

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: J504/11

In the matter between:

JOHAN ARMSTRONG

Applicant

and

SOUTH AFRICAN CIVIL
AVIATION AUTHORITY

Respondent

JUDGMENT

LAGRANGE, J:

Introduction

1] Judgment in this matter was handed down on 5 May 2011. The reasons for the judgment are set out below.

2] This is an application for final relief which was brought on an urgent basis to prevent the respondent employer ('SACAA') from continuing with any disciplinary proceedings against the applicant. The principal basis for the application is that the applicant contends the employer had already finalised matters arising from an incident between himself and Mr D. The applicant

submits that the erstwhile director of SACAA, Captain Jordaan, had already made a decision in conjunction with the Executive Legal Manager not to take any disciplinary action against him arising from the incident and that the matter was closed.

3] The incident took place on 2 December 2010 when the applicant who was employed as an inspector in the respondent's Airworthiness Department 2010 went to conduct an inspection on aircraft belonging to a flying school based at Brakpan airport. A confrontation ensued between himself and the owner of the aircraft, Mr S Dhlamini. Without going into detail it is sufficient to note that the applicant and the owner had conflicting accounts of what transpired and who was wrong. The applicant reported the incident to his immediate superior, Ms Teague. The latter in turn advised the applicant that the owner of the aircraft's father, Mr I Dhlamini who also happens to be employed by the respondent, had complained that the applicant had beaten his son. The son subsequently laid a complaint against the applicant. Various statements were taken from eyewitnesses to the incident and the applicant submitted a report on the incident to his superiors. Following the report, the General Manager: Aircraft Safety, Mr Chakarisa, referred the matter to the director requesting guidance on how the matter should be taken further.

4] After considering the matter, the director recommended that the applicant

should consider laying a charge against Mr Dlamini with the release and that SACAA should also consider laying charges against him on the basis that its regulations had been contravened. The director specifically sought the input of the legal department. On 3 December 2010 the general manager: Legal Department, Mr M endorsed the proposal of the director. Pursuant to those recommendations the applicant requested SACAA to institute criminal proceedings against Mr T for his alleged contravention of various provisions of the Civil Aviation Act 13 of 2009 arising from the incident. The legal department assisted the applicant in finalising the complaint, but it seems the matter was never formally lodged with the police.

5] Subsequent to the events above, Capt Jordaan left SACAA and Mr Chakarisa was appointed acting director in his stead. Events took a turn in the new year when the joint owners of the flying school now lodged a new complaint against the applicant with the respondent arising from the incident. This led to the applicant being suspended early in February 2011 and being issued with disciplinary charges. The essence of the charges is that he had allegedly physically manhandled Mr Dlamini during the course of his inspection in December and had brought the reputation of SACAA into disrepute by doing so. Understandably, the applicant was distressed by these developments relating to the incident.

6] The applicant asked for a final order declaring that the SACAA was bound by the ‘decision’ of the former director ‘made in conjunction’ with the Executive Legal Manager, Mr Mogai, in respect of the incident and prohibiting the employer from continuing any further disciplinary action against him. He further asked the court to compel SACAA to lay criminal charges against his accuser for contravening section 136 of the Civil Aviation Act 13 of 2009 and for other relief to finalise matters arising from the incident. In the alternative, he asked the court to order the employer to postpone the disciplinary hearing until such time as it reviewed the ‘decision’ mentioned and, in the event that the disciplinary proceeding did take place, to replace the chairperson Mr Matonsi, whom he claimed was a personal friend of the complainant’s father.

The rights in issue

7] In his founding affidavit, the applicant complained of the unfair manner in which his employer has dealt with the matter and approaches the court on the basis that he has no other way of protecting his livelihood and his constitutional rights not to be subject to unfair labour practices.

8] The first difficulty the applicant has is that it is now well established law that this court will not readily intervene on an urgent basis in incomplete internal proceedings.¹ Essentially, the applicant must demonstrate that his case is

¹ See *Booyesen v Minister of Safety and Security and Others* (2011) 32 ILJ 112 (LAC) at 129-130, par [54]

exceptional in terms of that standard. In support of his argument he cites the case of *Mortimer v Municipality of Stellenbosch*,² an unreported judgment of Gauntlett AJ decided before the LAC decision in *Booyesen* but referred to by the LAC in its decision.

9] In an obiter dictum, the court in *Mortimer* accepted the correct test for intervening in incomplete proceedings as the one expounded in *Wahlhaus v Additional Magistrate, Johannesburg*.³ The court in *Mortimer* was at pains to stress that **the threshold for intervention laid down in *Walhaus* was not satisfied merely because some unfairness had occurred or would result if the proceedings continued:**

“That unfairness has occurred is not the issue. The issue is **that** an irregularity has occurred (unfairness is just one manifestation) which, it is already apparent, is of a kind and a degree calculated to give rise to injustice. **And** in that regard, the court must consider whether the injustice is such that the affected party might not otherwise by other means attain justice. It may be noted that this is not the only area of law which seeks to differentiate between the potentially fatal or irremediable and that which is irregular, but is not **to** be treated as vitiating.”⁴

10] The LAC, which endorsed the approach in *Mortimer* was loath to lay down a definitive test for the exercise of the labour courts power to intervene in incomplete proceedings in exceptional circumstances, but it did identify criteria mentioned in *Walhaus* as some of the considerations which might justify intervention:

² (18243/2003) [2008] ZAWCHC 306 (27 November 2008), unreported

³ **1959 (3) SA 113 (A) at 119-120**

⁴ *Mortimer* above n 2 at para 17 of the unreported decision.

“Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.”⁵

11] One of the examples of a situation which might justify intervention cited in *Mortimer*, which the applicant relies on is, where a disciplinary inquiry was, for instance, **about to** commence or was being conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in law the inquiry.

12] The applicant alleges that the chairperson of the enquiry is a friend of the complainant's father who is also employed at SACAA. The only evidence he could advance for this assertion is that the two of them travelled on the same flight on a corporate World Cup soccer junket. They were not the only beneficiaries of this corporate largesse, other managers were also on the flight. A degree of familiarity among senior managers is not sufficient to impute an unacceptable degree of bias, bearing in mind the unavoidable presence of some bias in internal enquiries chaired by employees.⁶ I do not think the applicant has laid a sufficient factual foundation to establish a reasonable suspicion of bias that vitiates the prospect of a fair enquiry.

13] The other leg of the applicant's claim is the question whether or not the applicant's disciplinary charges were disposed of when the Director in conjunction with General Manager: Legal Department decided to recommend that criminal charges should be laid against the complainant and the applicant should be assisted in doing so. The applicant submits that, by so doing, a decision was made that no disciplinary action should be taken against him.

⁵ *Booyesen*, at par [54]

⁶ See *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 583C-F on the unavoidable practicalities of prior contact between parties in an internal enquiry, which alone cannot justify an allegation of bias.

14] It is true that the employer appeared to take the applicant's side in dealing with the incident, but that is not the same as pressing charges against him and then concluding on the basis of the evidence that he is not guilty of misconduct. The applicant wrongly tries to elevate his situation to be on a par with someone who has already faced disciplinary charges and is acquitted only to be faced with a fresh set of charges, which are in substance the same. The principle of 'double jeopardy' has no application in a situation in which the applicant was never previously charged and had not been subjected to an enquiry on substantially the same charges as before.

15] I am not persuaded that the initial approach to the incident adopted by the employer can equate to an acquittal of the applicant of a charge of misconduct arising from the incident. Even if the employer had provisionally and explicitly expressed the view that it saw no need to initiate disciplinary proceedings against the applicant, it does not mean that it could not reconsider its approach, especially in the light of a further complaint lodged after it had taken its initial decision not to initiate disciplinary action.

16] The applicant contends that the only way the respondent could proceed with disciplinary action against him is if it set aside its own decision on review. A case in which this was done is *Ntshangase v MEC for Finance: Kwazulu-Natal and Another*.⁷ In that matter the state, as the employer, asked the court to set aside the sanction imposed by the chairperson of a disciplinary enquiry. However, what distinguishes that matter from this one is that the decision under scrutiny in *Ntshangase* was the outcome of a formal statutory disciplinary process, where the employer was bound by the chairperson's decision.⁸ Whichever way one construes the deliberations of

7 (2009) 30 ILJ 2653 (SCA)

8 At 2661, para [17]

the former Director in this case about the appropriate course of action for SACAA to pursue in relation to the incident, they cannot be construed as equivalent to a final and binding decision on whether or not the applicant was guilty of misconduct. They amounted to a view taken by the employer on an appropriate course of action to follow at the time.

17] Subsequent to embarking on that approach SACAA received a complaint from the joint owners of the aircraft company about the altercation with the applicant. Captain Jordaan had left SACAA and Mr Chakarisa was appointed as the Acting Director. SACAA then decided to invoke disciplinary proceedings against the applicant. It is true that this must have been an unpleasant turn of events for the applicant and he might well have questions in his mind about what prompted SACAA to change tack so dramatically, but I do not think that the executive authority of a body like SACAA cannot change its mind on a course of action when it is not bound by its earlier decision like the employer in *Ntshangase's* case was.

Conclusion

18] In the circumstances, I am satisfied that the applicant has failed to establish a clear right that would entitle him to relief in this instance, and consequently the application must fail for this reason. It is accordingly not necessary to consider the other grounds for succeeding in an urgent application for a final interdict.

Order

19] Accordingly, the following order was made in this matter:

- a. The application is dismissed.
- b. No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 01 April 2011

Date of judgment: 05 May 2011

For the Applicant: Advocate P L Uys

instructed by B Swart.

For the Respondent: Advocate P

Mokoena instructed by M Fisha.