IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 143/21

In the matter between:

NQOBILE PEARL MUNTHALI **Applicant**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA) **Respondent**

Heard: **18 February 2021 (*via* Zoom)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for the hand-down is deemed to be on 24 February 2021 at 18:00**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant approached this Court to obtain urgent relief declaring her employment contract with the respondent (PRASA) as remaining extant, and further ordering PRASA to comply with the terms of that agreement by retrospectively reinstating her in its employ.

Background:

[2] To the extent that at the core of PRASA's opposition to this application is that it is not urgent, the following salient facts are relevant;

2.1 A contract of employment was concluded between the applicant and PRASA on 15 May 2009 effective from 1 April 2009. The applicant was employed as Chief Information Officer in Business Information Management. That contract was for an indefinite period, subject to the normal rules pertaining to termination, *viz*, resignation, death, retirement, dismissal for misconduct, capacity or operational requirements.

2.2 The applicant averred that between January 2012 and January 2021, she occupied various other senior and acting executive positions, including Group Chief Risk Officer; Group Executive: Business Development; Group Executive: Human Capital Management (HCM); Group Executive: Chief Information Officer, and CEO of PRASA Development Foundation. PRASA however disputed that she had occupied the positions of Group Chief Risk Officer and that of Group Executive Business Development. Nothing however turns on these disputed facts.

2.3 On 11 June 2019 the applicant was placed on precautionary suspension with full pay and benefits on the grounds of allegations of misconduct. Until 31 January 2021 when the applicant's services were terminated, she had not been called to an internal disciplinary enquiry to answer to any allegations of misconduct against her.

2.4 In June 2020, attempts were made by PRASA to engage the applicant in a potential retrenchment exercise, but those attempts appeared to have gone nowhere.

2.5 In July 2020, PRASA required the applicant to testify in internal disciplinary proceedings against another employee. The applicant had agreed after PRASA had in a letter dated 31 July 2020, agreed to uplift her suspension with effect from 4 August 2020. It was however agreed that she would be placed on 'special leave' pending attempts at amicably finding a solution to the dispute between the parties, or the finalisation of a retrenchment process to be initiated.

2.6 On 30 January 2021, PRASA had released a press statement, announcing a decision to terminate the applicant's contract of employment, together with those of two other executive employees. The substance of the public announcement was *inter alia*;

(a) That the executives had overstayed their five year terms at PRASA, as all executives should not have exceeded that period in their positions;

(b) The applicant was on suspension for alleged misconduct, and her contract of employment ought to have been terminated upon the expiry of a five-year term.

2.7 The basis upon which it was contended that the applicant had exceeded her five year term was clause 8 of PRASA's Recruitment and Selection Policy of 2018[1], which it was contended was in accordance with its clause 2, applicable to all employees at PRASA, including its divisions and subsidiaries. In the alternative, PRASA contended that the termination was based on the provisions of clauses 9.12.2 of the Recruitment and Selection Policy of 2020[2], which came into effect on 18 March 2020, and which was also applicable to all permanent and fixed term employees in all of PRASA's divisions and subsidiaries.

2.8 PRASA in these proceedings further justified the termination on the basis that the clause 15 of the applicant's contract of employment of 2009 provided that the contract was subject to its conditions of service, policies and procedures (as revised from time to time) that serve to regulate the employment relations. In this regard, it was submitted that at the time of termination, the applicant had since August 2014, *de facto* occupied the position of Chief Executive Officer: PRASA Development

[1] Which provides:
'Appointments to Senior Management, General management and Executive positions must be fixed on a fixed term contract for a period not exceeding five years and may be renewable'

[2] Which provide;
'Appointment of Executive Positions, i.e., Group Chief Executive, Chief Financial Officer, Chief Executive Officer of a division or subsidiary and any other Group Executive positions shall be made on the basis of fixed term contracts for a period not exceeding five years at a time'

Foundation, and that since no contract was signed, the terms and conditions of the contract insofar as the duration was concerned, was for a fixed term of five years, making the provisions of the 2018 and 2020 Policies applicable.

2.9 The applicant contends that the press release was widely publicised in the media. She averred that she only became aware of the termination of her contract upon receiving a 'WhatsApp' message from her colleague in PRASA on the day it was announced, who had allegedly further informed her that the termination of her contract was trending on social media.

2.10 A letter dated 29 January 2021 confirming the termination of the contract of employment was only sent to the applicant on 1 February 2021, after she had contacted the Head of Employee Relations at PRASA, Mr Le Roux, to enquire about the termination of her contract having been announced in the public media. In the letter, PRASA stated that the basis of the immediate termination was that;

(a) The applicant's only employment contract on record was the one dated 31 July 2009;

(b) There was no signed employment contract on record in respect of the position she had occupied at the time of termination;

(c) Her employment had exceeded the normal five years fixed term contracts extended to all executives.

2.11 The applicant responded to the letter of termination through her attorneys of record on 5 February 2021, in which other than contesting the basis of the termination, she had demanded confirmation of her reinstatement by no later than 17h00 on 8 February 2021, failing which the Court would be approached on an urgent basis.

2.12 The short response from PRASA's attorneys of record on 9 February 2021 was that they would accept service on its behalf. The

urgent application was then launched on 10 February 2021 and filed the following day.

[3] In opposing the application, PRASA's two principal contentions are that the application does not deserve the urgent attention of this Court, and that on the facts, there was no breach of contract.

Urgency:

[4] The Court enjoys a discretion in according a matter urgency. In the exercise of its discretion, the Court will examine whether the applicant has in the founding papers, set out the circumstances which justifies that the application be heard as one of urgency, and the basis upon which it is said that substantial redress would not be obtained at a hearing in due course. Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case[3].

[5] Of equal importance is that urgent relief will be denied in circumstances where the applicant has failed to act with the necessary haste in approaching the Court, as the primary objective of approaching a Court on an urgent basis is to prevent harm or prejudice from occurring[4].

[6] The starting point is whether the applicant had approached this Court with the necessary haste. I agree that she did so. The public announcement of the termination took place on 30 January 2021, and she received written

[3] See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 6 and 7; See also *Export Development Canada and Another v Westdawn Investments Proprietary and Others* (6151/2018) [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

> "It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.
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> Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

[4] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11

confirmation of the termination on 1 February 2021. It is accepted that she took a further four days prior to putting PRASA on terms, but that delay in the light of the circumstances of the case is negligible, in view of PRASA's response of 9 February 2021 to her letter of demand. Thus, to the extent that this application was launched on 10 February 2021, and the matter was set down on 18 February 2021, the applicant cannot be accused of having been dilatory.

[7] The applicant's principal grounds for seeking urgent relief mainly relate to her personal circumstances and financial hardship. She conceded that a loss of income was on its own insufficient to justify urgency. She further complained about the defamatory statements made by PRASA and its conduct in effecting the termination, the irreparable reputational damage caused by the public announcement, and the consequences on her prospects of securing alternative employment.

[8] The issue of whether financial hardship is a basis of seeking urgent relief has received attention in this and other Courts. In other decisions, it has been held that as a general principle, financial hardship does not establish a basis for urgency[5]. It has been held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to acquire the requisite urgency necessary to justify a departure from the ordinary court rules[6]. In other decisions however, it has been

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[5] See *Hultzer v Standard Bank of South Africa (Pty) Limited* (J 469/99) [1999] ZALC 46 (25 March 1999) at para 13; *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16.

[6] *Ntefe J Ledimo & others v Minister of Safety and Security & Others* (2242/2003) [2003] ZAFSHC 16 (28 August 2003) at paragraph 32, where Rampai J) held that:

> "In the three cases I have quoted above the courts have held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to ground the requisite urgency necessary to justify a departure from the ordinary court rules. In applying this principle, a judge will do well to keep the words of wisdom which were expressed through the lips of Kroon J on p 15 in **CALEDON STREET RESTAURANTS CC** (*supra*). I find it apposite to echo those sentiments here by quoting him verbatim:
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> > "However, the following comments fall to be made. First, to the extent that these cases may be interpreted as laying down that financial exigencies cannot be invoked to lay a basis for urgency, I consider that no general rule to that effect can be laid down. Much would depend on the nature of such exigencies and the extent to which they weigh up against other considerations such as the interests of the other party and its lawyers and any inconvenience occasioned to the court by having to entertain an application on an urgent basis. Second, whatever the extent of the indulgence, the sanction of the court thereof that an application be heard as a matter of urgency, would not in general, in this Division, accord the matter precedence over

accepted that the general principle may be departed from if exceptional circumstances are established, depending on the merits of each case[7].

[9] I agree with the proposition in *Ntefe J Ledimo & others v Minister of Safety and Security & Others*[8] that there is no immutable rule that financial exigencies cannot be invoked to lay a basis for urgency. This is so in that Courts in any event enjoy a discretion in the overall determination of whether a matter should be accorded urgency or not. Inasmuch as factors surrounding financial hardship on their own are not a basis for according a matter urgency, these have to be determined together with other facts and circumstances pleaded in the founding papers, which points to a conclusion that those facts and circumstances are exceptional, thus necessitating that the matter should be treated as urgent.

[10] Again, inasmuch as it can be accepted and expected that dire consequences would flow from a loss of a job, including financial hardship, reputational damage, or dimmed prospects of securing alternative employment, the facts of this case given the manner with which the termination of the contract of employment took place, places this case in the category of exceptional circumstances. My conclusions are based on the uncontested facts, which are essentially the following;

i. Notwithstanding the subsequent elevation to other posts, the applicant's 2009 contract of employment was indefinite. As shall further be illustrated below, it was readily conceded on behalf of PRASA that there was no legal basis upon which it could be said that the 2018 and 2020 Recruitment and Selection Policies relied upon had retrospective effect, to be therefore applicable the applicant's original contract of employment.

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other matters and result in the disposal of the latter being prejudiced by being delayed."

[7] See *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8 where it was held:

'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

[8] *supra*

ii. The reliance by PRASA on clause 15 of the applicant's contract of 2009 does not take its case any further, in that it cannot be read from the provisions of that clause that PRASA is as a matter of course, entitled to substantially revise an employee's terms and conditions of employment as it deemed fit, including invoking substantive conditions that were not bargained for when the contract was entered into.

iii. The applicant was placed on precautionary suspension for over a period of 19 months with full pay (bar being placed on 'special leave' in August 2020), on the grounds of allegations of misconduct.

iv. Despite the prolonged suspension of the applicant and at enormous financial costs to PRASA, at no point were any formal allegations made against her. In fact, PRASA readily conceded that the allegations of misconduct (which are still unknown) were withdrawn, and that the precautionary suspension was also uplifted.

v. Without any warning, and without first extending any courtesy to the applicant, PRASA had publicly announced the termination of her contract of employment.

vi. In terminating the contract, PRASA other than setting out its reliance on its policies surrounding the five-year term period, failed in its press release, to mention that the termination had nothing to do with allegations of misconduct against the applicant, or her alleged suspension.

vii. In fact, PRASA went a step further by publicly announcing that the applicant was on suspension for alleged misconduct, when this was patently false, since the allegations in that regard were withdrawn and further since her suspension had been lifted as far back as July/August 2020.

[11] To the extent that PRASA had contended that the applicant's financial hardship was hardly a consideration when determining urgency, it was held in *South African Informal Traders Forum and Others v City of Johannesburg and Others;*

South African National Traders Retail Association v City of Johannesburg and Others[9] that the ability of people to earn money and support themselves and their families is an important component of the right to human dignity, and that without that ability, they faced "humiliation and degradation".

[12] In the light of the above undisputed facts, I fail to appreciate how any conclusion can be reached that the conduct of PRASA of terminating the contract publicly and in doing so, also misrepresented the facts, cannot be said to have created exceptional circumstances, This is particularly so in the light of the potential or actual public humiliation and reputational damage caused by the public announcement.

[13] In her founding papers, the applicant averred that any prospects of future employment are already dim in the light of the press release. She had made reference to one potential employer who had called her after the press release, to cancel any further discussions with her about potential employment. It follows that any further humiliation and degradation to the applicant arose not only from the mere termination of her contract of employment, but also from the manner with which that termination was effected.

[14] Too much emphasis was placed by PRASA on the fact that the events leading to the termination should be viewed in the light of the history of it being embroiled in malfeasance, which is the subject matter of the ongoing 'State Capture' enquiry. It is understandable that PRASA is entitled to clean up its mess in the light of that negative history. However, the fact remains that the applicant in this case has not been formally charged with any form of misconduct in that regard. In fact, PRASA has abandoned any disciplinary steps against the applicant. In the light of these facts, the question that remains unanswered is why then would PRASA publicly announce the termination, and also falsely state that the applicant was on suspension for alleged misconduct at the time of termination when this was the case?

[9] 2014 (6) BCLR 726 (CC) at paras [31] and [36]

[15] I further agree with contentions made on behalf of PRASA that this Court is inundated with urgent applications from well-heeled employees and executives, who may have a false sense of importance and entitlement. These individuals purposefully seek to jump the proverbial litigation queue, and habitually approach this Court on an urgent basis in respect of routine matters that ought to have initially gone through the dispute resolution procedures set out in the overall scheme of the Labour Relations Act (LRA).[10] This Court has repeatedly taken a stand and expressed its displeasure against such individuals and application, and where appropriate, issued stern warnings through punitive costs orders[11].

[16] This case however, even if it involves a highly paid executive, is not one of those that fall under the above category. This is based purely on the common cause facts already pointed out, which in turn makes the facts of this case exceptional. In any event, it would be improper for this Court to solely concern itself with the type and status of litigants that approach it for urgent relief, rather than determining whether a case has been made out for that relief. This is so in that section 34 of the Constitution of the Republic[12] guarantees everyone to have their disputes resolved by the application of law decided in a fair public hearing before a court.

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[10] Act 66 of 1995, as amended

[11] See *Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo Province and Another* (J 1886/2013) [2013] ZALCJHB 225 at para 52; *Mosiane v Tlokwe City Council* (2009) 30 ILJ 2766 (LC) at para 15 – 16, where it was held;

> "A worrying trend is developing in this Court in the last year or so where this Court's roll is clogged with urgent applications. Some applicants approach this Court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief on an urgent basis.
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> All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant Bargaining Councils and then approach this Court for the necessary relief. Other employees would still approach this Court for relief in the ordinary manner and not on an urgent basis."

[12] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

[17] To conclude then on the issue of urgency, I am satisfied that the applicant has made out a case for this Court to treat her application with urgency. From the common cause facts leading to the termination of the applicant's contract, if her application were to be struck off, the consequences of the manner and circumstances under which the termination of her contract took place, may not be mitigated by any redress she may obtain in due course.

The merits:

[18] Given the concessions made by PRASA in regards to the lack of any legal basis upon which it can be said that the 2018 and 2020 Recruitment and Selection Policies had retrospective application to the applicant's contract of employment of 2009, and further in the light of my conclusions in regards to the provisions of clause 15 of the 2009 contract of employment, it follows that the invariable conclusion to be reached is that there was indeed a breach of the applicant's contract of employment. It is therefore not even necessary to deal with any submissions regarding the interpretation of these policies *vis-à-vis* the applicant's contract of employment. Furthermore, nothing needs to be said about the fact that out of about 20 Executives who were in a similar position as the applicant insofar as the application of these policies were concerned, only the applicant and other two executives were adversely affected by PRASA's ill-advised decision and its reliance on the policies in question.

[19] In regards to whether the applicant has satisfied the requirements of the relief she seeks, on its plain reading, the applicant's original contract of employment was for an indefinite duration. That contract incorporated the standard clauses of non-variation or amendments unless these were reduced to writing between the parties, and further stipulated the notice periods in regards to termination. Clearly all of these clauses did not matter to PRASA, when it decided to publicly announce the termination of the applicant's contract of employment with immediate effect. Such conduct clearly amounts to an unlawful repudiation, entitling the applicant to enforce that contract.

[20] It is not even necessary to address issues surrounding whether the applicant has an alternative remedy in the light of the facts that led to the termination of

her contract and the legal basis of her claim. The irreparable harm to her should urgent relief not be granted is apparent from the consequences of the circumstances and manner surrounding the termination of the contract as already dealt with. It follows therefore that her urgent applicant should succeed.

Costs:

[21] The applicant seeks a costs order in the light of PRASA's conduct in terminating her services. She contended that PRASA acted in bad faith, knowing that there was no legal basis to justify its stance, and that its conduct smacked of gross abuse of power. I agree with these contentions based on the conclusions reached in this judgment.

[22] It has already been stated that PRASA given its history of being embroiled in allegations of malfeasance, was entitled to act against individual employees proven to have been involved in such malfeasance. This however did not entitle it to act in a gung-ho manner, that grossly violated its employees' basic fundamental rights. As a side issue, various options were available to PRASA in dealing with the applicant to the extent that it could not pursue any disciplinary measures against her and/or saw her as redundant. It is common cause that attempts were made at initiating a retrenchment process, and it is not clear how that process faltered.

[23] In the end, PRASA's conduct of publicly announcing the termination of the applicant's contract without first informing her, and in the course of doing so, misrepresented the true facts at the time of the termination, was not only appalling, but shockingly malicious and inhumane. As at the time the contract was terminated, the applicant was neither suspended nor was she facing allegations of misconduct. The consequences of that misrepresentation in the light of the public announcement of the termination of her contract are indeed colossal, and to a large extent irreparable. To this end, the requirements of law and fairness dictate that the applicant be entitled to her costs.

[24] Accordingly, the following order is made;

Order:

1. The non-compliance with the forms and service contemplated in the Rules of this Court is condoned and this matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court.

2. It is declared that the employment contract between the Applicant and the Respondent remains extant.

3. The Respondent is ordered to comply with the terms of the employment contract, and to reinstate the Applicant in its employ retrospective from 29 January 2021.

4. The Respondent is ordered to pay the applicant's costs, on Attorney and own Client scale.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	G. Fourie SC, instructed by Elliot Attorneys
For the Respondent:	A. Mosam SC with M.T.M. Phehane, instructed by De Swartd Myambo Attorneys