



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2024 - 027585

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

26/3/2024
DATE

SIGNATURE

In the application by

YAKO, GUGULETHU

Applicant

And

NATIONAL LOTTERIES COMMISSION (NLC)

First Respondent

**THE BOARD OF THE NATIONAL LOTTERIES
COMMISSION**

Second Respondent

SCHOLTZ, JODY-LYNN

Third Respondent

**MKHATSHWA, ADV MANDLA, NO (in his capacity as the
Chairperson of the Disciplinary Hearing)**

Fourth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Final and Interim interdict – requirements

A court will intervene in incomplete disciplinary proceedings only in exceptional circumstances – these circumstances must appear from the evidence

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application, including the costs of two counsel, on the scale as between attorney and own client.*

[2] The reasons for the order follow below.

Introduction

[3] This is a judgement in the urgent court. The applicant seeks an order -

- 3.1 that the matter be heard as one of urgency in terms of rule 6 (12) of the uniform rules,
- 3.2 that a ruling by the fourth respondent dated 1 March 2024 and refusing an application for the postponement of disciplinary proceedings be set aside,
- 3.3 that the decision to appoint the fourth respondent as the chairperson of the disciplinary hearing be set aside,
- 3.4 that the decision of the third respondent to suspend or charge the applicant, or to institute disciplinary proceedings against the applicant is a contravention of section 2G (3) (b) of the Lotteries Act 57 of 1997, be set aside.

3.5 that the continuation of the disciplinary hearing before the fourth respondent be suspended pending the hearing and decision of part A of an application brought by the applicant on 5 February 2024 under case number 2024 – 011466,

3.6 that the first respondent or any other respondent who opposes the application pay the costs of the applicant.

[4] The orders sought in paragraphs 3.2, 3.3, and 3.4 constitute final relief. The relief in paragraph 3.5 is interim relief pending the hearing of and a decision in part A of the applicant's application of 5 February 2024.

[5] The applicant is employed by the first respondent as a legal manager. The first respondent is the National Lotteries Commission (the NLC), a public entity established in terms of the Lotteries Act. The second respondent is the board of the NLC, the governing body of the NLC. The third respondent is the Commissioner *nomine officio* appointed in terms of the Lotteries Act and the fourth respondent is the chairperson appointed to hear and decide on charges brought against the applicant by her employer.¹ It is not apparent why the second respondent was cited as the NLC is already before the court, but nothing turns on this.

Urgency

[6] The applicant was suspended on 16 October 2023 and she questioned the authority of the third respondent to suspend her on 26 October 2023. The third respondent replied in writing on 6 November 2023. She was charged on 7 December 2023. The applicant was informed on 12 January 2024 that the fourth respondent had been appointed to preside over the disciplinary hearing.

The present application was brought on 7 March 2023, some six months after the suspension and three months after receipt of the charge sheet. No explanation is provided for the long delay since November 2023 and particularly for the delay from 12 January 2024 when the identity of the fourth respondent and all other facts were known to the applicant. In my view therefore no case is made out invoke rule 6 (12).

¹ The fourth respondent abides the decision of the court.

The jurisdiction of the High Court

[7] Section 157 (1) and (2) of the Labour Relations Act 66 of 1995 reads as follows:

157 Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

[8] The orders sought by the applicant are aimed at setting aside and terminating disciplinary proceedings flowing from her employment by the NLC. The Labour Relations Act contains extensive provisions that govern legal aspects of the employer/employee relationship, such as a guarantee of freedom of association,² collective bargaining,³ and, most importantly in the present matter, dispute resolution.⁴

The Act provides for the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA)⁵ and the Labour Court.⁶

² Chapter II.

³ Chapter III.

⁴ Chapter VII.

⁵ Section 112.

⁶ Section 151.

[9] The fairness or otherwise of disciplinary proceedings between employer and employee is regulated by the Labour Relations Act and the respondents argue that no case is made out in the founding papers to bring the matter within the jurisdictional ambit of the High Court. .

[10] The applicant on the other hand argues that her application is based on constitutional principles and therefore that the High Court has jurisdiction in terms of section 157 (2). It is correct that the application is ultimately related to the constitutional right to fair labour practices entrenched in the constitution, but this is so in the sense that the Constitution pervades all of the law.

[11] A litigant can in my view not escape the restriction imposed by section 157 (1) of the Labour Relations Act merely by referring also to constitutionally entrenched rights in order to invoke section 157 (2). I need not however decide this question in this application and I shall assume without deciding that the High Court does enjoy jurisdiction to hear this interdict application.

Section 217 of the Constitution and the principle of subsidiarity

[12] The applicant submits that the fourth respondent was appointed in contravention of section 217 of the Constitution, 1996, in that a competitive bidding process was not followed. There is no merit in the argument. The principle of subsidiarity applies and the Public Finance Management Act 1 of 1999 was adopted by Parliament to give effect to the provisions of section 217 of the Constitution.

[13] Cameron J⁷ in the Constitutional Court said in *My Vote Counts v Speaker of the National Assembly*:⁸

“[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right

⁷ Cameron J (Moseneke DCJ, Froneman J and Jappie AJ concurring).

⁸ *My Vote Counts v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 53, and *Airports Company SA SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) with reference to section 217 of the Constitution. See also the judgment by Khampepe J in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) para 102.

exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.”

[14] The applicant does not take issue with the Public Finance Management Act and how it was implemented.

The decision to institute disciplinary proceedings

[15] In terms of section 2G (2)⁹ of the Lotteries Act the board of the first respondent shall institute disciplinary proceedings against an employee who fails to comply with section 2G. The applicant is critical of the fact that the applicant was suspended by the third respondent and not by the board.

[16] The board of the NLC received a report of the disciplinary action instituted against the applicant in January 2024 and approved of the action taken. This is confirmed in a confirmatory affidavit by the chairperson of the board. The right of the first respondent to file the supplementary affidavit is disputed but I am satisfied in any event that the third respondent has personal knowledge of these affairs in her capacity as commissioner and that her evidence that the report was made to the Board and approved can be accepted. There is no indication that any vested rights of the applicant were affected by the subsequent ratification insofar as it was necessary to do so and the ratification is lawful.¹⁰

[17] The board of the NLC is responsible for the governance of the entity while the third respondent as Commissioner is responsible for the day-to-day administration and management. The obligation of the board is satisfied when the Commissioner initiates proceedings but it remains the responsibility of the board to ensure that steps are taken when appropriate to do so. There is after all an obligation on the board to ensure the law is applied and to authorise disciplinary proceedings in a case of a breach of section 2G of the Lotteries Act.

[18] The fourth respondent was appointed through a process in compliance with the supply chain management policy of the NLC. The NLC disciplinary standard operating

⁹ Only one of the charges relate to section 2G (2) of the Lotteries Act.

¹⁰ See *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) paras 12 to 14.

procedure regulates the appointment of a chairperson to chair disciplinary hearings. An external chairperson with appropriate knowledge and at least five years' experience in labour law may be appointed to preside over a disciplinary hearing. The fourth respondent meets the requirement.

[19] The applicant has not challenged the authority of the fourth respondent in proceedings before him. It was held in *Jiba v Minister of Justice and Constitutional Development and Others*,¹¹ that there is no reason for the authority to dismiss an employee to be determined by the court in motion proceedings initiated on an urgent basis when the tribunal itself has not made any ruling in this regard.

[20] The applicant chose to challenge the authority of the fourth respondent in court proceedings but the evidence presented does not justify granting the order sought.

The disciplinary hearing

[21] The applicant is facing a disciplinary hearing before the fourth respondent and pending the finalisation of the hearing she was suspended on 16 October 2023 with full pay and benefits. Serious charges have been brought against her namely that she benefited financially from a grant beneficiary of the NLC. This is strictly prohibited. She admits that various amounts were paid into her bank account but says these were payments made by a suitor who at the time wanted to impress upon her that he was in a financial position to care for her. They subsequently did enter into a relationship.

[22] The applicant was informed on 12 January 2024 that the fourth respondent had been appointed to preside over the disciplinary hearing and the hearing commenced on 5 February 2024 and convened again on 15 February 2024. On both occasions the applicant objected to the continuation of the hearing and she informed the tribunal that she was in the process of filing an application to review and aside the report of the Special Investigation Unit which formed the basis of her suspension and the charges brought. It is argued on behalf of the applicant that the report is unlawful in that *inter alia* the applicant was not afforded a hearing before the Special Investigation Unit made its recommendations.

[23] I point out that the very purpose of the hearing that was convened was and is to

¹¹ *Jiba v Minister of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC), [2009] ZALCJHB 2 para 16.

afford the applicant the opportunity to present her case and to answer the charges brought against her, and that the purpose of the main application as well as this urgent application is to prevent the hearing from continuing.

[24] In the review application that was brought on 5 February 2024 the applicant seeks in part A an interdict to prevent the third respondent from implementing the report of the Special Investigation Unit and to suspend the disciplinary proceedings. In part B of the review application the applicant seeks orders to review and set aside the report.

[25] On 1 March 2024 the fourth respondent ruled that the disciplinary hearing would continue despite the pending review application. In so doing the fourth respondent was exercising a discretion not to grant a postponement or a stay, and there is no evidence presented that merits the inference that the exercise of his discretion is open to attack on any ground of legality or any other ground.

[26] The court will intervene in incomplete disciplinary proceedings only in exceptional circumstances. In *Laggar v Shell Auto Care (Pty) Ltd and Another*,¹² Cleaver J said:

“[14] The Labour Court has held that it will not easily interdict the holding of a disciplinary hearing and will do so only where exceptional circumstances are established. See Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another (1998) 19 ILJ 635 (LC); Mantzaris v University of Durban-Westville and Others [2000] 10 BLLR 1203 (LC); Ndlovu v Tansnet Ltd t/a Portnet [1997] 7 BLLR 887 (LC). There is also authority for the proposition that the High Court will be reluctant to stop proceedings in inferior courts and tribunals. See Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another 1959 (3) SA 113 (A); Van Wyk v Midrand Town Council and Others 1991 (4) SA 185 (W). Applying these principles I am not persuaded that the importance of the applicant's position in the company establishes exceptional circumstances or that any other exceptional circumstances have been shown to exist.”

[27] Similarly, in *Jiba v Minister of Justice and Constitutional Development and Others*,¹³ van Niekerk J said:

¹² *Laggar v Shell Auto Care (Pty) Ltd and Another* 2001 (2) SA 136 (C) para 14.

¹³ *Jiba v Minister of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC), [2009] ZALCJHB 2 paras 11 and 12.

“[11] I wish to deal with the application in so far as it relates to the chairperson’s ruling on a more preliminary basis. Exceptional circumstances aside, it is undesirable for this court to entertain applications to review and set aside rulings made in uncompleted proceedings. In The Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson and others (unreported, C249/09, 14 April 2009), I said the following in relation to the review of interlocutory rulings made by commissioners:

“There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy-related reason – for this court to routinely intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court.” (at para 4).

[12] The same considerations apply to internal disciplinary hearings, with the additional point that for this court to routinely consider applications such as that before me would entirely undermine the statutory dispute resolution system. By asking the court to rule that the disciplinary action initiated against the applicant was unauthorised and unprocedural, the applicant is effectively asking the court to bypass the bargaining council and to ignore its role in a carefully crafted scheme that acknowledges and gives effect to the value of self-regulation. This court, through its review powers, is mandated to exercise a degree of oversight over labour-related arbitrations - its powers as a court of first instance are constrained by the LRA, and that constraint must be respected.”

[28] I refer also to the judgement by Phatsholane DJP in *Ndhlovu v Department of Health, Northern Cape Province and Another*¹⁴ where the learned deputy judge president said that the court should be careful not to usurp the functions entrusted to a disciplinary tribunal. Intervention in uncompleted processes would result in piecemeal adjudication of issues and frustrate the expeditious resolution of labour disputes.

[29] The applicant argues that her suspension and the subsequent appointment of a disciplinary tribunal was done by the third respondent and not by the board of the first respondent and that the fourth respondent was not appointed in a transparent process. These averments do not constitute exceptional circumstances. I have already dealt with the fact that the proceedings were initiated on behalf of the first respondent by its Commissioner, the third respondent who is in the position of its chief executive officer above as well as with the appointment of the fourth respondent.

The requirements for an interdict

[30] The requirements for a final interdict¹⁵ are –

- 30.1 a clear right;
- 30.2 an injury actually committed or reasonably apprehended;
- 30.3 the absence of any other satisfactory remedy.

[31] The requirements in an application for an interim interdict are also not contentious.¹⁶ They are –

- 31.1 a *prima facie* right, coupled with a balance of convenience in favour of the granting of the interim relief OR a clear right obviating the need to show a favourable balance of convenience (and in which case a final interdict may follow);
- 31.2 a well-grounded apprehension of irreparable harm if the interim relief is

¹⁴ *Ndhlovu v Department of Health, Northern Cape Province and Another* [2023] ZANCHC 26 para 39.

¹⁵ Van Loggerenberg *Erasmus: Superior Court Practice*, vol 2, 2023, D6-14, footnote 122.

¹⁶ See *Setlogelo v Setlogelo* 1914 AD 221 at 227, followed by South African courts over the last century and the authorities listed by Van Loggerenberg *Erasmus: Superior Court Practice*, vol 2, 2023, D6-16C, footnote 165.

not granted and the ultimate relief is eventually granted; and

31.3 the absence of any other satisfactory remedy.

[32] The applicant does not identify any right that was infringed. It is of course not contentious that she is entitled to *inter alia* the rights granted under the Constitution and the Labour Relations Act but nothing on these papers support an argument that these rights have been threatened. Her *audi alteram* rights are intact. She is entitled to dispute the allegations made and the evidence presented against her but she is not entitled to prevent the investigation of complaints or to prevent a disciplinary hearing from taking place.

[33] The applicant was suspended with full pay pending the final outcome of the disciplinary proceedings and there is no reasonable apprehension of harm. She is entitled to participate in the disciplinary proceedings.

[34] The applicant has alternative remedies in that:-

34.1 her first review application of February 2024 has not been enrolled yet and no explanation is given for the failure to enrol the application,

34.2 she was in a position to present her case before the fourth respondent, and

34.3 It was possible for the applicant if so advised to apply for the recusal of the fourth respondent and he would have had to consider such an application.

[35] I conclude that no case is made out for an interdict.

Costs

[36] Both sides sought a punitive cost order including the cost of two counsel. Punitive cost orders are not easily made but exceptional circumstances may justify such an order when a litigant conducted itself can in a “*clear and indubitably vexatious and reprehensible manner*.”¹⁷ In the present matter the applicant makes serious and scurrilous allegations against the respondents without presenting any factual evidence in support of these allegations of bad faith and ulterior motive on the part of the respondents.

¹⁷ *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC) para 21.

[37] The applicant also launched this urgent application under circumstances where an application for the review of the report of the Special Investigation Unit was already pending. No explanation is given for the failure to prosecute that application to finality and to opt instead for this urgent application.

[38] It is impossible to avoid the inference that the present application was launched as a tactic to delay rather than finalise the disciplinary proceedings in good time. Under these circumstances I am of the view that a punitive cost order is justified.

Conclusion

[39] in summary,

- 39.1 the applicant makes out no case for an order setting aside the ruling by the fourth respondent of 1 March 2024 in which the fourth respondent refused an application for the postponement of the disciplinary proceedings,
- 39.2 the applicant fails to make out a case for an order setting aside the appointment of the fourth respondent as the chairperson of the disciplinary hearing,
- 39.3 the applicant similarly fails to make out a case for the setting aside of the decision to suspend or charge the applicant or to institute disciplinary proceedings against the applicant,
- 39.4 lastly, no case is made out for an interim order suspending the continuation of the disciplinary hearing before the fourth respondent.

[40] For all the reasons set out above I make the order in paragraph 1.



MOORCROFT AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 March 2024**

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25 MARCH 2024

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