

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J102/24

In the matter between:

MATRIC LUPHONDO

Applicant

and

RG PIETERSE NO

First Respondent

NATIONAL PROSECUTING AUTHORITY

Second Respondent

Heard: 9 February 2024

Delivered: 9 February 2024 (An order was handed down on 9 February. This judgment was handed down electronically by emailing a copy to the parties. The 13 February 2024 is deemed to be the date of delivery of this judgment).

Summary: Interdict pendente lite. Applicant sought to interdict ongoing disciplinary hearing of senior official in the public service. Failure to prove prima facie right and reasonable prospects of success in main dispute. Application dismissed, no order as to costs.

JUDGMENT

DANIELS J

Introduction

[1] On 9 February 2024, I heard the application, which came before the court, as an urgent application. I handed down an order, dismissing the application, with no order as to costs, that same day and indicated that my reasons would follow. These are my reasons.

[2] The applicant seeks an order interdicting his disciplinary enquiry pending the outcome of a review application brought in the Labour Court under case number JR17/2024. The applicant alleges that the disciplinary process to be both unlawful¹ and unfair.²

[3] He alleges that only the Minister can determine how he to be disciplined, because of section 12, 13 and 14 of the National Prosecuting Authority Act No. 32 of 1998 as amended (hereafter the “NPA Act”)

[4] The application is opposed by second respondent, hereafter referred to as the “NPA”.

[5] The structure of this judgment is as follows:

- 5.1 First, I begin with the issue of jurisdiction,
- 5.2 Second, I set out the material facts,
- 5.3 Third, I deal with urgency,
- 5.4 Fourth, I set out the applicable legal principles,
- 5.5 Finally, I apply the law to the facts, and set out my conclusion.

Jurisdiction

[6] It is trite that the Labour Court does not have an “all embracing jurisdiction over the employer – employee relationship” and its jurisdiction is governed by the four walls of the statute, or statutes, which grant it jurisdiction. The Labour Court exercises its broad powers, located under section 158 of the LRA, in relation to those matters which fall under its jurisdiction, located in section 157.

¹ In para 3.3 he alleges that the dismissal is unlawful because it must be held in accordance with section 12(6) of the NPA Act - and this is not the case.

² At para 7.11 of the founding affidavit, the applicant states: “I humbly submit that the prima facie right that I have is founded on the principles of procedural and substantive fairness”.

[7] Section 157(2)(a) and (b) of the LRA provides that the Labour Court has concurrent jurisdiction with the High Court in respect of: (1) any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution arising from employment and from labour relations; and (2) any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as employer.

[8] It took some time before the vexed issue of jurisdiction of this court, to intervene in incomplete disciplinary processes (where the CCMA or bargaining council was mandated to determine procedural fairness after the dismissal) would finally be settled.

[9] In *Booyesen v SA Police Service & another*³ (hereafter “*Booyesen*”) Cheadle AJ explored, in depth, the structure of the LRA, and its relationship to the constitutional right to fair labour practices. The learned Acting Judge held that this court did not have jurisdiction to intervene in uncompleted disciplinary processes. This was followed by *Jiba v Minister of Justice & Constitutional Development*⁴ where Van Niekerk J, held that the court indeed had jurisdiction to intervene, but it may not do so in a manner which would finally determine the dismissal dispute and the court must intervene only in “exceptional circumstances”.

[10] On appeal, the LAC finally settled the issue in *Booyesen*⁵ holding that this court may intervene in incomplete disciplinary processes if fairness was at issue, even though the CCMA or bargaining councils would subsequently to determine, on arbitration, whether the dismissals were fair.

Material facts

³ 30 ILJ 301 (LC)

⁴ (2010) 31 ILJ 112 (LC)

⁵ (2011) 32 ILJ 112 (LAC)

[11] The applicant was appointed by the second respondent as a Chief Prosecutor. Thereafter, he was appointed as the Acting (Regional) Director.⁶

[12] The applicant has been on paid suspension since 7 April 2021. He was charged with gross misconduct, viz bribery and corruption, on or about 31 May 2021. His arrest has been published widely in the media and televised. There can be little question that it is in everybody's interest that the dispute is resolved expeditiously, but, of course, also fairly.

[13] Although the applicant's disciplinary hearing formally commenced during May 2021, as of February 2024, the parties have yet to present any evidence. The correspondence tendered into evidence as annexures to affidavits reveal that the NPA has repeatedly, and bitterly, accused the applicant of unnecessarily delaying the process. There may be some merit to the accusation. Most tellingly, the applicant accused the initial chairperson, a prominent and respected senior counsel, of bias and sought her recusal. The applicant took that issue on review, in this court, where the dispute was settled on the basis that the parties would conduct the disciplinary process through arbitration before the General Public Service Sector Bargaining Council (hereafter the "Bargaining Council") under section 188A of the LRA. Now, the applicant challenges the jurisdiction of the Bargaining Council, and its appointed arbitrator, to conduct the section 188A arbitration – the very process agreed upon.

[14] The section 188A hearing is being conducted under the so-called Senior Management Service Handbook (the "SMS Handbook") although the provisions of the LRA, applicable to section 188A arbitrations, such as sections 138 and 142, remain applicable. Section 188A gives the applicant a significant measure of procedural protection against a possibly biased employer.

[15] The applicant alleges that he will suffer a grave prejudice if the hearing is not interdicted from proceeding on 12, 13 and 14 February 2024 (the "set down

⁶ Directors, including deputy directors and acting directors, are located at the NPA regional offices.

dates”) because his legal team is unavailable. In addition, the applicant alleges that:

15.1 He became aware of the set down dates on 7 December 2023, while awaiting a ruling from the Bargaining Council on two preliminary points (which he had earlier taken).

15.2 His legal team were not consulted on the set down dates, whereas this had previously occurred.

15.3 A few days later, on 12 December, the Bargaining Council sent its ruling on the preliminary points to the applicant’s legal team, although it had earlier been sent to the NPA. Instead of writing this off (the Bargaining Council’s failure to send the ruling to him at the same time) as an administrative error, the applicant says that this is proof of conspiracy.

15.4 The applicant filed an application in this court under case number JR17/24 to review and set aside the ruling by the arbitrator.

[16] Importantly, the applicant does not state when his legal team is available, nor does he explain whether their availability was communicated to the Bargaining Council at the last sitting.

[17] In addition, there are no confirmatory affidavits from any of the attorneys or advocates in the applicant’s legal team. Accordingly, allegations that they are not available constitutes hearsay evidence, which can only be admitted under section 3(1) of the Law of Evidence Amendment Act,⁷ where a proper basis has been laid.

[18] The applicant contends that the NPA will be guilty of contempt of court if it calls two witnesses to testify because they have been warned not to testify by a Judge of the High Court, given that they are witnesses in a pending matter before the High Court. Of course, this is a problem for the NPA, and not the applicant. The applicant contends that he has not been provided with documents by the NPA, but it is apparent from the pleadings and the various annexures, that this has little merit. The applicant complains that the

⁷ No. 45 of 1988 as amended.

chairperson, or arbitrator, the first respondent in this matter, is biased. Yet, once again, the allegation is unsubstantiated.

[19] There are further indications that the applicant seeks to delay appear from his technical approach to the section 188A process:

19.1 The applicant alleges that a pre-arbitration minute must be concluded before the hearing begins. Surely it is in the hands of the arbitrator, who must determine whether the conclusion of a minute will shorten proceedings?

19.2 The applicant alleges that the SMS handbook requires the employer to disclose the main evidence against him before the hearing begins. It is unclear what the main evidence would constitute, except for the nature of the charges and any documents, and video or audio recordings which the employer intends to use. In these circumstances, an employee can object to the admission of evidence, with great significance, if it was in existence previously and is produced at the hearing for the first time.

Urgency

[20] The applicant moved with reasonable expedition, given the circumstances, once the set down dates were provided to him on 7 December 2023. The applicant contacted his attorneys and had them address a letter of demand to the Bargaining Council. Thereafter, when his attorneys received the ruling from the Bargaining Council, on 12 December, he launched a review application thereafter.

[21] This application, his second application in a short space of time, was launched at the end of January 2024 and heard only a few days later.

[22] I have also taken into consideration that these proceedings were launched during the tail end of the festive season. Of course, while the festive season can never constitute a good reason for delay, it is a reality that matters, including courts and law firms, move slower at that time. The application was launched well in advance of the disciplinary hearing set down to proceed on 12, 13 and 14 February.

[23] In the circumstances, I accept that the matter is urgent.

Interim Interdict: Applicable Legal Principles

[24] The applicant seeks an interdict *pendente lite*, pending the finalisation of his review application, brought under case number JR17/2024. In that regard, he alleges that the first and second respondents have no authority to conduct a disciplinary hearing against him because, as an acting director, his discharge is governed by section 12, 13 and 14 of the NPA Act. Furthermore, the applicant alleges that his lawful removal first requires the Minister to exercise his powers under the NPA Act.

[25] In *UDM and another v Lebashe Investment Group and others*⁸ the Constitutional Court held as follows:

“An interim interdict pending an action is an extraordinary remedy within the discretion of the court. For an order to be said to be interim it must be capable of being reconsidered at the pending trial on the same facts by the court of first instance.The requisites for the right to claim an interim interdict are: a prima facie right even if it is open to some doubt, injury actually committed or reasonably apprehended, balance of convenience, the absence of any similar protection or remedy...the court must exercise its discretion judicially upon a consideration of all the facts and circumstances.” (Own emphasis)

[26] In addition, where an applicant seeks to interdict a functionary from exercising a public power, a court may only grant an interim interdict, when it is satisfied that the applicant has good prospects of success in the main review.⁹ The Constitutional Court stated: “*It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power*

⁸ 2023(1) SA 353 (CC) at para 47

⁹ *EFF v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at para [42].

conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstance.”¹⁰

[27] Accordingly, this court is required to assess whether the applicant has reasonable prospects of success in the review. What follows does not finally determine whether the applicant’s rights under the NPA Act have been or will be breached. This is merely a “peek into” the merits, as is required in an application of this nature.

[28] As the paragraphs below explain, I am not satisfied that the applicant has reasonable prospects of success in the review, the main dispute. This is based on my understanding of the NPA Act, as explained below.

Interpretation of the NPA Act

[29] It is necessary to consider the applicable provisions in the NPA Act:

29.1 Section 12 deals with the term of office of the National Director and Deputy National Director. These individuals are insulated to protect them and ensure their independence. Only the President may suspend them, pending such enquiry as the President deems fit. Given that the applicant is not the National Director, nor the Deputy National Director, the section holds no relevance for him.

29.2 Section 13 deals with the appointment of Directors and Acting Directors. The section provides that the President will appoint Directors after consultation with the National Director and the Minister, while Acting Directors will be appointed by the Minister after consultation with the National Directors. Clearly, Acting Directors are not accorded the same level of armor. This can only be because of the intended nature of their tenure, temporary and insecure.

¹⁰ Fn. 9 above

29.3 Section 14 grants Directors a measure of protection against dismissal. They too are also given the protections in section 12 (3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge.

[30] It is readily apparent that the NPA Act does not deal with the discharge of Acting Directors or Deputy Directors. On the other hand, the Act deals specifically with the appointment and discharge of National Directors, Deputy National Directors, and Directors.

[31] In the unreported judgment of *Tshavungwa v National Director of Public Prosecutions and others* (TPD 42117/06 dd 19 March 2008) the court held that the dismissal was unlawful because it was unauthorized. The court held that it was axiomatic that, given that deputy directors are appointed by the Minister, they should be discharged by the Minister. With respect, I differ. The NPA Act carefully spells out the procedures for the appointment process, and the discharge process. The protections accorded to each position (i.e. the procedures for discharge) are commensurate with the level of authority and permanency applicable. It was no accident that the legislature did not provide protection for Acting Directors and Deputy Directors. This is consistent with the intention - providing additional statutory protection only to those that require it. Everyone else can rely on the constitutional right against unfair dismissal – protection which cannot lightly be sniffed at.

[32] In *Natal Municipal Pension Fund v Endumeni Municipality*¹¹ (hereafter “NMPF”) the SCA had the following wisdom to share:

“The Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar

¹¹ 2012 (4) SA 593 at para 18

and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. (Own emphasis)

[33] Firstly, there is no ambiguity in the NPA. The applicant seeks to tempt the court into reading in provisions which are not there. In *NMPF* the SCA sternly warned us against this approach. To do so would usurp the powers of the legislature.

[34] In *Jiba*¹² this court, per Van Niekerk J distinguished *Tshavungwa* (from the facts of that matter) on the basis that in *Tshavungwa* the employee had already been dismissed. Much like the *Jiba* matter, this matter is also distinguishable from *Tshavungwa*. The applicant has been called to account for alleged misconduct; and he has not been dismissed. It is not open to this court to speculate that he will be dismissed. The applicant is entitled to raise its defence, if he is dismissed, on review. It is premature for the court to do so at this stage, on an urgent basis.

[35] In addition, the *Tshavungwa* and *Jiba* judgments are not authorities for the carefully constructed dispute resolution structures of the LRA to be undermined through piecemeal attacks. I can put it no better than Van Niekerk

¹² See fn. 4

J: “In short there is no reason why the question of authority to dismiss should be determined by this court in motion proceedings, initiated on an urgent basis, in circumstances where no dismissal is apprehended, and where the chairperson of a disciplinary enquiry (and I would add, a commissioner or arbitrator in unfair dismissal proceedings) has not been seised with the question of authority and has made no ruling on it.” (Own emphasis).

[36] Of course, in this matter the chairperson has rendered his ruling on jurisdiction, and the ruling is pending review. However, this does not mean that piecemeal litigation is to be endorsed. Piecemeal litigation is the very antithesis of expeditious dispute resolution, one of the primary objects of the LRA.

[37] In my view, the applicant has failed to prove its right on a *prima facie* basis, and he has failed to show good prospects of success in the main dispute. I therefore need not consider the other requirements for an interim interdict. Nor do I need to consider whether there are exceptional circumstances.

Costs of the application

[38] Both parties sought costs. In *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*¹³ the court stated as follows: “The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of

¹³ [2008] 6 BLLR 540 (LAC) at para 19

not discouraging parties to approach these Courts with their disputes.” (Own emphasis)

[39] Both parties genuinely believed they were acting in defence of their rights. In these circumstances, there is nothing in law or fairness which requires that either of them be mulcted in costs. I therefore exercise my discretion by making no costs order.

Conclusion

[40] In the result, the application is dismissed, with no order as to costs.

R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Instructed by:

For the Respondent
Instructed by: