



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J856-17

In the matter between:

CHIKANE ALBERT CHIKANE

First Applicant

NATALIE ROSALIND GOVENDER

Second Applicant

and

MEC FOR ROADS AND TRANSPORT,

GAUTENG PROVINCE

First Respondent

HEAD OF THE DEPARTMENT OF ROAD AND

TRANSPORT,GAUTENG PROVINCE

Second Respondent

MAJANG INCORPORATED ATTORNEYS

Third Respondent

BOSMAN GIYOSE DYASI INCORPORATED

Fourth Respondent

Heard: 19 April 2017

Delivered: 25 April 2017

JUDGMENT

WHITCHER J

Introduction

- [1] The applicants seek on an urgent basis to interdict the first and second respondents from proceeding with a disciplinary hearing against them, pending the final determination of a review application brought by the applicants in the High Court in which application they seek to review and set aside a forensic investigation report commissioner and issued by the second respondents on 1 November 2016. They seek the review on the basis that the forensic investigation infringed the principle of legality and the findings are irrational because the applicants were not given an opportunity to make representation on the final forensic report and/or before it was finalised.
- [2] The applicants submit that the disciplinary charges levelled against are squarely based on the forensic report and if the review is successful the charges will fall away and the respondents will be expected to reconsider their decision to lay the said charges against them.
- [3] For the reasons set out hereunder the application is dismissed.

Prima facie right

- [4] The object of the forensic investigation was to, *inter alia*, investigate whether disciplinary proceedings should be brought against employees, and the applicants were, amongst others, the subject of the investigation. In the end the report recommended disciplinary charges be levelled against the applicants.
- [5] The issue of legality may be relevant to the review before the High Court, but the matter before me deals with the fairness of the disciplinary proceedings.
- [6] On the applicants own version, they were interviewed during the investigation in July 2015 and given an opportunity to make comments [that is make representation on issues being investigated]. However, the applicants claim that they were entitled to be given an opportunity to make representations on

the entire report before its finalisation because the charges levelled against them are based squarely on the report.

- [7] The existence of a right is a matter of substantive law. The applicants, in the context of these proceedings, are essentially claiming that they had a right to be heard and given an opportunity to make representations before the finalisation of the forensic report because their charges arise therefrom. Other than a bald allegation to this effect, the applicants have not established that they have a special contractual right or right that exists in the LRA or Code of Good Practice in the LRA.
- [8] While the Code on Good Practice in the LRA states that an investigation should be carried out to determine whether there are grounds for charging an employee with misconduct, the Code suggests this investigation need not be a formal enquiry. The Code makes no mention of a right to be heard during the investigation or that the investigation must be conducted like a formal inquiry. The Labour Court *Avril Elizabeth Home*¹ and the LAC in *Semenya SC & others v CCMA & others*² emphasized that the Code clearly envisages procedures that are not strictly formal and that a high level of procedural fairness is not required in internal processes. The Code merely provides that employees have the right to be heard prior to a decision being made by the employer on whether they are guilty of charges of misconduct levelled against them.
- [9] In any event the applicants have failed to demonstrate that their charges are squarely based on the forensic report.
- [10] As correctly submitted by the respondents, if this court grants the application, it would mean that employers would be forced to conduct formal hearings before an investigation is complete.

Alternative remedy

¹ Avril Elizabeth Home [2006] 27 ILJ 1644 (LC).

² (2006) 27 ILJ 1627 (LAC).

- [11] If the charges are based on the forensic report, it follows that the applicants will have an opportunity to challenge the findings of the forensic report at the disciplinary hearing. As correctly submitted by the respondents, the remedy that is immediately available, and the one that the applicants seek to frustrate, is the disciplinary hearing. And if such does not provide the desired outcome, the applicants have the right to refer the matter to the CCMA or relevant bargaining council for relief.
- [12] There is no evidence before me that the disciplinary hearing will not follow the usual course, which is a decision based on the evidence led at the hearing through witnesses by both parties, and not merely based on a reading of the report [if the report is entered into evidence].
- [13] The applicants essentially want this court, *on application*, to determine the same matters that will be the focus of the disciplinary hearing.

Reasonable apprehension of harm

- [14] As indicated, if the charges are based on the investigation report, it follows that the respondents will have to prove the charges at the hearing by leading evidence and the applicants have the right to challenge and oppose that evidence by leading contrary evidence and cross-examining the respondents' witnesses. There is thus no reasonable apprehension of harm.

Order

- [15] The application is dismissed with costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Adv P M Maake and Maphwanya, instructed by Thilivhali Radzilani Attorneys

For the First and Second Respondents: Adv Nhlapo, instructed by State Attorney, Johannesburg

Labour Court