THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Of interest to other judges

Case no: J 306/24

In the matter between:

LUCKY MOLOI **First Applicant**

and

CHEMICAL, ENERGY, PRINT, PAPER AND WOOD WORKERS UNION (CEPPWAWU) **First Respondent**

SIPHO SONO *N.O.* **Second Respondent**

Heard: 4 April 2024

Delivered: (This judgment was handed down electronically by emailing a copy to the parties. The 16th of April 2024 is deemed to be the date of delivery of this judgment).

Summary: (Urgent application – Stay of s 188A enquiry pending outcome of review proceedings – Reimbursement of deduction from salary – Urgency – Applicant not able to justify timing of application nor why the application time frames were so compressed – Application struck off the roll for lack of urgency)

JUDGMENT

LAGRANGE, J

<u>The nature of the application</u>

[1] This is an opposed urgent application. The applicant, Mr L Moni, is an employee of the first respondent, CEPPWAWU, a union under administration ('the union'). The second respondent, Mr S Sono ('Sono') is the appointed administrator of the union.

[2] The applicant launched this application on 2 April 2024 and enrolled it for hearing on 4 April 2024. He gave the respondents until 11h00 on 3 April to file any answering affidavit. They managed to file an answering affidavit by around 08h00 the following morning, but Moni only filed his replying affidavit close to 11h00 the next day, by which stage the court was already in session.

[3] The original founding papers before the court lacked all the annexures, numbering over thirty-eight in all and consisting of more than a hundred pages. During the hearing, Moni, who was representing himself, explained that he had experienced difficulties scanning the annexures and transmitting them to court. Strictly speaking, the matter should have been removed from the roll because the founding papers were incomplete. Nevertheless, the court agreed to proceed as the respondents were willing to do so and Moni was directed to remedy the missing annexures during the following day, most of which he did. However, there were only 36 numbered annexures filed whereas there should have been 43. Some of the annexures were also incomplete documents.

[4] In summary, apart from wanting the matter heard on an urgent basis, Moni seeks the following relief:

4.1 to interdict a S 188A inquiry by an arbitrator due to resume/commence on 18 April 2024 for a variety of reasons, or alternatively

4.2 to suspend the s 188A inquiry pending the finalisation of a review application in case JR 168/2024, and

4.3 an order compelling the union to pay him the remains of his salary for March 2024 and that of his colleague and employee representative, Mr T Boikanyo, for the month ending March 2024 to enable him to cover penalties incurred as a result of him defaulting on certain debit orders on account of a deduction made by the union from his salary.

[5] It is apparent that the relief relating to the suspension of the s 188A inquiry is interim in nature, whereas the relief sought relating to his remuneration is for final relief. The review application mentioned is a review of an arbitrator's ruling dated 17 January 2024, in which the arbitrator refused to halt the s 188A enquiry because the arbitrator did not consider herself bound by the finding of the arbitrator in a previous award to the effect that the administrator could not institute disciplinary action without first consulting the National Executive Committee of the union ('the NEC').

[6] The union has raised a special plea of *res judicata.* It submits that the court has already dealt with the primary issue of the power of the administrator to take disciplinary action against Moni, under case number J 134/2024. Although certain averments are made about the judgment in support of the claim that it has previously decided the issue, I was not furnished with a copy of the judgment and I am not prepared to make a decision on this objection in the absence of it.

[7] It should also be mentioned that Moni cites a whole host of other complaints such as: accusing the union of unfairly discriminating against him by replacing him with a coloured person during his suspension; the alleged harassment of other staff, and bias on the part of the CCMA in allowing a certain individual to represent the union and in requiring the timeous submission of medical certificates.

Brief Chronology

[8] For the purposes of sketching the tortuous conduct of the disputes referred to the CCMA by Moni a brief chronology is necessary. However, I should mention that because Moni's founding affidavit does not follow a strict chronological order and his bundle of annexures was incomplete, the sequence of events and which matter he is referring to are sometimes difficult to discern. His claim relating to the deduction from his salary is set out separately, because is easier to unravel from the procedural morass of his unfair labour practice claims and the s 188A enquiry.

[9] The union was placed under administration on 4 June 2020. The current administrator is Mr S Sono ('Sono'). The court's order set out the various powers the administrator can exercise. Moni and other employees litigating against the union have subsequently argued that clause 3.9 of the first administration court order handed down by the Honourable Judge Rabkin-Naicker on 4 June should be interpreted to mean that the administrator lacked authority to institute any disciplinary steps against employees or members without first consulting the national executive committee of the union. It has been a constant refrain raised by Moni in the course of the various disputes outlined below. The particular empowering clause in question read:

"3.9 That she is authorised, acting on her own and to the exclusion of the General Secretary and/or Deputy General Secretary and/or the President and/or any other official of the respondent to convene, by notice given in the manner and within the time periods contemplated in clause 44(3) of the Constitution of the respondent, on meeting or meetings of the National Executive Committee, for the purpose inter alia of – 3.9.1. Placing the audited financial statements for the years ending 2014, 2015, 2016 and 2017 before that Committee; 3.9.2. Consider any motions for the removal or reinstatement of a National Office-Bearer; and 3.9.3. Consider any other motions which she has, in the manner contemplated in the Constitution of the respondent, been requested to place upon the agenda of such meeting."

[10] On 13 June 2022, Sono instructed Moni to report for work at the union head office from 1 July and to submit various regular work schedules and programs relating to his work. Moni took exception to the tone of this instruction, queried Sono's mandate as administrator, objected to being micromanaged and claimed that his work entailed him being 'unfixed' and 'offsite'. On the same day, he referred a claim of unfair discrimination to the CCMA claiming he was being bullied and harassed by the administrator who was acting outside his mandate (case no MPEM 4514-22, referred to also as the 'first CCMA dispute')

[11] On 21 July, Sono suspended Moni from duty on account of various alleged acts of misconduct, which would be communicated to him in the course of instituting a disciplinary enquiry. The notice of a disciplinary inquiry was issued to Moni on 26

July 2022. The charges concerned alleged insolence, gross misconduct for concluding a training agreement without authority and gross negligence in the performance of his duties.

[12] In response, on 29 July, Moni applied to this court to interdict the disciplinary enquiry, until his first CCMA dispute had been finalised, and also sought an order uplifting his suspension. On 2 August 2022, the application was settled and the settlement agreement was made an order of court. A critical part of the order was that the parties agreed that the pending disciplinary hearing should take the form of a s 188A enquiry.

[13] On 22 August 2022, Moni referred an unfair labour practice dispute to the CCMA, arising from his suspension a month earlier. He requested, amongst other things, the upliftment of his suspension. He also alleged he had been subjected to an occupational detriment on 'grounds of the Protected Disclosure Act' (case no MPEM 6414-22, referred to also as the 'second CCMA dispute' or the 'suspension dispute').

[14] A dispute arose as to whether Moni signed the form consenting to the s188A procedure for the disciplinary enquiry. The union then advised they would abandon that process and resume with an internal disciplinary hearing. Moni then sought to interdict the inquiry. However, on 9 October 2023, this court ordered the CCMA to schedule the s 188A enquiry within 21 days.

[15] On 1 February 2023, an arbitrator concluded in a default award that Moni's suspension had been unfair and ordered its upliftment with effect from 15 February 2023. The union applied to rescind this award and this application was upheld on 2 March 2023.

[16] On 11 April 2023, when the suspension dispute was re-enrolled, the union contended that it had been agreed and made an order of court that the parties should be proceeding with the disciplinary process in terms of s 188A. Moni argued that the CCMA hearing should be postponed pending the outcome of the Constitutional Court petition for leave to appeal which would determine if the

administrator had the power to discipline him. The petition for leave to appeal concerned an appeal against a decision of the Labour Court on12 December 2022, which had extended Sono's term of office as administrator.

[17] On 25 April 2023, the arbitrator decided he did have jurisdiction to hear the suspension dispute, notwithstanding Moni having approached the Constitutional Court to determine if the administrator was empowered to take disciplinary action against him.

[18] On 27 July 2023 the suspension dispute was again re-enrolled at the CCMA, but Moni did not attend owing to being ill. He provided a doctor's note and his representative attended. The hearing was postponed to 26 September 2023. On 26 September 2023 the union issued Moni with notice of a fresh disciplinary hearing. The copy of this notice, which was attached as Annexure LM 18 to Moni's founding affidavit, is incomplete.

[19] On 23 October 2023, the long delayed section 188A enquiry was due to commence before an arbitrator (Case no GAJB 22692-23). Moni again challenged the power of the administrator to take disciplinary action against him, but the arbitrator declined to make a ruling on the issue at that stage, before she had heard evidence.

[20] On 7 November 2023, the unfair suspension dispute was re-enrolled, but could not proceed on that occasion because Moni's representative withdrew for lack of funding. It proceeded on 12 December and on 19 December 2023, the arbitrator handed down his award. The arbitrator found that Moni's suspension was unprocedural because the administrator had not consulted with the NEC before suspending him. This accorded with Moni's interpretation of clause 3.9 of the administration order. Nevertheless, the arbitrator declined to decide if the administrator had acted fairly in charging him with misconduct, noting that the s 188A enquiry was underway in compliance with a court order. Accordingly, he had no jurisdiction to make any findings on the administrator's institution of disciplinary proceedings. The arbitrator ordered Moni to return to work on 2 January 2024, but he

claimed he was unable to as the union office was shut down until 22 January 2024. It appears there is a dispute about when he should have returned to work, which led to further disciplinary charges being laid against him. Further details on this are set out below.

[21] On 17 January 2024 the s188A enquiry convened. Based on the suspension award and the arbitrator's finding in that matter that Moni could not be suspended without the NEC being consulted, Moni brought that award to the attention of the arbitrator in the s188A enquiry. The arbitrator declined to stop the enquiry because she held she could not be bound by the finding of another arbitrator. As the s 188A enquiry was a disciplinary hearing, and based on the surrounding circumstances, I assume that Moni had argued that the basis for the unfair suspension ruling of 19 December 2023 meant that the administrator did not have the power to discipline him and so the s188A enquiry could not proceed. Moni does not make this expressly clear in his founding affidavit.

[22] On 19 January 2024, Moni said the union accused him of being absent without leave on 17 and 18 January when he had been attending the s 188A enquiry. In fact, the union's letter claimed he should have returned to work on 8 January and his absence from work until 19 January 2024 was considered absence without leave. It announced that the union was going to initiate the 'AWOL process' as it considered he had absconded from work. Moni argues, amongst other things, that he would have been in breach of his suspension conditions if he had returned to work before 17 January and could have been charged for that. This argument he bases on a curious and unsubstantiated belief that, at that stage, the union could still have 'appealed' against the arbitration requiring him to report for work on 2 January 2024 and, if successful, his return to work would have been in breach of his suspension.

[23] In any event, on 24 January 2024 he received a notice of a fresh disciplinary enquiry to begin on 12 February. He was charged with not complying with the CCMA award, which ordered him to return to work on 2 January 2024, whereas he only presented himself for work on 22 January. Accordingly, he was charged with

desertion as defined in the union's own disciplinary code, namely being absent without notice for more than five days.

[24] The s 188A enquiry was due to reconvene on 5 to 7 February, but the union asked the arbitrator to extend the hearing to 9 February without consulting Moni, according to him. Annexures LM 27 and LM 28 to the founding affidavit, which apparently pertain to this issue, were not filed with the court. He claims he advised the CCMA in writing he would be unavailable as he was meeting a legal representative to assist him with the preparation of court papers. The union apparently told Moni that his duty to attend work encompassed his attendance at the s 188A enquiry.

[25] On 8 February, Moni sent a letter of demand to the union that he intended to approach this court on an urgent basis to interdict the enquiry. By this stage the enquiry had already been set down on 6 days in January and February. Thereafter it was set down on ten days between 8 February and 23 March. Moni claimed he was not 'given any space' to present evidence in these hearings, and was subject to premature objections, threats and insults. He claims his representative was also prevented from speaking by the arbitrator and the union representative. He alleges the arbitrator forced him to say things he did not want to say, by threatening to close the hearing if he did not. He seeks the courts protection against this alleged "blatant harassment filled with hatred".

[26] He complains further that the union representative tried to get the arbitrator to schedule dates for enquiry in such a way that he and his representative, would be unable to represent each other in their own respective enquiries.

[27] On 8 March 2024, Moni launched an application to review the ruling of the arbitrator in the s 188A on 17 January 2024 to the effect that she was not bound by the finding of the arbitrator in the suspension award that the administrator could not institute disciplinary proceedings without first consulting the NEC.

[28] On 20 March when his enquiry was to proceed, Moni asked to be excused because he needed to attend to a municipal electricity billing problem which needed to be resolved because it affected one of his children who was at home. The union and the arbitrator were only willing to release him if he agreed to pay the CCMA fees for the day, which he felt placed him in a predicament because he could not compromise his child's situation. Consequently, he felt he had no choice but to leave the hearing. Later, on 28 March, he received a letter from the union advising that R 11,801.73 would be deducted from his salary at the end of that month to pay for the daily costs of the s 188A arbitrator.

[29] On the same day, in an urgent application brought at the instance of the administrator and the union, this court varied the terms of the order made by Judge Rabkin-Naicker on 4 June 2020, in which she set out the administrator's powers. The effect of the variation was to remove clause 3.9 from the terms of the administrator's appointment, thereby removing the basis on which Moni and others had previously relied to challenge the authority of the administrator to take disciplinary action.

The salary deduction

[30] Moni claims the union stopped his salary on 28 February without notice and without providing a reason for doing so. I assume, though it is not clear, that he means he was not paid his salary for February. On 28 March he was advised that an amount of R 11,803.73 will be deducted from his salary, leaving him with a net salary of R 7,723.02. He claims this is a breach of section 34 of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'). He argues that this is also an unfair labour practice in terms of section 186(2)(b) of the LRA because it amounts to unfair disciplinary action. He also contends the deductions were made in contravention of the administrator's mandate.

Evaluation

Urgency

[31] In *Maqubela v SA Graduates Development Association and Others* [1], the Labour Court held:

"'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. "

[32] The first question to be answered is whether Moni has provided an adequate justification for bringing this application on barely two court days' notice to be heard on 4 April. The next date of the resumption of the s 188A hearing is 18 April 2024. That hearing has already sat on around 15 days.

[33] At the commencement of the hearing of the urgent application, I asked Moni to explain why he launched the application when he did. Instead of answering my question, he began with a long elaboration of the history of his disciplinary engagements with the union.

[34] It appears that the essence of the right he seeks to assert is the same one he has raised on a number of occasions before, namely that the administrator lacks the power to implement disciplinary action against him. He places great emphasis on the finding in the award of the arbitrator handed down on 19 December 2023 that his suspension was unprocedural because the administrator was obliged to consult with the NEC before suspending him. He has already launched a review application of ruling by the arbitrator in the s 188A enquiry to proceed because she did not consider herself bound by the previous arbitrator's finding on the administrator's power. That application was launched on 8 March 2024. Moni provides no explanation why he did not apply at the same time to stay the s 188A proceedings then. In short there is no explanation why it was launched nearly a month later, nor

[1] (2014) 35 *ILJ* 2479 (LC) at para 32.

why the time frame for hearing the application was compressed into a period of two days.

[35] Insofar as he might argue that it was his claim that the union had committed an unfair labour practice by deducting R 11,801.73 from his salary at the end of March for the missed hearings the launching of an urgent application for that relief on 2 April 2024 is slightly more justifiable.

[36] Moni also argues he cannot obtain adequate relief in due course for his monetary claim. I note from his salary that he earns above the earnings threshold that would allow him to refer a claim under s 73A(1) of the BCEA to the CCMA. Accordingly, he must approach this court or an appropriate civil court. The union, possibly correctly, argues that the salary deduction cannot constitute an unfair labour practice. It also claims it is not a contravention of s 34 of the BCEA, but does provide any justification for this claim.

[37] On the face of the undisputed facts, given the provisions of s 34(2) the union's claim seems highly debatable. In the notice of motion, Moni simply asks for relief in the form of repayment of the large deduction made from his remuneration in March. He does not ask the court to declare it an unfair labour practice, though he contends it is in his founding affidavit. Nonetheless, he plainly avers the deduction was made in breach of s 34(2). He also explains how the size of the deduction resulted in him being unable to pay his regular monthly debts to creditors.

[38] Nonetheless, even though this court does in exceptional circumstances allow an employee to recover remuneration on an urgent basis[2], that does not excuse Moni bringing this application on the degree of short notice he has in this instance. In bringing the application on barely two days' notice, it appears his intention was to put the union under as much time pressure as he felt he could. The result was, as often happens in such cases, that he made it practically impossible to file his own replying affidavit in time. It also meant the court did not have sight of his replying affidavit before the hearing.

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[2] See, for example *Harley v Bacarac Trading 39 (Pty) Ltd (2009) 30 ILJ 2085 (LC) at para 8*

Conclusion

[39] In light of the above discussion, I find that Moni has not justified that his application was sufficiently urgent to launch it on two days' notice for a hearing on 4 April 2024. I am also inclined to order costs against him for the manner in which he has conducted these proceedings, but on this occasion will not do so in the hope that the striking off of his application will prove salutary enough to dissuade him from employing such an unjustifiable litigation stratagem again.

Order

1. The application is struck off the roll for lack of urgency.
2. No order is made as to costs.

R G Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: In person

For the Respondents: A Mohlala instructed by KMNS Inc