NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)

Case No. 1/2022

In the matter between:

TULANI LUMKWANA **Applicant**

and

SUPERINTENDENT-GENERAL
DEPARTMENT OF HEALTH
EASTERN CAPE PROVINCE **First Respondent**

SUPERINTENDENT-GENERAL
DEPARTMENT OF PUBLIC WORKS
EASTERN CAPE PROVINCE **Second Respondent**

JUDGMENT

HARTLE J

[1] The applicant, a logistic support clerk presently in the employ of the first respondent, issued out an application on an urgent basis against both respondents in which she seeks an order directing the first respondent to comply with a prior order of this court dated 7 January 2022 within five days and for a further order that the first "respondent's" (Sic) "be directed (to) show cause as to why his failure to implement and comply with the order issued by Honourable Judge Mbenenge JP should not be declared to be in contempt of court…"

[2] Despite the obvious nature of the application, the applicant vehemently disavowed that these are contempt proceedings.

[3] Mr. Mdunyelwa who appeared on behalf of the applicant insisted that it was instead an application to compel. This notion is instantly negated by both the fact that the application was "issued" against the same parties and under the same case number as concerns the prior order and treated as if it were an interlocutory application or an adjunct to the original proceedings. Further there can be no doubt from the applicant's founding affidavit that the current proceedings arise from the alleged non-compliance by the respondents (it is not clear which of the respondents is supposed to be at fault) with an incident of the prior order and every manifestation thereof is aimed at vindicating that situation.

[4] The notice of motion echoes that this is what the application is all about, namely the contempt of a court order and the applicant's attorney, Mr. Tsipa, also presaged the exigency of the matter in the certificate of urgency provided to the duty judge as a precursor to the application on the first respondent's failure to comply with the said order.

[5] The full order of 7 January 2022 is set out below:

> "1. The Applicant's non-compliance with Uniform Rules of this Court regarding service and time frames is hereby condoned.
> 2. The Applicant's non-compliance with the provisions of section 35 of the General Law Amendment Act 62 of 1955 is hereby condoned;
> 3. A rule Nisi do hereby issue calling upon Respondents to show cause, if any, on Tuesday 18 January 2022 at 09h30 or so soon thereafter as the matter may be heard, why an order in the following terms should not be granted;-
>
> 3.1 The 1st Respondent's failure to pay the Applicant salary is hereby declared to be unlawful and is set aside.
>
> 3.2 The 1st Respondent pay the Applicant's salary for the months ending in November and December 2021 within five (5) days from the date of service of this order on the respondents.
>
> 3.3 That the Respondents is hereby interdicted from making any further deductions from the Applicant's salary without following due processes.
>
> 3.4 The 1st Respondent pay costs of this application.
>
> 4. Paragraph 3.3 of this order shall operate as interim interdict pending the finalization of this application.
> 5. The respondents deliver their answering affidavits, if any, by 14 January 2022, upon the delivery of the relevant notice to oppose by Tuesday 11 January 2022."

[6] It is immediately evident that paragraph 3.3 of the rule *nisi* was intended to operate as an interim interdict and is by all accounts an ostensibly enforceable order of court. I was informed from the bar however that the original application is opposed and that the rule *nisi* of 7 January 2022 was extended, by agreement, on 18 January to 1 March 2022 to allow the respondents to oppose the granting of the final relief sought including confirmation of the interim interdict sought to be enforced.

[7] The applicant complains that since she transferred as an employee from the second respondent's to the first respondent's department with effect from 1

November 2021, she was not paid her salary in January 2022. (It is not clear if she meant to suggest that the November and December 2021 salaries were also not paid because she justifies urgency on the basis of *inter alia* her not being able to pay her medical aid subscriptions since November 2021. Reading between the lines though her concern generally arises from the fact that the smooth flow of the payment of her regular salary has been impacted since her internal transfer from one department to the other.)

[8] The certificate of urgency is undated but my colleague, Mjali J, was ostensibly approached on 3 February 2022 on the basis provided for in rule 12 (d) (ii) of the Joint Rules of Practice for the issue of a directive. Self-evidently she did not regard the matter as urgent enough to warrant the enrolment of the proposed application on a day other than one on which the motion court sits.[1] She, however, directed the applicant to:

[1] The Joint Rules of practice provide as follows in respect of urgent matters:

"12. Urgent Applications

(*a*) In all applications brought other than in the ordinary course in terms of the Rules of Court, the legal practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the Judge and in which the reasons for urgency are fully set out.

(*b*) The certificate of urgency shall set out the grounds for urgency with sufficient particularity for the question of urgency to be determined solely therefrom without perusing the application papers.

(*c*) In matters contemplated in Rule 12 (*a*) above, the registrar shall issue the papers and shall place the matter on the roll of cases as may be provided for in the notice of motion commencing the application.

(*d*) In all urgent applications in which it is sought to enrol the matter other than on a day normally reserved for the hearing of motion court matters:

(i) The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the application papers are placed before the Judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers.

(ii) The certificate of urgency will be placed before the Judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours.

(iii) Should he/she determine that it is sufficiently urgent, he/she will then give directions as to the time and place, when and where the application is to be heard. Should he/she decide that the matter is not sufficiently urgent to be heard on a day other than a normal motion court day he/she shall record same on the file whereupon the applicant may deal with the application in accordance with Rule 12 (*a*) if so advised."

> "Serve papers on the respondent and set the matter down for hearing in the Motion Court on Tuesday 8/2/20"[2]

[9] When the matter appeared before me in motion court in East London on Tuesday, 8 February 2022 all that was in the court file, apart from the papers filed in the prior application, was the said directive which obviously made no sense in relation to the first application as the return date for that matter was still in the offing. Mr. Mdunyelwa brought me up to speed about the subsequent, present, application. Since the court file was lacking, I stood the matter down until Thursday, 10 February 2022, for the papers of the second issued application to be supplemented. On the 10th Ms. Mqobi (who I am told is also on record in the main application) appeared on behalf of the respondents. She indicated that she had been informed about the application by telephone and asked to attend at court to inquire what was happening since she understood that the matter was only due to be called again on 1 March 2022.

[10] The papers in my file now contained the present application (with the same case number as the prior application) date stamped 9 February 2022 by the registrar,[3] a notice of motion calling upon the respondents to appear on "Friday, 8th February 2022" (sic), a prayer for a rule with no detail indicated by when the respondents should show cause, a warning to the respondents to deliver notice to oppose on or before 16h00 on 7 February 2022 ("which date had ostensibly passed by the time the application was issued by the registrar"), no indication as to when the respondent should, if they wished to do so, file answering affidavits, a founding affidavit deposed to only on 7 February 2022, and an undated certificate of urgency by Mr. Tsipa.

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[2] The next motion court was to be held in East London.

[3] This post-dates the first enrolment of the matter before me on Tuesday, 8 February 2022.

[11] It appears further that service was effected on the office of the Chief State Legal Advisor at 15h44 on 7 February 2022 (sixteen minutes before the time the respondents were called upon to deliver their notice to oppose), this despite the fact that the details and reference number of the State Attorney are indicated in a footer to the notice of motion as the already on record legal representatives for the respondents.

[12] As an aside all of this suggests to me that the applicant was not trying very hard to give effective notice of an application that purports to seek very significant relief against the respondents.

[13] It just so happened that I could not deal with the application on the tuesday because of an absence of the papers although I suspect that I would probably have been prevailed upon to grant yet another further interim order if the obstacle of the missing papers had not presented itself to the applicant. Further, because the roll was crowded on Thursday, 10 February 2022, the matter was rolled even further until Friday, 11 February 2022. I should add that I indicated to the parties while the matter was standing by waiting to be called that they should agree a timeframe to allow the respondents to put up answering affidavits, but Mr. Mdunyelwa remained resolute that his client wished to press in for interim relief because of the claimed urgency regardless of the respondents being afforded an opportunity to respond.

[14] Given the unique circumstances under which the respondents had been hustled to court on very short notice (if it can count for notice at all), Ms. Mqobi placed on record at the outset when the matter was called on Friday 11 February 2022 that the applicant, since her internal transfer from the Department of Public Works to Health, had indeed not been paid her salary but added that this was due to circumstances beyond the first respondent's control. I was informed from the

bar that the applicant owes monies to the State because of unpaid incapacity leave taken by her preceding the transfer, and that this first needs to be resolved on the payment system before she can receive regular payments again or her transfer can be properly captured on the payroll system. *Inter alia* this will require her co-operation to sign off on certain documentation and other protocols to be put in place which has not happened.

[15] I gathered from my interaction with counsel over the two days while they were waiting for the matter to be called that there is a serious sticking point, but this in my view even more so justified the respondents being given time to put up a formal answer and explanation to the applicant's simplistic allegation of the failure of both respondents to have complied with the terms of the interim interdict, bare of the reasons therefor that to my mind would obviously negate any suggestion of wilful *male fides* on their part in having failed to give effect to the interim interdict of 7 January 2022 by withholding payments to her.

[16] Be that as it may, and not surprisingly, certain antipathy on the part of the applicant contributed to the obvious stalemate between the parties because of the fact that the respondents had missed their deadline of 14 January 2022 to deliver their answering affidavits in the main application suggesting a lack of appreciation of the applicant's situation and respect for the interim order, especially paragraph 5 thereof which in all probability had been included in the order by Judge President Mbenenge consonant of the fact that case flow management is applicable even in respect of urgent opposed applications.[4]

[17] Given Mr. Mdunyelwa's insistence that the issue of interim relief be addressed regardless of what directives I might issue concerning the exchange of papers to elucidate why the applicant hasn't yet been paid, and the filing of heads

[4] See Bobotyana and others v Dyantyi and others, ECDG case no 1198/20, at paras [17] and [18].

of argument etc., Ms. Mqobi (arguing from the bar) took issue with the manner of service upon the respondents (indeed service ought indeed to have been effected in terms of rule 4 (1) A (Aa) yet the papers were served on the offices of the Chief State Law Advisor)[5]; the absence of any essential allegations in the applicant's papers to sustain a complaint of contempt of court (this was conceded as much by Mr. Mdunyelwa's who insisted that this was rather an application to compel)[6] and, more importantly, the absence of any urgency in the matter.

[18] It is in respect of the latter submission that I am inclined to find in favour of the respondents.

[19] There appears to be a misconception that a litigant who succeeds in getting a directive from the duty judge in terms of par 12 (d) (iii) of the Joint Rules of Practice has somehow also managed to navigate successfully through the narrow gate of entitlement to have the matter regarded as one of urgency. In this instance

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[5] This sub-rule provides as follows:
"4. Service.—(1) (*a*) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners—
…… (*a*A) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings." If the applicant intended to rely on this provision, service should have been effected on the State Attorney who is on record for the respondents in the main application.

[6] Given the view that I take in this matter it is unnecessary to consider the merits of the matter. I note however that it is not foreign to seek an order to compel a state functionary to take steps to comply with an order of court sounding in money as a precursor to contempt proceedings proper down the line (See Thozamile Eric Magidimisi v The Premier of the Eastern Cape, Bhisho [2006] ZAECHC 20 (25 April 2006), but this can hardly occur in a vacuum and there should be a carefully pleaded context. If the applicant meant to suggest however that this was an application to compel the respondents *not* to make deductions against the employee's salary contrary to the provisions of section 34 of the Basic Conditions of Employment Act, No 75 of 1997, that too might present a tenable cause of action. (See Public Servants Association of South Africa obo Ubogu v Head of the Department of Health, Gauteng and Others 2018 (2) BCLR 184 (CC) which confirms the principle that arbitrary deductions against a public servant's salary are unlawful. See also T A Gqithekhaya & Others v Amathole District Municipality (EL Case No. 601/2021) in which the court issued an interim order prohibiting arbitrary deductions summarily effected or about to be effected against the applicants' salaries all of whom were engaged in unlawful industrial action; and Z Vumazonke v Municipal Manager (EL case no 595/2018) in which the respondents purported arbitrarily to recover overpayments against leave benefits due to an employee who had resigned.) As indicated above, however, the applicant's case made out in the papers is one of contempt of a court order, plain and simple and counsel's attempt to masquerade it as something else was nothing short of being extremely opportunistic.

however the duty judge did no more than suggest that it was not a matter that warranted her attention on a non-motion court day and that the applicant could try her luck, as it were, by dealing with the application in accordance with practice rule 12 (*a*) if so advised. But before a litigant can do so he/she must still comply with the peremptory provisions of uniform rule 6 (12) which provides 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 it deems fit.
> (*b*) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

[20] In this instance the applicant, apart from repeating the same grounds of urgency related in the prior/main application concerning her state of penury by the absence of her salary, failed to mention at all why she could not be afforded substantial redress at a hearing in due course. Indeed, why could she not simply wait out the return date of the main application in which the very same complaint is already under consideration? Alternatively, is the answer not suggested in Bobotyana v Dyantyi?[7] In this respect, could she not have asked the registrar for the hearing to be moved up on the unopposed roll as an "uncontested opposed application" in terms of joint practice rule 15 (k) (i) in the absence of the respondents having filed their answering affidavits as directed in the order of 7 January 2022? Further alternatively could she not have asked for an audience with a judge to issue further case management directives? Whatever the case, the applicant has simply failed to meet the requirement indicated by uniform rule 6

[7] Bobotyana *Supra*, at paras [14] and [15].

(12) (b) by suggesting why she would be comprised redress wise by a hearing in due course of the *present* application.

[21] Concerning objective urgency, although the applicant disavows that the present application amounts to contempt proceedings, it makes little sense in my view to ask for a second interim order for more or less the same relief as claimed in the main application still under consideration pending the return date of the 7 January 2022 order. I mention further that despite the reference to a rule *nisi*, it is apparent from the applicant's notice of motion that no interim relief is actually being requested beyond the declarator prayed for that the respondents are supposedly in contempt of a court order. So where is the urgency then, not in relation to the main application, but to the present one and how would the proposed order vindicate the underlying complaint which is the applicant's dire financial situation? The question begs itself.

[22] There is the further misconception that a directive issued by a duty judge in terms of joint rule of practice 12 somehow absolves a litigant from adapting Form 2 (a) to meet the claimed exigency of any particular situation. In this instance it is obvious that the applicant could not even be bothered to indicate a return date in her notice of motion. Mr. Mdunyelwa argued that this was deliberately left open for the court to fix a return date, but a litigant must be properly informed by a notice of application what relief will be sought and when so that an election can be made to oppose or not to oppose, or perhaps to come on the indicated return date at the designated time and to the indicated venue to show cause why the relief claimed should not be granted. Leave aside this defect, the applicant acted extremely late on Mjali J's directive, purporting to serve the application on 7 February and ostensibly issuing it only on 9 February 2022, defeating the purpose of her directive which was to ensure that the respondents received timeous notice of the proposed application. Such casualness self-

evidently contradicts the notion that the matter was urgent to start off with.

[23] I have mentioned above the other shortcomings in the applicant's notice of motion or lack of attention to proper procedure.[8]

[24] It is up to a litigant when seeking the condonation of the court in proceedings launched on an urgent basis not only to establish urgency on a substantive basis, also but to ensure that the form of notice used is adjusted with as little prejudice to the respondent as is possible, due regard being had to that litigant's right to be effectively heard and to give his/her own account of the situation bearing upon the relief being sought. Leaving aside the fact that the application was "served" sixteen minutes before the cut off time by when the respondents had to indicate if they wished to oppose the relief sought by the applicant, nothing is said in the notice of motion at all regarding the respondents' election should they wish to oppose.

[25] The applicant's representatives in this matter further stubbornly refused to allow the respondents time to file an answer or to agree to time frames in this respect despite in effect seeking final relief if regard is had to the manner in which the notice of motion was crafted. It seems that the applicant believed that she was home dry by the mere fact of Mjali J's directive and that that was that.

[26] The court in Caledon Street Restaurants CC v D'Aviera[9] made it clear what the procedure and principles are when a party seeks to litigate on an urgent basis as follows:

> "In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant the following principles are applicable. It is incumbent on the applicant

[8] See paragraph [10] above.
[9] [1998] JOL 1832 (SE).

to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6(12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase " which shall as far as practicable be in terms of these rules" must not be treated as **pro non scripto.** The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2 (a) of the First Schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey rule 6(5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers). On the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a). It may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be met by using Form 2(a) with shortened time periods or by another adaptation of the form, e.g. advanced nomination of a date for the hearing of the matter, or omitting notice to the registrar accompanied by changed wording

where necessary. Adjustment, not abandonment of Form 2(a) is the method."[10]

[27] In the circumstances of the present case the applicant merely repeated the urgency occasioned by her penury as was indicated in her prior application and failed to bring home why it was so essential on an urgent basis to seek what is in effect a mere declarator concerning the contempt of one or both of the respondents. Further there appears to be no valid reason why the respondents should have been railroaded into court at extremely short notice and in complete disregard of their entitlement to say why they should not be declared to be in contempt of court and, if a declarator that they are in contempt is to be made, why they should be censured under the circumstances. For this reason, the deviation from the customary form of a notice of motion cannot be justified. The applicant retains her right in the main application to deal with her concerns on the return date and to argue for a final order. She has not convinced me that condonation should be granted in all the circumstances.

[28] Be that as it may, I am not satisfied that the application deserves to be dismissed outright by reason of Ms. Mqobi's admission from the bar that her clients have not complied with the prior order or conversely put, have persisted in making deductions against the applicant's salary which for all intents and

[10] It needs to be added that any deviation from the standard form of notice of motion should in the present day also take into account the fact that it is no longer open to a party to simply fix a date for the hearing of an opposed application which, since the advent of case flow management, is subject to the preserve of a judge certifying the matter trial ready and the registrar's involvement under the case management protocols set forth in the practice directives. The Judge President remarked as follows in Bobotyana, (*Supra*): "There is a further dimension to the shortcomings in the manner in which the application was launched and pursued. Whilst, in the past, an applicant could, for reasons of urgency, deviate from the usual form for launching applications by, for example, using shortened time periods, advance nomination of a date of hearing, omitting notice to the Registrar and adaptation of the wording, the advent of Judicial Caseflow Management has now put in place another dispensation relevant to the setting down of cases." It is salutary in my view to seek a directive even in the case of a rule 12 (a) enrolment, or to make allowance in the notice of motion for the opposing party to appear in court or input by written submissions what course the matter should take regarding the exchange of papers etc if the matter is to be opposed. In this instance applicant's counsel insisted on arguing the matter without allowing the respondents an opportunity to file answering affidavits and rejected the notion that the court was entitled to impose timeframes for an opposed application regime.

purposes appear to have no legal basis. In the circumstances it is appropriate in my view to strike the matter from the roll for want of urgency rather than dismissing it out of hand.

[29] Ms. Mqobi asked for costs *de bonis propriis,* but I am not inclined to grant any costs in favour of the respondents at all. Whilst the applicant's failures here relate to form and procedure, the respondents appear to have done little to allay the applicant's representative's complaint that they are not concerned for their admitted failure to have complied with the interim order. On the other hand, the applicant must appreciate that an abuse of the urgency procedure on the basis which I have outlined above will not lightly be tolerated.

[30] I propose therefore to make no costs order (the absence of one being censure enough for the applicant) as neither party deserves to be rewarded in all the circumstances.

[31] In the premises I issue the following order:

1. The second urgent application is struck from the roll.
2. There is no order as to costs.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 8, 10 and 11 February 2022

DATE OF JUDGMENT: 2 March 2022

*Judgment delivered electronically at 09H30 on this date by email to the parties.

APPEARANCES:

For the applicant: Mr. Mdunyelwa instructed by Y Tsipa Attorneys c/o Bacela Bukula & Associates, East London (ref. Mr. Tsipa).

For the respondents: Ms. Mqobi instructed by the State Attorney, East London (ref. Mr. Dlanjwa).