



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1396/15

ROBERT MCBRIDE

Applicant

and

THE MINISTER OF POLICE

First Respondent

P.L. MOKOENA *N.O.*

Second Respondent

Heard: 23 July 2015

Judgment: 24 July 2015

Summary: Urgent application for an interim order staying a disciplinary hearing pending the outcome of a constitutional challenge.

JUDGEMENT

AC BASSON, J

- [1] This is an urgent application in terms of which the applicant seeks to interdict the disciplinary proceedings that the first respondent ("the Minister") has instituted against him and scheduled to take place on 27 July 2015 pending the final determination of a constitutional challenge in the High Court of the Minister's statutory powers to unilaterally suspend, discipline and remove the Executive Director of IPID from office.
- [2] Due to the constraints of the urgent court, I have indicated to the parties that I will only give brief reasons for my order.
- [3] At the outset, I should point out that the applicant, in addition to the application to interdict the disciplinary enquiry from proceeding, also sought an order reviewing and setting aside the ruling made by the second respondent (the appointed chairperson of the disciplinary enquiry) to dismiss the applicant's application to stay the disciplinary proceedings. I have indicated to the parties that I do not intend to entertain the review application of the decision made by the second respondent on an urgent basis. The applicant has also since abandoned its attack on the lawfulness of the appointment of the second respondent as the chairperson of the disciplinary hearing
- [4] The High Court has already set down the applicant's constitutional challenge by special allocation on an expedited basis for hearing on 27 and 28 August 2015. This constitutional challenge is contained in Part B of the application that served before the High Court (per Fabricius, J) in terms of which the applicant had sought to interdict his impending suspension. Fabricius, J struck Part A off the roll but held that the application in due course under Part B (the constitutional challenge) is not without merit. In his judgment, Fabricius, J expressed the view that the constitutional challenge bears reasonable prospects of success:

[7] I do not intend dealing with the likelihood or otherwise of the relief sought in part B of this application be granted or not. However, the ease mirrored in the submission that these type of bodies should be independent, but at the same time and also aware of the fact that independence is one of degree, depending upon the relevant context of the legislation applicable....

Also, to prevent abuse of power, which is obvious and sadly part of human nature, someone has to guard the Guardian. “*quis custodiet ipsos custodies*” the Roman poet Juvenal asked in one of his Satires. I am merely mentioning this because I do believe that part B is arguable, and it does have reasonable prospects of success. That is in my view one of the requirements in the present context having regard to the test laid down in *Airoad Express (Pty) Ltd v Chairman Local Road Transportation Board Durban* 1986 (2) SA 663 (AD).¹

- [5] Before turning to the merits of this application, it is important to point out that the applicant does not seek to avoid disciplinary action being taken against him. In this regard, the applicant has made it clear that he is prepared to face disciplinary action provided that the disciplinary proceedings take place in accordance with the law and the Constitution. The applicant further states that should his constitutional challenge succeed, an order would be sought which would empower Parliament as opposed to the Minister to institute disciplinary proceedings against him should it wish to do so and determine whether to remove him from office. However, because the current disciplinary process fails to meet the requirements of the law and the Constitution, the process, so it was submitted, is unlawful and unconstitutional.
- [6] At the outset, it should be pointed out that it is this Court's view that an employer has the right to discipline employees.² However, such a right must be exercised in a lawful and fair manner. In the present instance, the applicant is submitting that the present statutory regime and disciplinary proceedings fail to meet the requirements of the law and the Constitution and, therefore, submits that the disciplinary process should be interdicted pending the outcome of the constitutional challenge. Although I am of the view that the disciplinary enquiry should be interdicted pending the outcome of the constitutional challenge, this order should not be read to have the effect of shielding the applicant from any future disciplinary proceedings. The employer retains its right to discipline once the constitutional challenge has been pronounced upon.

Urgency

¹ Case No: 6588/15, North Gauteng High Court, Pretoria at para 7.

² *Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC).

- [7] It is trite that an applicant seeking urgent relief must satisfy the Court that the matter must be dealt with on an urgent basis, and that the urgency is not self-created.³ It was submitted on behalf of the respondent that the present application is not urgent and that it should, therefore, be struck off the roll. It was also submitted on behalf of the respondent that the application constitutes an abuse of court processes.
- [8] On behalf of the applicant, it was submitted that the matter is urgent for the following reasons: Prior to launching this application, the applicant has unsuccessfully applied to the second respondent to stay the disciplinary proceedings and to challenge the lawfulness of his appointment. The chairperson gave his decision on these two issues on 14 July 2015. This urgent application was instituted on 16 July 2015 (merely two days later) It was submitted that the applicant, therefore, only instituted these proceedings after exhausting the alternative remedy available to him by first approaching the chairperson for a stay of the disciplinary proceedings pending the outcome of the constitutional challenge. The disciplinary proceedings that the Minister has instituted against the applicant are due to proceed on Monday, 27 July 2015. It was, therefore, submitted that the urgent application could only have been brought after the applicant has exhausted his internal remedies. The urgency is, therefore, not, according to the applicant, self-created.
- [9] I am not persuaded that urgency in this matter is self-created. In this regard, I am in agreement with the principle that a party should exhaust alternative remedies before approaching this Court on an urgent basis. It was appropriate in these circumstances to have approached the chairperson first prior to approaching this Court. I have also taken note of the fact that the application was brought within two days after the chairperson handed down his decision.
- [10] In the event, that I am persuaded that the matter is urgent.
- [11] Before I turn to a discussion of the merits, it is necessary to briefly deal with the following two points raised during argument.

³ *Mashiya v Sirkhot NO and others* (2012) 33 ILJ 420 (LC) at para 16.

Should this Court grant an order which has the effect of suspending the operation of legislation?

[12] The point was made that this Court should not grant an order which has the effect of suspending the operation of legislation. I disagree. This Court does have the power to grant an interim interdict pending a constitutional challenge provided that it does so only in exceptional circumstances. As was pointed out by the Court in *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute For Democracy in South Africa and Another As Amici Curiae)*,⁴ the court will only grant interim relief to the extent that it interferes as little as possible with the operation of the legislation and only where it is strictly necessary in the interest of justice to do so:

[32] From the foregoing, we would hold that:

- (a) It is not necessary in this case to decide whether a High Court has jurisdiction to grant interim relief the effect of which is to suspend the operation of national or provincial legislation.
- (b) A High Court has jurisdiction to grant interim relief designed to maintain the *status quo* or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature.
- (c) Such interim relief should only be granted where it is strictly necessary in the interests of justice. That is the constitutional standard provided in ss 80(3) and 122(3) of the Constitution and should also apply in cases such as those presently under consideration.
- (d) In determining the interests of justice, the Court must balance the interests of the person seeking interim relief against the interests of others who might be affected by the grant of such relief.

⁴ 2003 (1) SA 472 (CC) at para 32.

- (e) The interim relief should be strictly tailored to interfere as little as possible with the operation of the legislation and all the more so where the legislation relates to an amendment to the Constitution.’(footnote omitted)

Should this Court intervene in incomplete disciplinary proceedings?

[13] The further point was raised that the Labour Court should not intervene in incomplete disciplinary proceedings. It is clear from various cases that the Labour Court is not precluded from intervening in incomplete disciplinary proceedings provided that the court will only in exceptional circumstances. What these exceptional circumstances are is left to the discretion of the Court. In this regard, the Labour Appeal Court in *Booyesen v The Minister of Safety and Security*⁵ made it clear that this Court has the power to intervene in incomplete disciplinary proceedings to prevent a serious injustice. The Court will therefore only intervene “in exceptional cases”.

‘It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would... be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.’⁶

[14] The Labour Appeal Court further expressly rejected the notion that judicial oversight of the conduct of disciplinary proceedings would necessarily be “costly, time consuming, disruptive and [a] duplication of proceedings” and recognised the fact that judicial intervention may in fact prove to be time-saving and less costly:

‘... judicial intervention may prove to be time saving and less costly if the process is not proceeded with. It may also prevent costly litigation. The very fact that the Labour Court has the power to issue interdictory relief suggests that the legislature was aware that the exercise of such power might interfere with the freedom of employer’s to contract and the employer’s business in deserving cases.’⁷

⁵ *Booyesen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC); (2011) 32 ILJ 112 (LAC).

⁶ *Ibid* at para 54.

⁷ *Ibid* at para 51.

[15] The LAC in *Booyesen* also specifically endorsed the decision by the Labour Court in *Mortimer v Municipality of Stellenbosch and Another* (footnote omitted) where the court held as follows:⁸

Where a person in truly extraordinary circumstances (...) approaches the Labour Court on the basis that a disciplinary inquiry was for instance, about to commence or was conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in law the enquiry, I have little doubt that the Labour Court would in law exercise these powers to stop it.⁹

[16] In principle, therefore, there exists no absolute bar against this Court exercising a discretion to intervene in incomplete disciplinary proceedings provided that exceptional circumstances exist. I will return to the question whether this Court should intervene in the applicant's disciplinary hearing where I consider the question whether the applicant has satisfied the requirements for an interim interdict.

Requirements for an interim interdict.

[17] It is trite that the four requirements for interim relief are the following:

- 18.1 the existence of a *prima facie* case (or at least one open to some doubt);
- 18.2 a well-grounded apprehension of irreparable harm;
- 18.3 there must be no other satisfactory remedy; and
- 18.4 the balance of convenience must favour an interim interdict.¹⁰

Prima facie right

[18] The *prima facie* right on which the applicant relies on is the right to lawful disciplinary proceedings and the right to disciplinary proceedings that are

⁸ *Ibid* at para 53.

⁹ *Mortimer v Municipality of Stellenbosch and Another* (18243/2003) 2008] ZAWCHC 306 (27 November 2008).

¹⁰ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691C-G; *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 372E – G.

constitutionally valid. According to the applicant, this right is threatened by the unconstitutional exercise of unilateral power by the Minister in taking disciplinary action against the applicant and by virtue of the fact that the proceedings are not subjected to Parliamentary oversight. I have already indicated that the High Court has expressed the view that the applicant's constitutional challenge against the Minister's unilateral disciplinary powers has reasonable prospects of success.

[19] I am mindful of the fact that the constitutional challenge is pending before the High Court and that it would be inappropriate for this Court to make any findings in respect of the constitutional issues that are pending before the High Court. The only question before this Court is whether the applicant has a *prima facie* right to the protection of the right to a lawful and properly constituted disciplinary enquiry. I have already referred to the fact that the applicant is submitting that this right is threatened by the unconstitutional exercise of unilateral power by the Minister in taking the disciplinary action against him. The constitutional challenge to be launched is supported by two prospective *amici curiae* (one which is the *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) 2015 (2) SA 1 (CC)). The prospects in the constitutional challenge turn on a question of law.

[20] I have perused the heads of argument that have been filed on behalf of the applicant in the constitutional challenge. I am of the view that the legal basis for the contention that the Minister's power to subject the applicant to a disciplinary enquiry has reasonable prospects of success. The applicant has therefore, in my view, succeeded in establishing a *prima facie* right. Moreover, in the context of labour law the applicant has, at the very least, a right to a lawful and fair disciplinary enquiry. Although I have concluded that the applicant has a *prima facie* right to the relief sought, the question still remains whether this constitutes exceptional circumstances which warrant this Court to interfere in incomplete disciplinary proceedings.

[21] I have already referred to the fact that, in principle this Court may intervene in incomplete disciplinary enquiries provided, as already indicated, that exceptional circumstances exist. In this matter, the applicant seeks to interdict a disciplinary enquiry on the basis that there is a pending constitutional challenge against the

Minister's statutory powers to unilaterally discipline him as executive director of Independent Police Investigative Directorate ("IPID"). This constitutes, in my view, exceptional circumstances. What makes this matter further exceptional is the allegation that the present disciplinary enquiry will infringe the constitutional independence of IPID and will infringe the applicant's right to a lawful disciplinary enquiry. I have already referred to the fact that the applicant is alleging that he has a *prima facie* right to a disciplinary enquiry that is instituted by Parliament and not by the Minister.

[22] This case is, therefore, an exceptional one and I am of the view that the failure to intervene would lead to a grave injustice. In this matter, the applicant is the Head of a national corruption-fighting body - the IPID – which is expressly required under s 206(6) of the Constitution¹¹ to be "independent" – being subjected to a disciplinary inquiry that is in all likelihood unconstitutional constitutes a violation of that independence. The High Court has already found that the applicant's constitutional challenge against the Minister's statutory power to unilaterally discipline him (as the Executive Director of IPID), has "reasonable prospects of success". The High Court has thus already found that the applicant has a *prima facie* right to a disciplinary inquiry that is instituted by Parliament and not by the Minister. I have perused the judgment by Fabricius, J and I am in agreement with his views. There is, in my view, at least a reasonable possibility that the conduct of the disciplinary inquiry will infringe upon the constitutional independence of IPID and will infringe on the applicant's right to a lawful disciplinary inquiry.

[23] In the event that it is concluded that the applicant has succeeded in establishing a *prima facie* right and that exceptional circumstances exist warranting this Court to intervene in an incomplete disciplinary hearing.

Irreparable harm

- [24] Linked to the question whether the applicant has established a *prima facie* right is the question of a well-founded apprehension of irreparable harm and prejudice should the relief not be granted.
- [25] In this regard, the applicant has raised the following four points: Firstly, there is a constitutional challenge pending in the High Court which is directed at challenging the constitutional validity of the powers that the Minister has relied upon to institute the disciplinary proceedings against the applicant. It follows, so it was submitted, that should the applicant be successful in the constitutional challenge, the disciplinary process, irrespective of the outcome thereof will fall to be declared invalid and set aside. This in turn could mean that the proceedings will have to commence afresh in terms of the provisions of section 17DA (3) to (7) of the SAPS Act.¹²
- [26] Should the disciplinary proceedings be declared invalid and set aside, a new disciplinary process will in all likelihood have to be reinstituted against the applicant. The applicant thus faces the extraordinary prospect of duplicate disciplinary proceedings which in turn will have severe financial consequences for him. Should the present disciplinary hearing, therefore, be allowed to proceed, all parties involved will have incurred wasted costs in respect of the present disciplinary hearing, cost that may not ever be recovered. I have perused the papers and I am persuaded having regard to the charge sheet that complex issues of fact and law are involved in the disciplinary enquiry and would require significant time and legal expertise. The Minister has appointed both senior and junior counsel to mount the prosecution but has rejected the applicant's request for financial assistance. The applicant must therefore finance his own defense whereas the Minister has at its disposal public funds to prosecute the applicant. Although the applicant has obtained financial assistance to defend himself in the current disciplinary enquiry, he submitted that he does not have sufficient funds to defend himself in a second disciplinary hearing in the event the current hearing is set aside on the basis that its establishment was unlawful and unconstitutional.

¹² Act 68 of 1995.

- [27] Secondly, it was submitted that should the disciplinary proceedings not be interdicted, the applicant will face the real risk of being subjected to cross-examination for no good reason as well as the prospect of repeated cross-examination in subsequent disciplinary proceedings. This, he submitted, is inherently prejudicial.
- [28] Thirdly, it was submitted that in any event until the constitutional challenge has been determined, the lawfulness and legitimacy of the disciplinary proceedings are in doubt. It was further submitted that should the applicant be successful with his constitutional challenge the current disciplinary enquiry will in all likelihood be declared invalid and set aside. In this regard, the Court was referred to the decision of the Constitutional Court in *Kruger v President of the Republic of South Africa and Others*¹³ in support of the contention that decisions taken in terms of a statute that is declared to be invalid will have the effect that decisions that were taken in terms of that law will also be invalid.
- [29] Fourthly, it was submitted on behalf of the applicant that for as long as the disciplinary proceedings are allowed to persist there is an ongoing prejudice or at least the real risk of undergoing prejudice to the constitutionally protected status of IPID as an independent investigating directorate. It is therefore submitted that the prejudice contemplated in this matter is not merely the prejudice that may be suffered by the applicant as an individual employee but also the prejudice caused to the independence of IPID by the Minister's exercise of unilaterally disciplinary powers against the head of the institution.
- [30] I am persuaded that the applicant's apprehension in regard to the prejudice that he contends he will suffer if the interdict is not granted, is well-founded. I am persuaded that there is an inherent and fundamental prejudice in being subjected to a disciplinary enquiry which *prima facie* is unlawful and unconstitutional. I am further persuaded that the financial loss that the applicant will suffer in defending himself at the disciplinary proceedings that are likely to be set aside will not be

¹³ 2009 (1) SA 417 (CC): '[52] It follows that the First Proclamation is objectively irrational because the provisions of the Amendment Act which it purported to put into operation were an arbitrary selection. Under the doctrine of objective invalidity, the First Proclamation should be regarded as having been a nullity from the outset. It was invalid ab initio and therefore has no effect in law. Furthermore, if the First Proclamation were to remain in effect, it would create a number of legal and practical problems.'

recoverable and that should he be placed in a position where he will have to defend himself in a second disciplinary enquiry, his right to defend himself may be severely impaired as a result of financial constraints. I am also persuaded that the applicant may be severely prejudiced should he be subjected to cross-examination in two disciplinary hearings whilst facing the same charges.

- [31] I have taken note of the submission on behalf of the Minister that it will suffer prejudice should the disciplinary proceedings be stayed as this would invariably lead to a delay in finalising the disciplinary hearing. I have, however, taken note of the fact that the constitutional challenge pending before the High Court has been set down for hearing by special allocation in little more than one month's time (27 and 28 August 2015). I have also taken note of the fact that following the High Court's determination of the application, the matter may directly be referred to the Constitutional Court.
- [32] I have considered the prejudice that the applicant contends he will suffer if the interdict is not granted and weighed that up against the prejudice that may be suffered by the Minister by not being able to finalise the disciplinary proceedings against the applicant. I am of the view that the balance of convenience favours the granting of the interdict.
- [33] I do not accept that the effect of the interdict will be that applicant will be immunised from accounting and answering to the charges. I have perused the charge sheet. The charges against the applicant are undoubtedly of a very serious nature. The order staying the disciplinary hearing pending the outcome of the constitutional challenge does not have the effect and does not intend to have the effect of shielding the applicant against future disciplinary proceedings. I have also indicated at the beginning of my judgment that the applicant does not seek to avoid accounting for his conduct. He is only insisting that he accounts for his conduct in proceedings that are lawful and do not infringe upon the independence of IPID. Furthermore, although it is undoubtedly accepted that it is in the interest of justice that disciplinary proceedings against an employee ought to be finalised expeditiously, this principle does not outweigh the principle at issue in these proceedings namely that the applicant is entitled to be subjected to proceedings that are lawful, constitutional and proceedings that do not infringe

upon the independence of IPID. I have also taken note of the submission that the Minister would suffer irreparable harm as a result of placing the applicant on suspension with pay for four months. There is no merit in this submission. Furthermore, I have also taken note of the fact that should the disciplinary process be invalidated, the Minister - and therefore the taxpayer - would have wasted substantial funds.

Suitably alternative remedy

[34] On behalf of the applicant, it was submitted that he does not have a suitable alternative remedy other than an interim interdict. On behalf of the respondent, it was submitted that the applicant has recourse to the remedies provided for by the Labour Relations Act ("the LRA").¹⁴ Although it is undoubtedly so that the applicant in principle has the right, if he is dismissed, to avail himself of the remedies provided for by the LRA this is not the end of the enquiry. The question is not simply whether an alternative remedy is available to the applicant, the question is whether there is a suitable or adequate remedy available to the applicant. I am, in the circumstances, not persuaded that the applicant has a suitable alternative remedy available.

[35] I am, therefore, persuaded that the applicant has satisfied the requirements for an order interdicting the disciplinary hearing pending the outcome of the constitutional challenge.

Order

[36] In the event, the following order is made:

36.1 The disciplinary hearing in respect of the applicant is interdicted pending the final determination of the constitutional challenge launched in the High Court (Gauteng Provincial Division Pretoria) under case number 6588/15.

36.2 The first respondent is ordered to pay the costs of this application such costs to include the costs of two counsel.

¹⁴ Act 66 of 1995.

AC Basson

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate S Budlender with advocate

J Bleazard

Instructed by: Adam & Adam Attorneys

For the Respondents: Advocate W. Mokhari SC with Advocate

T. Ngukaitobi and Advocate Tulk

Instructed by: Hogan Lovells Incorporated Attorneys