REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J892/2014

ZIXOLISILE FENI **Applicant**

and

PAN SOUTH AFRICAN LANGUAGE BOARD **First Respondent**

MXOLISI ZWANE **Second Respondent**

Heard: **22 April 2014**

Delivered: **24 April 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicant brought this urgent application to seek an order in the following terms;

1.1 "That the disciplinary proceedings initiated by the respondents against the applicant are stayed pending the resolution of dispute of occupational detriment referred by the applicant to the CCMA and after conciliation to the Labour Court; (pendete lite)" (Sic);

[2] The Applicant is currently employed by the First Respondent as its head of Legal services. There is a history of acrimonious litigation between the parties dating back to June 2010 when the applicant was first dismissed by the first respondent. He has since been retrospectively reinstated in his position. He is currently involved in numerous other matters against the respondents that are before this court. Amongst these are disputes under case number J2824/2013 pertaining to the alleged restructuring of his position and functions. That matter has not as yet been set-down. The second respondent was appointed by the Minister of Arts and Culture as the Caretaker CEO of the first respondent. The second respondent's appointment was the subject of litigation before the North Gauteng High Court in April 2013 under case number 6498/2012. The application to invalidate his appointment was apparently dismissed by that Court. There is however a similar application before this court under case number J157/2014.

Background:

[3] On 15 March 2014, the applicant made what he deemed to be a protected disclosure by sending correspondence to the office of the Public Protector wherein he requested an investigation into allegations of abuse of power by the respondents, irregular spending and non-payment of contributions towards employees' benefits. On 20 March 2014, the applicant was served with a letter of intention to suspend him on the grounds of serious and substantial breaches. He was invited to make representations as to the reasons he should not be suspended, which he duly did. The allegations against the applicant pertained to appearances at this court on various dates. It was alleged that he had represented persons who had brought cases against the first respondent instead of defending the respondents against such claims. It was also alleged that he had committed serious dereliction of duties.

[4] On 31 March 2014 the applicant approached this court on an urgent basis under case number J439/2014, and sought *inter alia*, a declarator to the effect that his suspension was unlawful. He sought reinstatement with immediate effect, and an order that the respondents be interdicted from initiating any

disciplinary proceedings against him. The court, per Van Niekerk J, struck the matter off the roll on account of lack of urgency.

[5] On 3 April 2014, the applicant was issued with a notice to attend a disciplinary enquiry scheduled for 25, 29 & 30 April 2014. It is these proceedings that the applicant sought to stay. The applicant's contention was that the second respondent in particular was pursuing the disciplinary proceedings against him after he had reported his (second respondent's) conduct to the Public Protector and the President. He had submitted that he had made a protected disclosure in good faith, and that the information he had disclosed was substantially true, and that had not made those disclosures for the purposes of gain. His main contention was that the charges levelled against him amounted to an occupational detriment as envisaged in the provisions of the Protected Disclosures Act 26 of 1999 (The PDA), and that the timing of the charges was a direct response and retaliation to the disclosures he had made.

[6] Having received a copy of a notice to attend the disciplinary enquiry through his attorneys of record, the latter had on 4 April 2014, sent correspondence to the first respondent in which *inter alia*, they confirmed receipt of the notice and made allegations of an occupational detriment. The applicant's attorneys of record had further indicated that a dispute pertaining to an occupational detriment was to be referred to the CCMA after which the matter would then be referred to this court. It was also pointed out that the validity of the charges were placed in dispute and a demand was made that the disciplinary enquiry be stayed pending the resolution of the dispute to the CCMA. Despite putting the first respondent on terms, no response was forthcoming.

[7] On 9 April 2014, a similar letter was sent to the first respondent by the applicant's attorneys' of record in terms of which an undertaking was sought by 12h00 on 10 April 2014 that the hearing would not proceed, failing which the applicant would approach this court. On 10 April 2014, the applicant referred a dispute to the CCMA. The relief he sought from the CCMA is *"Permanent stay of disciplinary proceedings*". On 14 April 2014 he filed a Notice of Motion and his Founding Affidavit in respect of this application.

The respondents' response:

[8] The respondents' contention was that this application dealt in substance with the same issues and the same relief as under the previous urgent application under case number J439/2014. To this end, it was argued that this application was *res judicata*. It was further submitted that the only new issue arising is the referral of a new dispute to the CCMA based on the occupational detriment in terms of the PDA. It was however submitted that this issue was also canvassed by the applicant under case number J439/2014. The respondents have further argued that the application is not urgent; that the applicant has not established a clear right for the relief he seeks; that he has an adequate alternative remedy; and has not or will not suffer irreparable harm.

Is the matter res judicata?

[9] The requisites for the exception *res judicata* are stated by Hoffman and Zeffertt[1] as follows:

> '…it is now trite that to succeed in the defence of *res judicata*, the defendant in civil proceedings has to establish that a prior final judgement had been given in proceedings involving (a) the same subject matter, (b) based on the same res or thing, (c) between the same parties, or, put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to proceed against the other on the same cause, for the same relief, can be met by the exception *res judicata*.'

[10] In *Huisman and Another v Lakie and Others*[2] Plasket J held that;

> In strict terms, a plea of res judicata may be raised when, one dispute having been terminated (by an order that is final in effect), another is set in motion and both involve the same parties, concern the same thing and the same cause of action. In Prinsloo *NO* & others v Goldex 15 (Pty) Ltd & another [2012] ZASCA 28 (28 March 2012), Brand JA set out the position thus:
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> > 'The expression *"res judicata"* literally means that the matter has already been decided. The gist of the plea is that the matter or

[1] The South African Law of Evidence, 4th Ed, at 337
[2] (3248/10) [2014] ZAECGHC 1 (9 January 2014) at para 19

> question raised by the other side has been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the exception was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (idem actor, idem res et eadem causa petendi).'

[11] A party to proceedings may raise *res judicata* only if the matter has been heard by a competent court, which has made a final and definitive judgment or order on the merits of the matter, and as such the order should be immune from variation or review because of changed circumstances[3].

[12] In the applicant's written heads of argument in respect of the application under J439/2014, one of the issues identified for determination by the court was whether the applicant's suspension does not amount to an occupational detriment or not. In the present application, the same issue as to whether there has been an occupational detriment was also raised in the applicant's written heads of argument. The applicant's contention was that the issues were different in that the first application dealt with the issue of the suspension and intended disciplinary enquiry, whilst the second application dealt with the staying of the disciplinary enquiry pending resolution of the dispute by the CCMA or alternatively a determination by this court.

[13] The allegations surrounding the applicant being subjected to an occupational detriment were made in respect of the two applications. Furthermore, the same submissions as to the reason the applicant should not be suspended were also raised as to the reason he should not be subjected to a disciplinary enquiry. As it was correctly pointed out on behalf of the respondents, the applicant invoked the provisions of the PDA in respect of interdicting the disciplinary proceedings and the seeking the upliftment of his suspension in respect of the first application, as he has done in seeking the stay of the disciplinary proceedings in this application. Even though there are vast similarities between the two causes of action, and further even though the

[3] *Le Roux v Le Roux* 1967(1) SA 446 AD at 463

court should be averse to entertaining the same disputes being brought by parties after they were previously before the same court, ultimately, the court's hands will be tied where the first application was simply struck off the roll on account of lack of urgency.

[14] In essence, Van Niekerk J did not make a final and definitive judgment or order on the merits of the matter. This implies that the applicant can re-enroll that matter on the ordinary roll for its merits to be dealt with. To this end, it is concluded that the defence of *res judicata* as raised by the respondents is not sustainable. The argument that Van Niekerk J had ruled the first application was not urgent and it therefore followed that this application is not equally urgent can also not be sustained in that there are factual differences between the basis of the urgency advanced in the first application and those advanced in this application as shall be illustrated below.

Urgency:

[15] The second respondent denied that the application before the court was urgent based on the very same reasons advanced in the urgent application under J439/2014. It was further submitted that this application was premature and in bad faith, and that it was up to the chairperson of the disciplinary enquiry to consider an application for a postponement by the applicant on 25 April 2014. The second respondent also denied that the applicant was being subjected to an occupational detriment, and that the disciplinary enquiry against the applicant was unrelated to his alleged protected disclosure. It was contended that the allegations against the applicant were triggered by his conduct as a legal officer of the respondent, and that the applicant had not explained the reason he had not instituted a dispute based on the PDA from the onset instead of at this late stage. To this end, it was further submitted that the allegations in respect of the PDA are an afterthought, opportunistic and an unjustified attempt to prevent the disciplinary hearing from proceedings.

The legal framework in respect of urgency:

[16] In order for an applicant to be successful in an application for an interim interdict he/she must establish the following:

a) A *prima facie* right, even though open to some doubt;
b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;
c) absence of an alternative remedy;
d) a balance of convenience in favour of granting the interim relief.

[17] In view of the discretionary nature of an interim interdict, these requisites should not be judged in isolation, but in interaction with each other[4]. Harms explained this discretion in the following manner[5]:

> "A court always has a wide discretion to refuse an interim interdict even if the requisites have been established. This means that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision, and not that the court has a free and unfettered discretion. The discretion is a judicial one, which must be exercised according to law and upon facts. On the other hand, a court has no discretion to grant an interim interdict if the requirements have not been established."

[18] Before dealing with the question whether the applicant has satisfied the requirements of the nature of relief he is seeking, the first hurdle he has to surmount however is to convince the court that indeed the matter before it deserves urgent attention. An applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the rules of this Court. This much can be gleaned from Rule 8 of the Rules of this Court which provides that:-

> "(2) The affidavit in support of the application must also contain-
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> (a) the reasons for urgency and why urgent relief is necessary;
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> (b) the reasons why the requirements of the rules were not complied with, if that is the case ..."

[4] See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A)
[5] Civil Procedure in the Supreme Court (page A-43)

[19] Whether a matter is urgent involves two considerations. The first is whether the reasons that makes the matter urgent, have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. Thus, the applicant must satisfy the court that if the matter is not treated as one of urgency, something drastic is likely to happen[6].

[20] Amongst the fundamental principles relating to urgency is that when an application is brought on that basis, the institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. In this case, it was common cause that on 20 March 2014, some five days after the applicant had made a disclosure, he was issued with a notice of intention to suspend him. In his representations as to the reason he should not be suspended, the applicant had raised a whole range of issues and in respect of the alleged protected disclosure, he merely deemed it to be "curious" that he would report the second respondent to the public protector and thereafter be placed on precautionary suspension.

[21] On 31 March 2014, the applicant launched an urgent application under case number J439/2014, which was heard and struck from the roll on 3 April 2014 as already indicated above. On 3 April 2014, the applicant was issued with a notice through his attorneys of record to appear at a disciplinary enquiry. This application was only filed on 14 April 2014. On 10 April 2014 the applicant referred a dispute to the CCMA, and that matter has since been set down for 2 May 2014.

[22] Other than the letters of 4 and 9 April 2014 sent to the first respondent requesting a postponement, there is no explanation from the applicant as to the reason that he did not immediately approach the court after he was issued with a notice to appear at the disciplinary enquiry. The letters of 4 and 9 April 2014 and lack of response thereto cannot serve as an excuse for not filing this application immediately after he was served with the notice to attend the disciplinary enquiry. In any event, those letters merely served as complaints and a demand to postpone the disciplinary proceedings. The respondents were correct in their approach in contending that only the chairperson of the

[6] *Vermaak v Taung Local Municipality* (JR315/13) [2013] ZALCJHB 43 (12 March 2013) at para 12.

disciplinary enquiry could make a decision as to whether to grant the postponement or not. To the extent that the applicant persisted in seeking a postponement from the respondents, and further to the extent that he had not acted in due haste in bringing this application, it is concluded that the urgency which he now alleges is self-created.

[23] During argument, I had pointed out to Mr. Faku on behalf of the applicant that the mere fact that the disciplinary enquiry was scheduled to commence from 25 April 2014 was not sufficient on its own to establish urgency. His main contention however was that firstly, the matter was urgent on the basis that there was reason to believe that the applicant would not get a fair hearing in view of the history surrounding his previous dismissal by the first respondent. In the applicant's view, as also gleaned from his pleadings, he had a reasonable apprehension of harm if the enquiry proceeded as it was just a window dressing exercise to dismiss him. He contended that this would have a detrimental impact on him, as a dismissal would prejudice his reputation, advancement, job security and fulfilment. It was also submitted on his behalf that the matter was urgent as he had made a protected disclosure.

[24] I took issue with the unsubstantiated contention that the intended disciplinary enquiry would be a sham or that the applicant had reason to believe that he may not be accorded a fair hearing. The applicant seems to rely on the events of June 2010 when he was dismissed by the first respondent in his absence. Those events cannot be the basis for a conclusion to be made that the new disciplinary enquiry to be held on 25 April 2014, with a new chairperson and new set of circumstances, would lead to the same results. The applicant was furnished with a detailed "charge sheet" which spelt out his rights in clear terms and indicated who the chairperson and the initiator would be. He has had ample opportunity to prepare for that enquiry since the notice to attend the enquiry was issued. There are no urgent or special circumstances obliging the court to intervene or interfere with that process. As already indicated, the fact that the enquiry will take place on a particular date is not on its own a factor that can persuade the court to treat the matter as urgent. Inasmuch as an employee is entitled to fair labour practices, the employer is equally

entitled to institute discipline in the workplace, and the courts should be weary to interfere with those processes.

[25] The applicant also contended that the urgency was further based on the fact that if dismissed, this would have a detrimental impact on him as his reputation will be prejudiced, that his advancement, job security and fulfilment will be prejudiced. These factors are unfortunately the invariable consequences of a dismissal which are suffered by a multitude of employees on a daily basis having gone through a disciplinary enquiry. However, these employees all await their turn in the litigation queue, and follow all dispute resolution mechanisms provided in the Labour Relations Act.

[26] In *Radinaledi Josiah Mosiane v Tlokwe City Council*[7], Francis J had lamented the abuse of the court process by well-heeled individuals in the following terms:

> "A worrying trend is developing in this Court in the last year or so where this Court's roll is clogged with urgent applications. Some applicants approach this Court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief on an urgent basis"[8].
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> And,
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> "All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the

[7] (2009) 30 ILJ 2766 (LC)
[8] At para 15

> relevant Bargaining Councils and then approach this Court for the necessary relief. Other employees would still approach this Court for relief in the ordinary manner and not on an urgent basis[9]."

[27] The above sentiments are wholly apposite in this case. Whilst it is acknowledged that this Court is a creature of the Labour Relations Act and designed to achieve the objectives of that legislation, its processes are nevertheless not there for the taking or abuse. But for the fact that the application under J439/2014 was struck off the roll, the applicant was unrelenting and had deemed it appropriate to bring a similar application within 14 days of the first application having been struck off. In arguing that the matter was urgent, he had in the words of Francis J, approached this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. Not only were the arguments advanced fanciful but they were so presumptuous and unreasonable that it is clear that the applicant is desperate to avoid or prevent the disciplinary enquiry from taking place. As already indicated, this court cannot be abused for those ends. Furthermore, it needs to be stated that the applicant has already referred a dispute to the CCMA. That matter is set down for 2 May 2014. Thus other than the alternative remedy to be found in respect of that process, the applicant still has the option of the internal disciplinary enquiry which he is so desperately attempting to circumvent. Accordingly, the matter should be struck off the roll on account of lack of urgency.

Costs:

[28] This court will order costs having taken into account considerations of law and fairness. The general approach that should be followed by courts in considering the aspect of "fairness" is that costs do not automatically follow the result, unless there are special or exceptional circumstances justifying a costs order. Conduct including *mala fides*, unreasonableness and frivolousness has been found to be factors justifying the imposition of a costs order[10].

[9] At para 16 [17]
[10] *Chevron Engineering (Pty) Ltd v Nkambule & Others* 2004 (3) SA 495 (SCA) para 42.

[29] In the light of the conclusions and comments already made in regard to the aspect of urgency, it is also my view that the applicant should be saddled with the costs of this application. In approaching the court after the respondents had not acceded to his request to postpone the disciplinary enquiry when he could have simply approached the chairperson of the enquiry on the hearing date, the applicant clearly acted unreasonably. His alleged apprehension that he may not get a fair hearing was clearly imagined and not supported by any discernible facts. In my view, it would be unfair to burden the respondents with legal costs in circumstances which such costs could clearly have been avoided.

Order:

i. The application is struck off from the roll on account of lack of urgency.
ii. The applicant is ordered to pay the costs of this application.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. T. Faku of Faku Attorneys
For the Respondents:	Adv. L Nowosenetz
Instructed by:	MB Mokoena Attorneys