IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1809-17

In the matter between:

MAJOLA, BONGA BALDWIN **Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL ROADS AND TRANSPORT,

GAUTENG PROVINCIAL GOVERNMENT

ISMAIL VADI **First Respondent**

HEAD OF DEPARTMENT, ROADS AND TRANPORT,

GAUTENG PROVINCIAL GOVERNMENT

RONALD SWARTZ **Second Respondent**

Heard: **14 September 2017**

Delivered: **29 September 2017**

JUDGMENT

WHITCHER, J:

Introduction:

[1] The applicant has approached this court on an urgent basis for orders that, pending the outcome of the protected disclosure dispute he referred to this Court on 24 July 2017,[1] his precautionary suspension effected on 30 June 2017 is lifted and the respondents are interdicted from proceeding with the disciplinary proceedings it has instituted against him.

[2] The charges in the suspension notice allege that in August 2016 the applicant refused to report to the Head of Department's office after he was temporarily transferred there, continuously disregarded the authority of the Head of Department, refused to execute tasks assigned to him by the Head of Department, refused to submit a performance agreement and persistently took unauthorised leave. It further alleges that the applicant has made false and unsubstantiated allegations against the Head of Department.

[3] The applicant contends that he is being subjected to disciplinary action on account or partially on account of him having made protected disclosures against the respondents on 1 February and 14 June.

[4] In seeking interim relief, the applicant has to show the existence of a *prima facie* right even if it is open to some doubt, a well-grounded apprehension of irreparable harm if interim relief is not granted, the absence of an alternative remedy and that the balance of convenience favours the granting of the interim relief. Other than these requirements, the key question is whether the applicant acted with due urgency in bringing this application.

Background

[5] It took an inordinate amount of time to unravel the following series of events from the voluminous papers in this matter.

[6] The parties' relationship is characterised by a long history of litigation with claims of persistent misconduct and counter claims of occupational detriments.

[1] Under case number JS 571-17.

[7] The more recent was played out in February 2017. In August 2016 the second respondent temporarily transferred the applicant on the basis that the applicant did not possess a security clearance, which is a term of his employment. On 26 January 2017 the applicant, in an urgent application, claimed that his transfer was on account of him having made a protected disclosure on 29 August 2016 pertaining to the irregular appointment of legal service providers by the department in July and August 2016. On 21 February, Tlhotlhalemaje J found no merit in the applicant's claim and dismissed the application.[2]

[8] Following this there were a series of written exchanges between the parties in *April, May and June 2017*. Save for the charge that the applicant has made false allegations against the second respondent, the exchanges largely cover the allegations in the suspension and disciplinary notice of 30 June 2017.

[9] On *11 May 2017* the second respondent directed the applicant to show cause why disciplinary action should not be taken against him.

[10] On *17 May and 25 May 2017* the second respondent sent and received correspondence which, on its face, indicates that he was in the midst of investigating irregular payments in a project, which I will refer to as the William Nicol project.

[11] On *14 June 2017 at 9.24am* the second respondent stating that it had been brought to his attention that the applicant had approached certain officials to access "sensitive" documents on the William Nicol project in the absence of prescribed procedures and security clearance.

[12] On *14 June 2017 at 1pm* the second respondent informed the applicant that he had considered his response to the letter of 11 May 2017, why he was dissatisfied with the response and that he was preparing to take disciplinary action against him.

[13] On *14 June 2017 at 6pm* the applicant sent out a disclosure pertaining to the William Nicol project.

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[2] JR 122-17.

[14] On *30 June 2017* the applicant was placed on precautionary suspension and notified of the charges levelled against him. As stated earlier on, the charges essentially covered the exchanges the parties had been having since 2016 going into 2017.

The disclosures

[15] On *1 February 2017* the applicant made a disclosure which alleges that the department had irregularly appointed certain legal service providers in July and August 2016 and implicates the second respondent as the official Accounting Officer of the department.

[16] *On 14 June 2017* at 6pm the applicant made a disclosure to various levels of government, including the first respondent, that irregular payments of R26 million had been made by the department between January and April 2017 to a construction company in connection with the William Nicol project. He alleges in the disclosure that the second respondent had not acted on the matter on the discovery of the irregularities.

[17] The disclosure further alleges that the second respondent had instructed the payment of the legal service providers irregularly appointed in July and August 2016.

[18] On *28 June 2017* he supplemented both disclosures with further documents.

The applicant's prospects of success in the PDA referral[3]

[19] In my view, there is a weak link between the disclosures and the second respondent's decision to institute disciplinary action against the applicant. I say this for the reasons that follow.

[20] The disclosure of 1 February 2017 is really a re-hash of the disclosure made in August 2016. The disclosure was thus made months before disciplinary action was contemplated by the second respondent.

[3] The protected disclosure dispute the applicant referred to this Court on 24 July 2017.

[21] The applicant's claim that his transfer was on account of him having made a protected disclosure on 29 August 2016 pertaining to the irregular appointment of legal service providers by the department in July and August 2016 was dismissed on 21 February by Tlhotlhalemaje J.[4] Thus, in essence, it has already been found that the disclosure of 1 February 2017 is not linked to action being taken against the applicant.

[22] In his disclosure made on 14 June 2017, the applicant used the second respondent's correspondence of 17 and 25 May 2017 to prove irregularities in the William Nicol project. The applicant would have been aware from this correspondence that the second respondent was in the midst of investigating the William Nicol irregularities.

[23] Disciplinary action against the applicant was imminent long before he made the disclosure on 14 June 2017.

[24] The applicant would have known this from his prior correspondence with the second respondent, particularly the letters of April and 11 May 2017, and, in the unlikely event that he was in any doubt, the letter he received at 1pm on 14 June 2017.

[25] He received the letter informing him of the impending disciplinary action *before* he sent his disclosure of 14 June 2017 to the Premier.

[26] The applicant pointed out that on the morning of 14 June 2017 he received an email from Swartz which indicated that Swartz was aware that he was making enquiries about the William Nicol project. This does not favour the applicant's case in any significant manner considering the parties' correspondence prior thereto going back to 2016 and April and May 2017, which in my view indicated that the second respondent was clearly bent on instituting disciplinary action and was merely paving the way thereto.

[27] There is only one matter which may favour the applicant in the main application. One charge is that the applicant has made false and unsubstantiated allegations against the HOD. The applicant submits that this

[4] JR 122-17.

charge clearly demonstrates that he is being disciplined for making protected disclosures.

[28] However, if the second respondent's view on the matter is correct, the department is entitled to discipline employees for making false allegations.

[29] The second respondent testified in his opposing affidavit that he was cleared of any wrongdoing as alleged in the August/February disclosure. He stated that Treasury investigated these claims, and, although its findings implicated certain officials, it did not implicate him.

[30] Furthermore, contrary to the applicant's claim in his disclosure of 14 June 2017, the second respondent did act when he became aware of the irregularities in the William Nicol project and the applicant was acutely aware of same when he made the allegation against the second respondent.

[31] An employee who has purportedly made a protected disclosure is not by virtue of such granted blanket immunity against prosecution for misconduct. An investigation into misconduct and a subsequent prosecution is not wrongful merely because they follow the employee having made an alleged protected disclosure. It will be wrongful if reasonable and probable grounds for prosecuting are absent and it is clear that the intention of the employer is not to obtain a conviction but to harass the employee for making a protected disclosure.

[32] In my view, the entire history of the parties and their exchanges between them demonstrates that the charges are grounded in valid concerns regarding the conduct of the applicant.

[33] The courts have also held that even where an employee has made a protected disclosure, he must also answer to the allegations against him and that employers are entitled to invoke their internal disciplinary processes as it would be contrary to the spirit and letter of the PDA to interfere with internal processes.[5]

[5] *Ngobeni v Minister of Communications and Another* (2014) 35 ILJ 2506 (LC) at [71]

[34] An employee may not use the PDA to essentially be a law unto himself in the workplace, avoid his duties and show complete disregard for authority, which appears to be the case in this matter.

[35] In any event, even if my evaluation of the matter thus far is wrong, the applicant has a serious problem with the issue of urgency.

Urgency

[36] On 14 June 2017 the second respondent categorically told the applicant in writing that it intended to take disciplinary action against him. On 4 July 2017, he was served with a formal notice thereof. The applicant launched this application a month later, on 4 August 2017, and in his notice of motion effectively gave the respondents' one court day to provide a meaningful opposition.

[37] I agree with the respondents that, having delayed for a month to seek the relief he now seeks, the applicant is not entitled to approach this court on an urgent basis. Still less was he entitled to make give the respondents less than 48 hours to file opposing papers in this matter considering its voluminous nature.

[38] The applicant submits that the delay was caused by the fact that his attorneys at first tried to resolve the matter by warning the respondents against its unlawful conduct and seeking undertakings from the respondent. However, it is evident from the correspondence that by 7 July 2017 it was clear that the respondents would not budge from their position. The applicant would also have appreciated this in light of the fact that the institution of the disciplinary proceedings was pre-dated by a series of uncompromising correspondence on the matter and uncompromising litigation between the parties on similar matters. I note that in previous urgent matters against the same respondents, the applicant was warned against the same claims to explain his delays.

[39] In light of these circumstances, this matter falls to be struck from the roll with costs for want of urgency.

Irreparable harm and an alternative remedy

[40] I am also not convinced that the applicant has no alternative remedy to protect himself against unfounded allegations and a sham disciplinary hearing.

[41] Section 188A (11) of the Labour Relations Act 1995 now contains the following procedure:

> Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act 26 of 2000), that employee or the employer may require that an enquiry be conducted in terms of the section into allegations by the employer into the conduct or capacity of the employee.

[42] In *Letsoalo & another v Minister of Police & others*[6] the Labour Court declined to grant urgent applications to postpone disciplinary enquiries pending the resolution of unfair labour practice disputes, finding, *inter alia*, that the LRA 1995 now provides an alternative remedy in cases involving claims of a protected disclosure. It noted that s 188A(11) has recently been enacted to provide a procedure to avoid extensive collateral and delaying litigation in disputes arising from protected disclosures made in terms of the Protected Disclosures Act 26 of 2000. The section provides that, if an employee alleges in good faith that the holding of a disciplinary enquiry contravenes the PDA, either the employee or the employer may insist that an enquiry into the employee's conduct or capacity be conducted by an arbitrator appointed by the CCMA or a bargaining council. The court, therefore, found that the applicants ought to have invoked the provisions of s 188A (11), and were not entitled to the urgent relief they sought.

[43] This also puts paid to any concerns on the part of the applicant regarding possible irreparable harm that may arise from a disciplinary hearing conducted by his employer.

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[6] (2016) 37 ILJ 1916 (LC)

Order

[44] In the premises, the following order is made:

1. The application is dismissed with costs.

B. Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: B Ford

Instructed by: Ndumiso Voyi Attorneys

For the respondents: V Soni, SC

Instructed by: State Attorney, Johannesburg