



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

| | |
|------------------------------|--------|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case No. 3243/2024

In the matter between:

MAKGOTSO ELIZABETH MBUYISA

APPLICANT

And

**HEAD OF DEPARTMENT: FREE STATE
DEPARTMENT OF SOCIAL DEVELOPMENT**

FIRST RESPONDENT

TUMELO JACOB PHALO
(In his personal capacity)

SECOND RESPONDENT

**THE PREMIER OF THE FREE
STATE PROVINCE**

THIRD RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL

FOURTH RESPONDENT

**DIRECTOR GENERAL: FREE STATE
PROVINCIAL GOVERNMENT**

FIFTH RESPONDENT

CORAM: MAJOSI, AJ

HEARD ON: 21 JUNE 2024

DELIVERED ON: 25 JUNE 2024

JUDGMENT

[1] The applicant, approached the court on an urgent basis seeking an order in the following terms.

- “1. That the Applicant’s non-compliance with the rules of court regarding form, service and time-periods in respect of the application of this nature as provided in terms of Rule 6 be condoned, and that that the application be heard as an urgent review application in terms of Rule 6(12) and that the matter be heard by a single judge;*
- 2. That it be directed that the time period that has lapsed since the service of this application on the respondents is deemed reasonable, and constitutes sufficient time for service, as contemplated in section 35 of the General Laws Amendment Act 62 of 1995*
- 3. That the decision taken by the First Respondent on 30 May 2024 to impose a precautionary suspension against the Applicant, be reviewed and set aside*
- 4. That it be declared that the First Respondent lacked the authority to suspend the Applicant*
- 5. That it be declared that the precautionary suspension of 30th May 2024 by the First Respondent of the Applicant is unlawful, unconstitutional, and of no force and effect:*
 - 5.1 That it be declared that the first respondent abused his power as the Head of Department: Free State Department of Social Development, by imposing a precautionary suspension on 30th May 2024 against the Applicant;*
- 6. That the Second Respondent (“Adv TJ Phahlo”) be ordered to pay the costs of this application in his personal capacity on an attorney and client scale, such costs to include the costs of two counsel;*

7. *In the event of (any) of the other Respondents oppose this application, that they be ordered to pay the costs of the application jointly and severally with the Second Respondent on an attorney and client scale, such costs to include the costs of two counsel;*
8. *Further and/or alternative relief.*
9. *Alternatively, to the above, and in the event that this Honourable Court is not inclined to grant the aforementioned orders:*
 - 9.1 *That the interim application is dealt with as one of urgency;*
 - 9.2 *the First Respondent's precautionary suspension contained in the letter dated 30th May 2024 imposed against the Applicant, is suspended pending the final determination of the review application, including the final determination of any subsequent appeals;*
 - 9.3 *the First Respondent is interdicted and restrained from implementing and or effecting the precautionary suspension decision dated 30th May 2024 against the applicant in any manner whatsoever;*
 - 9.4 *the Applicant shall remain in the post of Chief Director: Social Welfare Services, Free State Department of Social Development;*
 - 9.5 *The Second Respondent ("Adv TJ Phahlo") is ordered to pay the costs of this application in his personal capacity on an attorney and client scale, such costs to include the costs of two counsel;*
 - 9.6 *In the event of (any) of the other Respondents oppose this application, that they be ordered to pay the costs of the application jointly and severally with the Second Respondent ('Adv TJ Phahlo')*

on an attorney and client scale, such costs to include the costs of two counsel;

10. *Alternatively, to paragraphs 9.5 – 9.6 above, that the costs of this application be reserved for adjudication in the review application referred to in paragraph 9.2 above;*
11. *that the order in paragraphs 9.2 -9.4 above shall serve as an interim interdict with immediate effect pending the finalization of the review application referred to in paragraph 9.2 above;*
12. *Further, and alternative relief.”*

[2] The application is opposed by the first and second respondents. They pleaded specifically that the matter is not urgent and ought to be dismissed. Furthermore, that this court does not have the requisite jurisdiction to hear the application and that if the court is so inclined, the applicant failed to satisfy the requirements for interim relief sought. These assertions were detailed in the answering affidavit.

[3] The applicant did not file a replying affidavit and reserved their rights therein pending the hearing of the application and in so doing, left the allegations in the answering affidavit unchallenged. In light of this, the urgent review application was abandoned in favour of the alternative relief sought as delineated prayer 9 of the amended notice of motion.

[4] I was concerned about the urgency of the application and jurisdiction being raised and I requested parties to address me on these points before I could adjudicate the merits as the applicants indicated that they are proceeding with the alternative of interim relief pending the final determination of a review application.

[5] A brief background to the facts are: On 13 May 2024, the first respondent, who is also cited in his personal capacity as the second respondent herein, forwarded a letter to the applicant requesting representations for an instruction she gave to the Office of the State Attorney to withdraw a pending court application to review

and set aside the irregular appointment of another official, Chief Director: Community and Partnership Development without internal legal advice from the Department's Legal Services.

- [6] On 20 May 2024, the applicant's written response lamented the request for reasons for her decision as he had no authority to do so as she was executing her duties in as the then acting head of department and blatantly refused to provide him with a response. This was despite her returning to her substantive position as a Chief Director in the department at the time of this request.
- [7] In the absence of the applicant's response, the first respondent caused a letter of precautionary suspension with full benefits to be sent to the applicant on 30 May 2024 pending an investigation as she refused to account or provide an explanation. On 31 May 2024, the applicant's attorney sent a letter to the first respondent demanding that the decision to place her on precautionary suspension be rescinded by 4 June 2024, failing which, the High Court would be approached to obtain the necessary relief.
- [8] The first respondent acknowledged her letter on 3 June 2024 wherein it was also indicated that the matter is being referred to legal services for further handling and she was provided with a contact details of the responsible advocate in that regard. The said advocate was contacted by her attorney on 4 June 2024 but no formal engagement took place and as she was informed that the first respondent was yet to be provided with comprehensive legal advice.
- [9] She accepted the explanation given as she was aware that departments in government are overstretched until 11 June 2024 when she gave her attorney instructions to launch the urgent application and this was served and filed after her consideration on 14 June 2024.
- [10] Counsel for the parties provided me with their heads of argument in court which most peculiarly, already dealt with the issue of jurisdiction of this court and I allowed them to hand up relevant case law to that effect. I deem it unnecessary to include all the cases I was referred to. I am satisfied that this court does have the necessary jurisdiction to adjudicate the alternative urgent interim relief

sought, which is now being pursued by the applicant. This finding will also determine how this court exercises its discretion where costs are concerned.

[11] Rule 6(12) of the Uniform Rules of Court provides as follows:

(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 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.

[12] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* the following was stated at paragraphs 6 – 7:

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. 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.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.”

[13] Counsel for the applicant argued that the first respondent egregiously abused his power by suspending her without the authority to do so and that his conduct subverted the rule of law and required the court to intervene and put an end to it.

Furthermore, that should interim relief be sought in the ordinary course, the applicant would already be subjected to the disciplinary process and punitive processes contemplated in the unlawful suspension letter¹ and will not be afforded substantial redress in due course.

- [15] It was lastly argued that due to her high-ranking position as Chief Director of three directorates, she provides strategic leadership for programs critical to the Department of Social Development and any acting appointment in her stead will be adrift in the sea of litigation involving the department in the provision of social welfare services² and therefore, the matter must be considered on an urgent basis as she also was not afforded *audi alteram partem*.³
- [16] Transversely thereto, counsel for the Respondent argued that the truncated timelines limited their ability to adequately present their case and that applicant's case is predicated on hearsay and is not supported by confirmatory affidavits from the third, fourth and fifth respondents. The senior legal advisor in the office of the Premier whom the applicant alleges confirmed that the instruction to withdraw legal proceedings without her input amounts to hearsay in the absence of a confirmatory affidavit in that regard. It was also asserted that the applicant failed to disclose in her papers that she had an interest in the matter being set aside by the state attorney hence she gave an instruction of that nature due to her own lack of qualifications. It was thus likely, should she remain in office, that she would likely manufacture further evidence.
- [17] Furthermore, it was contended that the precautionary suspension is in line with paragraph 8.8 of the Directive on Discipline Management in the Public Service as issued by the Minister for Public Service and Administration which came into operation on 1 April 2024 which gives all heads of departments the necessary authority to effect precautionary suspensions and is not punitive and does not require her response⁴ and her reliance on the principle of legality as grounds for urgency is ill fated as she has no prospects of success on the merits.⁵

¹ Applicant's heads of Argument paragraph 65 – 69.

² Founding affidavit paragraphs 231.

³ Founding affidavit 17.2.

⁴ Respondent's heads of argument, paragraphs 28 – 30.

⁵ Respondent's Answering Affidavit, paragraphs 29 – 30.

- [18] It must be noted before this hearing commenced, I made the parties aware that no replying affidavit had been filed in response to the answering affidavit. This is over and above the answering affidavit being filed a day later than the truncated timelines and an amended notice of motion being filed by the applicant on the very date she received a notice to oppose. The applicant nevertheless indicated that they will be proceeding with the urgent application pertaining to interim interdict and reserved their rights therein and did not request an extension to file same.
- [19] Hearsay evidence may be allowed in urgent applications with limitation. The case of the applicant is premised in the subject matter of her suspension which she alleges amounts to the abuse of power by the first respondent as she had been assured by the legal department in the form of Mrs. Naidoo, that their input (as legal advisors) and legal advice was not required for an instruction to the state attorney. The absence of such a confirmatory affidavit leaves much to be desired as it may well speak to her prospects of success in the interim relief sought which is not the subject matter of this court's adjudication but certainly a fact that may be considered by this court *in lieu* of urgency.
- [20] It is also evident from the answering affidavit that the precautionary suspension cannot be regard a punitive in nature and that the investigation as per the relatively short time frames indicated in the Minister's directive may or may not lead to her being suspended in ordinary terms as a decision pertaining her actual employment has not yet been made. In my view, this alone negates urgency.
- [21] In *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) it was stated that:

"Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the

particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.”

[22] I am not persuaded that the application is so urgent that it I ought take it on the roll. It will be struck off the roll for lack of urgency due to the applicant’s failure to comply with Rule 6(12) (b) of the Uniform Rules of court. In light of this finding, I exercise my discretion and order that each party pay their own costs.

[23] Accordingly, the following order is made:

1. The application is struck off the roll.
2. Each party to pay their own costs.

MAJOSI O R, AJ

APPEARANCES:

On behalf of the Applicant

Adv. M.J Merabe

With

Adv. K. Nhlapo - Merabe

Instructed by:

Salakuva Attorneys

BLOEMFONTEIN

On behalf of the First & Second Respondent

Adv. L.R Bomela

Instructed by:

State Attorney

BLOEMFONTEIN

