



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J1529/15

BONGA BLADWIN MAJOLA

Applicant

and

**MEC FOR ROADS & TRANSPORT:
GAUTENG PROVINCIAL GOVERNMENT**

First Respondent

**HOD FOR ROADS & TRANSPORT: GAUTENG
PROVINCIAL GOVERNMENT, MR RONALD SWARTZ**

Second Respondent

GRAHAM MOSHOANA, N.O.

Third Respondent

Heard: 6 August 2015

Delivered: 7 August 2015

Summary: Self-created urgency – application struck from the roll with costs.

JUDGMENT

MYBURGH, AJ

- [1] In this urgent application, the applicant seeks an interim order that the respondents be interdicted from proceeding with any disciplinary action or inquiry against him, pending the finalisation of the “occupational detriment dispute”¹ referred by him to the bargaining council,² including the adjudication of the dispute by this court.
- [2] The matter comes about in the following circumstances.
- a. The applicant is employed by the Gauteng Provincial Department of Roads and Transport (the department) as chief director: registration and operating licensing. He reports to the second respondent (Mr Swartz), who is the head of the department. The department falls under the control of the first respondent (the MEC).
 - b. On 24 July 2014 and 10 October 2014, respectively, the applicant made two separate disclosures. In the first disclosure, the applicant informed the Premier of the Province of Gauteng (the Premier) of certain tender improprieties. In the second disclosure, the applicant informed the MEC of his belief that Mr Swartz and certain other officials had colluded in the appointment of a firm of attorneys to act on behalf of the department in an arbitration involving so-called contract workers.
 - c. On 28 October 2014, an urgent application brought by the applicant to interdict a disciplinary inquiry scheduled for 30 October 2014 was heard in this court by Molahlehi J. The applicant’s cause of action was the same as his cause of action in this matter – the contention was that

¹ In terms of section 186(2)(d) of the LRA, the following constitutes an “unfair labour practice”: “an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 [‘the PDA’] ... on account of the employee having made a protected disclosure defined in that Act.” Section 1 of the PDA defines an “occupational detriment” as including being subject to “disciplinary action” or being “suspended”.

² The General Public Service Sectoral Bargaining Council (GPSSBC).

being subjected to disciplinary action (in the form of a disciplinary inquiry) was an occupational detriment arising from his disclosure to the Premier.

- d. On 4 November 2014, Molahlehi J handed down judgment in which he dismissed the application with costs. This on account of it having been found that there was no causal connection between the disciplinary charges (involving a contravention of the National Strategic Intelligence Act) and the disclosure made to the Premier. (The applicant sought to appeal the judgment, but his appeal has lapsed due to his failure to deliver the record within time.)
- e. Turning now to the immediate run up to this matter, on 4 June 2015, the applicant was given notification of his precautionary suspension. The notice sets out the “allegations” against the applicant and advised of his suspension “pending the finalization of the disciplinary hearing”. The allegations were described as follows in the notification: (i) “misleading senior counsel ... on the opinion dated 21 November 2013 on the issue of contract workers”; (ii) “you failed or neglected to implement the settlement agreement that was signed on 1 October 2014 arising from the dispute that was referred to the bargaining council, despite repeated instructions to do so” (this dispute related to the termination of contract workers); (iii) “gross insubordination” arising from this; and (iv) incurring wasteful and fruitless expenditure in “conduct[ing] interviews at the OR Tambo International Airport Holiday Inn Garden Court”
- f. The applicant’s suspension appears to have taken effect on 8 June 2015.
- g. On 10 June 2015, and arising from his suspension, the applicant referred an occupational detriment dispute to the bargaining council. In his referral, he described the outcome sought by him as the “suspension of proceedings with all (sic) disciplinary actions or enquiry against me pending the outcome of this dispute, and if the conciliation

does not resolve the dispute, pending adjudication by the Labour Court". (On 22 June 2015, the bargaining council issued a certificate of non-resolution in the suspension dispute.)

- h. On 17 June 2015, the applicant filed an urgent application in this court, in which he sought, *inter alia*, an order that his suspension be set aside pending the finalisation of the dispute referred to the bargaining council ("the first application").
- i. The first application was heard by Coetzee AJ on 23 June 2015, who granted an order postponing the matter *sine die* and setting a timetable for the filing of an answering and replying affidavit. The affidavits have been filed (the replying affidavit on 30 June 2015), and the matter is now awaiting set down.
- j. On 24 July 2015, the applicant was issued with a notice to attend a disciplinary inquiry scheduled for 3 August 2015. The charges against the applicant are exactly the same as those set out in his notice of suspension issued on 4 June 2015.
- k. On 27 July 2015, arising from having been called to attend a disciplinary inquiry, the applicant referred a second occupational detriment dispute to the bargaining council.
- l. On 30 July 2015, the applicant launched the present application, in which he seeks the relief described in para 1 above ("the second application"). The applicant's cause of action in the second application is the same as his cause of action (or at least a substantial part of it) in the first application. According to him, the disciplinary action (just like his suspension) is an occupational detriment arising from the two disclosures referred to in para 2(b) above.
- m. On 31 July 2015, being the date upon which the second application was set down, Van Niekerk J postponed it to 6 August 2015, and set a timetable for the delivery of an answering and replying affidavit.

- n. It was in these circumstances that the matter came before me on 6 August 2015.
- o. The disciplinary inquiry has been rescheduled for later this month.

[3] Given the chronology of events set out above, it is not surprising that the department took the point at the hearing before me that, insofar as the second application is urgent, such urgency has been self-created, with the result that the matter should be struck from the roll.

[4] Having considered the submissions of the parties on this issue, I am of the view that the department's point certainly has merit. This for the following main reasons.

- a. As far back as 4 June 2015, the applicant was aware that he was going to be arraigned before a disciplinary inquiry, and of the charges that he was going to face (which came to pass on 24 July 2015).
- b. On 10 June 2015, in his referral to the bargaining council arising from his suspension, the applicant expressly recorded that he sought by way of outcome that "all disciplinary action or enquiry" should be suspended pending the outcome of the referral. The applicant thus considered any disciplinary action (in the form of a disciplinary inquiry) at the time as constituting an occupational detriment and was opposed thereto. (Yet he waited some 1 ½ months before bringing the second application.)
- c. In his first application brought as far back at 17 June 2015, which was launched off the back of this bargaining council referral, the applicant limited the relief that he sought to his suspension – and inexplicably did not extend it to cover any disciplinary action or inquiry (as per his referral).
- d. Instead of doing so, the applicant waited until he was charged on 24 July 2015 before challenging the conducting of a disciplinary inquiry in his second application (launched on 30 July 2015). In so doing, the

applicant created his own urgency, which, on first principle, is impermissible.

- e. This much is clear from the following finding by the Constitutional Court: “The applicants’ conduct seems to be a classic example of the creation of one’s own urgency, which under normal circumstances would justify a finding that no urgency has been shown.”³ There is nothing abnormal about the circumstances of this matter; the principle thus applies.

- [5] There is another related problem with the second application. It is that substantially the same application (between the same parties involving the same cause of action) is already before court – this in the form of the first application. Whether or not a plea of *lis pendens*⁴ would be upheld in such circumstances need not be decided at this stage (and was not raised or argued). For present purposes, the importance of the existence of the two parallel and substantially similar applications, is that it demonstrates that the urgency surrounding the second one is self-created.
- [6] In their heads of argument, both parties submit that a punitive costs order should be granted. To my mind, costs in the ordinary course will suffice.

³ *Ex parte Minister of Social Development and others* 2006 (4) SA 309 (CC) at para 17.

⁴ The requirements for the establishment of a plea of *lis pendens* are that the litigation is between the same parties; that the cause of action is the same; and that the same relief is sought in both. In the present matter, the first two requirements are satisfied, but the relief is marginally different, in that the first application seeks to stay the applicant’s suspension, whereas the second application seeks to stay his disciplinary inquiry. However, in *Caesarstone v Sdot-Yam Ltd v World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) at paras 21-22, the SCA found that the requirement that the relief claimed had to be the same could be relaxed where the circumstances supported doing so. This is probably such a case.

[7] In the result, the following order is made:

1. The application is struck from the roll for lack of urgency;
2. The applicant shall pay the first and second respondents' costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: M Ramushu of Ramushu Mashile Twala Inc

On behalf of the first and second respondents: V Soni SC (instructed by Norton Rose Fulbright Inc)