



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**CASE NO J 897/14**

Not reportable

Of interest to other judges

In the matter between:

**WISANI EVIDENCE NGOBENI**

Applicant

and

**MINISTER OF COMMUNICATIONS**

First Respondent

**DG: DEPT OF COMMUNICATIONS**

Second Respondent

**Application heard: 29 April 2014**

**Judgment delivered: 30 April 2014**

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**JUDGMENT**

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**VAN NIEKERK J**

Introduction

- [1] This is an urgent application in which the applicant seeks an interim order *inter alia* interdicting the respondents from proceeding with any disciplinary action

against him, pending the conciliation of an unfair labour practice dispute between the parties that has been referred to the General Public Service Sectoral Bargaining Council and failing a successful conciliation, pending adjudication by this court.

- [2] In an amended notice of motion filed before the hearing of the present application, the applicant sought also to interdict the respondents on the same basis reflected above, pending an application for leave to appeal filed under case number J08\14 and if leave to appeal is granted, pending a final determination of the appeal by the Labour Appeal Court.

#### Material facts

- [3] I do not intend to burden this judgement with a repetition of the facts relevant to the application. These are recorded in the affidavits filed by the parties, and much of the background to the dispute between them is captured in the judgment delivered via my brother Tlhothalemaje AJ on 3 April 2014. In that judgment, the court dismissed, with no order as to costs, an application in which the applicant in the present proceedings sought a declaratory order to the effect that certain disclosures made by him were protected by the Protected Disclosures Act (PDA) and that the respondents should be interdicted and restrained from subjecting him to any occupational detriment. It is not disputed that at that stage, the respondent had made allegations of misconduct against the applicant and that he had been requested to furnish reasons as to why he should not be suspended.
- [4] In its judgement, the court held that the applicant had established that he made a protected disclosure, in good faith. However, the court dismissed the application on the basis that the pending disciplinary action against him did not constitute an occupational detriment. In so finding, the court effectively held that the applicant had failed to establish any causal connection between the disclosure and the pending disciplinary action. The court's conclusion appears to be found in paragraph [74] of the judgment in which the court said the following:

‘In summary, the applicant has demonstrated that he has made a protected disclosure, which disclosure was made in good faith. The applicant is however not entitled to the relief he seeks in view of the failure to establish the requirements of the relief that he seeks to the extent that it was found that the intended disciplinary action will not constitute an occupational detriment, that he has not established what irreparable harm he would suffer, and that he has alternative remedies.’

- [5] In this regard, the court found *inter alia* that the applicant would be entitled to rebut the allegations against him at the pending disciplinary enquiry, and that he was in any event entitled to refer any dispute concerning an alleged dispute concerning an occupational detriment to the bargaining council for conciliation and thereafter, should conciliation fail, to this court for adjudication.
- [6] It should be observed that the order of the court was in the nature of final order in which the court specifically ruled that the intended disciplinary action against the applicant did not constitute an occupational detriment and that the respondents were entitled to institute disciplinary proceedings against the applicant (at paragraph [71]). I do not read the judgment to mean, as the applicant contends, that the application was dismissed only because the court found that a mere threat of disciplinary action did not meet the requirements for a final interdict. It seems to me, from the reading of the judgment, that the court was not satisfied that there was a causal nexus between any disclosure made by the applicant and an occupational detriment in the form of disciplinary proceedings that the respondent sought to institute. For this reason primarily, the application was dismissed and the applicant cautioned to appear at the disciplinary hearing and answer the allegations made against him.
- [7] After the delivery of the judgment on 10 April 2014, the applicant was handed a notice of a disciplinary hearing, and notice of a possible precautionary suspension pending that hearing. In terms of the notice of the disciplinary hearing, the applicant was called upon to appear before a hearing on 25 April 2014 to answer to 5 charges of misconduct. On the same day, the applicant filed

an application for leave to appeal against the judgment of Tlhotlhemaje AJ. On 11 April 2014, the applicant was suspended from his employment on full pay. On the same day, the applicant referred a dispute to the bargaining council, contending that is being subjected to disciplinary action constituted an occupational detriment for the purposes of the PDA and thus an unfair labour practice. In the referral, the applicant sought an outcome in terms of which the respondents would be prohibited from proceeding with any disciplinary action against him and his suspension uplifted.

### The issue

- [8] The primary defence raised by the respondent in the present proceedings is averred to the application to interdict the disciplinary hearing is *res judicata*. In this regard, the respondents contend that the applicant has previously referred a dispute regarding the same facts seeking to declare, amongst other things, the same disciplinary proceedings to constitute an occupational detriment. In *Nestle (SA) (Pty) Ltd v Mars Inc.* 2001 (4) SA 542 (SCA), the Supreme Court of Appeal said the following:

‘The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principal which is that they should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must be brought to its conclusion before the tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally’.

- [9] In *Dumisani & another v Mintroad Sawmills (Pty) Ltd* (2000) 21 ILJ 125 (LAC), the Labour Appeal Court held that ‘it is against public policy that a litigant should on the same grounds be able to keep demanding the same relief from the same adversary’ (See paragraph [6] of the judgment).

## Analysis

- [10] For a defence of *res judicata* to succeed where that defence relies on an earlier judgment, it is incumbent on the body claiming *res judicata* to show that there has already been prior judgment, in respect of the same parties and in which the same point was at issue. There is no dispute that the judgment of Tlhotlhalame AJ is a prior judgment that concerned the same parties. The applicant submits that the judgment does not concern the same issue since the applicant now seeks interim as opposed to final relief pending the outcome of unfair labour practice proceedings now instituted and secondly, that in the previous application, no charges had been presented to him, whereas in the present instance, he has been furnished with charges and a disciplinary hearing has been convened.
- [11] I deal with the second point first. In the application that previously served before this court, the applicant, as I have indicated above, contended that the disciplinary proceedings that the respondents intended to convene, constituted an occupational detriment. The respondents have now convened that enquiry. The disciplinary action that the applicant seeks to interdict is the same disciplinary action on which the court has already pronounced. I am not persuaded by the applicant's submission that there is a material difference for the purposes of the definition of an 'occupational detriment' in that in the application previously before the court, disciplinary proceedings were pending whereas they are now the subject of specific charges. It is clear from the terms of the judgment referred to above that at least some of the specific allegations of misconduct which related to the pending disciplinary proceedings have been incorporated into the charges now brought against the applicant. In so far as these proceedings concern an application for an interim order, I fail to appreciate how it can be said that for the purposes of a plea of *res judicata*, the suit is any different. While it is true that in the present application the applicant need only establish a prima facie right, I fail to appreciate how this can be accomplished in the face of a prior factual finding that the disciplinary proceedings that the

respondents intended to initiate against the applicant were not causally linked to any disclosure that he may have made. In my view, in these circumstances, the requirements of a defence of *res judicata* have been met and the present application stands to be dismissed on that basis.

- [12] In these circumstances, it is not necessary for me to consider any of the further submissions made by the respondent, but for that concerning the amendment to the applicant's notice of motion. That amendment, as stated above, seeks to interdict the disciplinary proceedings pending the outcome of the application for leave to appeal against the judgment of Tlhotlhamaje AJ. In *Constantines v Jockey Club od SA* 1954 (3) SA 35 (C), Herbststein J held that where in a main application the court had found that the applicant had not made a case for an interdict, there would be no point in granting the applicant an interim interdict pending the outcome of any appeal proceedings. Since the applicant was not successful in his attempt to interdict the respondents from proceeding with the disciplinary action against him, in my view, he cannot seek an interim interdict pending an appeal against that decision. To the extent that the court may be entitled to entertain such an application (see *Indwe Aviation v Petroleum Oil and Gas Corporation of SA* (2) 2012 (6) SA 110 (WCC)), the applicant has failed to establish that he will suffer irreparable harm should the application not be granted. The applicant has referred a dispute concerning both his suspension and the institution of disciplinary proceedings to the bargaining council, and he has the right to refer those disputes to the appropriate forum, in due course, should those disputes remain unresolved. Further, the applicant has alternative remedies available to him, both in the form of the avenues open to him in the statutory dispute resolution process and specifically, the range of remedies (some of which may be ordered to operate with retrospective effect) that will be available to the applicant should he ultimately succeed.
- [13] In so far as the unfair suspension dispute referred to the bargaining council is concerned, the parties agreed (correctly) that the outcome of the present

application in relation to the disciplinary proceedings underway would dictate the outcome of that element of the relief sought.

- [14] Finally, in relation to costs, this court is traditionally reluctant to make orders for costs in cases where individual employees seek to pursue grievances against the employers in good faith. The potential threat of an order for costs order not to have the effect of closing the doors of this court to such persons. However, in the present instance, I must necessarily be reminded that this is not the first occasion on which the applicant has brought the respondents to court in relation to preliminary issues concerning the allegations of misconduct made against him. Given the fact that the applicant has chosen to seek interim relief in respect of the matter in which final relief has already been refused, in my view, the institution of these proceedings was unreasonable and an abuse of the process of this court. In the exercise of the broad discretion conferred on the court by s162 of the LRA, there is no compelling reason why costs should not follow the result

For the above reasons, make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK  
JUDGE OF THE LABOUR COURT

#### APPEARANCES

For the Applicant: In person

For the First and Second Respondents: Adv. T Venter instructed by the State Attorney