IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J4115/18

In the matter between:

TLADI MOSES LITSOANE	**First Applicant**
ANNEXURE "TML''	**Second to 29th Applicants**
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**First Respondent**
NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES	**Second Respondent**

Heard: **22 November 2018**

Delivered: **28 November 2018**

JUDGMENT

MAHOSI J

Introduction

[1] This is an urgent application in terms of which the applicants seek an order in the following terms:

> '1. It be declared that the respondents are prohibited from dismissing the applicants without following pre-dismissal procedure as provided by the Labour Relations Act, 66 of 1995.
>
> 2. The respondents be interdicted from appointing anyone to the Correctional Services Parole Board pending referral and outcome of their reasonable expectation of further contractual renewals in terms of section 186(1)(b)(i) of the LRA to the Public Services Bargaining Council.
>
> 3. The respondents be ordered to reappoint the applicants on the same terms pending referral and outcome of their dismissal to the bargaining council.
>
> 4. The respondents be ordered to pay the costs of the application on an attorney and own client scale.'

[2] The respondents, in the answering affidavit, opposed the application on the grounds that the relief sought in the notice of motion is not legally sustainable. The respondents' contention is that this application is not urgent and further that it lacks merit as the applicants are not employees of the Department of Justice and Correctional Services and as such were never dismissed. The respondents also took issue with the first applicant's failure to attach confirmatory affidavits of the second to twenty-ninth applicants.

Background Facts

[3] Prior to outlining the applicants' case in detail and considering the issues that gave rise to the claim, it is necessary to summarise the facts that form the relevant background to the dispute between the parties.

[4] The applicants are appointed as members of Correctional Supervision Parole Board (CSPB) in terms of section 74 of the Correctional Services Act[1]. The first respondent addressed a letter dated 26 February 2018 to the first applicant in terms of which the following was communicated:

> 'Kindly be advised that the Department of Correctional Services is hereby extending your contract as chairperson of the Correctional Supervision and Parole Board (CSPB), which is due to end on 31st of March 2018. The extension will be for a further period of three (3) months from 1st of April 2018 to 30thJune 2018. This will be the final extension of your current contract with the Department.
>
> Kindly further be advised that the opportunities to serve on the CSPB will be advertised soon, and you are advised to apply if interested. Kindly take note that suitable candidates shall be considered and recommended (and) may be placed on new contract.'

[5] At the beginning of March 2018, the first respondent published an advertisement, calling for applications to serve as members of the CSPB. Upon becoming aware of the advertisement, on 19 March 2018, the applicants addressed correspondence to the first respondent demanding that the process of interviewing interested candidates be halted. They argued that, as the board members, they were still in office and further that they had a legitimate expectation that their positions had become permanent. On the 13 April 2018 the respondents addressed a letter to the applicants in which it stated that a consultation with them would be arranged for the purpose of attending to their concerns. That consultation did not materialise. It is common cause that the applicants' contracts were subsequently renewed for a further period of two months until 31 August 2018 and again until 30 November 2018. On 13 November, the applicants filed this application. As earlier intimated, the respondents opposed this application on the basis that it lacks urgency and merits.

[1] Act 111 of 1988.

Urgency

[6] Rule 8 of the Rules of this Court provides that:

> '(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
>
> (2) The affidavit in support of the application must also contain-
>
> (a) the reasons for urgency and why urgent relief is necessary;
>
> (b) the reasons why the requirements of the rules were not complied with, if that is the case; and
>
> (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.'

[7] In *Jiba v Minister of Justice and Constitutional Development and Others,*[2] this Court considered Rule 8 and stated as follows:

> 'Rule 8 of the rules of this court requires 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 ordinarily 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.'[3]

[8] As stated above, Rule 8 of the Rules of this Court requires the applicant to set out an explanation why the relief is sought on an urgent basis and why the time frames set out in the Rules should be abridged. The applicant is required to show cause why the Rules of this Court relating to forms and service should be dispensed with. In the founding affidavit, the applicants set out the reasons for bringing this application on an urgent basis as follows:

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[2] (2010) 31 ILJ 112 (LC).
[3] At para 18.

'12. The first respondent has published and advertised positions we occupy without giving us notice of dismissal nor taking us through pre-dismissal processes as provided in Schedule 8 of code of Good practice of the LRA.

13. The conduct of the respondents is unlawful and continues to be so, as our contracts of employment will terminate on 30 November 2018.

14. We have notified the respondents to seize from such conduct on a number of occasions, however the respondents have ignored our requests.

15. As a result of the respondents' unlawful conduct and blatant refusal to communicate with us, we have no other remedy left but to approach the Honourable Court on an urgent basis.

16. We submit that the urgency is not self-created as it is supported by the facts above.'

[9] From the above, it is apparent that the applicants' reason for bringing this application on an urgent basis is based on the alleged respondent's unlawful conduct and the fact that their contracts are due to be terminated on 30 November 2018. Based on their own submissions, the applicants became aware of the first respondent's advertisement for applications from interested parties to serve as members of the CSPB in March 2018. In their letters of demand, they intimated the intention to institute court proceedings but they did not do so. This application was filed on 13 November 2018 and there is no explanation as to why this application was brought almost eight months after being aware of the respondents' intention to appoint new board members.

[10] On 20 November 2018, the applicants filed a supplementary affidavit in an attempt to explain why they failed to approach the Court earlier. The respondent filed an answering affidavit on 21 November 2018 oblivious of the supplementary affidavit and later filed a response to the supplementary affidavit. On the same day, the applicants filed the replying affidavit. In its response to the supplementary affidavit, the respondent objected to the filing of the supplementary affidavit and asked the Court to regard such an affidavit

pro non scripto. The respondent based its objection on the applicants' failure to seek leave of Court to file such an affidavit and the lack of special circumstances giving rise to something unexpected or new that emerged from the applicant's answering affidavit.

[11] Rule 6(5)(e) of the Uniform Rules of Court requires that the filing of further affidavits be permitted only with indulgence of the Court and the Court will only exercise its discretion if good reasons to do so were furnished by the party seeking to introduce a further affidavit. In this application, this was not done by the applicant. In the supplementary affidavit, the applicants informally sought leave from the Court to supplement the founding affidavit.

[12] To an extent that the applicants failed to seek leave of this Court to file the supplementary affidavit, it is apparent that they disregarded the Rules of the Court and chose a flawed manner to litigate. The Court must show its displeasure by striking out the whole supplementary affidavit. However, I will consider the supplementary affidavit for reasons that will become apparent later.

[13] In supplementing the founding affidavit, the applicants submitted that the delay was caused by the fact that they waited for the respondents to give them notice regarding their future employment. The waiting resulted from the fact that, in response to their letter of demand, the respondents had sent them a correspondence dated 13 April 2018 indicating that consultation was arranged to address the concerns raised in their letter. Subsequently, on 18 June 2018, the applicants contracts were extended from 1 July 2018 to 31 August 2018 and were further extended from 1 September 2018 to 30 November 2018. On 9 September 2018, the applicants instructed their attorneys to send a correspondence to the respondents demanding withdrawal of the advertisement of board positions and giving notice of intention to bring this application. It was through this correspondence that the applicant sought to give a 30-day notice to the respondents in terms of the Institution of Legal Proceedings Against Certain Organs of State Act[4].

[4] Act 40 of 2002.

[14] The unlawfulness of the first respondents' conduct and its refusal to communicate with the applicants does not render this matter urgent. After the contracts were renewed, the applicants found it unnecessary and/or neglected to bring this application. The applicants created urgency by waiting until a few days before the expiry of their contracts to bring this application. This is so because the undelying cause for bringing this application is still the subject matter of an ongoing dispute between the parties as the respondents neither withdrew the advertisement of the positions of CSPB nor promised to do so.

[15] Reliance on the respondents' promise to attend to their concerns is unreasonable as this undertaking was done on 13 April 2018. There is further no explanation why the applicants could not approach the bargaining council during the period of extension. The applicants' attempt to justify a further delay by making a submission that they had to give the respondents a 30-day notice is not helpful. The respondents correctly submitted that the provisions of the Institution of Legal Proceedings against Certain Organs of State Act are not applicable in this matter.

[15] To an extent that the applicants failed to state why this application could not be brought earlier, the applicants have not shown why the Rules of this Court relating to forms and service should be dispensed with or why they cannot obtain substantial redress by complying with the prescribed timeframes or why this Court's assistance is immediately required. As such, the applicants have, in my view, failed to make out a case for urgency and it is for that reason alone that their application stands to fail.

Costs

[16] In terms of section 162 of the Labour Relations Act[5] LRA, the Court has a discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[6], that the rule of practice that costs follow the result does not apply in labour matters

[5] Act 66 of 1995 as amended.
[6] (2018) 39 ILJ 523 (CC)

and further that costs orders should be made in accordance with the requirements of law and fairness. In this matter, both parties prayed for punitive costs.

[17] As earlier intimated, the applicants failed to furnish grounds justifying the launching of this application on an urgent basis. It is apparent that this application would not have been necessary had the applicants referred their dispute to the bargaining council as required by the LRA. As such, there is no reason why the respondents should be out of pocket for opposing this application.

[18] In the circumstances, I make the following order.

Order

1. This application is dismmissed with costs including costs of two counsel.

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D. Mahosi

Judge of the Labour Court

Appearances:

For the Applicants:	Advocate Khumalo,
Instructed by:	Shandukane Attorneys
For the Respondents:	Advocate Mphahlele SC and Advocate Phefadu
Instructed by:	State Attorney – Cape Town