challenged the urgency of this application.

#### Urgency

[17] Mr Duze submitted that this matter remained urgent and that he prepared this application as soon as it was reasonably possible. In opposing the urgency of this matter, Mhlathuze Water submitted that Mr Duze was relying on self-created urgency in that he knew on 06 June 2022 that he would not be allowed back at work, but despite this, he only delivered this application on 20 June 2022.

[18] The requirements for urgency are trite.<sup>3</sup> Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court requires a party seeking urgent relief to set out the reasons for urgency and to show why the rules of this Court relating to forms and service should be dispensed with.

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<sup>3</sup> See: *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).

[19] In *Jiba v Minister of Justice and Constitutional Development and Others*<sup>4</sup>, this Court considered Rule 8 and stated as follows:

‘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.’

[20] In the current matter, Mr Duze failed to set out an explanation why the relief is sought on an urgent basis, except to state that he prepared this application as soon as it was reasonably possible. He further failed to set out an explanation why the timeframes set out in the Rules should be abridged and why the Rules of this Court relating to forms and service should be dispensed with.

[21] Instead, Mr Duze submitted that Mhlathuze Water’s conduct of putting him on a protracted and indefinite paid suspension offends his constitutional imperatives, including his right to dignity, the freedom to choose his trade, occupation and profession freely, fair and just administrative action and Mhlathuze Water’s obligation to use public resources efficiently, economically and effectively.

[22] Mr Duze further stated that Mhlathuze Water’s disciplinary code, which was incorporated to his contract of employment recognizes these constitutional imperatives by limiting the period within which all disciplinary matters are to be finalized to three months, and on good cause six months. In addition, Mr Duze’s submitted that being away from his chosen profession for more than six months was prejudicial to him as he continues to suffer harm.

[23] Admittedly, Mr Duze’s constitutional rights are of paramount importance. However they do not necessarily render his application urgent. He alleges that the urgency was triggered by the notice of suspension dated 2 June 2022,

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<sup>4</sup> (2010) 31 ILJ 112 (LC) at para 18.

which purports to suspend him pending the outcome of the disciplinary enquiry. However, he fails to explain why he approached this Court only on 20 June 2022.

- [24] What became apparent was that instead of approaching this Court immediately after receipt of the aforementioned suspension letter, on 06 June 2022 he addressed a letter to Mhlathuze Water indicating that he would return to work on 09 June 2022 and that if he would not be permitted to return to work, he would approach this Court for an urgent relief.
- [25] Mhlathuze Water acted promptly. On the same day, 06 June 2022, it advised him that he would not be allowed to return to work. Mr Duze still failed to approach this Court at that point. Rather, a week later, he addressed another letter to Mhlathuze Water inquiring what legal basis it had to continue with his suspension and requested a copy of the board resolution that authorized his continued suspension.
- [26] The conduct of Mr Duze's attorneys is a clear demonstration of '*litigation at leisure*', which exhibited lack of due haste in bringing this application. This Court has cautioned that the latitude extended to parties to dispense with the rules of the court in circumstances of urgency is not available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely on to seek relief.<sup>5</sup>
- [27] This Court and the Labour Appeal Court have, on numerable occasions, expressed an unwillingness to interfere in incomplete disciplinary inquiries. In *Booyesen v Minister of Safety and Security and others*<sup>6</sup> the Labour Appeal Court found that:

'... [T]he Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in

<sup>5</sup> See: *Himoinsa Southern Africa (Pty) Ltd v Taylor and Another* (J873/2021) [2021] ZALCJHB 329 (1 October 2021)

<sup>6</sup> [2011] 1 BLLR 83 (LAC) at para 36.

exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.’

- [28] It is apparent from the above authority that the guiding principle, which this Court must follow, is the question whether there exists, any truly exceptional circumstances, which warrants its intervention in incomplete disciplinary proceedings. In *casu*, Mr Duze failed to show that there were exceptional circumstances warranting granting of the orders as sought. As such, I was not persuaded that he had made out a case for the relief sought. Thus, his matter fell to be struck off the roll for lack of urgency.

### Costs

- [29] Mr Duze sought a cost order against Mhlathuze Water and the latter sought an order of costs *on* a punitive scale, including the cost consequent upon the employment of a senior counsel and two counsel were employed against Mr Duze.
- [30] The rule of practice that costs follow the result does not apply in Labour Court matters.<sup>7</sup> However, in a case where the urgency is self-created and the conduct of the litigant was frivolous, *mala fide* and forum shopping, the Court must show its displeasure. In this matter, Mr Duze approached the CCMA for the upliftment of his suspension and whilst knowing that his matter was scheduled to be heard on 15 July 2022, he rushed to this Court with a similar application, *albeit* on the basis of the unlawfulness of the conduct of Mhlathuze Water. This flies in the face of a number of this Court’s judgments emphasising the narrow basis on which intervention in uncompleted disciplinary proceedings might be sought<sup>8</sup>. As such, I took the view that the costs of this litigation must be borne by Mr Duze.

<sup>7</sup> *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC).

<sup>8</sup> See: *Shezi v South African Police Service and others* (2021) 42 ILJ 184 (LC) at para 24.



[31] It was for the above reasons this Court issued the aforementioned order.

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D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate

Instructed by: Garlicke & Bousfield Incorporated Attorneys

For the respondent: Advocate

Instructed by: MacGregor Erasmus Incorporated Attorneys

LABOUR COURT