



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: J124/2017

In the matter between:

MZWANDILE NTAMBO

Applicant

And

TRANSNET FREIGHT RAIL

Respondent

Heard: 02 February 2017

Delivered: 02 February 2017

Dated: 07 February 2017

REASONS FOR ORDER

TLHOTLHALEMAJE, J

[1] The Applicant's urgent application was dismissed with no order as to costs on 02 February 2017. What follows hereunder are reasons in that regard.

[2] In his Notice of Motion before the Court, the Applicant sought an order interdicting and restraining the Respondent from initiating and/or proceeding with the disciplinary hearing against him in line with the notices to attend a disciplinary hearing served upon him on 23, 23 and 25 January 2017. The disciplinary hearing in accordance with the last notice was scheduled for 02 February 2017.

[3] In view of three different sets of notices served on the Applicant, and further it being his contention that it was only on 24 January 2017 that it dawned upon him that the charges preferred against him pertained to issues and a dispute that he had already referred to the Transnet Bargaining Council, I was prepared to accept that the application should be accorded urgency.

[4] The application before the Court is against the following background;

4.1 The Applicant has nine years' service with the Respondent. He currently holds the position of Specialist Train Driver. He was initially dismissed by the Respondent on 31 August 2013. Having referred an alleged unfair dismissal dispute to the CCMA, his dismissal was found to be fair. He had successfully launched an application to review and set aside that, and was accordingly reinstated in terms of an order issued by this Court on 17 December 2015.

4.2 There are factual disputes in regards to what had transpired upon his return to work on 18 January 2016. His contention was that it took the Respondent until 22 February 2016 to fully reinstate him. Be that as it may, he was then required to attend a validation course for the period between 3 – 18 March 2016 at the Respondent's training facilities in Kimberly. Despite questioning the need for such re-training, the Applicant had duly complied and had passed the said courses.

4.3 The course also had a practical training component which was to be conducted at the Respondent's facilities in Johannesburg. The Applicant's contention was that despite presenting himself for that part of the training, it never took place. On 1 November 2016, and having performed no duties since his reinstatement, it came to his attention upon seeing the duty roster that his position had been 'downgraded' to 'Learner Train Driver', and this had been done without any discussions with him.

4.4 Aggrieved at the state of affairs, and further having formed the view that an unfair labour practice pertaining to demotion, reduced pay, and instructions to undergo further training had been perpetrated against

him, the Applicant had then filed a dispute with the CCMA on or about 30 November 2016. That dispute has since been referred to the Transnet Bargaining Council as it has the requisite jurisdiction. The dispute has been set-down for a hearing on 22 February 2017.

4.5 Despite being served with the referral, the Respondent had on 10 December 2016, requested the Applicant to vail himself for theoretical training. The Applicant, on the advice of his attorneys of record, had refused to follow the specific instruction as he deemed it to be unfair. Flowing from these events, the Respondent then issued the three sets of notices of disciplinary enquiry as indicated elsewhere in this judgment.

[5] The Respondent's case is that as a consequence of his initial dismissal, the Applicant having been out of service for over two years, was required to undergo re-training. As a result of an administrative error on its part, the Applicant was placed on a training course which he was not required to undertake in March 2016. The re-training that the Applicant was required to undergo was in terms of its Integrated Management System Training Delivery Procedure (The training policy), and was more extensive than the one he had attended in March 2016.

[6] The Respondent viewed this re-training as crucial in that all train drivers had to undergo it on a regular basis. It was not a once-off training, and was meant to equip drivers with the necessary skills and qualifications in order to enable them to comply with the Respondent's safety standards. The consequences of failing to adhere with the requirements of the policy were dire, as there were safety risks to the Respondent, to the other drivers, and to surrounding communities where the Respondent conducted its business.

[7] It was in the light of these considerations that the Applicant was not allowed to operate or drive trains. He was nevertheless paid his full salary even though he could not be allowed to perform his functions. The Respondent had made the necessary arrangements for the Applicant to undergo training, and on 1

December 2016, he was informed through a letter that he was required to attend theoretical and practical training courses available to all the drivers.

- [7] Notwithstanding receipt of the letter on 2 December 2016, the Applicant failed to attend the training as scheduled on 9 January 2017. A meeting was held with the Applicant on 10 January 2017. His line manager, and other officials from Employee Relations and Human Capital had attended the meeting. At that meeting, the Applicant reiterated that he would not attend the training as instructed by his line manager. The Applicant was then afforded an opportunity to reconsider his position and advised to attend a training scheduled for 12 January 2017.
- [8] The above meeting was also followed up with a letter from his line manager, again instructing him to attend the training as scheduled. It was only when he had refused to obey the instructions to attend the training that the notices to attend the disciplinary enquiry were issued. The Applicant was charged with gross insubordination, absenteeism on 13 January 2017, and gross misconduct. It was common cause that the disciplinary enquiry was postponed to 9 February 2017.

Evaluation:

- [7] It is trite that for an applicant to be successful in an application for an interim interdict he/she must establish (i) a prima facie right, even though open to some doubt; (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted; iii) absence of an alternative remedy; (iv) a balance of convenience in favour of granting the interim relief. Other than these requirements, the key question in instances where an employee seeks to interdict disciplinary proceedings is whether there are exceptional circumstances that permit this court to intervene¹. The Labour Appeal Court in *Member of the Executive Council for Education, North West Provincial*

¹See *Booyen v Minister of Safety and Security and Others* (2011) 32 ILJ 112 (LAC) at para 54, where it was held that;

‘.... the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court exercise such powers having regard to the facts of each case. Among the to be considered would in my view be whether failure intervene would lead to grave or whether justice might be attained by other means. The list is not exhaustive.’

*Government v Gradwell*² further added that courts can only intervene where extraordinary or compellingly urgent circumstances permit.

[8] The Applicant contended that the matter involved his right to fair labour practices, and that the actions of the Respondent as outlined above, and in particular, the notice to attend the disciplinary enquiry constituted a serious violation of that right. The Applicant's contentions need to be considered within the context of the rights he alleged were being violated, and the Respondent's concomitant right to discipline its employees where the need arose. The dispute³ referred to the Transnet Bargaining Council pertains to an alleged unfair labour practice. In his referral, the Applicant alleged that the Respondent did not want him to work; that he had been demoted; and that he was treated differently. That dispute, as I had raised with the Applicant's Counsel during argument, has got nothing to do with the charges preferred against him, as those specifically pertain to allegations of misconduct, arising mainly out of his refusal, as conceded, to undergo further training in the light of his absence from work for a period over two years.

[9] In circumstances where the Applicant had been out of service for a period of over two years, and where his position as a train driver required of him to undergo training which was crucial at both the level of his competency and for safety purposes, the Respondent cannot be faulted where the Applicant, on no less than two occasions blatantly refused to follow an instruction to undergo that training. The allegations that his rights to fair labour practices were violated by the institution of the disciplinary proceedings are without substance and clearly amount to red herring. Being instructed to undergo the training in circumstances as alluded to in this judgment even after he had lodged a dispute cannot by all accounts amount to a violation of the Applicant's rights to fair labour practices.

[10] The mere fact that disciplinary proceedings have been instituted against the Applicant does not imply that his right to have his dispute at the Bargaining Council determined has diminished or violated. I am accordingly satisfied that

² (2012) 33 ILJ 2033 (LAC)

³ Annexure 'MN5' to the Founding Affidavit

the Applicant has failed to establish a *prima facie* right to the relief that he seeks.

[11] To the extent that the Applicant has failed to establish the existence of a *prima facie* right, there is no need to consider the remaining issues pertaining to any apprehension of irreparable harm, the balance of convenience and the absence of any other satisfactory remedy. The Applicant in the light of the allegations of misconduct against him is going to have an opportunity to state his case in the disciplinary enquiry. Those disciplinary proceedings fall within the prerogative of the Respondent to institute, and there is no basis for any conclusion to be reached that they had been instituted for some unfair reasons or for ulterior motives. Conversely, the Applicant's dispute before the Bargaining Council is scheduled to be heard on 22 February 2017 irrespective of the outcome of the disciplinary enquiry scheduled for 9 February 2017. Thus, no compelling or extraordinary circumstances prevail in this case to justify the court's intervention. There is further no basis for any conclusion to be reached that the failure to intervene would lead to grave injustice.

[12] The Applicant, given the litigation history between the parties might have seen the need to approach the court on an urgent basis. Be that as it may, the application was ill-conceived, especially since it appears that he had been assisted by his attorneys of record since 10 January 2017 after a meeting was held with him. Notwithstanding my views on the logic of approaching the court in the manner the Applicant had, considerations of law and fairness militated against any cost order being made. It was in the light of these considerations that the order of 01 February 2017 was issued.

Edwin Tlhotlhemaje

Judge of the Labour Court, South Africa

APPEARANCES:

For the Applicant: Adv. Z. Ndlovane

Instructed by: Machingura Attorneys

For the Respondent: Ms. Z. Ngwenya of Cliffe Dekker Attorneys

LABOUR COURT