

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J1330/2023

In the matter between:

MARTIN O' BRIEN VAN DER WESTHUIZEN

Applicant

and

ORACLEMED HEALTH INVESTMENTS (PTY) LTD

Respondent

Heard: 3 October 2023

Delivered: 26 January 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 26 January 2024.)

JUDGMENT

PHEHANE, J

Introduction

[1] The applicant was dismissed from the employ of the respondent on 28 September 2023 following an internal disciplinary hearing.

[2] The applicant approaches this Court on an urgent basis, seeking extraordinary relief, in essence, an order setting aside his dismissal which has the effect of reinstating him. Further (and once reinstated) an order effectively barring the respondent from instituting internal disciplinary proceedings against the applicant until such time as referrals to the Commission for Conciliation, Mediation and Arbitration (CCMA) by the applicant in terms of the provisions of section 188A of the

Labour Relations Act¹ (LRA) have been determined, and that any charges the respondent intends levelling against the applicant should be amassed with charges under the section 188A proceedings.

[3] The application is opposed by the respondent on the basis essentially, that the application is not urgent² and in consideration of the merits, that the relief the applicant seeks is incompetent.³ In addition, that the relief sought in the amended notice of motion constitutes a new cause of action which is an irregular step.

Background

[4] Prior to the applicant's dismissal, the respondent initially levelled charges against the applicant. The disciplinary hearing was held on 11 September 2023 (first disciplinary hearing).

[5] Proceedings in terms of section 188A of the LRA were initiated by the applicant, as he alleged that he was suffering an occupational detriment as contemplated in the Protected Disclosures Act⁴ (PDA).

[6] Section 188A of the LRA reads:

'188A. Inquiry by arbitrator. (1) An employer may, with the consent of the *employee* or in accordance with a collective agreement, request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee*.

(2) The request must be in the *prescribed* form.

(3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of—

(a) payment by the employer of the *prescribed* fee; and

(b) the *employee's* written consent to the inquiry.

¹ Act 66 of 1995, as amended.

² Respondent's heads of argument at paras 4 and 5 and paras 9 to 12.

³ *Ibid*, at paras 6 to 8.

⁴ Act 26 of 2000.

(4) (a) An *employee* may only consent to an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1).

(b) Despite any other provision in *this Act*, an *employee* earning more than the amount determined by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act* at the time, may agree in a contract of employment to the holding of an inquiry in terms of this section.

(5) In any inquiry in terms of this section a party to the *dispute* may appear in person or be represented only by—

(a) a co-employee;

(b) a *director* or *employee*, if the party is a juristic person;

(c) an office bearer or official of that party's registered *trade union* or registered *employers' organisation*; or

(d) a legal practitioner, on agreement between the parties or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the Commission.

(6) Section 138, read with the changes required by the context, applies to any inquiry in terms of this section.

(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142 (1) (a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the *director* for the purpose of this section, must be read as a reference to—

(a) the secretary of the *council*, if the inquiry is held under the auspices of the *council*;

(b) the *director* of the accredited agency, if the inquiry is held under the auspices of an accredited agency.

(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any such ruling.

(9) An arbitrator conducting an inquiry in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, rule as to what action, if any, may be taken against the *employee*.

(10) (a) A private agency may only appoint an arbitrator to conduct an inquiry in terms of this section if it is accredited for arbitration by the Commission.

(b) A *council* may only appoint an arbitrator to conduct an inquiry in terms of this section in respect of which the employer or the *employee* is not a party to the *council*, if the *council* has been accredited for arbitration by the Commission.

(11) Despite subsection (1), if an *employee* alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), that *employee* or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the *employee*.

(12) The holding of an inquiry by an arbitrator in terms of this section and the suspension of an *employee* on full pay pending the outcome of such an inquiry do not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000).'

[7] The hearing in terms of section 188A of the LRA was scheduled for 28 September 2023 at the CCMA. The applicant approached this Court on an urgent basis under case number J1280/23 to interdict the first disciplinary hearing pending the determination of the section 188A proceedings at the CCMA.

[8] On 20 September 2023, Rabkin-Naicker, J ordered that the first disciplinary hearing be stayed pending the outcome of the proceedings at the CCMA.

[9] On 22 September 2023, the respondent launched an application for leave to appeal the interim order per Rabkin-Naicker, J and on the same date (22 September 2023), the respondent served the applicant with a new charge sheet and called him to attend a disciplinary hearing on 28 September 2023 (second disciplinary hearing), being the same date as the CCMA hearing.

[10] The applicant contends that the charges pertaining to the second disciplinary hearing emanate from the facts that relate to the first disciplinary hearing and therefore, the proper cause was for the respondent to supplement its charges under the section 188A LRA proceedings already before the CCMA. The charges in respect of the second disciplinary hearing make reference to the proceedings under case number J1280/23 in which this Court found that the applicant made out a *prima facie* case of contravention of the PDA by the respondent.

[11] The applicant avers that the respondent refused to postpone the second disciplinary hearing. The applicant attended the second disciplinary hearing, in which hearing he was not allowed legal representation (although legal representation was permitted at the first disciplinary hearing). The outcome of the second disciplinary hearing was the applicant's dismissal.

[12] According to the applicant, the second disciplinary hearing was a sham, as it circumvented the Court order per Rabkin-Naicker, J and it was purposefully set down for hearing on the same date as the CCMA hearing. The applicant states that the second disciplinary hearing was hurried in order to dismiss him, thus obfuscating against the protections afforded to the parties in the PDA.

[13] The CCMA hearing on 28 September 2023 was postponed.

[14] The applicant sought leave to file a supplementary affidavit which explains in essence, that he approached this Court for urgent relief and that the matter was initially set down to be heard by this Court on 28 September 2023, but was rescheduled to 29 September 2023 and later, to 3 October 2023 by the Registrar of this Court. The applicant states that he has been prejudiced by the rescheduling of his urgent application in the afore-going manner. The applicant does not explain what steps were taken by him, if any, to appraise the Registrar of the urgency of his matter requiring it to be heard on 28 September 2023.

[15] The challenge the applicant now faces, is that firstly, he has been dismissed. He alleges that his dismissal is the very occupational detriment he was trying to avoid and he did everything and is powered to approach this Court for relief. He alleges that his dispute before the CCMA is now academic.

[16] In view of the fact that the applicant has now been dismissed, in my view, the remedy for the applicant is in terms of the provisions of section 191 of the LRA read with section 187 of the LRA. The applicant is alive to this.⁵

⁵ Supplementary affidavit, at para 48 on p 54.

[17] Mr. Cook for the applicant submits that “*the automatically unfair dismissal route is reactive relief*” and that that applicant seeks the protection afforded to him in section 188A (11) of the LRA. The applicant contends that exceptional circumstances exist that warrant this Court’s intervention: those are, in essence: the Registrar’s refusal to schedule the urgent interdict for hearing (on an unopposed basis) on 28 September 2023⁶ - the applicant contends that had he been heard on that date, he would not have been dismissed, as he would have succeeded in obtaining an order interdicting the second disciplinary hearing; the respondent’s jurisdiction to hold the second hearing is ousted by the applicant lodging a second referral in terms of section 188A of the LRA with the CCMA in relation to the second charges.

[18] On a plain reading of section 188A (11) of the LRA, the section provides for the conduct of a *pre-dismissal* hearing before the CCMA, council with jurisdiction or an accredited agency. In the premises of the applicant’s dismissal, he has a remedy of an automatically unfair dismissal. I do not agree that such remedy is reactive as submitted by Mr. Cook. In light of the applicant’s dismissal, it would be absurd to invoke the provisions of section 188A (11) of the LRA.

[19] The effect of the application for leave to appeal suspends the operation of the order by Rabkin-Naicker, J. Whether there is merit in appealing an interim order is not for determination in this present case.

[20] On the facts of the present case, the applicant has been dismissed and he contends that the respondent has contravened the provisions of the PDA. An unfair dismissal dispute has not been conciliated by the CCMA. This Court accordingly lacks jurisdiction to adjudicate this dispute.

[21] If I am wrong that this Court lacks jurisdiction (which I do not believe so), then, I find that the application is not urgent for the reasons that follow, and I would accordingly strike the matter off the roll for lack of urgency.

⁶ The matter became opposed after the notice of motion was amended pursuant to the applicant’s dismissal.

[22] The applicant was aware on 22 September 2023 of the second disciplinary hearing. It sought confirmation from the respondent by 26 September 2023, whether the respondent would agree to postpone the second disciplinary hearing pending a determination by the CCMA whether it had jurisdiction to hear the applicant's referral, or whether the respondent would "allow" the applicant to launch an urgent application to stay the second disciplinary hearing. The applicant states that it is his attention to allow the parties sufficient time to file their respective papers.⁷ An urgent application was launched only 27 September 2023, giving the respondent severely truncated time frame (hours) to oppose the application. The application was not opposed at that point. The amended notice of motion also contains hours within which to respond. The answering affidavit and replying affidavits were delivered on the date of hearing (3 October 2023).

[23] The applicant's supplementary affidavit makes out no case whatsoever on urgency – no reasons for urgency following the applicant's dismissal are pleaded; no reasons are set out why the rules of this Court relating to service have not been complied with. The applicant does not state that if he is not heard on an urgent basis, he will not receive substantial relief if his matter is heard in the normal course. In short, there is non-compliance with the provisions of rule 8 of the Rules for the Conduct of Proceedings in the Labour Court. Thus, no urgency is demonstrated by the applicant.⁸ In my view, given the fact that the applicant had been dismissed four days prior to the delivery of the amended notice of motion and supplementary affidavit, no urgency arises when consideration is had to the relief sought by the applicant.

[24] In the premises, the order is as follows:

Order

1. The matter is struck off the roll for lack of jurisdiction.

⁷ p 33.

⁸ See: *Mohlala-Mulaudzi v Property Practitioners Regulatory Authority* [2023] JOL 57988 (LC) at para [37], where this Court stated that adequate reasons must be provided by an applicant to satisfy the Court that its application is urgent and that urgent relief is necessary "*today, and not tomorrow...*"

2. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. AL Cook

Instructed by:

Crawford & Associates

For the Respondent:

Adv. A Snider SC

Instructed by:

Pottas Attorneys