IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 801/17

In the matter between:

JOHANNES ADAM ENSLIN **Applicant**

and

GERHARD POTGIETER CLEANING SERVICES (PTY) LTD T/A MR CLEAN **Respondent**

Heard: **10 April 2017**

Delivered: **28 April 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant approached this Court by way of urgent proceedings to seek an order declaring that the disciplinary proceedings instituted against him were invalid and unenforceable as they were pursuant to a protected disclosure he had made as contemplated in the provisions of the Protection of Disclosure Act.[1] The order sought is *interim*, pending the

[1] Act 26 of 2000

outcome of an unfair labour practice dispute referred to the CCMA in relation to the disciplinary action taken against him.

Background:

[2] The respondent, Gerhard Potgieter [Maintenance] Cleaning Services (Pty) Limited, trading as 'Mr. Clean', is a private enterprise founded and established by the late Mr. Gerhard Potgieter. It renders cleaning services to different corporate entities with Shoprite Checkers being one of its main clients. It employs about 6000 employees who service 402 shops of the Checkers/Shoprite Group and further provide trolley services.

[3] The applicant commenced his employment with the respondent during 2004 as a Workshop Manager. He averred that upon the death of Potgieter during July 2012, Mr Leon Nicolaas Uys (Uys) became the majority shareholder and Managing Director of the respondent. Although it is disputed, the applicant further averred that during 2013, he was elevated to the position of Deputy Managing Director of the respondent.

[4] The applicant also averred that during 2013 he became aware of Uys' sudden accumulation of wealth, which did not correlate with his known income derived from the respondent and Uys' estate. This had left the applicant suspicious that Uys might have been involved in some irregularities.

[5] During 2016, the applicant became aware of an exchange of hard foreign currency between Uys and one Mr Shafik Salie in the amount of approximately twenty US Dollars ($20 000). Upon confronting Uys, the latter informed him that the money came from the respondent's African operations and was to be sold to associates, where-after the rand value of amounts received would be paid into the respondent's business.

[6] The applicant had reason to believe that a transaction of that nature might be unlawful, and in contravention of foreign exchange and customs laws and regulations and laws of the Republic. The applicant then took it upon

himself to investigate similar transactions undertaken in the name of the respondent.

[7] During 2014, the applicant and Uys founded and registered a company known as ‘CleanCorp’ after Potgieter’s death. The applicant is the sole director of the said company. CleanCorp was established to take over the business of the respondent in an event that the latter could not meet its contractual obligations. The rationale behind its establishment was that at the time, the respondent was indebted to ABSA and SARS, and there was a possibility that the bank could call up the loan, which could have resulted in the respondent being declared insolvent.

[8] The applicant contends that during October 2016, Mr Sean Luyt (Luyt) who was then employed by the respondent, approached him and provided him with several documents that demonstrated that Uys had acquired a number of properties, either in his name or through a family trust. The applicant alleged that the documents also demonstrated irregular transactions in which Uys was syphoning money from the respondent and from foreign countries by various means.

[9] Based on the evidence at their disposal, the applicant and Luyt then consulted a legal practitioner, Raain Louw Attorneys during November 2016, to establish whether that information amounted to any conduct that was unlawful or irregular. The attorneys’ advice was that the applicant and Luyt had a legal obligation to disclose the purported suspicious transactions to SARS.

[10] On the strength of the legal advice, on or about 4 November 2016, the applicant held a meeting with Uys to discuss the purported irregular transaction within the respondent. Uys allegedly admitted some of the information as being factual and denied others. The applicant nevertheless proceeded to investigate the matter further and went back to Louw, who undertook to assist him and Luyt in any in discharging their legal obligations.

[11] During December 2016, the applicant had a discussion with a Mr Kobus Zwennis, the representative of Shoprite Checkers in control of the contract, who was also his friend. The applicant alleges that the sole purpose of the discussion between him and Zwennis was to ensure that the contractual obligations between the respondent and Shoprite Checkers were not interrupted. He further contended that the discussions centred around the allegations against Uys, and an eventuality where there could be consequences as a result of the disclosure. The intention of this meeting according to the applicant was for him to be placed in a position where he could ensure that the respondent's obligations to Shoprite Checkers were continued through CleanCorp, which was already established as a backup, in the event that the respondent went under.

[12] During 9 January 2017, the applicant, Luyt and Uys together with Mr Wian Ferreira held a meeting. In that meeting, certain allegations of misconduct were levelled against Luyt. Luyt was informed of the intention of the respondent to suspend him pending the finalisation of an investigation pursuant to the allegations. Uys further informed the applicant that he had already discussed the allegations against the respondent with Zwennis in December 2016 and those allegations were to be investigated by a team already appointed.

[13] Following his suspension, Luyt in the face of the allegations of theft, fraud and other impropriety, elected to resign on 9 January 2017. On 12 January 2017, the applicant and Luyt met with attorneys Raain Louw. In that meeting, two representatives of the South African Revenue Services were also present. It was in that meeting that the applicant had disclosed the allegations of possible money laundering through the import of foreign currency from other African countries, the purchase of private properties by Uys through the CleanCorp, and money being held in other entities related to the respondent in the Republic and in foreign countries that was not declared to SARS.

[14] On or about 9 February 2017, the applicant contends that he was contacted by the South African Revenue Services representatives who

had requested him to reduce his allegations and/ or disclosure in writing in a form of an affidavit.

[15] On 10 February 2017, the applicant and Uys met at the City Lodge in Pretoria to discuss the applicant's disclosure. Uys had disputed any wrongdoing and requested him to participate in an investigation against allegations of misconduct levelled against him by certain employees of the respondent and Luyt.

[16] On or about 16 February 2017, the applicant deposed to an affidavit affirming to the allegations of impropriety against the respondent, and in particular, Uys, which he had provided to the SARS

[17] On 13 March 2017, charges of misconduct were preferred against him. The charges in annexure "A" of the notice of disciplinary enquiry were formulated as follows:

> "Annexure A
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> 1. Gross misconduct in that during the period of September 2016 to October 2016 you unlawfully made electronic copies and/ or took photographs of and/ or hard copies and/ or reproduced photographs of personal documentations belonging to Mr Leon Uys with the intention of utilizing the personal information to bring Mr Leon Uys and/ or the company into disrepute and/ or disgracing the company with Shoprite/Checkers.
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> 2. Gross misconduct in that during the period of December 2016 you failed to act in good faith towards the company and acted to the detriment of the company and in direct conflict of interest with the company in that you approached and had a meeting with Mr Zwennis and requested Mr Zwennis to cancel contracts with the company and allocate the contracts to yourself and/ or an entity owned by yourself alternatively in which you have interest.
>
> 3. Gross misconduct in that on or about July 2016 you failed to act in good faith towards the company and acted to the detriment of the company in that you failed to take remedial action against Mr S Luyt when it came to your attention that Mr S Luyt fraudulently misrepresented to one of the clients of the company being

> Shoprite/Checkers that their trolley losses were less than it factually was by moving trolleys already audited in Middelburg region to the Alberton region for specific trolley to be re-counted in the Alberton region."

[18] Regarding the above charges, the applicant's contention was that;

a) they related directly to the disclosures made by him and Luyt to Louw the attorney, the SARS and Zwennis of Shoprite Checkers;

b) they related to confidential information of Uys that was copied and used by Luyt, and not upon his instructions or assistance.

c) the information he had obtained from the respondent, CleanCorp and other entities to which monies of the respondent had been distributed or belonged to was not confidential as he was allowed to have access to and question it in his capacity as Deputy Managing Director, and the information was not disclosed in a mala fide fashion or to benefit himself;

d) the allegations against him directly related to the disclosures he had made to SARS under the PDA, and any disciplinary steps was therefore unlawful

[19] In an answering affidavit deposed to by Uys, the respondent's answer to the applicant's allegations was that;

a) Uys currently holds 96% shares in the company, whilst the other 4% is held by a Dries Bothma. The respondent generates an income of about R23,2 million a month from Shoprite/Checkers alone. The applicant holds the position of Operations Manager for Botswana and all the provinces except for Kwa-Zulu Natal and Western Cape. Uys denied that the applicant was appointed as Deputy Managing Director. He conceded that he fulfilled the functions of Uys' second in charge.

b) The applicant was not a shareholder and had no idea of what Uys' income was, but had attempted to create an impression that there was something suspicious about Uys' wealth.

c) The applicant had no legitimate basis for removing documents from Uys' office and had merely done so unlawfully with the assistance of Luyt as confirmed by the latter, for the sole purpose of attempting to hijack the business of the respondent, and was now after the fact, attempting to align himself with the PDA, based on information that was at best speculative.

d) It was the applicant that had approached Luyt to join him in a new company, Clean Corp Holdings (Pty) Ltd that was established in January 2014, to find information to discredit Uys and the respondent, and to convince Zwennis to give them the Shoprite/Checkers' contracts.

e) Uys denied that he was involved in money laundering or there was any wrong doing in handling of foreign cash in that what was handed to him by Salie was an amount of $10 000.00 that was brought into the country from Botswana, which had nothing to do with the operations of respondent, and which in any event the respondent did not have to declare in terms of the Customs and Excise Regulations. He further averred that the allegations of wrongdoing are at best sketchy and the fact that Louw had not deposed to any confirmatory affidavit about the alleged disclosures can only imply that he avoided possible defamation claims.

f) The respondent despite the applicant having approached the SARS had no knowledge of any investigations flowing from the alleged disclosure, and the respondent as at February 2017 had a clean report and had received a clean bill of health from SARS.

g) At a meeting between Uys and the applicant on 4 November 2016, the latter had attempted to blackmail Uys into giving him shares and profit-sharing in the respondent, and had refused to divulge any information intended to be disclosed to SARS' officials that to date remained unidentified.

h) The information disclosed to SARS according to Uys remained speculative and could not be construed as a disclosure as envisaged in the PDA, and the applicant could not rely on that affidavit to avoid the continuation of the disciplinary enquiry.

i) The charges preferred against the applicant emanated from information received by Ferreira, of the respondent's Human Resources from Mrs de Wet, its administration manager in the Benoni on or about 14 February 2017, to the effect that the applicant and Luyt had committed of acts of misconduct over time since mid- 2016. De Wet's confirmatory affidavit in respect of these allegations was attached to the founding affidavit.

j) Investigations thereafter followed, and Luyt had also submitted an affidavit, in which he had confirmed having had several meetings with the applicant to discuss a variety of issues, which in the respondent's view laid the basis for the charges against the applicant. Similar affidavits were also obtained from Edwin Vertue who is the Operations Manager in Gauteng.

k) Based on the allegations made against the applicant, he was then suspended with full benefits on 21 February 2017 and issued with a notice on 13 March 2017 to attend a disciplinary enquiry scheduled for 16 March 2017;

l) On 13 March 2017, the applicant sent through a medical certificate which declared him medically unfit from 3 March 2017 until 10 March 2017. Another medical certificate followed on 15 March 2017 which declared him unfit until 31 March 2017

m) A new notice to attend the disciplinary enquiry was issued on 28 March 2017 in terms of which the enquiry was scheduled for 1 April 2017. On 29 March 2017, the applicant's attorneys of record sent an e-mail to the respondent informing it that the pending disciplinary action was as a result of a protected disclosure and was thus unlawful and unfair. The respondent was then advised of the intention to bring this application and requested that the disciplinary proceedings be postponed.

n) Following various telephonic communications between the attorneys of record, it was accepted that the medical certificate declaring the applicant medically unfit until 10 March 2017 should have read 10 April 2017 and the disciplinary proceedings were postponed to 11 April 2017.

o) The respondent was advised on 4 April 2017 that the applicant would be proceeding with this application. This was followed a referral of the dispute to the CCMA on 5 April 2017, and a copy of this application.

p) The respondent holds the view that there is no basis for the granting of the order sought, as the applicant, in the event of an unfavourable outcome from the disciplinary enquiry, can approach the CCMA.

Evaluation:

[20] The applicant seeks interim relief, and the requirements for such relief are well-known[2]. Thus, applicant must establish the existence of a *prima facie* right; the apprehension of irreparable harm; the absence of an alternative remedy; and the balance of convenience. Principal amongst considerations in urgent applications, whether an interim or final order is sought is whether grounds for the matter to be heard on an urgent basis have been established.

Urgency:

[2] LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267 A-F.

[21] The respondent's primary contention was that the application before the court was not urgent. The principles surrounding urgent applications in this court are trite. Rule 8 of the Rules of this Court[3] requires a party seeking urgent relief to set out reasons for urgency, why urgent relief is necessary, and why the requirements of the rules of court have not been complied with[4]. Thus, an applicant is required to place such facts before the court as would be sufficient to enable it to exercise a judicial discretion in regard to whether sufficient and satisfactory grounds have been shown to exist to justify giving the particular matter preference [5].

[22] In this case, the applicant averred that the application was urgent based on the following grounds;

a) The disciplinary enquiry was set to continue on 10 April 2017;

b) There was no purpose in waiting until after the date to have the application heard considering the nature of the relief required;

c) He was only able to consult counsel during the week of 21 March 2017 and an attorney during the week of 28 March 2017 due to his illness.

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[3] Rule 8 provides that;

> 1) "A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
> 2) The affidavit in support of the application must also contain-
>   a) the reasons for urgency and why urgent relief is necessary;
>   b) the reasons why the requirements of the rules were not complied with, if that is the case; and
>   c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted".

[4] See Maqubela v SA Graduates Development Association and Others [2014] 35 ILJ 2479 (LC) at para 32, where it was held that;

> "Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her affidavit the reasons for urgency and to give cogent reasons why urgent relief is necessary…"

[5] Mimmo's Franchising CC v Spiro, Harry David (JA58/00) [2002] ZALAC 7 (29 March 2002) at paragraph 29. See also Jiba v Minister: Department of Justice and Constitutional Development and Others 2010) 31 ILJ 112 at para 18 where it was held that;

> "Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules".

d) The urgent relief was required to enable him to pursue the remedies he had under the LRA and the PDA with respect to the protected disclosure he had made and the fact that the respondent was committing an unfair labour practice in this regard

e) If urgent relief was not granted, it would mean that Uys would be allowed to continue with his orchestrated attempt and object to get him dismissed, and once dismissed, this would cause him grave injustice and would have dire consequences for him and his dependants.

[23] The respondent as already indicated vehemently denied that there was any urgency in the application, and that any urgency that might exist is self-created. I agree with the submissions made on behalf of the respondent that the urgency in this matter is self-created. My conclusions in this regard are fortified by the trite principle that the latitude extended to parties to dispense with the rules of the court in circumstances where they seek urgent relief is not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely on to seek relief[6].

[24] The applicant in this case was dilatory, and there is nothing to gainsay the contention that it is his very inactivity from when the disciplinary steps against him commenced that is the very cause of harm on which he seeks to obtain relief. In this regard, it is observed that;

a) The applicant was suspended with full benefits on 21 February 2017. He was content to be on suspension, and had not taken any steps to challenged that suspension.

b) On 3 March 2017, the applicant sent through a copy of his medical certificate which declared him medically unfit until 10 March 2017. It is not known what he had done between 27 February 2017 and 3 March 2017.

[6] National Police Service Union and others v National Negotiating Forum and others (1999) 20 ILJ 1081 (LC) para [39]

c) Upon receipt of a notice to attend a disciplinary enquiry on 13 March 2017, in terms of which the enquiry was scheduled for 16 March 2017, the applicant sent through another copy of his medical certificate on 15 March 2017, which declared him unfit until 31 March 2017. This was a day prior to the enquiry. The timing of the submission of the copy could not have been coincidental, and I am inclined to agree with the respondent's contentions that the applicant was clearly trying to avoid the enquiry.

d) The applicant allegedly consulted with counsel during 'the week of 21 March 2017 and an attorney during the week of 21 March 2017'. Again, there is vagueness in respect of specifics, and it is strange that the applicant would want to consult with counsel first prior to consulting with his attorneys. Even then, no action was taken after those alleged consultations.

e) On 28 March 2017, a new notice to attend the disciplinary enquiry was issued to the applicant in terms of which the enquiry was scheduled for 1 April 2017. In response to this notice, the applicant's attorneys of record for the first time on 29 March 2017 made allegations of a protected disclosure and indicated their intention to approach the court on an urgent basis. This was notwithstanding the applicant's initial contention that as far back as November 2016 he had intended to make a protected disclosure after discussing the allegations with Zwennis and Uys.

f) His attorneys had further on 28 March 2017 requested that the disciplinary enquiry scheduled for 1 April 2017 be postponed pending the proceedings before this court. Despite the notice, still the applicant failed to launch the application.

g) On 30 March 2017, the applicant's attorneys of record telephonically contacted the respondent and made a further request for a postponement of the disciplinary enquiry on the grounds that the attorney was not available on the specified date.

This was followed by yet another copy of the applicant's medical certificate, declaring him unfit until 10 April 2017.

h) *Prima facie*, it appears that the applicant was bent on avoiding the disciplinary enquiry. Even if he had reason to believe that the disciplinary proceedings were unwarranted, and despite threatening legal action, he had not done so, until the respondent had insisted that the enquiry would proceed on 11 April 2017.

i) On 4 April 2017, the applicant's attorneys of record advised that they would be proceedings with an urgent application. An unfair labour practice dispute was referred to the CCMA on 5 April 2017. This was according to the respondent, followed by the applicant's urgent application as served on it some three hours after receipt of the referral. The application was filed with the Court on 6 April 2017, some 38 days since the suspension.

[25] In *AMCU and Others v Northam Platinum Ltd and Another*[7] this Court held that;

> "A final consideration when it comes to urgency is the expedition when taking action. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event-giving rise to the proceedings, the more urgency is diminished."

[26] In the light of the time-line as summarised above, there can be no doubt that the situation sought to be remedied with this urgent application arose on 27 February 2017 when the applicant was suspended. Until the first notification to attend the disciplinary enquiry was issued on 13 March 2017, he took no action. The applicant waited until 6 April 2017 to approach the CCMA and to launch the application in view of the respondent's insistence that the disciplinary enquiry was to proceed on 11 April 2017. The applicant does not proffer any reasonable explanation as to the reason that he had not approached the court earlier after he was

[7] (2016) 37 ILJ 2840 (LC) at para 26

suspended or notified of the intended disciplinary proceedings. His only explanation was that he was sick and had been booked off.

[27] It is not even clearly discernible from the copies of medical certificates issued on 3 March 2017 and 15 March 2017 as to what could have rendered the applicant so incapacitated as to be unable to take any steps in regard to the respondent's alleged unfair conduct towards him. In my view, the requests to postpone the disciplinary proceedings on either medical grounds or on the fact that his attorney was not available was merely an attempt at avoiding the inevitable.

[28] The referral of the dispute to the CCMA on 5 April 2017 in view of the suspension having taken place on 27 February 2017 was in any event belated and an after-thought. This was in view of the realisation that such a referral was required for the purposes of the interim order to be sought. The subsequent launching of this application on the same date as the referral to the CCMA was clearly an attempt to demonstrate that the matter was expeditiously attended to when this was not the case. This was indeed a classic case of self-created urgency.

[29] In the light of the above, the Court is not satisfied that the reasons that make the matter urgent have been set out succinctly in the papers. There is nothing in the applicant's reasons for urgency that indicates that he will not obtain a substantial relief at a later stage.

[30] Other than the above factors, the applicant was well aware that he had an alternative remedy in the form of a referral to the CCMA, and the courts are loath to accord a matter urgency where a party has alternative remedies. This is even more apposite in this case where the relief sought is in a form of a declaratory order. In *MEC for Education: North West Provincial Government v Errol Randal Gradwell*[8]**,** it was held that a declaratory order is usually inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. These remedies are clearly available to the applicant.

[8] (2012) 33 ILJ 2033 (LAC) at para 46

[31] In the light of all factors considered above, the matter ought to be struck off the roll. Thus, no purpose would be served in determining whether other requirements for the relief sought have been met. It is further trite that this court takes into account the requirements of law and fairness in determining whether a cost order should be made. In this case, having considered those requirements, I am satisfied that the applicant ought to be burdened with the costs of this application.

[32] Accordingly, the following order is made:

Order:

i. The applicant's application is struck off the roll for lack of urgency.

ii. The applicant is ordered to pay the costs of this application

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E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Ms. S Lancaster of Lancaster Kungoane Attorneys
For the Respondent:	Adv. A van der Merwe
Instructed by:	Tertius Bootha Attorneys