



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no J 467/17

In the matter between:

MPHO SEKANO

Applicant

And

TIGER BRANDS LTD

Respondent

Heard: 3 March 2017

Delivered: 6 March 2017

JUDGMENT

VAN NIEKERK J

[1] This is an application, brought on an urgent basis, in which the applicant initially

sought a final order reviewing and setting aside a decision by the respondent to convene a disciplinary enquiry into alleged misconduct by the applicant, and ordering the respondent to take all necessary steps in terms of its grievance procedure in terms of the Promotion of Administrative Justice Act, 3 of 2000. The relief sought is of course wholly misguided, since the respondent is an organ of state nor does it exercise public power when seeking to discipline one of its employees. In any event, at least since *Gcaba v Minister of Safety and Security and others* (2010) 31 ILJ 296 (CC), the law has been settled in favour of a single system of law, i.e. that created by the LRA. Counsel for the applicant ultimately sought an interim order interdicting the disciplinary hearing pending the outcome of a grievance hearing initiated by the applicant.

- [2] The material facts are not in dispute. The applicant was employed by the respondent in November 2016. There were concerns about the applicant's performance. The applicant initiated a grievance in terms of the respondent's procedure. A meeting was held on 2 February 2017 and an outcome issued on 8 February 2017. The report filed by the chair of the meeting could find no evidence of victimisation or unfair threatening behaviour or unfair treatment of the applicant, but recommended the appointment of an independent party to 'facilitate a better understanding and relationship building' between the applicant and her line manager, the subject of the grievance. The applicant sought to 'appeal' against the outcome.
- [3] On 27 February 2017, the applicant received a notice to attend a disciplinary hearing into charges that she had during her interviews in September 2016 represented that she had certain skills whereas she did not possess those skills. The enquiry was scheduled for 2 March 2017.
- [4] The applicant contends that in terms of the grievance policy and procedure, no employee may be prejudiced in any way consequent on raising or dealing with a grievance. In essence, the applicant contends that the convening of the

disciplinary hearing is a breach of grievance policy. She contends that the matter is urgent and that if the disciplinary hearing were to proceed, she may well be dismissed.

- [5] The respondent admits that on 27 February 2017 it issued the notice to attend the disciplinary hearing scheduled for 2 March 2017. Without prior warning or notification, the present papers were served on the respondent at 14h26, requiring the respondent to file an answering affidavit by 14h30 and to be in court by 15h00 to oppose the application. It was largely for this reason that the proceedings were stood down to 3 March 2017, a matter to which I shall return in due course.
- [6] The deponent to the answering affidavit avers that the grievance filed by the applicant was fully dealt with over a period of two days. Detailed findings and recommendations were made, but the applicant remains aggrieved since she claims that the process did not deliver positive results for her. AS far as the respondent is concerned, the grievance process has run its course. The disciplinary hearing is an entirely separate matter and relates to what the respondent alleges are misrepresentations made by the applicant at her pre-employment interviews. The respondent contends that it is entitled to proceed with the hearing without interference.
- [7] The requirements for the granting of interim relief are well-established. The applicant is obliged to establish a *prima facie* right, a reasonable apprehension of irreparable harm if the interdict is not granted, the absence of a satisfactory, alternative remedy and that the balance of convenience is in favour of granting the interim relief sought.
- [8] Where the nature of the interim relief sought requires the court to intervene in internal disciplinary proceedings, a high bar has been set. Initially this court took the view that it had no jurisdiction to intervene in domestic

disciplinary proceedings. The Labour Appeal Court set aside that decision in *Booyesen v Minister of Safety, Security and Other*, 2011 (32) ILJ 112 (LAC) where the court held that this court had jurisdiction to intervene, but that it should only do so in exceptional circumstances, where a grave injustice may result and where the employee has no other adequate remedies. The Labour Appeal Court purposely refused to be more prescriptive than that and clearly left matters such as the present to be dealt with by the exercise of a discretion, based on all of the relevant facts and circumstances presented in each case. This court has on more than one occasion warned would-be applicants in matters such as the present against the abuse of this court's processes to delay or obstruct uncompleted internal disciplinary hearings. The threshold for intervention is set high – an applicant must show that truly exceptional circumstances warranting intervention exist, that a grave injustice might otherwise result and that there are no other adequate remedies available.

- [9] In my view, the applicant has failed to meet the threshold for intervention. The applicant has been called to an enquiry to account for alleged misconduct. She has the right to defend herself against the allegations that she misrepresented her skills and experience and to state her case. There is no basis on which she might reasonably at this point anticipate that she will be dismissed unless, of course, she is found guilty of the offence and dismissal is considered an appropriate penalty. Her concern that she will be prejudiced by a disciplinary hearing is purely speculative. In so far as the grievance procedure is concerned, I am satisfied that the respondent's decision to convene a disciplinary hearing is a discrete process. The applicant has not established any nexus between the pending hearing and her lodging a grievance. She has not made out a case of victimisation, which in essence is the nature of the protection afforded by paragraph of the policy, on which she relies. If the applicant is dismissed or some lesser penalty is imposed, should the applicant regard

the respondent's conduct as unfair, she has the right to refer the matter to the CCMA, and enjoys all of the rights under the LRA to protect her right to security of employment.

- [10] In the absence of a *prima facie* right, the reasonable apprehension of irreparable harm and the balance of convenience in favour of the applicant, the application stands to be dismissed.
- [11] The respondent sought costs on a punitive scale. I do not think that costs on that scale are warranted, but neither parties' representative disputed that costs on the ordinary scale should follow the result. The filing of the present application by the applicant's attorney on 30 minutes notice to the respondent is nothing less than a manifest abuse of the process of this court. At 15h00 on 1 March 2017, I stood the matter down to 16h00 to enable the applicant's attorney to make enquiries from the person on whom service was effected as to whether the respondent intended to oppose the application. The applicant's attorney filed an affidavit recording her conversation with a Mr Mzothando Mtsikitsiki, a legal adviser employed by the respondent. His attitude was that it was 'practically impossible' for the respondent to come to court at 16h00 (he did not seek any extension of the period afforded to the respondent to indicate its attitude), and that the respondent did not know whether it intended to oppose the application since he had not yet read the papers. This is an astonishing attitude for a legal adviser to adopt – to indicate that the respondent intended to litigate at its leisure in the face of a directive by a court that an urgent application stand down precisely to allow the respondent an opportunity to read the papers (the founding affidavit is some 6 pages) and indicate whether it intended to oppose the proceedings. The respondent's failure to respond to the invitation extended to it and its attitude toward the application smacks of disrespect for this court and its proceedings. But for Mr Mtsikitsiki's conduct, I would

have had no hesitation awarding the respondent its costs. In the circumstances, the interest of the law and fairness are best served by limiting the respondent's costs to the costs of appearance on 3 March 2017, excluding the costs of preparation.

For the above reasons, I make the following order:

1. The application is dismissed.
2. The applicant is to pay the respondent's costs of appearance on 3 March 2017.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. RA Arcangeli instructed by Ranthako Attorneys

For the Respondent: Mr. Chavoos, Norton Rose Fulbright