

Not reportable

Delivered 030211

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J161/2011

In the matter between:

NANDIPHA MASHIGA

Applicant

And

VOX AMVIA

First respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second respondent

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application, heard yesterday afternoon, in which the applicant seeks *inter alia* the staying of the outcome of a disciplinary enquiry pending the finalisation of an urgent referral made to the CCMA concerning an alleged unfair labour practice, and to declare as an unfair labour practice the first respondent's conduct in instituting a disciplinary enquiry while a dispute about a grievance remains pending before the CCMA.

[2] The relevant facts are briefly the following. The applicant was employed by the first respondent in September 2009. The applicant reported to the managing director, one Craig Freer. During the course of June 2010, the applicant was advised that she should report to the production manager, Clausen. From this point, some tension obviously arose between the applicant and the management of the first respondent, culminating in a series of warnings given to the applicant to the effect that she should improve her work performance. On 13 December 2010, the applicant lodged a grievance. The grievance records that the applicants had experienced a myriad of work-related problems that had affected her health and more specifically, that she had been subjected to what she claimed to be an unfair demotion and harassment. A grievance hearing was convened on 15 December 2010. In what appears on the face of it to be an agreed outcome, the applicant was to meet the tasks given to her by 11 January 2011, she would continue to report to the production manager, a performance review process would remain in effect, and the first respondent would arrange for training in respect of document processes in ISO format. The applicant was not satisfied with the outcome of the hearing and escalated the grievance in the document dated 17 December 2010. A further hearing into the grievance took place, at which the applicant was represented by a union official. At this meeting, the applicant contends that Freer demanded that she withdraw certain statements made about him. This was followed up in a letter addressed to the applicant on 21 December 2010 in which Freer made reference to what he termed blatant misrepresentations of what he had said and in effect, accused the applicant of fabricating the content of a conversation that had taken place between them. The applicant was afforded an opportunity to reject the statements. On 24 December 2010 the applicant responded to Freer's e-mail. Matters rapidly degenerated from that point and in mid-January 2011, the applicant sent a message to one De Graaf, contending that Freer and Clausen were engaged in a systematic effort to make working conditions unbearable and that due to her ill-health, the applicant had decided to work from home until such time as matters had been resolved. De Graaf responded by recording that the applicant's claim was nothing less than a brazen attempt to lay a foundation to claim constructive dismissal, warned her to attend at work on 18 January 2011 and advised her that disciplinary charges were in the offing. On 17 January 2011, the applicant referred a dispute to the CCMA in the form of what was described as an urgent application. The

referral form summarises the facts on which the applicant relies as the filing of a grievance against managers who are claimed 'to have unilaterally changed the terms and conditions of the contract only to be subjected to wanton victimisation – including threatening her with an enquiry'. The CCMA ultimately scheduled a meeting for 3 February 2011. On 18 January 2011, the first respondent sent the applicant a letter calling upon her to attend a disciplinary hearing scheduled for 1 February 2011. In terms of the letter, the applicant was called upon to answer to charges relating to misconduct (in the form of statements made about members of the first respondent's management) and for a failure to meet the required performance standards.

[3] This application was filed some five hours prior to the time for which it was set down. The first respondent filed a brief answering affidavit. In essence, the first respondent's case is that on 1 February, after seeking unsuccessfully to have the disciplinary hearing postponed and after unsuccessfully applying for the recusal of the chairperson, the applicant and her representative left the hearing. In the circumstances, the chairperson, a member of the Johannesburg Bar, continued with the hearing and recommended ultimately to the first respondent that the applicant be dismissed for misconduct and poor work performance. A letter of dismissal was annexed to the affidavit.

[4] In so far as the applicant seeks relief in respect of the outcome of the disciplinary hearing, it seems to me that the relief sought has been overcome by events. Even if I were to approach the application on the basis that the relief effectively sought is the setting aside of the finding made about the chairperson of the disciplinary enquiry pending the outcome of the unfair labour practice proceedings initiated by the applicant, I am not persuaded that this is an appropriate case for intervention. The Labour Appeal Court recently affirmed in *Booyesen v The Minister of Safety Security* [2011] 1 BLLR 83 (LAC) that while the Labour Court has jurisdiction to intervene in uncompleted disciplinary enquiries, this should occur only in exceptional cases. The court referred to the judgment by Gauntlett AJ in *Mortimer v Municipality of Stellenbosch and another* (case number 18243\2008) in which it was suggested that the Labour Court would intervene to exercise its powers only in "truly extraordinary circumstances..." In *Booyesen*, the Labour Appeal Court held that while it was not possible exhaustively to define the circumstances in which

intervention would be warranted, the factors to be considered would include whether a failure to intervene would lead to a grave injustice, or whether justice might be obtained by other means (see paragraph 54 of the judgment).

[5] The applicant seeks a final order. Accepting for the moment that the application is urgent, it is incumbent on the applicant to establish a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. In my view, there is a clear alternative remedy open to the applicant or, to use the words of the Labour Appeal Court in *Booyesen*, justice might be obtained by other means. The prejudice on which the applicant relies on this application has obviously been eclipsed by the applicant's dismissal. The applicant is entitled, subject to any obligation to file an appeal against the chairperson's finding, to refer a dispute to the CCMA contesting the substantive and procedural fairness of her dismissal. In the event that the matter is not successfully conciliated, the applicant is fully entitled to refer the dispute to arbitration in circumstances where the primary remedy prescribed by the Act is reinstatement. In the circumstances, I fail to appreciate on what basis this court ought to intervene at this point. The applicant has all of the rights established by chapter VIII of the Act at her disposal, and if she is ultimately vindicated, she will suffer no prejudice on account of the first respondent's actions, assuming that they are found to be wanting. If the purpose of the disciplinary enquiry, as the applicant suggests, was to "ambush" her in circumstances where she had laid a grievance and referred a dispute about a failure to resolve that grievance to the CCMA, that is a factor that an arbitrator will no doubt take into account in determining the fairness of the applicant's dismissal. In short, the applicant has an alternative remedy at disposal and for that reason, this application must fail. In these circumstances, I need not consider the submissions advanced on behalf of the applicant in relation to the existence or otherwise of a clear right. In particular, and despite the invitation to the contrary, it is not appropriate for this court to venture into the merits of the applicant's grievance and the dispute referred to the CCMA.

[6] I turn next to the question of costs. On receipt of this application, the first respondent's attorneys wrote to the applicant recording the outcome of the enquiry and the fact of the applicant's dismissal. The letter further invited the applicant to withdraw the application, failing which the first respondent stated that it would seek a

punitive costs order. Despite this, the applicant has persisted with the application, and the applicant's representative was less than candid when the question of the existence of the dismissal was pursued. In these circumstances I fail to appreciate why the first respondent should be denied its costs.

[7] Finally, in relation to this morning's conciliation meeting convened by the CCMA, I did not understand the applicant to seek any relief in respect of that meeting. It remains for the CCMA, in the light of the applicant's dismissal and the basis of this order, to decide how it intends to proceed.

I accordingly make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application 2 February 2011

Date of judgment 3 February 2011

Appearances

For the applicant: Union Official

For the first respondent: Mr S Milo, Mahons Attorneys