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(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

02 February 22
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 37/22

In the matter between:

SOLIDARITY OBO MEMBERS	First Applicant
WYNAND FRANSUA COERTZEN	Second Applicant
STEPHANIE CHRISTENSEN	Third Applicant

and

SEESA (Pty) Ltd	Respondent

Heard: **27 January 2022**

Delivered: **02 February 2022**

Summary: Urgent application - applicant must make out case for urgency – requirements for a final order not satisfied – application struck from the roll.

JUDGMENT

DEANE AJ

Introduction and Relevant Facts

[1] This is an opposed urgent application for a final order to declare that the Respondent's mandatory vaccination policy and the policies flowing therefrom be declared unlawful.

[2] The relief sought as mentioned in the notice of motion[1] in summary includes:

(i) restoring the second and third applicants' contractual rights, which include but are not limited to their rights to tender and render their services and to be remunerated;

(ii) to compel the respondent to comply with a lawful procedure in formulating and adopting policies which seek to implement measures so as to address the impact and consequences caused by the COVID-19 pandemic.

[3] The relevant background facts giving rise to this urgent application is around a dispute on the respondent's decision to adopt a policy entitled COVID-19 Admission to Premises Policy[2] (Policy) which seeks to prohibit any unvaccinated employee entering into the workplace.

[4] Due to the refusal to abide by the mandatory Policy the second and third applicants were refused access to the workplace when they reported for duty on or about 3 January 2022.

[5] As a result, the first applicant has instituted these proceedings on an urgent basis.

[6] The first applicant is Solidarity a trade union, of which the second and third

[1] Notice of Motion, pgs. 1-2 & the Founding Affidavit, pg. 6, para 5.
[2] Pleadings FA9.

respondents are members of.

[7] The second applicant is Wynand Fransua Coertzen, employed as a software developer at the respondent.

[8] The third applicant is Stephanie Christensen, employed as a legal advisor at the respondent.

[9] I am informed that at the time of the hearing of this application, the respondent had undertaken to pay the salaries of the second and third applicants and that there is now effectively only one applicant, being the second applicant. The reason is, it has been submitted, that there is no longer a dispute with the third applicant.[3]

[10] It was agreed that oral submissions would only focus on two points *in limine*:

(i) Urgency or the lack thereof; and

(ii) The lack of a basis for the merits of the application, being the unlawfulness of any dismissal that may be affected by the Respondent pursuant to the implementation of its mandatory vaccination policy.

[11] The issue of urgency was very much in dispute, and the applicant would thus have to satisfy the requirements of urgency so as to convince this Court to entertain the matter outside the ordinary course. Further, the applicant seeks final relief, and thus the applicant must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[4]

[12] There are various submissions including but not limited to the issue of retrenchments, retrenchment processes and concerns around procedure in relation to implementing the mandatory vaccination policy. However, this judgment will only focus on those issues relevant to determining the matter of urgency, directly relevant to the two points argued *in limine*. It was agreed that should I find that the application was indeed urgent then the parties would be

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[3] Heads of Argument dated 25 January 2022.
[4] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20.

willing to submit oral arguments on the merits of the application in court on a date to be determined.

[13] I now turn to the issue of urgency.

Urgency

[14] Where it comes to the general principles applicable in establishing urgency, this is dealt with in Rule 8 of the Rules of the Labour Court. In applying Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Other*[5] held:

'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.'

[15] The Court in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[6] succinctly summarised the requirements that have to be met to satisfy this Court that the matter may be entertained as one of urgency. These are: (a) the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when deciding whether or not urgency has been established; (d) 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; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[16] Another important consideration to be applied when deciding whether a matter

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[5] (2010) 31 ILJ 112 (LC) at para 18.
[6] (2016) 37 ILJ 2840 (LC) at paras 20 – 26, including the authorities cited in the judgment.

is urgent, is the determination of whether an applicant would not be afforded substantial redress in due course, and the duty is on the applicant to provide proper reasons in support of such a case. In *Maqubela v SA Graduates Development Association and Others*[7] it was succinctly described that:

'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 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. ...'

[17] Emanating from the provisions of Rule 8 and the principles set out in the authorities referred to above, it is evident that urgency is not there for the taking. An applicant seeking urgent relief must adequately and in detail, set out in the founding affidavit, the reasons the matter before the Court should be treated with urgency. An applicant that approaches the court on an urgent basis essentially seeks an indulgence and to be afforded preference in order to prevent the prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is the issue of self-created urgency.

Analysis

[18] The submitted bundle of documents is quite lengthy in nature, I will therefore only refer to that which is absolutely necessary for the purposes of this urgent application.

[19] The above summary considered, this now brings me to the facts of this matter relating to urgency. I must confess that I have many concerns in this regard, and I do consider the applicant's case on urgency to be severely lacking, for the reasons to follow.

[20] First and foremost, what becomes clear is that this application was not brought at the earliest available opportunity. Employees of the company received notice

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[7] (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.

of the mandatory vaccination policy and the implementation thereof on 19 November 2021.[8] Specifically relating to the second applicant, on 8 December 2021, the second applicant and the respondent's representatives, Phillip Sergeant and Ryan King, convened a counselling session wherein it was confirmed by the second applicant that he refuses to submit to the vaccination. He further confirms that I "understand that the policy that we are required to return to work in January 2022 (*sic*)"[9] clearly indicating that he was already aware of what the expectations from employees were and what the consequences were. It was made clear to the applicant in the counselling session that "come the first of January 2022 you will not be allowed to be return to work and then you will not be paid. (*sic*)".[10] At this date already he should have launched an urgent application. However, the second applicant procrastinates.

[21] The next relevant chronology of events from the papers is an email dated 30 December 2021 where reference is made to communications dated 13 December 2021, between the second applicant and a Pieter P. de Jager,[11] on the issue of the mandatory vaccination policy. These communications further confirm that the second applicant was well aware that come 1 January 2022 he would not be allowed access to work in compliance with the Policy. The communications on 13 December 2021, if not the 8th December 2021 communication, should have been the catalyst for the bringing of an urgent application. But it took the applicant over a month to bring the application.

[22] In *Mashiya v Sirkhot NO and Others*[12] the Court dealt with a period of delay from 25 July to 19 August and which was considered to be unacceptable. Furthermore in *Ngcongo v University of South Africa and Another*[13] the Court found a five-week delay in seeking to urgently challenge a ruling, without any proper explanation for it, to be not urgent. In my view, the same considerations apply *in casu*. On this basis alone this application falls to be struck from the roll.

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[8] Pleadings FA8, pgs. 125-129.
[9] Pleadings pg. 136, Closing Statements.
[10] Official Record of COVID-19 Counselling Session: Refusal: Vaccination, FA10, pg. 134.
[11] Annexure FA12, pg. 141. Pieter de Jager is the line manager of the second applicant. Pieter de Jager's designation is Training National Manager.
[12] (2012) 33 ILJ 420 (LC).
[13] (2012) 33 ILJ 2100 (LC) at para 9.

[23] The next part of the applicant's explanation where it comes to urgency is equally unsatisfactory. The above principles require that in an urgent application the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity. The respondents submit that the applicants "have singularly failed to comply with this peremptory requirement" and that "the deponent to the founding affidavit purports to address urgency in paragraph 122-127 of the founding affidavit" but that in those paragraphs only "an explanation is tendered as to why the application was not launched earlier, but nothing is said about why it is urgent".[14] In oral submissions before me the applicants submit that looking at the totality of the facts and what transpired in December and January, the relief that is being sought is embedded in the respondents refusal to allow the applicant to tender their services. The applicant further submits the facts in totality make this matter an urgent one.

[24] The legal applicable principles are clear on what is required in the founding affidavit in order to prove urgency. The failure to adequately and in detail provide this court with those reasons as required, means that the application falls short of the requirements of urgency. The lack of particularity where it comes to urgency, in the founding affidavit, is thus concerning.

[25] Furthermore, in oral submissions the applicant argues that this matter concerns issues of public interests and therefore this court can exercise its discretion in favour of urgency. It was further submitted by the applicants that the press is filled with articles on the issue of vaccines and that the relevance of this is both employers and employees are at sea as to what is and is not acceptable.

[26] The respondent disagrees and says that merely because something may fall in the public interest does not make it urgent and that this was not pleaded to in the founding affidavit.

[27] In addition, the respondent argues that whether or not the respondent followed a correct procedure in the implementation of its vaccination policy is not a public interest issue.

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[14] Respondents Answering Affidavit, pg. 3, para 3.2.

[28] It is trite that in motion proceedings an applicant must stand or fall by the allegations made in the founding affidavit.[15] Looking at the reasons provided for in the founding affidavit for the purpose of this application I am in agreement with the respondent. The issue of a public interests' matter was not argued nor pleaded in the founding affidavit and therefore cannot be entertained herein.

[29] In addition, the applicant has constantly submitted that the issue that is being pleaded is a breach of contract. Now, in the *Northam Platinum* case the court stated:[16]

"No matter what the cause of action may be, it is what the applicants want, and require, at the end of the day, that is the important consideration. Whether relying on breach of contract, unlawful dismissal, or automatic unfair dismissal, the end result will always be the same, if the applicants are successful. In the unfair dismissal case, an order of fully retrospective reinstatement will be competent, which is exactly the same as restoring the status quo ante prior to dismissal. And in the case of an unlawful termination or breach of contract of employment, the relief of specific performance restores the status quo ante. The applicants can thus get proper substantial redress in the normal course, without having to resort to these urgent proceedings."

[30] Therefore, an important consideration in the case of urgency is whether the applicants are able to obtain proper substantive relief at a later stage. In this case there are no exceptional reasons provided in order to allow the applicant to jump the queue and try to get the matter heard as an urgent matter. There is simply no justification for this and there is clearly an opportunity for redress in the normal course.

[31] In addition, the arguments submitted in the founding affidavit regarding injury or harm would not have application here. Firstly; this court is informed that on 18 January 2022 the Respondent undertook to pay the salaries of the second and third respondents. Accordingly, any potential prejudice or harm in terms of

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16 2016) 37 ILJ 2840 (LC) at para. 39.

non-payment of salaries would no longer be relevant herein. In addition, the kind of general submissions made in the founding affidavit are of little assistance when deciding urgency.[17]

[32] Secondly; regarding the issue of retrenchments, the applicants' case is that the risk assessment policy undertaken by the Respondent in respect of COVID-19 and the resultant mandatory vaccination policy are unlawful for want of compliance with the provisions of the Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces of 28 May 2021.[18] The applicants further submit that any retrenchment pursuant to the implementation of the COVID-19 policy will be unlawful because the risk assessment which preceded it was unlawful.[19] For the purposes of this urgent application it would be premature of this court to decide upon the lawfulness or otherwise of a dismissal yet to be affected.

[33] *In casu,* none of the reasons given make out a case as to why the circumstances of the applicants need to be dealt with on an urgent basis and would not be capable of being fully addressed in the normal course. Indeed, where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be considered and granted by a Court in the ordinary course.

[34] Applying all of the above considerations and principles to this application I am of the view that the grounds for urgency are not sufficient to make out a case for the matter to be heard on an urgent basis.

[35] This then only leaves the issue of costs. I have had regard to the issue of costs. In terms of section 162 of the LRA, the Court has a wide discretion in awarding costs. Both parties have sought costs against each other. There is no reason why the general rule that costs must follow the result should not apply.

[36] In the premise I make the following order:

Order

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[17] *CWIU v Sasol Fibres* (1999) 20 *ILJ* 1222 (LC) at 1227B – C.
[18] Annexure FA20, pg. 172.
[19] Founding Affidavit, pg. 50.

1. The application is struck off the roll for want of urgency.
2. The applicant shall pay the respondent's costs.

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T Deane AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocates C Goosen and D Groenwald
Instructed by:	Serfontein Viljoen en Swart
For the Respondent:	Adv RG Beaton SC
Instructed by:	De Villiers & Du Plessis Attorneys