



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1744/11

In the matter between:

NW MASHIYA

Applicant

and

ADV I. SIRKHOT N.O.

First respondent

**THE MINISTER OF
CORRECTIONAL SERVICES**

Second respondent

**THE NATIONAL COMMISSIONER
OF CORRECTIONAL SERVICES**

Third respondent

Delivered: 3 November 2011

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

- [1] The applicant seeks leave to appeal against my judgment of 30 August 2011. The judgment was handed down on an urgent basis pursuant to an urgent application concluded at 17:00 the previous day. The parties delivered their submissions in this application on 28 October 2011.
- [2] The applicant sought to interdict the respondents from proceeding with a disciplinary hearing on 30 August 2011; and a mandamus ordering that the chairperson of the disciplinary hearing recuse himself. In my judgement, I held that the application was not urgent; that the applicant had not established a prima facie right or an apprehension of irreparable harm; that the balance of convenience favoured the respondents; and that the applicant had an adequate alternative remedy available to him. I dismissed the urgent application with costs.

Grounds of appeal

- [3] The applicant appears to rely on the following possible grounds of appeal:
- 3.1 that I erred in referring to 19 August 2011, being the date on which the applicant brought an earlier urgent application before Bhoola J, as a point of reference for deciding the question of urgency;
 - 3.2 that I erred in referring to the chairperson of the disciplinary hearing's ruling on 25 July 2011 not to permit legal representation as the applicant's purported cause of action for its urgent application;
 - 3.3 that I erred in finding that the chairperson exercised his discretion and decided not to deviate from the prescripts of the SMS handbook that no legal representation is permitted;
 - 3.4 that I erred in finding that there was nothing improper in the manner in which the chairperson was appointed;
 - 3.5 that I erred in finding that the Department went out of its way to appoint an independent outsider to chair the hearing;
 - 3.6 that I erred in finding that the applicant had not established a reasonable apprehension of bias; and

3.7 that I erred in finding that the applicant has not shown any apprehension of irreparable harm as he has other remedies available to him.

[4] At the outset, I must point out that the applicant is not entitled to proceed, as of right, with the application for leave to appeal against the dismissal of the recusal application.

[5] The Constitutional Court had the following to say in this regard in *SACCAWU and others v Irvin & Johnson Ltd Seafoods Division Fish Processing*:¹

“An applicant for recusal cannot be said to be ‘entitled’ to prosecute an appeal immediately. Two considerations suggest the contrary. First, though there is some early authority that a decision by an applicant for recusal to proceed with the merits of the matter instead of insisting on challenging the refusal to recuse by way of appeal may constitute a waiver of the recusal objection, it is clear from subsequent authority that waiver in these circumstances occurs only if it is unambiguous. The recusal point unless so abandoned therefore remains good for a later appeal. There can accordingly be no question of an ‘entitlement’ to proceed immediately.”

And

“Whether a court that has dismissed a recusal application permits the applicants to bring appeal proceedings first will depend on a range of factors. These include the nature of the matter, the nature of the objection to the court's composition, the prospects of success in the recusal, and, in the case of an appellate court, the length of the record. The decision on these factors lies with the court itself. The applicants will therefore not be entitled to proceed as of right with the application for leave to appeal.

[6] The present application concerns not only a ruling on the recusal, but also an urgent application to interdict a disciplinary hearing. In both of these instances exceptional circumstances would have to be present to grant leave to appeal, given the dicta in *Irvin & Johnson (supra)*; *Jiba v Minister*:

¹ 2000 (3) SA 705 (CC) paras 5-6.

*Dept of Justice and Constitutional Development & others*²; and *Booyesen v Minister of Safety and Security*.³

First ground of appeal

- [7] The question of urgency was not dealt with on the basis of 19 August 2011 – the date of the first urgent application before Bhoola J – as "the point of reference." As I stated in paragraph 16 of my judgement, even if one accepts that the application of 29 August 2011 was triggered only by the ruling on 25 July, any urgency is entirely self-created. The purported cause of action was clear from at least 25 July 2011. There is no basis for this purported ground of appeal.

Second ground of appeal

- [8] The applicant submits that I misunderstood his cause of action, which is that he is seeking to enforce his constitutionally protected right to a fair hearing. *Au contraire* -- I dealt with that in paragraphs 20-21 of the judgement. The applicant could not show that the apprehension of bias on the part of the chairman was reasonable; therefore, the question whether the applicant would be denied the right to a fair disciplinary hearing had to be answered in the negative.

Third ground of appeal

- [9] It is correct that the chairperson reasonably exercised his discretion not to deviate from the default position in the SMS handbook that no legal representation is allowed. That is dealt with fully in paragraphs 25 and 26 of my judgement and needs no repetition here.

Fourth ground of appeal

- [10] I do not think it is likely that another court would come to the view that Adv Sirkhot's acceptance of his appointment as chairperson was irregular, or that it could create a reasonable apprehension of bias. His appointment

² (2010) 31 ILJ 112 (LC) para 17.

³ [2011] 1 BLLR 83 (LAC) para 54.

was done in terms of the SMS handbook and was not raised at the commencement of the disciplinary hearing on 14 July 2011.

Fifth ground of appeal

[11] It is also unlikely that another court could come to the conclusion that Adv Sirkhot was not an independent outsider. He is not an employee of the Department and the Department was fully within his rights to appoint a person outside the public service as a chairperson in terms of the SMS handbook. This purported ground of appeal also has no merit.

Sixth ground of appeal

[12] Another court is not likely to come to another conclusion on the question whether the applicant had shown a reasonable apprehension of bias. As the Constitutional Court pointed out in *President of the RSA & others v South African Rugby Football Union & others*⁴, the test for recusal is whether a reasonable, objective and informed person would on correct facts reasonably apprehended that the presiding officer has not will not bring an impartial mind to bear on the adjudication of the case. Such a person would not have formed such a reasonable apprehension on the facts of this case.

Seventh ground of appeal

[13] The applicant clearly had other remedies available to him. The Labour Appeal Court has already come to a similar conclusion on similar facts in *Booyesen (supra)*, and there is no reason to believe that it will come to a different conclusion in this case, should leave to appeal be granted.

Conclusion

[14] The applicant has not been able to show that another court could reasonably come to a different conclusion on any of the seven possible grounds of appeal raised by him.

[15] The application for leave to appeal is refused with costs.

⁴ [1997] 7 BCLR 725 (CC) para [48].

A J Steenkamp
Judge

LABOUR COURT