

IN THE LABOUR COURT OF SOUTH AFRICA**HELD AT JOHANNESBURG****CASE NO:** J2239/2015**DATE:** 2016-01-14

In the matter between

BEMAWU & 35 OTHERS

Applicants

and

SABC & 10 OTHERS

Respondent

Date of *ex tempore* judgment : 14 January 2016

Date edited and signed : 2 March 2016

J U D G M E N T

STEENKAMP, J

- [1] The applicant, being BEMAWU or the union, seeks to interdict a disciplinary process against 35 of its members. The disciplinary process stems from allegations of fraud on a massive scale perpetrated against the SABC Medical Aid Scheme.
- [2] Although 35 of the union's members are cited as the applicants, the SABC intends to take disciplinary action against more than 100 employees. Given the number of employees involved, it has adopted a disciplinary process that differs to that envisaged by its Disciplinary Code i.e. that of individual hearings presided over by a panel of three

chairpersons with *viva voce* evidence and the opportunity to cross-examine. Instead, it has adopted a process where the individual employees are presented with the allegations against them in writing; they can then make written representations; and those representations will be considered by a chairperson from a panel appointed by Tokiso, the independent dispute resolution agency. That chairperson, taking into account the allegations and representations, will have to make a decision whether or not the individual employee in question has or has not committed the misconduct complained of. If the employee is found to have committed the misconduct, that employee will be given the opportunity to make further representations with regard to sanction after which the chairperson will make a recommendation on sanction to the SABC.

[3] The union says that this departure from the Disciplinary Code which forms part of all employees' contracts of employment is unfair and should be interdicted.

[4] The first question to be considered is that of urgency. The union initially launched an application for an expedited hearing as envisaged by clause 12.14 of the Practice Manual of this Court; however, as Mr *Van As* explained, that changed when Tokiso sent out notices to some employees that the findings in respect of those employees would be made this coming Monday, on 18 January. Those notices were sent out on 6 January and he submits that led to this matter becoming urgent.

- [5] Mr *Maserumule*, for the SABC, however, maintained his objection to the matter being heard on an urgent basis during the recess. In order to consider that objection the background and chronological sequence of events leading to the application becomes relevant.
- [6] The SABC and the union first met as far ago as March 2015 when the SABC informed the union representatives of the allegations of medical aid fraud and of its intention to discipline the employees involved. On 18 June 2015 it informed the union in writing of its intention to adopt the disciplinary process that I have outlined. On 24 June the union requested the internal audit report on which the allegations were based, which the SABC refused to provide. On 17 September the SABC issued letters to employees detailing the allegations of misconduct against each of them and inviting them to respond to those allegations. On 22 September the union wrote an e-mail to the SABC rejecting that procedure and the next day, 23 September 2015, the union's attorneys of record wrote to the Corporation, also challenging the disciplinary procedure adopted by it and threatening an urgent application to interdict it.
- [7] On 28 September the Corporation replied to the attorneys' letter, refusing to suspend the process. However, the union did not at that stage carry out its threat of bringing an urgent application. By 19 October the SABC responded in writing to further concerns raised by the union regarding the disciplinary process and explicitly informed the union that no further extension would be granted after the extension that it had granted to make further representations.

- [8] It is after that, on 8 November 2015, that the union delivered the application for relief on an expedited but not urgent basis. No date was set down for the hearing of that application. The current urgent application was then brought by way of an amended notice of motion on 11 January to be heard today, 14 January 2016.
- [9] It will become apparent from this chronology of events that the union has known from at least 28 September 2015 that the SABC was not prepared to change its view on the way that it decided to conduct the disciplinary process, and at the very latest by 19 October, it knew that no further extension would be granted.
- [9] I have some sympathy for the process adopted by the union. All too often, applicants approach this court on an urgent basis in matters that are not urgent, but nevertheless do require to be heard on a more expedited basis than is provided for in the rules of court. That is why the court has adopted an alternative process by way of the Practice Manual. However, in this case, I agree with Mr *Maserumule* that the urgency has not only been created by Tokiso sending out the letters on 6 January 2016. The urgency is self-created in that the union knew months ago that the SABC was proceeding with the process it adopted. By October 2015 that process was underway and Tokiso may as well have informed the employees of the decisions it had taken at any time after that and after they had made written representations. The fact that it informed them of its intention to do so by 18 January did not create any new urgency in the matter.

[10] For those reasons I would agree with Mr *Maserumule* that the union has not shown urgency and that the matter should be removed from the roll.

[11] I will, nevertheless, given that the parties have addressed me fully on the merits, express my view on those merits briefly, albeit *obiter*.

[12] The first question is, of course, whether the union has established a clear right. It bases its argument in that regard on the terms of the Disciplinary Code which, as I have noted, forms part of the employees' contracts of employment. It seems to me that there are two aspects of that code that must be taken into account. The first is the overarching principle set out in clause 1.4, that:

“Discipline will be maintained through a system of verbal and formal written warnings, hearings and inquiries that will be conducted in such a way as to ensure that discipline is exercised fairly in accordance with the rules of natural justice.”

[13] Against the background of that clause it seems to me that the process envisaged by the SABC does ensure that discipline will be exercised fairly in accordance with the rules of natural justice, albeit not in the way that the SABC normally conducts its disciplinary procedures. In these circumstances, where the Corporation has to deal with similar allegations of misconduct against more than 100 employees, it would be unworkable to adopt a process where each employee must be heard individually, call witnesses and present evidence. The rules of natural justice, and especially the principle of *audi alteram partem*, will be satisfied, albeit in an attenuated manner

in the process that the Corporation has decided to adopt.

[14] Mr Van As stressed the further provision in clause 4.5 that reads:

“For misconduct or offences which in the opinion of management warrant a stronger disciplinary measure than a warning... a formal disciplinary hearing must be held.”

and he stresses the word must.

[15] That is followed by a provision in 4.8 that says:

“The following procedure is recommended for the conducting of disciplinary hearing”,

and I stress the word “recommended”. The process outlined in the Disciplinary Code is only a recommendation. The only peremptory provision is that a “formal disciplinary hearing” must be held.

[16] Although the process adopted by the SABC in this case is different from that it normally adopts, I do not think that it can be said that it is not a “formal disciplinary hearing”. It envisages a hearing chaired by an independent and experienced chairperson on the panel of a respected dispute resolution agency. It envisages a hearing, albeit on paper without hearing oral evidence or argument. In my view it satisfies the requirements set out in the Code of Good Practice of the Labour Relations Act and set out by my Brother Van Niekerk J in the well-known case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 (27) ILJ 1644 (LC) at 1652. As a reminder, in that case, Van Niekerk J said:

“The balance struck by the Labour Relations Act thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with the right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioner at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employees.”

- [17] That is exactly the conundrum that the SABC faces in these proceedings. To have individual hearings for each individual employee numbering more than 100, along the lines of a criminal justice model, will impede the very workplace efficiencies that Van Niekerk J spoke about. As Mr *Van As* and Mr *Maserumule* also accepted, the Labour Appeal court held in *Booyens v Minister of Safety and Security* 2011 (32) ILJ 112 (LAC) at paragraph 54 that the court will only intervene in incomplete disciplinary hearings in exceptional circumstances. The Court said that there is no exhaustive list of such circumstances but that:

“The factors to be considered would in my view be where the failure to intervene would lead to grave injustice or where justice might be attained by other means.”

[18] In this case, it would appear to me that, firstly, the process adopted by the SABC will not lead to grave injustice. The union members will still have an opportunity to be heard. Secondly, and this foreshadows the question of an alternative remedy, justice may be attained by other means, that is the dispute resolution system prescribed by the Labour Relations Act. In fact, in the case before me, the exceptional circumstances go the other way. Exceptional circumstances have necessitated the Corporation to adopt a procedure other than the normal procedure envisaged by its Disciplinary Code. Those circumstances are the number of employees involved and the operational efficiencies of the organisation. I would therefore have formed the view on the merits that the union has not established a clear right as is required for final relief.

[19] As I have mentioned, I have also foreshadowed the question of an alternative remedy. The union members in this case, as any other employee in any other dismissal case, have the alternative remedy of approaching the CCMA, should the independent chairperson appointed by Tokiso find that they committed the misconduct complained of; should that chairperson recommend a sanction of dismissal; and should the SABC implement that sanction. For that reason also, I would have turned down the application.

[20] Insofar as costs are concerned, I take into account, firstly, that there is an ongoing relationship between the union and the Corporation. Secondly, I take into account that these are incomplete proceedings and that this is simply an initial skirmish in a longer battle. In law and fairness, I do not consider a costs order at this stage to be appropriate.

Order

The application is struck from the roll for lack of urgency with no orders as to costs.

AJ Steenkamp
Judge of the Labour Court

APPEARANCES

APPLICANTS: M J van As

Instructed by Johanette Rheeder.

FIRST RESPONDENT: Puke MASERUMULE (attorney).

APPEARANCE FOR THE PLAINTIFF: MR VAN AS

APPEARANCE FOR THE RESPONDENT: MR MASERUMULE

CERTIFICATE OF VERACITY

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<u>Case No</u>	<u>Client Reference</u>	<u># Pages</u>
J2239/15	N/A	10

RECORDED AT:

Court: Labour Court

Court Nr: Stenographer: [No annotation]

TRIAL DATES:

2016-01-14

ORDER TO TRANSCRIBE:

Transcribe soundtrack as per order

TRANSCRIBER:

Cherylene van Jaarsveld.

SOUNDTRACK:

Delivered on: 2016-02-15

DATE COMPLETED:

2016-02-16

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