



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 272/14

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Obo DAN NKUNA

Applicant

and

ENHLANZENI DISTRICT MUNICIPALITY

First Respondent

GERHARD BOTHA NO

Second Respondent

Heard: 11 February 2014

Delivered: 13 February 2014

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicants brought this application before the court on an urgent basis to seek an order in the following terms;

- 1.1 That the First Respondent be interdicted and restrained from continuing with the disciplinary hearing against Dan Nkuna, pending the Respondent obtaining condonation from the South African Local Government Bargaining Council (SALGBC) for the late commencement with the disciplinary hearing contrary to the period stated

in clause 6.3 and annexure B: Item 7 of the main Collective agreement: Disciplinary code and procedure.

- 1.2 Alternatively, that the Respondent be interdicted and restrained from commencing with the disciplinary hearing against Dan Nkuna, pending compliance with clause 6.11 of the Main Collective agreement: Disciplinary Code and Procedure, by firstly seeking the applicants' consent to the amendment of the time period and duration for the commencement and finalisation of the disciplinary hearing and/or by applying to the chairperson of the disciplinary hearing for amendment of the time period and duration for the commencement and finalisation of the hearing.

Background to the application:

- [2] Nkuna is employed by the First Respondent (Municipality) as a Chief Environmental Health Practitioner. On 25 July 2013 he was served with a notice to attend a disciplinary enquiry to answer to two allegations of misconduct. These related to his alleged failure or refusal to participate in the Individual Performance Management System, and also a refusal or failure to obey a lawful instruction. On 2 August 2013, the scheduled disciplinary enquiry was postponed. On the Applicants' version, there was no reason to postpone the enquiry and since that postponement, the enquiry never proceeded until Nkuna was informed that the enquiry would proceed on 30 January 2014.
- [3] On 30 January 2014 when the disciplinary enquiry was scheduled to commence, the Applicants had raised a point *in limine* to the effect that the disciplinary enquiry was convened irregularly and contrary to the provisions of clauses 6.3; 6.10 and 6.11 and annexure B: Item 7 of the Main Collective Agreement (The Main Agreement). The Second Respondent, who was the appointed chairperson of the enquiry had afforded the parties an opportunity to file their written submissions in respect of the points *in limine* by the next day, which they had done. The Chairperson had delivered his ruling on 31 January 2014 in terms of which he had ordered that the disciplinary enquiry should proceed on 12 and 13 February 2014. It does not appear from the ruling that the Chairperson had addressed the points *in limine* raised.

- [4] Having had regard to the above, and in bringing this application before the Court, the Applicants contended that since Nkuna was served with a notice of enquiry in July 2013, and since the hearing scheduled for 2 August 2013 did not commence on that date, and only for it to proceed on 30 January 2014, the Municipality had violated clause 6. 3, 6.10 and 6.11 of the collective agreement in that a reasonable period had elapsed from the time that the initial notice and the charge sheet were served on Nkuna. It was contended that the Municipality had failed to ensure that the hearing took place not earlier than five (5) days and not later than 15 (15) days from the date of service of the notice of misconduct as contemplated in clause 6.10 of the main agreement. To this end, it was contended that the Municipality should follow the provisions of clause 6.3 by approaching the SALGBC to seek condonation for non-compliance with the provisions of clause 6.10 of the agreement, before it can re-schedule the disciplinary enquiry.

The Respondents' response:

- [5] According to Hugh Mbatha, the Municipal Manager, the dispute arose after Nkuna and eight other employees were charged with various acts of misconduct. The disciplinary enquiry had proceeded on 2 August 2013 as scheduled and was postponed to 14, 15 and 16 August 2013. The enquiry however did not proceed on those dates and was re-scheduled for 29 August 2013. It had further taken place in October and November 2013 at which point the Municipality witnesses had testified. The enquiry was again scheduled to proceed on 9 December 2013. On 6 December 2013, SAMWU had brought an urgent application on behalf of Nkuna and eight others to interdict the continuation of the hearing. That matter was settled under case number J279/13, which settlement agreement was made an order of Court.
- [6] Mbatha further contended that if the Municipality had not complied with the provisions of the collective agreement as alleged, the applicants had an alternative remedy and could have approached the SALGBC. It was further contended that this application was not urgent, was an abuse of the court process, and that the applicants had not established the basis upon which the Court could interfere with the disciplinary hearing. Nkuna had according to

Mbatha, pleaded in the disciplinary enquiry, and it was not correct that the enquiry had not proceeded as alleged.

Evaluation:

- [7] The powers of this court to grant urgent interim relief and interdicts derive from the provisions of section 158 (a) (i) and (ii) of the Act. The Labour Appeal Court in *Booyesen v Minister of Safety and Security and Others*¹ explained the powers of this court in terms of these provisions in the following terms;

“...The Labour Court has jurisdiction to interdict any unfair conduct “including disciplinary action”. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the fact of each case. Among the factors to be considered would in my view be whether the failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive”.

- [8] It was common cause that the Applicants had initially brought an urgent application before this Court under case number J 2794/13 wherein an order was sought to interdict the Second Respondent in the present matter from continuing to be the Chairperson of the disciplinary enquiry. In that matter, the Applicants were cited as SAMWU obo Nkuna & 8 others. Wycliff Mabusela, who had deposed to the Applicants’ replying affidavit in this matter had averred that the relief that the Applicants sought in previous matter did not directly relate to Nkuna as he had not entered a plea at the disciplinary enquiry. In my view, this contention is clearly disingenuous in that there is no indication that Nkuna was in any form or manner excluded from the provisions of that settlement agreement which was made an order of Court. If this was the intention of the parties, provisions would have specifically been made in that settlement agreement.
- [9] Nkuna and others were charged with similar forms of misconduct on or about 25 July 2013. The disciplinary enquiry was initially scheduled for 2 August 2013 but was postponed. Further postponements occurred in August 2013 and the matter was set-down for 29 August 2013. As appears from an affidavit deposed to by Kennedy Nkosi, a SAMWU shop-steward in the matter under

¹ (2011) 32 ILJ 112 (LAC) at para 54

case number J2794/13, Nkuna took compulsory leave between 26 August and 24 September 2013. When the disciplinary hearing commenced on 29 August 2013, the case against Nkuna was separated from the others due to his absence. Nkosi further confirmed that at the hearing of 29 August 2013, the Municipality had called three witnesses to testify on its behalf and the matter was part-heard.

[10] On 10 October 2013, the Municipality had closed its case. Nkuna was present in that hearing and a request was made on his behalf that he should enter his plea and that all the other witnesses that had already testified should be recalled for his benefit. According to Nkosi, the Chairperson of the enquiry (Second Respondent) had not acceded to the request. In the light of the Chairperson's response, SAMWU had continued with the evidence of Nkuna under protest. Nkuna had led his evidence, was cross-examined and re-examined². In the light of Nkosi's averments, I fail to appreciate the reason Mabusela in his founding and replying affidavits would consistently and vigorously deny that the disciplinary enquiry against Nkuna had not commenced. The fact that Nkuna had not entered a plea does not imply that the enquiry had not commenced. In fact, as a disciplinary enquiry should not be conducted in the mould of criminal proceedings, the entering of a plea is not even a requirement. All that is needed is for the employer to spell out and clarify the charges preferred against an employee, and for the employee to be afforded an opportunity to respond to those charges.

[11] Clause 6.3 of Main Collective Agreement, upon which the Applicants heavily relied in bring this application provides as follows;

The Employer shall proceed forthwith or as soon as reasonably possible with a Disciplinary Hearing but in any event, no later than three (3) months from the date upon which the Employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC

Mr. Venter on behalf of the Applicants had submitted that the operative word in the above clause was "proceed" and that as Nkuna had not entered a plea

² See pages 63 to 65 of the Respondents' answering affidavit.

at the disciplinary enquiry, that enquiry could not have “proceeded” for the purposes of compliance with that clause. However, in the light of the conclusions reached above flowing from Nkosi’s averments, it is apparent that clause 6.3 is of no relevance, and does not come to the assistance of the Applicants. Even if it could be argued that not much weight should be attached to Nkosi’s averments to the extent that Nkuna had not entered a plea, it is clear from the plain reading of that clause that a disciplinary enquiry must be instituted within three months from the date upon which the Employer became aware of the misconduct.

[12] The Applicants’ case that the Municipality did not act in compliance with clause 6.3 cannot be sustainable in view of the sequence of events. As already indicated, Nkuna and others were charged on 25 July 2013 and an enquiry was scheduled for 2 August 2013. The misconduct in question took place in May and July 2013, and the enquiry was scheduled for 2 August 2013. It was not the case of the Applicants that there was a delay between the occurrence of the misconduct and the issuing of the notice of misconduct. Their complaint was that there was a delay between the postponement on 2 August 2013 and the re-scheduling of the matter on 30 January 2014. The Applicants however failed to take into account that had Nkuna not taken compulsory leave in the middle of the disciplinary enquiry, his matter would not have been separated from the other employees. It is therefore strange that the Applicants would complain about the delay in respect of Nkuna and allege non-compliance with the provisions of the main agreement, when the same complaint is not made in respect of the other eight employees whose disciplinary enquiry similarly took long.

[13] The Applicants by bringing this application not only failed to take the Court in its confidence but also abused the court process and were clearly opportunistic. These conclusions are based on the following considerations. On Mabusela’s version, since 2 August 2013, and until 30 January 2014, the enquiry had not proceeded. On Nkosi’s version however, the enquiry where Nkuna was present and had participated had taken place on 10 October 2013. It is strange that Nkosi and Mabusela would contradict each other on

such a crucial issue to their case. In my view, it is at the point of this contradiction that the Applicants' case should fall flat. The Court should thus take a dim view of the Applicants' approach to this matter. Furthermore, it is apparent that in bringing this application, the Applicants had with a clear intention to either stall the disciplinary enquiry or to completely avoid it, deliberately chosen to misinterpret the provisions of clause 6.3. of the main agreement. The provisions of clauses 6.10 and 6.11 are not even pertinent to this case for consideration by this Court. In the end, there is nothing exceptional about this application that would necessitate the intervention of the Court. As submitted on behalf of the Respondents, the nature of complaints that the Applicants have in respect of the disciplinary enquiry are procedural in nature, and disputes in that regard should be referred to the SALGBC. In the end, the Court should not have been burdened with this application.

Urgency:

[14] Notwithstanding the conclusions above, and further for the sake of completeness, I will deal with the question whether this application deserves to be treated with urgency. Urgent applications are dealt with in terms of Rule 8 of the Rules for the Conduct of proceedings in the Labour Court which provide that;

- “(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
- (2) The affidavit in support of the application must also contain-
 - (a) the reasons for urgency and why urgent relief is necessary;
 - (b) the reasons why the requirements of the rules were not complied with, if that is the case; and
 - (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted”.

- [15] The Labour Appeal Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*³ explained the requirements of Rule 8 as follows;

“Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules”.

- [16] It follows that an applicant seeking urgent interim relief must adequately and in detail, set out in his or her founding affidavit the reasons for the urgency. The basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court. (See *National Police Services Union v National Commissioner of the National Police Services and Others*⁴). As it was aptly put in *Vermaak v Taung Local Municipality*⁵;

“The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a Court to be placed in a position where the Court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the Court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.

- [17] I have had regard to the parties’ submissions in regards to whether the application should be treated as urgent or not. Based on the conclusions reached that the Applicants have clearly and deliberately misconstrued and misinterpreted the provisions of clause 6.3 for reasons already mentioned, it follows that the urgency which they allege is clearly self-created. Furthermore, the Applicants must have known about the disciplinary hearing scheduled for 30 January 2014 in advance. At no stage until that date did they raise any issue about non-compliance with the provisions of the Main Agreement. It was only when they had received an unfavourable outcome on the “*point in limine*” that they suddenly sought the intervention of this Court. Urgency in my view cannot arise simply out of an adverse finding in the process of a disciplinary

³ 2010 31 ILJ 112 at para 18

⁴ (1999) 20 ILJ 2408 (LC)

⁵ (JR315/13) [2013] ZALCJHB 43 (12 March 2013)

enquiry. In the circumstances, and as already indicated, the urgency alleged is clearly self-created, and this application is an abuse of the court process.

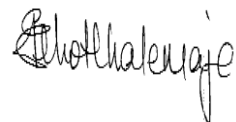
- [18] The complaints raised by the Applicants in respect of the disciplinary enquiry are merely procedural in nature, and they clearly have substantial remedy and redress in the SALGBC. There is no basis upon which the Court should conclude that if the matter is not treated as urgent, Nkuna will suffer irreparable harm. He should and must be subjected to a disciplinary enquiry like other employees. The circumstances surrounding the Applicants' complaints regarding the disciplinary enquiry are not unique or exceptional. Employees on a daily basis invariably complain about the unprocedural nature of disciplinary processes. Some employees however do take part in those supposedly unfair disciplinary enquiries under protest, wait for the outcome and then challenge it either at the CCMA or a Bargaining Council. In this case however, Nkuna took part in the enquiry under protest and before the enquiry could be concluded, had approached the Court for intervention. This conduct in my view constitutes an abuse of the Court process and should not be countenanced.

Costs:

- [19] A cost order is made following upon considerations of law and fairness. Throughout this judgment I have lamented the fact that this application was premised on a deliberate misinterpretation of clause 6.3 of the main agreement, was thus opportunistic and an abuse of the court process. Furthermore, there is no basis upon which the application should be treated with urgency. I have further considered the fact that in approaching the Court with this application, the Applicants failed to take it into its confidence when regard is had to averments made on behalf of the Applicants by Mabusela in this case as against those made by Nkosi in a matter involving the same parties under case number J 2794/13. The Court should take a dim view of such conduct and show its displeasure through a punitive cost order. To this end, the following order is made;

Order:

The application is dismissed with costs on attorney and own client scale.



Tlhotlhamajie, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv Venter

Instructed by: Maenetja Attorneys

For the Respondents: Mr. S July of Werkmans Attorneys