



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: J1876/17

In the matter between:

**BABALWA MAGODA**

**Applicant**

and

**DIRECTOR-GENERAL OF RURAL  
DEVELOPMENT & LAND REFORM**

**First Respondent**

**ADVOCATE TANYA GOLDEN SC**

**Second Respondent**

**Heard:** 24 August 2017

**Delivered:** 28 August 2017

**Summary:** Urgent application by a civil servant for interim relief interdicting continuation of disciplinary enquiry pending review of procedural rulings made by disciplinary chairperson – *prima facie* right to review not established – application for interim relief dismissed

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**JUDGMENT**

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**MYBURGH, AJ**

## Introduction

- [1] Eight years ago, Francis J identified that a worrying trend was developing in this court where the urgent roll is being clogged up with applications to interdict disciplinary enquiries from taking place.<sup>1</sup> In the years that followed, this court repeatedly echoed these sentiments.<sup>2</sup> But practitioners have not taken heed of this, with Van Niekerk J having commented last year that “[t]he urgent roll in this court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings”.<sup>3</sup> This case adds to what is a significant challenge to the capacity and resources of this court.
- [2] The applicant, a high-ranking civil servant, is presently being subjected to a disciplinary enquiry presided over by the second respondent (a senior counsel at the Cape bar) at which she faces charges of serious misconduct. She has been on suspension with full pay since December 2016. At issue are the following procedural rulings made by the second respondent during the course of the disciplinary enquiry.
- a) On 2 August 2017, a ruling refusing the applicant a further postponement on account of her illness, and a ruling that the matter will, accordingly, be decided on the basis of the evidence led to date. (At this point, the employer had completed its evidence and the applicant had testified in-chief for about 1 ½ days. Although the applicant contends that the second respondent’s ruling was to the

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<sup>1</sup> *Mosiane v Tlokwe City Council* [2009] 8 BLLR 772 (LC) at para 15.

<sup>2</sup> See *Jiba v Minister of Justice and Constitutional Development & others* [2009] 10 BLLR 989 (LC) at para 17; *SA Municipal Workers Union on behalf of Members v Kopanong Local Municipality* (2014) 35 ILJ 1378 (LC) at para 33; *South African Municipal Workers’ Union obo Dlamini and others v Mogale City Local Municipality and another* [2014] 12 BLLR 1236 (LC) at para 45; *Zondo & another v Uthukela District Municipality & another* (2015) 36 ILJ 502 (LC) at para 45; *Ravhura v Zungu NO & others* (2015) 36 ILJ 1615 (LC) at para 15; *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd & another* (2016) 37 ILJ 2840 (LC) at para 41.

<sup>3</sup> *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions & others* (2016) 37 ILJ 1704 (LC) at para 14.

effect that the matter would be decided on the basis of the employer's evidence alone, this is not borne out by the transcription of the disciplinary enquiry. The employer accepts that the second respondent should have regard to the applicant's evidence, and made reference to it in its heads of argument on the issue of guilt, which have been submitted to the second respondent.)

- b) On 8 August 2017, a ruling that the aforesaid rulings would not be reconsidered – this in circumstances where the applicant undertook an about turn and tendered to continue her evidence despite her illness. (I refer to both sets of rulings conjunctively below as “the procedural rulings”.)

[3] There are two parts to the present application. In part B, the applicant seeks to review the procedural rulings, while in part A the applicant seeks urgent interim relief interdicting the continuation of the disciplinary enquiry pending the outcome of the review (including any appeals). On 15 August 2017, I found part A of the application to be urgent, and am now seized with the merits thereof.

[4] In order to succeed with the application for interim relief, the applicant must establish a *prima facie* right to review the procedural rulings under part B. And in order to establish a *prima facie* right, the applicant must provide *prima facie* proof of facts that establish the existence of a right in terms of the substantive law.<sup>4</sup> A strict legal right to interim relief must be established, not simply some moral or equitable right.<sup>5</sup> The applicant would also then have to establish irreparable harm, that the balance of convenience is in her favour, and that there is no adequate alternative remedy.

#### Section 158(1)(h) and the applicant's pleaded grounds of review

<sup>4</sup> LAWSA vol 11 (2<sup>nd</sup> ed), para 404; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

<sup>5</sup> Prest *The Law and Practice of Interdicts* at 52.

- [5] Although not specifically pleaded, the applicant relies on section 158(1)(h) of the LRA, which clothes this court with the jurisdiction (and power) to “review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law”. This establishes a jurisdictional footprint for review, with the permissible grounds of review being dependent upon the nature of the impugned decision.<sup>6</sup> Amongst other things, insofar as the decision constitutes administrative action, a review on the grounds set out in section 6 of PAJA exists; and insofar as the decision does not qualify as administrative action but, nevertheless, involves the exercise of a public power, a review based on the principle of legality (encompassing legality and rationality) exists<sup>7</sup> – this being commonly referred to as legality review.<sup>8</sup> But the fact that a review in either of these circumstances exists, does not mean that it will always be entertained or found permissible. As the LAC put it in *De Bruyn*:<sup>9</sup>

“[28] But it does not follow that because the remedy of judicial review may still exist for public servants that the Labour Court will entertain an application to review ‘any act performed by the State in its capacity as employer’ as a matter of course. Recourse to review proceedings, in terms of s 158(1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place and also other applicable statutes.”

- [6] In the present matter, the applicant’s grounds of review are framed as being that the procedural rulings were unlawful (although the term is not used, it is

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<sup>6</sup> *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 ILJ 613 (CC) at para 28, fn 12; *Merafong City Local Municipality v SA Municipal Workers Union & others* (2016) 37 ILJ 1857 (LAC) at para 36.

<sup>7</sup> *Hendricks v Overstrand Municipality & another* (2015) 36 ILJ 163 (LAC) at para 29, read with para 21; *Merafong City Local Municipality (supra)* at para 38.

<sup>8</sup> See generally regarding legality review, *MEC for the Department of Health, Western Cape v Weder*; *MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 ILJ 2131 (LAC) at paras 33-35.

<sup>9</sup> *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety & Security & another* (2012) 33 ILJ 1822 (LAC) (“*De Bruyn*”).

pleaded that the second respondent applied the wrong legal test applicable to postponements), irrational and unreasonable. All of these are grounds of review of administrative action, while the first two grounds are a basis for legality review, but unreasonableness is not.<sup>10</sup> Although pleading her grounds of review in this fashion, nowhere is it explicitly pleaded by the applicant that the procedural rulings constitute administrative action, or that the second respondent exercised a public power in making them.

#### The applicant's legality review

- [7] In argument, Mr Ogunronbi (who appeared for the applicant) conceded that the procedural rulings did not constitute administrative action. To my mind, the concession was well made. In circumstances where the Constitutional Court found in *Chirwa*,<sup>11</sup> and confirmed in *Gcaba*,<sup>12</sup> that the dismissal of a public servant does not constitute administrative action, there exists no basis for finding that procedural rulings made during the course of a disciplinary enquiry – which may or may not lead to dismissal – do so.
- [8] Mr Ogunronbi went on in argument to place all of his eggs in the basket of legality review – his essential contention being that the second respondent acted unlawfully in deciding to exclude the applicant's evidence (or at least the completion thereof), with the result that the procedural rulings are reviewable. In the first instance, it is by no means clear to me that this falls within the applicant's pleaded grounds of review. In any event, the contention of unlawfulness seems to me to be misconceived for the following reasons. In advancing the contention, Mr Ogunronbi relied on authorities in which it has been found that where a decision-maker performing administration action breaches the *audi alteram partem* principle, the decision is rendered unlawful. These authorities are, however, inapplicable because we are, as Mr Ogunronbi conceded, not in the realm of administrative action. This forced Mr

<sup>10</sup> *Public Servants Association of SA & another v Minister of Labour & another* (2016) 37 ILJ 185 (LC) at para 58.

<sup>11</sup> *Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC) at paras 142 and 150.

<sup>12</sup> *Gcaba v Minister for Safety & Security & others* (2010) 31 ILJ 296 (CC) at para 66.

Ogunronbi into the contention that the same principle applies to the exercise of all public power and that a breach thereof gives rise to legality review. I do not agree with this contention. The fundamental requirement of the principle of legality is that the exercise of all public power must be rational. While the principle of legality has sometimes been expanded by treating an opportunity to be heard as a requirement of rationality,<sup>13</sup> this is a much narrower (and basic) process right than is contended for by the applicant.

[9] Notwithstanding the above, the main difficulty that I have with the construction of the applicant's case is that it assumes that the procedural rulings constitute the exercise of a public power, which is a prerequisite for legality review. While the dismissal of a public servant involves the exercise of a public power,<sup>14</sup> on the analysis provided by the Constitutional Court in *AMCU*,<sup>15</sup> I am not persuaded that the procedural rulings involve the exercise of a public power. The power exercised by the second respondent in making the procedural rulings does not "look and feel like"<sup>16</sup> a public power. Critically, it is not pleaded by the applicant (despite being challenged to do so in the employer's answering affidavit) that the source of the power is legislative. The second respondent is simply performing the role of management in chairing the disciplinary enquiry (a line management function), which is regulated by an internal disciplinary code and procedure,<sup>17</sup> with the Code of Good Practice: Dismissal (schedule 8 to the LRA) constituting part thereof.

[10] But even if I am wrong and the procedural rulings did involve the exercise of a public power, insofar as the LRA provides a remedy to address the applicant's complaints about them, I do not consider a review in terms of section

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<sup>13</sup> *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 34.

<sup>14</sup> *Chirwa (supra)* at para 138.

<sup>15</sup> *Association of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 ILJ 831 (CC) ("*AMCU*") at paras 74-83.

<sup>16</sup> *Ibid* at para 74.

<sup>17</sup> Para 2 of chapter 7 of the SMS handbook. There are references to this in the disciplinary charge sheet issued to the applicant.

158(1)(h) to be permissible – otherwise a separate legal framework would apply to public and private sector employees.<sup>18</sup> As held by the LAC in *De Bruyn*, the LRA may oust the section 158(1)(h) review jurisdiction of this court, where, for example, the dispute involves the interpretation or application of a collective agreement, which stands to be arbitrated by the CCMA.<sup>19</sup> The LAC went on to find that a section 158(1)(h) review was not permissible on what appears to be a wider basis: “[i]t follows that the appellant is confined to its remedy in terms of section 24 of the LRA and it may not, instead, seek to review the respondent's decision in the Labour Court in terms of section 158(1)(h).”<sup>20</sup> Along similar lines, the LAC indicated in *Hendricks* that section 158(1)(h) reviews should be confined to legitimate challenges where there is no other remedy available under the LRA.<sup>21</sup> As Murphy AJA went on to put it, “[i]f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for [its] resolution”.<sup>22</sup> This court has also held, on more than one occasion, that where another remedy exists under the LRA, a section 158(1)(h) review is not permissible.<sup>23</sup> In the present case, the LRA does provide for a remedy: an application for an interdict / declarator to vindicate the right to procedural fairness based on the LAC's judgment in *Booyesen*<sup>24</sup> (see further below). But that is not the claim brought by the applicant, who has instead nailed her colours to the mast of legality review.

[11] In seeking to address this issue, Mr Ogunronbi submitted that the alleged unlawfulness can only be remedied by bringing a legality review, and thus that

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<sup>18</sup> See generally, *Khumalo (supra)* at paras 30-31.

<sup>19</sup> *De Bruyn* at paras 29 and 34; followed in *Farre v Minister of Defence & others* (2017) 38 ILJ 174 (LC).

<sup>20</sup> *De Bruyn* at para 34.

<sup>21</sup> *Hendricks (supra)* at para 30; *Merafong City Local Municipality (supra)* at para 21.

<sup>22</sup> *Hendricks (supra)* at para 30. This emanates from *Chirwa (supra)* at para 124.

<sup>23</sup> See for example, *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 1238 (LC) at para 50; *MEC Department of Education KwaZulu Natal v Khumalo & another* [2010] 11 BLLR 1174 (LC) at para 26.

<sup>24</sup> *Booyesen v Minister of Safety & Security & others* (2011) 32 ILJ 112 (LAC).

the review was permissible. But, to my mind, this is also misconceived. The principle emerging from *Hendricks* (and related case law) is that section 158(1)(h) reviews (including legality review) are only permissible where there is no other remedy available under the LRA. The principle is not defeated because an applicant relies on legality (i.e. lawfulness) *in the review*, while the LRA provides for a remedy in fairness, because it is the existence of a remedy under the LRA that renders the review impermissible. In any event, in substance the applicant's complaint is that she was treated procedurally unfairly as a consequence of the procedural rulings. The founding affidavit is replete with references to the applicant's right to a "fair" trial or hearing having been breached. And in argument, Mr Ogunronbi placed reliance on item 4 of the Code of Good Practice: Dismissal (schedule 8 to the LRA), which deals with the procedural fairness of dismissals for misconduct. In effect, the applicant has labelled a complaint about procedural fairness as one of unlawfulness in order to mount a legality review, simply because unfairness itself is not a ground of review.<sup>25</sup> The LRA provides a remedy to address this very complaint; a review under section 158(1)(h) is thus impermissible.

#### Review *in medias res*: exceptional circumstances

[12] In the further alternative, even if a legality review is available to the applicant under section 158(1)(h) despite the existence of an alternative remedy under the LRA, in order to succeed with an application for interim relief at this stage, she would have to establish exceptional circumstances for a review *in medias res*. This was explained as follows by the old LAC in *Zondi*:<sup>26</sup>

"There is no universal or absolute test governing the question when a court will interfere in uncompleted proceedings, but one thing is clear from the cases and that is that a court will only interfere *in medias res* in exceptional

<sup>25</sup> See similarly, *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC) at para 125.

<sup>26</sup> *Zondi & others v President, Industrial Court & others* (1991) 12 ILJ 1295 (LAC) at 1300; cited with approval in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* (2000) 21 ILJ 2382 (LAC) at para 20.

circumstances, or when there is very good reason to do so. In ordinary circumstances the time to take any proceedings on appeal or review is at the termination thereof. The reasons for this attitude are equally clear. To permit interference in untermiated proceedings delays the continuation and completion of such proceedings. If such termination were to be readily permitted the proceedings might be interrupted at various times, and to deal with reviews or appeals piecemeal is clearly not practicable. In any event, the irregularity, even if it is allowed to stand, will not necessarily affect the result which might otherwise have followed. The tribunal concerned might for example in any event come to a conclusion favourable to the party otherwise affected by the irregularity. Even if the irregularity does in the end lead to a conclusion adverse to the person affected thereby, the time to put it right, as I have already said, is at the termination of proceedings.”

[13] Significantly, the court went on to find in *Zondi* that the commission of a gross irregularity was not, in itself, the basis for a review *in medias res*. The applicant has to go further and show that the gross irregularity will lead to a miscarriage of justice.<sup>27</sup>

[14] Along similar lines, the LAC in *Booyesen* set the following test for the intervention by this court in part-heard disciplinary enquiries (which test Mr Ogunronbi accepted that the applicant must satisfy at this stage in order to obtain interim relief):

“[54] ... 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 to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.”<sup>28</sup>

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<sup>27</sup> *Zondi (supra)* at 1303.

<sup>28</sup> Followed in *City of Cape Town v SA Municipal Workers Union on behalf of Abrahams & others* (2012) 33 ILJ 1393 (LAC) at para 16.

[15] In *Ngobeni*, Van Niekerk J expanded on this:<sup>29</sup>

"[12] ... this court does not ordinarily intervene in incomplete disciplinary proceedings. In *Booyesen* ... the LAC made it clear that the Labour Court may only interdict unfair conduct in the course of disciplinary proceedings 'in exceptional circumstances', such as where a grave injustice would result. In *Jiba v Minister: Department of Justice & Constitutional Development & others* (2010) 31 *ILJ* 112 (LC) at para 17, this court held that:

'Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145.'

[13] The policy underlying this approach was explained in *Trustees for the time being of the Bioinformatics Network Trust v Jacobson & others* (2009) 30 *ILJ* 2513 (LC); [2009] 8 *BLLR* 833 (LC) at para 4, where the court said the following in relation to incomplete arbitration proceedings:

'There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason – for this court routinely to intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced

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<sup>29</sup> Fn 3 above.

rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court.'

The principle is equally applicable (if not more so) to incomplete disciplinary proceedings."

[16] In addition to all of the above, the bringing of urgent applications in this court to interdict part-heard disciplinary enquiries is at odds with the design of the dispute-resolution system under the LRA. As Van Niekerk J went on to find in *Ngobeni*:

"[14] ... Applicants who move applications on an urgent basis in this court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute-resolution system. The court's proper role is one of supervision over the statutory dispute-resolution bodies; it is not a court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micromanage discipline in workplaces."

[17] With reference to the above, the fact that applications such as this ought to be discouraged for the numerous material reasons mentioned in the authorities, is the context within which the test of exceptional circumstances set in *Booyesen* stands to be applied. Seen thus, the test is clearly a stringent one, which will not be easily met.

[18] To my mind, this stringent test (i.e. of exceptional circumstances for intervention in a part-heard disciplinary enquiry) is not met in the circumstances of this matter for these reasons.

- a) Firstly, it is not clear whether any "grave injustice"<sup>30</sup> will be suffered by the applicant if the matter is decided without her completing her evidence. This is particularly so in the light of the fact that: (i) the applicant (albeit misguidedly) applied for absolution from the instance upon the closure of the employer's case – her position being that there was no need for her to give evidence because the employer had not

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<sup>30</sup> See the quotation from *Booyesen* in para 14 above.

made out a *prima facie* case; (ii) there is nothing to say that the applicant will be found guilty and dismissed if the matter is determined without her evidence being completed; (iii) the applicant does not plead what additional evidence in-chief she wishes to present (this in circumstances where she has already testified in-chief for some 1 ½ days) or that it will be in any way material; (iv) the applicant's case and defences would have been put to the employer's witnesses, with the second respondent thus being aware thereof; (v) the applicant turned down the opportunity of calling any other witnesses before the second respondent made her procedural rulings on 2 August 2017; and (vi) ironically, the applicant will be spared from being cross examined as a consequence of the procedural rulings, which would typically operate in her favour.

- b) Secondly, insofar as it may be denied, "justice [may] be attained by other means",<sup>31</sup> namely at arbitration before the relevant bargaining council, which, importantly, is a hearing *de novo*, as opposed to being based on the record of the disciplinary enquiry.<sup>32</sup> In the event of her being dismissed, there is thus nothing stopping the applicant from leading any additional evidence at arbitration that may be excluded from the disciplinary enquiry as a consequence of the procedural rulings. And insofar as the procedural rulings may be found at arbitration to have been procedurally unfair, the applicant would be entitled to compensation.

### Conclusion and order

[19] In all the circumstances, I am accordingly of the view that the applicant has failed to establish a *prima facie* right to the grant of interim relief. This because she has failed to establish the existence of a right in terms of the substantive law to the review of the procedural rulings based on the principle of legality; alternatively she has failed to meet the test of exceptional

<sup>31</sup> See also the quotation from *Booyesen* in para 14 above.

<sup>32</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para 18.

circumstances for intervention by this court in a part-heard disciplinary enquiry.<sup>33</sup> There is thus no need to consider the other requirements for the grant of interim relief.

[20] In relation to costs, I see no reason why costs should not follow the result in all the circumstances of this matter. Given the urgency with which the matter had to be dealt with by the employer, the importance of the issues at stake and the complexities arising from the nature of the application, it seems to me that the employer was justified in engaging two counsel. I thus intend ordering the applicant to pay the costs of two counsel.

[21] In the result, the following order is made:

- 1) part A of the application (i.e. the application for interim relief) is dismissed;
- 2) the applicant shall pay the costs, including those of 11 August 2017, which costs shall include the costs of two counsel, where so employed.

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**Myburgh, AJ**

Acting Judge of the Labour Court of South Africa

### **Appearances**

For the applicant: Adv S Ogunronbi instructed by Mtshontshi Attorneys

For the first respondent: Adv C Kahanovitz SC and Adv M van As instructed by the State Attorney

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<sup>33</sup> See para 4 above.