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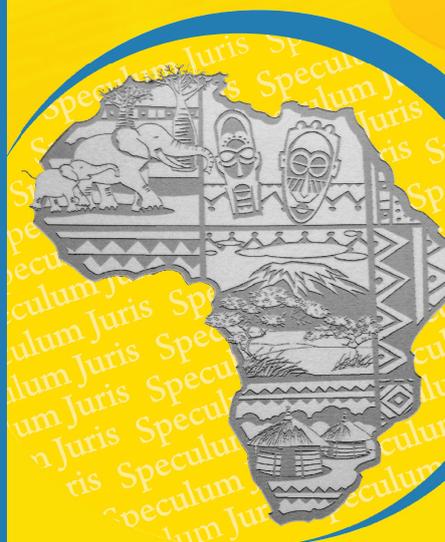
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Financial Hardship as a Ground of Urgency and Foundation for Exceptional Circumstances in Applications for Interim Relief: A Review of Court Decisions

Vuyo Peach*

Associate Professor, College of Law,
University of South Africa (UNISA)

Abstract

*The article focuses on the narrow but contentious issue of financial exigencies and loss of income as a ground for urgency as well as a key factor in establishing the existence of exceptional circumstances justifying judicial intervention on an urgent basis. The Labour Court’s record on whether financial hardship constitutes a sufficient basis for urgency, by extension, an overriding factor demonstrating the presence of exceptional circumstances, has left a patchwork of opinions. The clear message emerging from *Ledimo v Minister of Safety and Security* 2003 ZAFSHC 16, *Hultzer v Standard Bank of SA* 1999 8 BLLR 809 (LC) and *Tshwaedi v Greater Louis Trichardt Transitional Council* 2004 BLLR 469 (LC) is that financial exigencies and loss of income are not regarded as grounds for urgency. By contrast, pronouncements emanating from *Harley v Bacarac Trading* 39 (Pty) Ltd 2009 30 ILJ 2085 (LC), *DENOSA v DG: Department of Health* 2009 ZALC 211 and *UWC Academic Staff Union v**

* B.Iuris (Vista), LLB (Vista), LLM (PU for CHE), LLD (UniZulu), Diplomas: Human Rights Law (RAU), Contract Drafting & Interpretation (UJ), Labour Law Certificate and Advanced Certificate Labour Law (PU for CHE).

UWC 1999 20 ILJ 1300 (LC) suggest that there is no immutable rule that financial exigencies could not be invoked to lay a basis for urgency. It cannot be emphasised enough that loss of income matters beyond measure. As noted in SA Informal Traders Retail Association v City of Johannesburg 2014 6 BLLR 726 (CC), the ability of people to work and sustain their lives as well as those of their families, is one of the most essential components of the right to human dignity. Without such ability, a slide into humiliation and degradation is unavoidable. Ngoye v PRASA 2019 ZALCJHB 21 and Munthali v PRASA 2021 42 ILJ 1245 (LC) provide a platform to tackle the vexed question whether financial exigencies and loss of income constitute grounds for granting urgent relief. There is also a pressing question of equal, if not greater importance concerning judicial discretion when urgency is not established.

Keywords: exceptional circumstances; financial hardship; irreparable harm; loss of income; urgent relief

1 INTRODUCTION

A glimpse into the urgent roll of the High Court (HC) and Labour Court (LC) reveals that the court rolls are clogged by applications seeking intervention in one way or another in incomplete disciplinary proceedings.¹ In the labour litigation and dispute resolution landscape, well-heeled employees and executives under suspension and facing disciplinary process have sought interim relief as part of a stratagem to delay and derail ongoing disciplinary proceedings.² It could be argued that the derailment of workplace disciplinary inquiries is nothing but a manifestation of the insidious “Stalingrad defence strategy”.³ Put differently, the practice of instituting satellite litigation with no other purpose than to side-track courts from fulfilling their constitutionally

1 The trend is captured in *Ngobeni v Prasa Cres* 2016 8 BLLR 799 (LC) para 14 by Van Niekerk J in the following terms: “The urgent roll in this court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings. The present application is a prime example and is exacerbated by the preceding application to review and set aside Advocate Cassim’s ruling on recusal ... The abuse goes further — what the applicant effectively seeks to do is to bypass the statutory dispute resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of the structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute resolution system. The court’s proper role as one of supervision over the statutory dispute resolution body; it is not a court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micromanage discipline in workplaces.”

2 See Mischke “Delaying the Disciplinary Hearing: Strategies and Shenanigans” 2011 *CLL* 41; Cohen “Precautionary Suspensions in the Public sector: *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2012 (LAC)” 2013 *ILJ* 1706; Maloka “Interdicting an in-house Disciplinary Enquiry with Reference to *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78” 2019 *JJS* 12.

3 An opinion piece in *Judges Matters* “Using Stalingrad Tactics to Delay Justice” (19 June 2018) provide succinct definition of the Stalingrad defence strategy: This is a strategy of wearing down the plaintiff by tenaciously fighting anything the plaintiff presents by whatever means possible and appealing every ruling favourable to the plaintiff. Here, the defendant does not present a meritorious case. This tactic or strategy is named for the Russian city besieged by the Germans in World War II, available at <https://www.judgesmatter.co.za/opinions/using-stalingrad-tactics-to-delay-justice/>. See also De Vos “Stalingrad Defence: Zuma’s Costly and Legally Untenable Attempts to Avoid Facing Criminal Charges” *Daily Maverick* 27 October 2021 available at <https://www.dailymaverick.co.za/article/2021-10-27-stalingrad-defence-zumas-costly-and-legally-untenable-attempts-to-avoid-facing-criminal-charges/>.

mandated role and function of determining disputes fairly and expeditiously.⁴

Delaying tactics define the outlook of contemporary labour practice. One can do no better than paraphrase Tlhotlhlamajé J, these elite employees with a false sense of importance and entitlement purposefully seek to jump the proverbial litigation queue, and habitually approach the LC 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).⁵ LC judges have run out of words in expressing their disapproval against such litigants and applications, and in appropriate cases have issued stern warnings through punitive orders.⁶ It cannot be emphasised enough that the statutory dispute resolution processes were designed to be accessible, speedy and inexpensive.⁷

Few would disagree that loss of income, with concomitant financial hardship are self-evident matters demanding urgent and dedicated attention. The chief obstacle in applications for interim relief is urgency. Countless applications for interim relief are struck off the roll because of a lack of urgency, or urgency is considered self-created. In labour litigation, the troubling question concerns whether financial exigencies and loss of income can lay the basis for urgency and, at the same time, serve as an overarching factor in establishing the existence of exceptional circumstances warranting urgent intervention, and remains a contentious issue. The bench is divided as to whether financial hardship constitutes a sufficient basis for urgency. There are

4 The high points of Stalingrad manoeuvres and derailment of the administration of justice are exemplified in the never-ending *Zuma/Thint* corruption trial: *Zuma/Thint* cases: *Zuma v NDPP* 2009 2 SA 277 (SCA); *Zuma v NDPP* 2009 1 SA 1 (CC); *Zuma v NDPP* 2009 1 SA 141 (CC). For manifestation of delays in the administration of justice in relation to the WC JP Hlope, JSC conduct hearing: *Nkabinde v Judicial Service Commission* [2016] ZACC 25; *Nkabinde v Judicial Service Commission* 2016 4 SA 1 (SCA); *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 3 SA 538 (SCA); *Freedom Under the Law v Acting Chairperson of the Judicial Service Commission* 2011 1 SA 546 (SCA); *Langa CJ v Hlophe* 2009 4 SA 382 (SCA); *Hlophe v Freedom Under the Law In re: Freedom Under the Law v Hlophe; Moseneke v Hlophe In re: Hlophe v JSC* 2022 2 SA 532 (GJ); *S v Zuma* 2023 1 SACR 621 (KZ).

5 *Munthali* para 15. See also Moletsane “Challenges Faced by a Public Sector Employer that Wants to Dismiss an Employee who Unreasonably Delays a Disciplinary Enquiry” 2012 *ILJ* 1568; Norton “When is Suspension an Unfair Labour Practice? A Review of Court Decisions” 2013 *ILJ* 1694.

6 For example, in *Mosiane v Tlokwe City Council* 2009 30 *ILJ* 2766 (LC) paras 15–16, it was noted: “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. 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 Council 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.” See also *Magoda v DG of Rural Development and Land Reform* 2017 38 *ILJ* 2795 (LC) para 1; *Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo Province* 2013 ZALCJHB 225 para 52.

7 See Steenkamp and Bosch “Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential” 2012 *Acta Juridica* 120; Van Niekerk “A Speedy Social Justice: Structuring the Statutory Dispute Resolution Process” 2015 *ILJ* 837.

ample authorities that have answered the question in the negative.⁸ Simply put, the loss of salary and attendant financial hardship are not regarded as sufficient to establish urgency. Alternatively, some cases have held that the general rule could be departed from in special cases.⁹ In other words, there is no absolute rule that financial exigencies cannot be invoked to lay a basis for urgency.

The *PRASA* litigation¹⁰ affords a space to address the thorny question regarding financial exigencies and loss of income as a ground for granting urgency. A closely related problem concerns whether financial hardship is a strong indicator of exceptional circumstances warranting urgent judicial intervention.

An analysis of financial hardship as a basis of urgency inevitably invites consideration of judicial discretion when urgency is not established. Naturally, this means traversing the jurisprudential footprints of *Setlogelo v Setlogelo*¹¹ and *Webster v Mitchell*.¹² To recap the much-traversed requirements for granting interim relief are: (a) *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the absence of alternative remedy.¹³

2 THE STRINGENT REQUIREMENTS OF URGENCY

The starting point is whether the applicant has approached the High Court (HC),¹⁴ the Labour

8 *Ledimo v Minister of Safety and Security* 2003 ZAFSHC 16 para 32 (*Ledimo*), 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: “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 other matters and result in the disposal of the latter being prejudiced by being delayed.” See also *Tshwaedi v Greater Louis Trichardt Transitional Council* 2004 BLLR 469 (LC) (*Tshwaedi*); *Malatji v University of the North* 2003 ZALC 32 (LC) (*Malatji*); *National Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John* NO 1990 11 ILJ 971 (T) (*National Sorghum*); *Jonker v Wireless Payments Systems CC* 2010 31 ILJ 381 (LC) (*Jonker*); *SACWU v Sentrachem* 1999 6 BLLR 615 (LC) (*Sentrachem*); *Hultzer v Standard Bank of SA* 1999 8 BLLR 809 (LC) (*Hultzer*); *SACAWU v Shoprite Checkers (Pty) Ltd* 1997 10 BLLR 1360 (LC).

9 In *Harley v Bacarac Trading 39 (Pty) Ltd* 2009 30 ILJ 2085 (LC) (*Harley*) para 8 Van Niekerk J 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.” See also *Ngqeleni v MEC for Department of Health, Eastern Cape* 2018 ZAECMHC 77 (22 November 2018) (*Ngqeleni*); *Mthembu v Mpumalanga Economic Growth Agency* 2015 ZALCJHB 184 (*Mthembu*); *DENOSA v DG: Department of Health* 2009 ZALC 211 (*DENOSA*); *HOSPERSA v MEC for Health, Gauteng Provincial Government* 2008 9 BLLR 861 (LC) (*HOSPERSA*); *UWC Academic Staff Union v UWC* 1999 20 ILJ 1300 (LC) (*UWC Academic Staff Union*).

10 *Ngoye v PRASA* 2019 ZALCJHB 21 (*Ngoye*) and *Munthali v PRASA* 2021 42 ILJ 1245 (LC) (*Munthali*).

11 1914 AD 221 (*Setlogelo*).

12 1948 1 SA 1186 (A) (*Webster*).

13 See for e.g. *Zuma v Minister of Police* 2021 3 All SA 967 (KZP) para 42.

14 See for e.g. *Mndebele v Govan Mbeki Municipality* 2021 ZAMPMMC 9 (23 March 2021); *Hlazo v OR Tambo District Municipality* 2021 ZAECMHC 14 (4 May 2021) (*Hlazo*); *Phori v Minister of Police* 2021 ZAFSHC 221 (17 September 2021).

Court (LC),¹⁵ even the Supreme Court of Appeal (SCA)¹⁶ or the Constitutional Court (CC)¹⁷ with the necessary haste. Urgency results in a departure from the usual rules so prescribed. An applicant must therefore furnish the court with reasons why the application is urgent and why they cannot wait any longer to bring the application in a normal manner.¹⁸ For their application to be heard as urgent, every litigant must properly make a case of urgency. Rule 8 of the LC Rules, as well as Rule 6(12) of the HC Rules, governs urgent relief. The founding of urgency, therefore, depends on the merits and circumstances surrounding the case. What would an applicant who seeks to make out a case of urgency then have to show? The short answer is that reliable evidence must be placed before courts to permit urgent intervention. In *Mojaki v Ngaka Modiri Molema District Municipality*¹⁹ the court cited with approval the following dictum from *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*:²⁰

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.²¹

Of critical importance is that where urgency was entirely self-induced, urgent relief will invariably be denied. Put in another way, if the applicant fails to act with the necessary haste in approaching the court, the primary objective of approaching a court on an urgent basis is defeated. That objective is to prevent harm or prejudice from occurring.²² *Golding* is a typical example where the LC had no hesitation in finding that urgency was entirely self-created. In the instant case, the applicant knew when the disciplinary hearing was due to commence and yet gave the respondents less than one day before his application was to be heard to file answering papers, having expended nine days to draft his own lengthy founding papers. The fact that the hearing will take place on a particular date is not, on its own, a factor that can persuade the court to treat the matter as urgent. The only reasonable inference was that the applicant waited until the last minute before the envisaged date of the hearing to use the application to effectively scupper the beginning of the enquiry. Steenkamp J concluded that the court application had to

15 *Phaahla v Minister of Justice and Correctional Services* 2022 ZALCJHB 9 (7 February 2022); *Edebery v National Youth Development Agency* 2021 ZALCJHB 1 (7 January 2021) para 6; *Tsibani v Estate Agency Affairs Board* 2021 ZALCJHB 150 (24 June 2021).

16 See *OUTA v SANRAL* 2013 4 All SA 639 (SCA).

17 See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* 2021 5 SA 2 (CC) (*Secretary of the Judicial Commission of Inquiry*); *Moko v Acting Principal of Malusi Secondary School* 2021 3 SA 323 (CC) (*Moko*); *SA Informal Traders Retail Association v City of Johannesburg* 2014 6 BLLR 726 (CC) (*SA Informal Traders Retail Association*).

18 Peté *Civil Procedure: A Practical Guide* (2016) 480.

19 2015 36 ILJ 1331 (LC) para 17.

20 2011 ZAGPJHC 196 (*East Rock Trading 7*).

21 *East Rock Trading 7* para 6. See also *Tsibani v Estate Agency Affairs Board* 2021 ZALCJHB 150 (24 June 2021) paras 41–50; *NUMSA v Bumatech Calcium Aluminates* 2016 37 ILJ 2862 (LC); *TAWUSA v Algoa Bus Company (Pty) Ltd* 2015 36 ILJ 2148 (LC); *Vermaak v Taung Local Municipality* 2013 ZALCJHB 43 (12 March 2013) para 12; *Jiba v Minister: Department of Justice and Constitutional Development* 2010 31 ILJ 112 (LC) para 18 (*Jiba*); *Tshwaedi* para 10.

22 See *Golding v HCI Managerial Services (Pty) Ltd* 2015 1 BLLR 91 (LC) para 24 (*Golding*); *Ntozini v ANC* 2018 ZAGPJHC 415 para 1.

be struck from the roll on that reason alone.

3 FINANCIAL HARDSHIP AS A GROUND OF URGENCY

As already noted, the general position is that the mere fact that financial exigencies and loss of income have been suffered or would be suffered by the applicant does not, on its own, create the necessary urgency to justify deviating from the ordinary court rules unless exceptional circumstances have been adduced. Against this background, the LC's decision in *Sentrachem* addressing financial hardship is of considerable interest:

A medical aid benefit, *per se*, does not establish special circumstances. Virtually all employees, particularly those employed by large companies, are members of a medical aid fund. A medical aid benefit is often obtained on the same basis as the general remuneration package of an employee. Loss of income, probably the worst consequences of dismissal, is not a ground for urgency. Therefore, it is difficult to understand the argument that a loss of a medical benefit, *per se*, is a ground of urgency.²³

When the issue of financial exigencies arose in *Malatji*, the court pointed out that an exceptional circumstance should be adduced to permit courts to treat the matter as urgent.²⁴ In this case, the applicant was a manager at the university's student residence. She sustained serious injuries which left her incapacitated. Despite staying at home for a considerable period due to ill-health, she continued to be remunerated. The employer convened a meeting to discuss possibly stopping her salary. Subsequent to that, a letter of termination was drafted addressing her considerable absence related to her ill health. Pending the finalisation of arbitration proceedings, the applicant lodged an urgent application seeking reinstatement, and that the unilateral halting of her salary be declared unlawful.

The applicant's case was accentuated by reliance on financial hardship linked to non-payment, loss of medical aid cover, and the fact that she had not been able to undergo medical treatment. She pleaded:

In view of the fact that the respondent unilaterally stopped my salary, I depleted all my reserves that I had together with those of my husband. I am now unable to meet all these requirements in view of the period in which the respondent had stopped my salary.²⁵

The LC held that there was no proper evidentiary material placed before the court to justify the grant of urgency. Her statements were general and lacked substance. In short, she failed to demonstrate urgency supported by exceptional circumstances.

The same issue arose in stark form in *Gomba v MEC: Gauteng Department of Human Settlement*²⁶ and *Jonker*. In the former case, it was common cause that Gomba's services were terminated in accordance with the provisions of section 17(3)(a)(i) of the Public Service Act 103 of 1994.²⁷ The applicant was on leave at the time the Lisbon Building was engulfed in fire. Gomba failed to report for duty when she ought to have done so and therefore was not paid. She was then dismissed because of absenteeism. The applicant approached the LC on an urgent basis seeking

²³ *Sentrachem* para 20.

²⁴ *UWC Academic Staff Union* para 17.

²⁵ *Malatji* para 9.

²⁶ *Settlement* (2019) 40 ILJ 2355 (LC) (*Gomba*).

²⁷ See for e.g. *Minister of Defence and Military Veterans v Mamasedi* 2018 (2) SA 305 (SCA); *Maswanganyi v Minister of Defence and Military Veterans* 2020 41 ILJ 1287 (CC); *Masinga v Chief of the SANDF* 2022 ZASCA 1 (5 January 2022). See also Van der Walt, Abrahams and Qotoyi "Regulating the Termination of Employment of Absconding Employees in the Public Sector and Public Education in South Africa" 2016 *Obiter* 140; Mathiba "Deemed Dismissals and Suspensions in the Public Sector: *Grootboom v National Prosecuting Authority* 2014 ILJ 121 (CC)" 2015 *Obiter* 223.

an order declaring her termination as unfair and unlawful and that she be re-employed in her former position with the same full benefits. Gomba averred that the matter was urgent on the grounds that:

- a) Her contract of employment was wrongfully and unfairly terminated, causing her to suffer severe psychological trauma.
- b) She was on the brink of losing her residential property in which she lived with her minor daughter due to non-payment of her monthly bond;
- c) She recently discovered that she was pregnant and suffered from some other ailments including high blood pressure.
- d) She had no alternative remedies.
- e) Her circumstances were exceptional.²⁸

The LC agreed with the employer that Gomba has not set out facts requiring this application to be treated as urgent. Tlhotlhamaje J concluded as follows:

15.1 Having become aware of the non-payment of her salary on 15 March 2019, Gomba only approached this Court on 27 May 2019, some 10 weeks since the cause of the complaint.

15.2 ...

15.3 It is apparent from the above that Gomba did not act with the necessary haste in approaching the Court, and the invariable conclusion to be reached is that the urgency claimed is self-created.

15.4 Even if there is a semblance of attempts by Gomba to have her appeal attended to, other factors she had raised in submitting that the matter is urgent does not assist her case. The first is that, insensitive and uncaring as it may sound, financial hardship is ordinarily not regarded as a ground of urgency. It is a natural consequences of a loss of a job, and it would be untenable for the Court to treat financial hardship as a ground of urgency in each and every dismissal case in the light of the clear scheme of labour dispute resolution as contained in the LRA. All litigants that have had their services terminated, irrespective of status, financial means or financial hardship, are required to await their turn in the litigation queue. Gomba is not an exception, nor has she shown exceptional circumstances as shall be dealt with below.²⁹

The applicant in *Jonker* received a car allowance, which she was not entitled to due to an administrative error. Subsequent to that, a meeting was held where she was served with a notice that her services would terminate due to operational requirements. She launched an urgent application relying on section 77(1) of BCEA to interdict the employer from making deductions from her salary. The threshold issue was whether the applicant had shown the existence of urgency. The LC referred to the case of *DENOSA*, where the court was confronted with the issue of whether financial exigencies and loss of income constituted grounds for urgent relief. It followed the approach in *Hultzer*³⁰ where it was stated that financial distress did not constitute

²⁸ *Gomba* para 14.

²⁹ *Gomba* para 15.

³⁰ The LC in *Hultzer* para 13 said: “Financial hardship or loss of income is not regarded as a ground for urgency. Mlambo J in the *University of Western Cape* matter (*supra*) found that loss of income cannot establish a ground of urgency in an attempt to obtain urgent interim relief from this court. The applicant, in its founding papers, has not put forward any evidentiary detail with regard to injury to his reputation if he is not reinstated in his former position, by way of urgent relief.”

grounds for granting relief.

In the recent case of *NEHAWU v UNISA*,³¹ the applicant employees' financial hardship was pithily pleaded, and consequently, a case for the urgent intervention was infirm. The analysis of the LC restated the settled proposition that financial hardship is not a sufficient ground to establish urgency. Nkthutha-Nkontwana J³² relied on the *dicta* in *UWC Academic Staff Union*, where *Mlambo* J (as he then was), dealt with the issue as follows:

With regard to the notion of irreparable harm it needs to be mentioned that loss of income as a result of dismissal is the inevitable consequence and as such provides no good ground for the granting of urgent interim relief. Special circumstances must be advanced to persuade a court to oblige. Loss of accommodation has been found to be a special feature accepted by the courts in order to grant urgent interim relief. ... In considering the issue of irreparable harm the court will also consider the adequacy or not of any alternative remedy that may be available.³³

While the LC court has been disinclined to consider financial hardship and, more particularly, loss of income as a good ground for urgency, the only exception to this general principle is when there are exceptional circumstances that would justify the granting of urgent relief.³⁴ In this regard, the applicant must demonstrate detrimental consequences that may not be capable of being addressed in due course. This brings us to the other end of the spectrum; cases that have left the door open for financial distress as a basis for urgency. Simply put, there is no inflexible rule that financial hardship and loss of income can never be grounds for urgency. In the case of *HOSPERSA*, Basson J held that an employee was entitled to urgent relief in circumstances where her employer had unilaterally withheld her salary in breach of the Basic Conditions of Employment Act 75 of 1997, and where she had not been allowed to make representations before her remuneration was stopped. To the same effect in *Ngqeleni*, the HC found financial distress to be a sufficient reason for urgency based on the circumstances in which the applicant found himself due to the harsh termination of employment, which was its unlawfulness³⁵ the subject matter of the application.

In *Ledimo*, the court stressed that there was no immutable rule that financial exigencies could not be invoked to lay a basis for urgency. Factors that surround financial exigencies ought to be weighed together with facts and circumstances pleaded to show the existence of special circumstances necessitating that the matter be treated as urgent. *Ledimo* involved police officers who were suspended without pay. They launched an urgent application to the HC seeking an order declaring their suspensions unlawful and unconstitutional. They also asked for reinstatement. Deputy Commissioner contended that their application was not urgent. Rampai J dismissed the application for lack of urgency.

Harley similarly concerned a unilateral termination of the payment of remuneration. The respondent did not challenge the applicant's claim that the consequences of his suspension were such that he was in dire financial straits, and in particular that on 21 November 2008, the bank

31 2022 ZALCJHB 162 (21 June 2022) (*NEHAWU*).

32 *NEHAWU* para 10.

33 *UWC Academic Staff Union* para 17.

34 In *Mthembu* para 22, Tlhotlhamaje J stated: "As already indicated, it is not always that this Court should regard financial hardship and loss of income as grounds of urgency, but in this case the applicant has adduced sufficient evidence to support these grounds, which invariably extends beyond pure financial considerations. In conclusion on this issue, I am willing to further accept that the lack of diligence was not unreasonable given the circumstances of this case, and even if a contrary view was to be held, there are other factors in this case that are indeed compelling and exceptional to call for the court's intervention as illustrated below."

35 *Ngoye* para 28.

addressed correspondence to him threatening *inter alia* to foreclose on his mortgage bond.³⁶ Rather, the respondent maintained that the applicant's financial circumstances were of his own making.³⁷ The LC noted that, given the factual context, the respondent's assertion was flawed. In brief, the court was satisfied that this application was urgent.

The habitually errant Municipal Manager in *Hlazo*³⁸ was placed on precautionary suspension because of allegations of gross malfeasance. A letter of termination was then given to the applicant after a resolution taken by the municipal council on the basis that the contract had terminated because of the effluxion of time. He was also informed that the contract was for a period of two years and that a reference which had been made to termination, as dated for April 2022, was erroneous and therefore inconsistent with the provisions of section 57(6) of the Municipal System Act. The applicant approached the HC on an urgent basis seeking an order declaring the resolution taken by the municipality to be unconstitutional and invalid because it offended the doctrine of legality. He sought a declaration that his employment contract remains in existence and urgent reinstatement. In addition, the applicant sought an order directing the municipality to pay his salary for the month of February 2021 and his subsequent monthly salary. The municipality contended that the matter was not urgent. It also maintained that the employment contract was terminated in a manner that was valid, as it was for a period of two years.

The first issue was whether the applicant was entitled to approach the High Court on an urgent basis. The second main issue was whether the employment contract between the applicant and the first respondent was for a two-year term ending on 30 April 2020 or for a five-year term ending on 30 April 2023. On the issue of urgency, Jolwana J referred to section 82 of the Municipal Structures Act that it is only a municipal council that can effect termination of the contract of the municipal manager.

Jolwana J held that both the applicant and his counsel were ignorant about a letter of termination and that the letter gave them the same cause of action as the resolution, with no justifications provided on why they chose not to act with necessary haste. Practitioners should be meticulous in the analysis of the facts of each case to determine whether a lesser or greater degree of relaxation of court rules is required. A case of urgency must be made in the founding affidavits to provide reasonableness for departure from norms. In *casu*, the application lacked urgency. The judge elaborated:

There was every reason to strike this application off the urgent roll with costs as nothing of substance happened between the 01 December 2020 and the 12 March 2021 when these proceedings were instituted on an urgent basis. The reliance on the misreading of the resolution of 19 February 2021, which came to the attention of the applicant on 9 March 2021, was misplaced. The third respondent's strange and misleading covering letter which suggested that the resolution to terminate the employment contract was taken on 19 February 2021 when it should have been known to her and the applicant that the resolution to terminate his employment contract was taken on 21 October 2020 were all red herrings. None of that justified the applicant rushing to this court on an urgent basis more than three months after

³⁶ *Harley* para 10.

³⁷ *Harley* para 10.

³⁸ In an earlier case of *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (ECM), Hlazo, in his capacity as the municipal manager, was placed on precautionary suspension for concealing a damning forensic report implicating him in serious financial irregularities from the council and the mayor. He only revealed council when threatened with criminal action. See also Maloka "The *Turquand* Rule, Irregular Appointments and Bypassing the Disciplinary Process" 2017 *SA Merc LJ* 527 530; Kohn "Escaping the '*Shifren* Shackle' through the Application of Public Policy: An Analysis of Three Cases Shows *Shifren* is not so Immutable After All" 2014 *Speculum Juris* 74.

being aware of the termination of his employment contract.³⁹

An applicant will be entitled to urgent relief in a situation where her employer had solely terminated her salary in breach of the BCEA, compounded by a failure to afford her an opportunity to make representations before her salary was stopped.⁴⁰

Regarding loss of livelihood and ensuing hardship, the CC decision in *SA Informal Traders*⁴¹ is instructive. There, the apex court heard two urgent applications involving informal traders who traded in the inner City of Johannesburg and were evicted by Metro Police. The applicants sought the return of their stalls. The court stressed that an urgent appeal to the CC against an interlocutory order would be allowed as a matter of last resort where it was proven that the HC and the SCA failed to provide a proper urgent procedure. In the present case, it was clear that the informal traders lost their livelihood as a result of confiscation of their goods during “Operation Clean Sweep”. The CC rejected the City of Johannesburg’s contention that the urgency the applicants relied on was self-created. Skweyiya J held that the application for interim relief was manifestly urgent because:

The City had evicted the applicants from their trading areas or stalls and refused to allow them back, even though they had been verified and re registered at the behest of the City. Although the City admittedly failed to follow the processes in the Businesses Act, it forcibly evicted the applicant traders. Its conduct spawned immediate and acute hardship that left the applicant traders destitute. It was never disputed that they were unable to feed or house themselves or their families. The situation would have only worsened if it persisted.⁴²

4 JUDICIAL DISCRETION WHERE URGENCY IS NOT ESTABLISHED

Where the court exercises discretion to adjudicate the matter notwithstanding a lack of urgency, the following requirements of urgent relief would be essential: a *prima facie* right even if open to some doubt; reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; a balance of convenience must favour the grant of an interdict and absence of alternative relief.

4.1 *Prima Facie* Right Though Open to Some Doubt

A *prima facie* right is determined by a proper identification of an applicable right shown to exist as a matter of law. This could be done by having regard to various sources. A mere interest will not suffice. The potential evidence showing its existence must be less stringent than that of a person who wants to claim final relief.⁴³ The right must also be strengthened and supported with allegations, as well as other relevant materials, based on the version that one has regarding the dispute. Interdicts prohibit the occurrence of future conduct, and in this case, a burden rests on

³⁹ Hlazo para 22.

⁴⁰ *HOSPERSA*.

⁴¹ In an analogous Lesotho case of *Baitsokoli v Maseru City Council* 2005 LSHC 74 (20 April 2005), the litigants who were eking out an existence through informal trading argued that their rights to a livelihood were imperiled by relocation of their stalls to a new market.

⁴² *South African Informal Traders* para 36.

⁴³ *Msunduzi Municipality v Natal Joint Municipal Pension* 2007 1 SA 142 (N) para 13; *Phumelela Dlomo JV Kantera Trading v Walter Sisulu Local Municipality* 2019 ZAECGHC 31; *Zondo v uThukela District Municipality* 2015 36 ILJ 502 (LC) para 2.

the applicants to show the existence of a *prima facie* right threatened by imminent harm.⁴⁴

The case of *Theron v Minister of Correctional Services*⁴⁵ dealt with interim relief. Two causes of action were outlined, one being that the transfer of the applicant was unlawful and against his will and the other one being the fact that the transfer was considered to be a form of unfair labour practice which caused him an occupational detriment as a result of having made a disclosure which was protected by the Protected Disclosure Act 26 of 2000 (PDA). The applicant established a *prima facie* right in that he suffered an occupational detriment. Indeed, the court was satisfied that the disclosure was made in good faith and subject to the provisions of the PDA. As a result, the applicant was granted interim relief.⁴⁶

4 2 Irreparable Harm

One of the steep hurdles for an applicant to scale is to satisfy the court that there is a reasonable apprehension of irreparable and imminent harm occurring should the interim order not be granted.⁴⁷ The harm must be anticipated or ongoing.⁴⁸ In the case law, it is generally recognised that suspension and/or loss of employment has a detrimental impact on an employee's reputation, advancement, job security and fulfilment.⁴⁹ *Munthali* is one of the rare cases in which the applicant satisfied the court that, should urgent relief not be granted, she would suffer prejudice or irreversible harm. The irreparable harm was evident from the unlawful conduct of the employer in publicly announcing her termination. Serious reputational damage and humiliation created exceptional circumstances, which persuaded the court to grant urgent relief.⁵⁰

4 3 Balance of Convenience in Favour of the Granting of Interim Relief

In determining where the balance of convenience lies, a court must weigh the prejudice suffered by the applicant if the relief is refused against the prejudice the respondent will suffer if the relief is granted. The onus is on the applicant to demonstrate that the balance of convenience favours the granting of urgent relief. Another element to consider is the likelihood of success. Balance of convenience need not be in one's favour if the chances of succeeding are shown to be strong. Where the chances of success are proven weak, the balance of convenience must favour an applicant.⁵¹ The following brief passage captures the essence of the mandated approach:

The court in weighing where the balance of convenience rests, cannot fail to take cognisance of the effect of restraining order on the powers of the statute and constitution as well as functionary duties of organs of the state, which the urgent order is sought. The learned judge went on to say that since the court is burdened with authority to grant a restraining order of that kind, it cannot readily warrant it unless in circumstances where strong and proper cases

44 Peté "Interdicts" in Abrahams, (eds), *Civil Procedure: A Practical Guide* (2016) 482–490.

45 [2008] 5 BLLR 458 (LC) (*Theron*).

46 *Theron* para 4.

47 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 ZACC 19 para 55.

48 *OUTA* para 25.

49 *Minister of Home Affairs v Watshenuka* 2004 4 SA 326 (SCA) para 27. See also *SAPO Ltd v Jansen Van Vuuren NO* 2008 8 BLLR 798 (LC).

50 *Munthali* para 12.

51 Peté *Civil Procedure* 490. See also *Eriksen Motors Ltd v Protea Motors* 1973 3 SA 685 (A) 695E-F (*Eriksen Motors*).

have been made out for that relief.⁵²

In the case of *Ngubeni v The National Youth Development Agency*,⁵³ the agency terminated the applicant chief executive officer's services with immediate effect while the disciplinary process was in motion. The Board of NYDA was frustrated that the disciplinary hearing was proceeding slowly because of interlocutory applications launched by the CEO. Relying on section 77(3) BCEA, the applicant approached the LC for interim relief seeking specific performance. In other words, reinstatement as the CEO. The LC noted that there were no alternative remedies available to the applicant. There was evidently a prejudicial effect on the applicant's side should relief not be granted. By contrast, there was no inconvenience should the agency decide to continue with the hearing.

4 4 Absence of Satisfactory Remedy

The comments of Zondo J on the prescribed pathway carved out for aggrieved employees seeking to utilise the LRA's specialised dispute resolution institutions in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*⁵⁴ are worth quoting:

The LRA tells us when a person acquires the right not to be unfairly dismissed. It says that happens when you are an employee. The LRA also tells us how or when that right gets infringed. It says that that happens when an employer dismisses an employee without following a fair procedure and/or when there is no fair reason to dismiss. It also tells us that that right is infringed if the reason for the dismissal is listed in section 187 of the LRA. That is a provision for automatically unfair dismissals. The LRA also tells us what processes are to be employed by an employee who seeks a remedy for an alleged infringement of that right. Those processes are conciliation and, thereafter, either arbitration or adjudication, depending on the alleged reasons for the dismissal.

The LRA also tells us what remedies are available for the vindication of the right not to be unfairly dismissed or for the enforcement of that right. Those remedies are reinstatement, re-employment and compensation. It also tells us which fora an employee must go to in order to obtain a remedy for the infringement of that right. It says that these are the CCMA, bargaining councils, Labour Court and even a private arbitration forum where this is agreed to between the parties.⁵⁵ Case law affirms the principle that a declaratory order is usually inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction.⁵⁶ The same reasoning appears from the decision in *Jiba* that "urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the disciplinary proceedings ought to be discouraged."⁵⁷ In *Golding*, the applicant had not taken any steps to expedite the arbitration before the CCMA.⁵⁸ It stands to reason that disputes concerning unfair labour practice are matters best dealt with in arbitration proceedings, and if necessary, by the court in review proceedings.

5 THE SHIFTING GOALPOST OF "EXCEPTIONAL CIRCUMSTANCES"

Granted that an applicant would have scaled the usual requirements for urgent relief, the constant

⁵² *National Treasury* para 65.

⁵³ 2013 ZALCJHB 269 (21 October 2013) (*Ngubeni*)

⁵⁴ 2018 39 ILJ 1213 (CC) (*Pieman's Pantry*).

⁵⁵ *Pieman's Pantry* paras 130–131.

⁵⁶ See, for example, *MEC for Education, North West Provincial Government v Gradwell* 2012 33 ILJ 2033 (LAC); *SAMWU obo Members v Kopanong Local Municipality* 2014 35 ILJ 1378 (LC) para 21.

⁵⁷ *Jiba* para 18.

⁵⁸ *Golding* para 44.

headache is convincing the court that exceptional circumstances exist to warrant intervention. Many applicants fail to persuade judges on this score.

5 1 “Exceptional Circumstances”

The expression “exceptional circumstances” is both pervasive and elusive. The meaning of the phrase “exceptional circumstances” within the ambit of section 17(2)(f) of the Superior Courts Act 10 of 2013 (SCA 2013) provides a convenient starting point. So too are applications for appeal on an urgent basis in terms of section 18 of the SCA 2013.⁵⁹ A determination on the existence of exceptional circumstances will depend on the merits of a case. Exceptionality requires a departure from the ordinary rules and norms. The HC in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas*⁶⁰ explained exceptional circumstances as follows:

The words “exceptional circumstances” contemplate something out of the ordinary or of an unusual nature. The circumstances must arise from or be incidental to the case. The determination whether exceptional circumstances exist does not depend on the exercise of judicial discretion but is a fact-based exercise. Depending on the context of its use, the phrase exceptional circumstances has a primary meaning of unusual or different or in its secondary meaning, markedly unusual or especially different. Where in a statute it is directed that a fixed rule shall be departed from only in exceptional circumstances, a strict rather than liberal meaning should be given to the phrase.⁶¹

In the case of *Masinga v Chief of SANDF*,⁶² members of the SANDF brought an application in terms of section 18 of the SCA 2013 seeking an urgent order. Further, they requested that the order granted by the HC be put into effect pending the appeal. This followed the termination of the defence force members’ services. The crux of the dismissed members’ submission was financial hardship as a result of loss of employment. They could no longer be able to sustain their lives and those of their families. The likelihood of losing other valuable assets was a reality. The HC endorsed sentiments expressed in *MV Ais*. Of crucial importance was the prospects of success in applications for leave to appeal in determining the existence of exceptional circumstances.⁶³ In a scenario where the chances for succeeding were limited, did the factual matrix create a sufficient degree of special circumstances to justify an order in terms of section 18 of the SCA 2013?⁶⁴ The fact that members of the defence force were excluded from the scope of the LRA placed them in a precarious position. They had to wait for a long period for the outcome of an appeal process. Such constituted special circumstances permitting intervention.

The CC jurisprudence concerning direct access and urgency provides signposts for establishing the presence of exceptional circumstances. It cannot be gainsaid that the apex court must be convinced that it should determine an application as a court of first and last instance and as a matter of urgency. It has been held that an application for direct access is an extraordinary

⁵⁹ Suspensions of decision pending appeal “[1] Subject to subsections (2) and (3) and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. [2] Subject to subsection (3) unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgement which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal. [3] A court may order otherwise as contemplated in subsection (1) or (2), if the party who applied to court to order otherwise in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

⁶⁰ 2002 (6) SA 150 (C) (*MV Ais Mamas*).

⁶¹ *MV Ais Mamas* 155E–156H.

⁶² 2021 JOL 46660 (GP) (*Masinga*).

⁶³ See *Van Zyl v Steyn* 2022 ZAGPPHC 302 (3 May 2022) paras 20 and 35.

⁶⁴ *UFS v Afriforum* 2018 3 SA 428 (SCA) para 15.

procedure that must be followed only in exceptional circumstances.⁶⁵ Normally, therefore, the CC will expect the applicant to advance persuasive and cogent reasons before it will grant direct access.⁶⁶ Some of the relevant considerations pertaining to an application for direct access were expounded by Chaskalson P in *Bruce*⁶⁷ and endorsed in later cases.⁶⁸ So, for instance, in *Mazibuko*, Moseneke DCJ noted that: “[F]or the existence of exceptional circumstances, there must in addition to other factors, be sufficient urgency or public importance and proof of prejudice to the ends of justice to justify such a procedure.”⁶⁹ Another relevant consideration to a grant of direct access is whether an applicant can show that they have exhausted all other remedies and procedures that are available to them.⁷⁰

It is clear from *Moko* that cases in which the apex court has acceded to an application for direct access on an urgent basis are highly exceptional. In that case, the applicant, a matric learner, approached the HC as a matter of urgency for the vindication of his constitutional right to education. The HC struck the matter from the roll for lack of urgency on the basis that the application was not urgent. This placed the applicant in a paradoxical situation. Anxious to not have to wait until the supplementary examination in May 2021, or for the matter to be enrolled on the ordinary roll in the High Court, which could result in a determination of the matter only many months after examinations.⁷¹ This prompted the applicant to approach the court of last resort directly for the urgent relief. The effect of delay and palpable encroachment of the applicant’s right to education, as Khampepe J observed, constituted exceptional circumstances meriting granting direct access on an urgent basis. The justice said:

On the face of it, this matter concerns a potentially serious violation of the applicant’s right to education. Over and above that, a lack of urgent relief could have a significant adverse effect on the applicant’s future endeavours and opportunities. His life could forever be out of step by a whole year. Also, delaying the pursuance of further education until 2022, to wait for the results of the supplementary examination, could easily result in the applicant abandoning that admirable goal entirely. Even if the applicant wished to pursue a different path, a five to six-month delay in obtaining his matric results could similarly frustrate any attempt to obtain employment that requires a matric certificate. In my view, the urgency of this matter is undeniable.⁷²

5 2 Ngoye/Munthali Litigation

Ngoye and *Munthali* are similar cases concerning personal circumstances and financial hardship as a basis for seeking urgent relief. The applicants in both cases were able to demonstrate urgency and the existence of exceptional circumstances justifying the LC’s urgent intervention. In sum, on both occasions, the courts ordered PRASA to reinstate the employees retrospectively

⁶⁵ *Bruce v Fleecytex Johannesburg CC* 1998 4 BCLR 415 (CC) para 4; *Mazibuko NO v Sisulu* 2013 6 SA 249 (CC) para 35 (*Mazibuko*); *Christian Education South Africa v Minister of Education* 1998 12 BCLR 1449 (CC) para 4 (*Christian Education South Africa*); *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice intervening)* 1996 4 SA 331 (CC) para 6 (*Besserglik*); *S v Zuma* 1995 2 SA 642 (CC) para 11.

⁶⁶ *AParty v Minister of Home Affairs, Moloko v Minister of Home Affairs* 2009 3 SA 649 (CC) para 30; *Bruce* para 9.

⁶⁷ *Bruce* paras 7–8 and 19.

⁶⁸ Illustrative is *Secretary of the Judicial Commission of Inquiry* para 55–71. See also *Mazibuko* para 35; *AParty* para 29; *Christian Education South Africa* para 8.

⁶⁹ *Mazibuko* para 35.

⁷⁰ *Besserglik* para 6.

⁷¹ *Moko* para 20.

⁷² *Moko* para 21.

from 29 January 2021.

The applicants in *Ngoye* occupied senior executive positions at PRASA and received letters of termination of their contracts subsequent to a media statement that they exceeded the terms of employment.⁷³ They were also accused of taking advantage of the instability of the Board. In addition, the termination letter made it clear the employer's intentions to institute legal action to recover money from the Group Executive and Chief Operating Officers for approving payment to external service providers without authority.⁷⁴ Upon receipt of such letters, the applicants approached the LC on an urgent basis. They sought an order to set aside their contracts, that termination be declared unlawful, reinstatement, and setting aside a resolution taken by an improperly constituted Board.⁷⁵

Having disposed of the employer's spirited jurisdictional challenge⁷⁶ on the basis that the unlawfulness⁷⁷ in the case at hand was claimed under the BCEA,⁷⁸ the bone of contention became urgency. Further refining the general proposition that financial hardship cannot, on mere mention, be considered a reason of urgency, Baloyi AJ observed:

The argument that financial hardship is in fact a consequence of any form of termination of employment cannot fit in each and every case. In situations where an employee was afforded a notice prior to termination, whether in accordance with statutory provisions or contractual terms and conditions, the argument against a plea of financial hardship is likely to prevail. The argument against plea of financial hardship may also stick in situations where termination was effected without a notice to the employee, such as in a dismissal based on misconduct following a disciplinary action. From the above scenario, the underlying issue is that the employee would have had some time to revise his/her own affairs bearing in mind that a termination of employment will obviously bring about some form of financial hardship.⁷⁹

The court found that the applicants were active from the moment they were terminated and acted with requisite speed in prosecuting the application.⁸⁰ Leaving aside the issue of urgency, needless to say, the intricate question becomes proving the existence of exceptional circumstances. In the present case, the distinguishing feature and raising exceptional circumstances was the harsh and humiliating manner in which the termination of employment contracts was effected, "that is with immediate effect. There appeared no prior word or sign of caution that their contracts

⁷³ *Ngoye* para 5.

⁷⁴ It bears mentioning that Transnet was the epicentre of malfeasance: *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State Report: Part 2 Vol. 1* Transnet – available at https://www.scribd.com/document/556243206/Part-2-Vol-1-Transnet-Report-of-the-State-Capture-Commission-PART-II-Vol-I-010222#download&from_embed. See also *Swifambo Rail Leasing (Pty) Ltd v PRASA* 2020 1 SA 76 (SCA); *Gama v Transnet SOC Ltd* 2018 ZALCJHB 348; For analysis, see Thabane "Removal of Directors in State-Owned Companies: Shareholders' Franchise in Jeopardy? *Molefe v Minister of Transport and Others*" 2018 SA Merc LJ 155; Thabane and Snyman-Van Deventer "Pathological Corporate Governance Deficiencies in South Africa's State-owned Companies: A Critical Reflection" 2018 PELJ 3.

⁷⁵ *Ngoye* para 14.

⁷⁶ Relying on *Phahlane v Minister of SAPS* Unreported J736/2020 (11 August 2020) and *Chubisi v SABC (Soc)* 2021 42 ILJ 395 (LC), PRASA contended that the applicants' failure to specifically plead a breach of contract deprived the LC jurisdiction to determine the application. In response, the applicants invoked *Somi v Old Mutual Holdings (Pty) Ltd* 2015 36 ILJ 2370 (LC) and *Solidarity v SABC* 2016 37 ILJ 2888 (LC) to illustrate that the LC jurisdiction as it had upheld the applicants' claims based on unlawfulness.

⁷⁷ *Ngoye* paras 16–20. Jurisdictional disputes continue to flare up where the primary relief sought is unlawfulness, despite categorical pronouncements in *Steenkamp v Edcon Ltd* 2016 37 ILJ 564 (CC) paras 137 and 192. See also *Chirwa v Transnet Ltd* 2008 29 ILJ 73 (CC) paras 1 and 124; *Gcaba v Minister for Safety and Security* 2010 31 ILJ 296 (CC) para 75; *Baloyi v Public Protector* 2021 2 BCLR 101 (CC) 26–29.

⁷⁸ *Ngoye* para 20.

⁷⁹ *Ngoye* para 28.

⁸⁰ *Ngoye* para 27.

were facing termination.”⁸¹

5.3 Munthali

In *Munthali*, the applicant Chief Information Officer in Business Information Management was part of the executive at PRASA, placed on suspension because of allegations of misconduct. She approached the LC on an urgent basis seeking reinstatement to the executive position and for her contract to remain in existence. She maintained that the conduct of PRASA caused her irreparable reputational damage. Further, it will be difficult for her to secure alternative employment in light of PRASA publicly announcing her termination, and falsely stating that she was on suspension for alleged misconduct.⁸²

The primary question was whether Munthali took immediate action in approaching the LC. In addition, the important issue was whether financial hardship can be a basis for urgent relief. The employer contended that the matter was not urgent and that there was no breach of contract. The court found that a case of urgency was made because of immediate action being taken by the applicant.

The public announcement of the termination took place on 30 January 2021, and she received written 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.⁸³

It bears mentioning that the applicant had not been formally charged with any form of misconduct. The employer had jettisoned any disciplinary steps against the applicant. In view of these facts, it begs the question “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?”⁸⁴ In sum, the conduct of PRASA in effecting suspension created exceptional circumstances and attendant financial destitution constituted the sufficient ground for urgency.⁸⁵

6 CONCLUSION

The general principle that financial exigencies cannot be invoked to lay a basis for urgency has since been denuded of its somewhat inflexible nature. Importantly, the determinative issue remains establishing the existence of exceptional circumstances. *Ngoye* and *Munthali* illustrate that for financial hardship to lay a basis for urgency requires the applicant to overcome the high threshold of establishing the existence of exceptional circumstances. As already demonstrated, courts are disinclined to treat the loss of income and financial distress as a ground of urgency absent proof of the existence of exceptional circumstances. It follows that the applicant has to adduce sufficient evidence to support financial distress and loss of income, which invariably extend beyond narrow financial considerations. Even where the court has granted urgent relief, the judges have been careful to remind litigants and practitioners that a plea of financial discomfort cannot, *per se*, be considered a reason of urgency. Loss of income and concomitant financial hardship are natural consequences of dismissal. In a nutshell, the mere fact that the

81 *Ngoye* para 29.

82 *Munthali* paras 2.6 and 2.9.

83 *Munthali* para 6.

84 *Munthali* para 14.

85 *Munthali* paras 10 and 14.

irreparable financial harm has been suffered or would be suffered by the aggrieved employee was not, on its own, a decisive ground to acquire the requisite urgency necessary to warrant deviation from the normal court rules.