THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1808 / 16

In the matter between:

NATIONAL UNION OF METALWORKERS OF SA **First Applicant**

PERSONS LISTED IN ANNEXURE "A" **Second to Further Applicants**

and

BUMATECH CALCIUM ALUMINATES **Respondent**

Heard: **18 August 2016**

Delivered: **26 August 2016**

Summary: Urgent application – requirements for urgency – principles set out

Urgency – applicant must make out case for urgency – urgency self created – no urgency established

Lis pendens – principles considered and applied – lis pendens applicable and application incompetent

JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicants brought an urgent application in terms of which the applicants sought relief to the effect that the lock out implemented by the respondent be declared to be unlawful, that the respondent be interdicted and restrained form the continued use of the services of temporary workers, and that the respondent be order the pay the second to further applicants for the entire period of the unlawful lock out.

[2] The matter was strenuously opposed, in particular on the basis that it simply was not urgent and that the matter was lis pendens. I proceeded to consider the application on the basis, firstly, of these two points raised by the respondent. As will be elaborated on hereunder, both these points had merit, and consequently on 18 August 2016 I made an order that the application was dismissed with costs, with written reasons for the order to be handed down on 26 August 2016. There was no need to consider the merits of the application.

[3] This judgment now constitutes the written reasons for my order given on 18 August 2016.

Facts relating to urgency and *lis pendens*

[4] This matter dated back to August 2015. On 18 August 2015, the respondent issued a memorandum to the second to further applicant (hereinafter referred to as 'the individual applicants') of changes to the respondent's shift system. The first applicant (hereinafter referred to as 'NUMSA') was also notified of this on 25 August 2015.

[5] The shift change implemented reduced the working hours of the individual applicants from 194.85 hours to 173.20 hours. Needless to say, this also impacted on the remuneration earned by the individual applicants, who are

paid her hour. Further, shifts were reduced from 3 to 2, and on Fridays, day shift workers were required to knock off at 14h00.

[6] On 26 August 2015, NUMSA voiced its opposition to these proposed changes, contending that the same resulted in a unilateral change to the employment conditions of the individual applicants which would not be accepted. NUMSA proposed an alternative solution, which in essence entailed that if lesser hours are worked, the remuneration of the individual applicants should nonetheless not be affected.

[7] The dispute could not be resolved, and NUMSA referred a unilateral change to employment conditions dispute to the CCMA. Conciliation took place on 3 November 2015, where the dispute remained unresolved. NUMSA and the individual applicants then decided to pursue strike action as a result.

[8] NUMSA issued notice as contemplated by Section 64(1)(b) of strike action to be embarked upon by the applicants as a result of the above dispute, to commence on 5 November 2015. It was common cause that the requirements of Section 64 were satisfied and the strike would be lawful and protected.

[9] In response to the strike, the respondent issued a lock out notice. The respondent demanded that its position on the change to the shift system, with all its consequences, be accepted by the applicants.

[10] Strike action then indeed commenced on 5 November 2015, together with the accompanying lock out. In correspondence written on 24 and 25 November 2015, NUMSA indicated that the strike would be suspended, and the individual applicants would resume their duties on 27 November 2015. The applicants however did not accede to the demands of the respondent relating to the shift system, forming the subject matter of the lock out. When the individual applicants reported for work on 27 November 2015, they were not allowed back at work because of the continuing lock out.

[11] Correspondence was then exchanged between NUMSA and the respondent. A meeting was convened on 14 December 2015. Nothing could be resolved. The December holiday season intervened.

[12] On 13 January 2016, NUMSA's attorneys approached the respondent's attorneys with the view of setting up a meeting to resolve the matter. The respondent answered on 18 January 2016, demanding that certain undertakings given by the applicants with regard to refraining from violent and intimidatory conduct first be honoured before it would be willing to meet. Again, an impasse ensued.

[13] On 27 January 2016, NUMSA's attorneys informed the respondent's attorneys that continued lock out implemented by the respondent was unlawful, as it was implemented in response to a strike which had been called off. It was contended that the lock out was now based on 'disciplinary issues'. It was specifically stated in this correspondence that unless the individual applicants were allowed to resume their duties on 1 February 2016, the labour Court would be approached for what was labelled 'semi-urgent' relief. The respondent's attorneys answered on 29 January 2016, disputing the contention of NUMSA's attorneys.

[14] On 1 February 2016, the individual applicants reported for work. They were turned away, based on the continuing lock out. On 8 February 2016, it was said by NUMSA's attorneys in further correspondence that the continued lock out was unlawful.

[15] The applicants then brought an urgent application to the Labour Court on 18 February 2016, under case number J 303 / 16. Save for the current demand that the individual applicants be paid, the relief sought in that application was identical to the relief being sought in the application before me. This application was set down on 25 February 2016 and came before Golden AJ. In an order given on 25 February 2016, Golden AJ struck the matter from the roll for want of urgency.

[16] The parties had ongoing discussions, but the matter remained unresolved. Finally, and on 2 June 2016, NUMSA wrote to the applicant, recording that it was 'declaring' that the individual applicants would resume their duties and called on the respondent to provide the new 173 hour shift roster. Nothing was however said on the other issues forming the subject matter of the lock out, and in particular, the fact that the individual applicant sonly be paid for 173 hours. As a result, and on 6 June 2016, the respondent asked NUMSA

for clarity on what it meant. NUMSA answered on the same date, and other than raising a number of further issues, provided no answer to the outstanding demands of the respondent. In short, there was no agreement to the respondent's demands.

[17] On 20 June 2016, NUMSA again wrote to the respondent, in essence reiterating the same position it adopted before. Whilst NUMSA made it clear that the individual applicants would work the 173 hours, there was no agreement with regard to the issue of payment related to the actual hours worked, the change to the number of shifts, and knocking off at 14h00 on Fridays. NUMSA threatened that unless the individual applicants would be allowed to resume their duties that very day, their rights would be enforced.

[18] The respondent did not agree with the position adopted by NUMSA. In a response on 20 June 2016, it specifically referred NUMSA to the previous proceedings in the Labour Court and that any application now brought would not be urgent.

[19] On 20 June 2016, NUMSA then made a referral to the CCMA to the effect that the individual applicants were dismissed by the respondent. The CCMA declined to entertain the matter, and in a letter on 4 July 2016 indicated to NUMSA that only the Labour Court could interdict the lock out and thus have the individual applicants return to work.

[20] On 7 July 2016, NUMSA again wrote to the respondent demanding that the lock out be lifted, and stating that unless the individual applicants are allowed to return to work by 7 July 2016, the Labour Court will be approached to interdict the lock out. The respondent answered on the same day, recording that the issues giving rise to the strike had not been resolved. The respondent reminded NUMSA that the issue had been dealt with by the Labour Court previously.

[21] The current application now before me was then only brought on 2 August 2016. In this application, it is clear that the relief sought by the applicants was final relief.

<u>Principles - Urgency</u>

[22] Urgent applications are governed by Rule 8. In considering Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[1] said:

> '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.'

[23] What would an applicant who seeks to make out a case of urgency then have to show? In *Mojaki v Ngaka Modiri Molema District Municipality and Others*[2] the Court referred with approval to the following *dictum* from the judgment in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*:[3]

> '…. 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 redress 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 by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[24] Similarly, and in *Maqubela v SA Graduates Development Association and Others*[4] dealt with the consideration of urgency as follows:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly

[1] (2010) 31 ILJ 112 (LC) at para 18. See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).
[2] (2015) 36 ILJ 1331 (LC) at para 17.
[3] [2012] JOL 28244 (GSJ) at para 6.
[4] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

> whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshoana AJ aptly put it in *Vermaak v Taung Local Municipality*:
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> 'The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.''

[25] Where an applicant seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established.[5] In simple terms, the applicant must make out an even better case of urgency. In *Tshwaedi v Greater Louis Trichardt Transitional Council*[6] the Court said:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ….'

[26] Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[7] In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.[8] But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* the Court held:

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[5] [2002] JOL 9452 (LC) at para 8.
[6] [2000] 4 BLLR 469 (LC) at para 11.
[7] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd & Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50; *Association of Mineworkers and Construction Union v Lonmin Platinum (comprising Eastern Platinum Ltd & Western Platinum Ltd) and Others* (2014) 35 *ILJ* 3097 (LC) at paras 30-44.
[8] See *University of the Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) at para 15.

> '… if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency.'

Analysis

[27] In applying the above principles relating to urgency to the facts of this matter, I have little hesitation in concluding that the applicants' application is not urgent, for the reasons I now set out.

[28] Firstly, there has been an inordinate delay in the brining of this application by the applicants, which is destructive of any consideration urgency. The strike, and accompanying lock out, dates back to 5 November 2015. Added to that, the applicants 'suspended' their strike as far back as 27 November 2015, and other than further posturing and argument and contentions, by both parties, nothing much has changed since then. In particular, the respondent's position has always been that issues giving rise to the industrial action, by both parties, have not been resolved. This means that the real issue giving rise to this purportedly urgent application is some eight months old when the current application now before me was brought. This can never be urgent.

[29] But what remains incapable of any explanation, where it comes to urgency, is that Golden AJ struck the matter from the roll for want of urgency on 25 February 2016, albeit under another case number. The case remained the same. The only developments after that date is the parties each reiterating their position and demanding the other party comply. Only when an impasse is once again apparent in July 2016, do the applicants revert back to an urgent application. This is a prime example of self created urgency.

[30] Even worse still, and throughout June and July 2016, the applicants threaten urgent proceedings. Yet it takes some two months to bring this application, which period is simply sought to be explained on the basis of abortive meetings to discuss the matter. This is no explanation of the kind which can serve to establish urgency. In essence, the applicants waited much too long in bringing the application. I may mention that in *Mashiya v Sirkhot NO and*

Others[9] the Court dealt with a period of delay from a period of delay from 25 July to 19 August, under similar circumstances as those *in casu*, and considered this delay to be unacceptable. And in *Ngcongo v University of South Africa and Another*[10] the Court found a five week delay in seeking to urgently challenge a ruling, without any proper explanation for it, to be not urgent. These same considerations apply in the current matter.

[31] The applicants simply offer no explanation why no urgent legal proceedings were instituted immediately after either November 2015, January 2016, June 2016 or July 2016. These dates all relate to the same event of NUMSA demanding that the individual applicants return to work, and the respondent then refusing based on the pending lock out. The failure to offer such an explanation is fatal to the applicants where it comes to urgency. This situation is exacerbated by the fact that the first respondent twice warned the NUMSA in correspondence about this difficulty.

[32] The applicants must make out a case for urgency in the founding affidavit. In *Mashiya*[11] the Court held that: 'Rule 8 requires that the applicant sets out in his founding affidavit the reasons for urgent relief. This was not adequately done in this case. On that basis alone, the application should be dismissed or removed from the roll.' The applicants' case on urgency, as set out in the founding affidavit, is very sparse. There is no explanation for the delay. The consequences of the order of Golden AJ is not dealt with. The applicants seem to adopt the view that because the lock out is unlawful, they are entitled to urgent relief. That is simply not so. The lack of particularity where it comes to urgency, in the founding affidavit, is concerning, and may even serve to draw an inference that the applicants knew that they in effect had no explanation for the delay in bringing this matter and sought to avoid addressing it. The mere allegations of unlawfulness of the conduct of the respondent cannot in itself serve to establish urgency.

[33] Therefore, the applicants have failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied. This is clearly a matter of self created urgency. For this reason alone, the application falls to be struck

[9] (2012) 33 ILJ 420 (LC).
[10] (2012) 33 ILJ 2100 (LC) at para 9.
[11] (*supra*) at para 17.

from the roll, or dismissed. The Court in *February v Envirochem CC and Another*[12] dealt with a very similar situation, and even though Steenkamp J accepted that urgency was not established, the learned Judge proceeded to dismiss the matter. I intend to follow suit, *in casu*, for the reasons I now set out.

The issue of lis pendens

[34] As I have touched on above, the applicants' case in the proceedings under case number J 303 / 16 is virtually identical to the case now before me. The factual foundation is identical, and in essence, is founded the exact same contention that the lock out implemented on 5 November 2015 is unlawful. The relief sought is virtually identical.

[35] In fact, the only differences between the two proceedings are that the current application before adds some facts after June 2016, and adds a claim for the applicants to be paid. This however does not change that it is the same matter.

[36] The reality then is that Golden AJ was seized this the very same dispute on 25 February 2016. She struck it from the roll for want of urgency. That means that the application under case number J 303 / 16 remains alive, but must just be prosecuted in the normal course in terms of Rule 7. Of concern is the fact that the applicants did not even, in the current matter, deal with the matter under case number J 303 / 16 and what its implications are. The applicants approached the case as if this matter simply did not exist.

[37] The respondent, based on the aforesaid, has specifically raised the issue of *lis pendens*. The respondent also warned NUMSA about this difficulty.

[38] Therefore, in order the defence of *lis pendens* (or *lis alibi pendens*) to apply, there must be two separate proceedings either in the same court or in different court, between the same parties, based on the same factual matrix, and seeking materially the same relief. The principle of *lis pendens* was set out in the case of *Osman v Hector* [13] as follows:

[12] (2013) 34 ILJ 135 (LC) 17
[13] 1933 CPD 503 at 508.

> 'The plea of lis alibi pendens is dealt with in Halsbury's Laws of England (2nd ed, vol 6, p 357, par 7) where it is said:- "To bring two actions in England in respect of the same matter is regarded as prima facie vexatious and the Court will generally as of course, put the plaintiff to his election." As said by JESSEL, MR in McHenry v Lewis (22 Ch D 397 at p 400):- "In this country, where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will do." Or as BOWEN, JJ says at p 408: "The remedy and the procedure are the same and a double action on the part of the plaintiff would lead to manifest injustice.''

[39] In *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd*[14], it was held that the principle of *lis pendens* applies where there exists litigation which is pending between the same parties, these other proceedings must be based on the same cause of action, and these other pending proceedings must be in respect of the same subject-matter. The Court also held that is was not required, for *lis pendens* to apply, that the form of relief claimed in both proceedings needs be identical.

[40] As to the purpose of the defence of *lis pendens*, the SCA in *Nestlé (SA) (Pty) Ltd v Mars Inc*[15] held as follows:

> 'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

[41] In *February*[16] the Court held, in circumstances virtually identical to the proceedings in casu, as follows, in upholding the defence of *lis pendens*:

[14] 1981 (1) SA 1219 (T) at 1231
[15] 2001 (4) SA 542 (SCA) at para 16.
[16] (*supra*) at para 25.

> 'The pending High Court action - that the applicant did not disclose - involves the same parties, the same issues of fact, and the same cause of action arising from the alleged agreement between the parties, albeit that the relief sought differs.'

[42] Similarly, I am satisfied that the defence of *lis pendens* applies in this case. The dispute is between the same parties, about the same issues, and primarily the same relief is sought. The application under case number J 303 / 16 is still pending, and must be prosecuted in the normal course. The applicants needed to pursue that application to finality, in the normal course. The applicants in essence sought to circumvent what they were actually required to do by simply bringing a second application for what is the same case. This is not permissible. There is accordingly no reason why this second application, now before me, should not be finally disposed of, and dismissed.

[43] This then only leaves the issue of costs. The applicants have elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. There existed prior Court proceedings on the same issue, which the applicants simply sought to ignore. The conduct of the applicants border on an abuse of process. The respondent warned the applicants beforehand on the error of their ways. I also consider the complete failure to make out a proper case of urgency, and the fact that the applicants approached the matter on the basis that they in essence have a licence to urgency because of an allegation of unlawful conduct by the respondent. Whilst it may be so that the parties have a continuing relationship, I do not believe it to be a sufficient consideration standing in the way of making a costs order in the circumstances of this matter. In any event, and in terms of Section 162 of the LRA, I have a wide discretion where it comes to the issue of costs, and in this instance, I exercise this discretion in favour of making a costs order against the applicants.

[44] It is accordingly for all the reasons set out above that I made the order that I did on 18 August 2016.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants: Adv P Nkutha

Instructed by: Finger Phukubje Attorneys

For the First Respondent: Adv S Bernard

Instructed by: Yusuf Nagdee Attorneys