



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR358/18

In the matter between:

IVEDA VALERIE SMITH

Applicant

and

NATIONAL LOTTERIES COMMISSION

First Respondent

KGOANA MAMOGALE: CHAIRMAN

OF THE DISCIPLINARY ENQUIRY

Second Respondent

Heard: 29 March 2018

Delivered: 18 May 2018

Summary: Final interdict – declaratory order – power to discipline a member of the Distributing Agency in terms of the Lotteries Act 33 of 1997 – relief not competent due to non-joinder and alternative recourse.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In this application, the applicant (Ms Smith) seeks an order interdicting the pending disciplinary enquiry, reviewing and setting aside the ruling by the

second respondent (Mr Mamogale) to proceed with the disciplinary enquiry, declaring that the first respondent, the National Lotteries Commission (the NLC), has no power to institute disciplinary proceedings against her as a member of the Distributing Agency (the DA), and declaring the disciplinary enquiry against her unlawful.

- [2] On 18 April 2017, the Minister of Trade and Industry (the Minister) appointed Ms Smith as a full time member of the DA reporting to the Board of the NLC, subject to the policies, rules and regulations of the NLC. On 25 April 2017, Ms Smith signed a contract of employment with NLC wherein she accepted the terms and conditions of her employment which include an undertaking to be bound by the NLC Human Capital Management Policies, *inter alia*. She affectively commenced her employment with the NLC on 1 May 2017.
- [3] The NLC has instituted the pending disciplinary proceedings against Ms Smith on charges of misconduct pertaining to the allegations of dishonesty and misrepresentation. Tersely, Ms Smith is accused of failing to disclose the circumstances relating to her dismissal by the South Africa Council of Social Services Professionals (the SACSSP), her erstwhile employer, including the criminal charge of fraud. Also, that Ms Smith had lied to the interviewing panel that the SACSSP was willing to settle with her all the labour and criminal matters.
- [4] The disciplinary enquiry sat on 18 and 19 January 2018. Ms Smith raised a point *in limine* to the effect that the NLC lacked jurisdiction to institute disciplinary proceedings against her as she was appointed by the Minister. On 3 February 2018, during the sitting of the disciplinary enquiry, Mr Mamogale, handed down his ruling, dismissing the point *in limine*. It was in that sitting that the disciplinary proceedings were adjourned to 8 to 10 March 2018.
- [5] On 3 March 2018, Ms Smith launched this application in the ordinary course. On 7 March 2018, the NLC's attorneys of record reminded Ms Smith's attorneys of record that the disciplinary hearing would proceed as scheduled. The next day, 8 March 2018, Ms Smith approached this Court on urgent

basis. The urgent application was struck off the roll for lack of urgency by Prinsloo J on 9 March 2018.

- [6] The matter came before me on expedited basis at the instance of Ms Smith and as directed by the Judge President of this Court.

Section 26A and 26D of the Lotteries Act

- [7] Ms Smith is appointed in terms of section 26A of the Lotteries Act¹ which provides that:

‘26A. Distributing agency.’² — The distributing agency contemplated in section 22 (3) shall be —

- (a) appointed by the Minister in terms of this Act; and
- (b) accountable to the board.’

- [8] The Lotteries Act gives the Minister the power to discipline the member of DA in cases of conflict of interest. Section 26D provides as follows:

‘26D. Conflict and declaration of interest. —

- (1) A member of the distributing agency must, before appointment, submit to the Minister, board and the Commission a written statement in which he or she declares whether or not he or she has any direct or indirect interest, financially or otherwise, whether or not such interests —
 - (a) may constitute a conflict of interest in respect of his or her functions as a member of the distributing agency; or
 - (b) could reasonably be expected to compromise the distributing agency in the performance of its functions.
- (2) If such a member acquires any interest as contemplated in subsection (1), he or she must, within 30 days in writing, declare that fact to the Minister, board and the Commission.

¹ Act 57 OF 1997 as amended.

² The Lotteries Act defines ‘distributing agency’ as an agency appointed by the Minister in terms of section 26A read together with section 26B (3) of this Act, but not any department in the national or a provincial sphere of government.

- (3) A member must not be present at, or take part in, the discussion of or the taking of a decision on any matter before the distributing agency in which that member has an interest contemplated in subsection (1).
- (4) A member must not use his or her position or privileges, or confidential information obtained as a member of the distributing agency, for personal gain or to improperly benefit another person.
- (5) Should the Minister or the board become aware of any conflict of interest or perceived conflict of interest or circumstances that may compromise the impartiality of a person in executing his or her duties as a member of the distributing agency, the Minister may, after consultation with the board immediately order such person to stop executing any duties related to distributing grants pending any investigation or inquiry.
- (6) Should any member of the distributing agency become aware of any conflict of interest or perceived conflict of interest or circumstances that are likely to compromise his or her impartiality in executing his or her duties, such person must immediately stop executing such duties and must within seven days of becoming aware of such conflict or perceived conflict or circumstances inform the Minister, board and the Commission of any such conflict or circumstances and the Minister must, after consultation with the board consider whether such conflict or circumstances is likely to compromise the impartiality of such person in the performance of his or her duties.
- (7) The Minister may, after consultation with the board, institute disciplinary proceedings against any member of the distributing agency who fails or refuses to comply with or contravenes this section.
- (8) The Minister, board and the Commission must keep a register of the interests of members of the distributing agency disclosed in terms of this section and must update that register from time to time.
- (9) The Minister may, after considering whether such conflict or circumstances is likely to compromise the impartiality of such a person, inform such a person of his or her decision which may include

- (a) suspending such a person pending any further investigations;
- (b) instituting a disciplinary inquiry to probe such conflict or circumstances; or
- (c) dismissal of such a person from executing his or her duties as a distributor of grants on the ground of serious misconduct, where such person has failed to inform the Minister, board and the Commission of the existence of such conflict.'

[9] The crux of Ms Smith's impugn is that it is only the Minister who can institute disciplinary proceedings against her. Advocate Pheto, for Ms Smith, submitted that other than section 26D, the Lotteries Act is silent on the powers to discipline a member of the DA. Therefore, section 26D(9) evidently provides that it is only the Minister who can suspend, investigate, and institute disciplinary enquiry or dismiss a member the DA. Ms Smith further argued, in the alternative, that if it is found that the Lotteries Act is silent on the Minister's power to discipline a member of the DA, other than in terms of section 26D, the Minister's power to discipline a member of the DA must be implied in his power to appoint. To fortify this argument, Advocate Pheto referred to the Constitutional Court judgment in *Masethla v President of the Republic of South Africa and Another*.³

[10] The NLC, on the other hand, argued that the *Masethla* decision is distinguishable in the present case as Ms Smith bound by the employment contract which clearly stipulate the terms and conditions of her employment, including being subject to its disciplinary code. Advocate Kennedy SC, for the NLC, referred to the judgment in *Maroga v Eskom Holdings Ltd and Others*,⁴ where the High Court, per Masipa J, held that the *Masethla* decision was distinguishable since Mr Maroga had entered into a contact of employment which explicitly vested the power to dismiss in Eskom as his employer and not with the Minister of Public Enterprises. Similarly, in the present case, Ms Smith is employed by the NLC and as such the power to institute disciplinary proceedings vests with it and not with the Minister, so it was further argued.

³ 2008 (1) SA 566 (CC) at paras 67 to 68.

⁴ [2010] ZAGPJHC 133 (10 December 2010).

Non-joinder

[11] The NLC raised an issue of non-joinder. It argued that the Minister ought to have been joined as a party in light of the fact that Ms Smith seeks as the declaratory order that the Minister has exclusive powers to institute disciplinary proceedings against a member of the DA.

[12] In *State Information Technology Agency (Pty) Ltd (SITA) v Swanevelder and Others*⁵ this Court, per Molahlehi J, pertinently expounded the basic tenets applicable in instances of non-joinder as follows:

'[12] This Court in *Minister of Safety v De Vos* (2008) 29 ILJ 688 (LC), held that the commissioner has a duty, to raise the issue of non-joinder *mero motu* where none of the parties have done so. This duty arises from the principle that a third party should be joined in proceedings if he or she has a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgment or award that may be given in the matter. The duty arises from the principle that the commissioner should not pronounce on matters that may adversely affect the rights of a party who is not before him or her (see *Public Servants Association v Department of Justice & others* (2004) 25 ILJ 692 (LAC) [also reported at [2004] JOL 12460 (LAC) - Ed]). Thus failure by the commissioner to raise the issue of non-joinder renders the arbitration award reviewable and makes it irrelevant whether or not it was raised by any of the parties. The duty also arises in terms of rule 26 of the Rules of the CCMA.

[13] The broad principle at common law is that if a third party has or may have a direct and substantial interest in any order that a court may make or if such order cannot be carried into effect without affecting or prejudicing a third party, he or she is a necessary party and should be joined in the proceedings (see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)). A "direct and substantial interest" has been held to be "an interest in the right which is the subject matter of the litigation and not merely a financial interest": it is a "legal interest in the subject matter of the litigation" (see *Henry*

⁵ [2009] 7 BLLR 715 (LC)

Viljoen (Pty) Ltd v Awerbuch Brothers 1953 [2009] 7 BLLR 715 (SCA) (2) SA 151 (O) at 169-170) ...

- [14] The approach to be adopted when dealing with the issue of non-joinder was set out in *De Vos* supra as follows:

"In my view a court or an arbitrator can *mero motu* raise the issue of joinder at any stage of the proceedings. In other words a court or an arbitrator can raise the issue of joinder at the beginning of the case where the cause of action or the dispute as defined by the applicant is such that it clearly reveals that there is a third party that may have a substantial interest in the matter. Where the pleadings or the dispute as defined in the referral form of the applicant does not reveal that there is a third party that may have an interest in the matter, a court or an arbitrator may raise the issue of joinder at any stage when the evidence presented by any of the parties reveals that there is a third party that has an interest in the matter."

- [15] The two principles upon which this approach is based on were found in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) to be:

- "(1) That a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given; and
- (2) That the Court should not make an order that may prejudice a party not before it."

- [13] In view of the above, the NLC correctly argued that the Minister ought to have been joined as a party. There is no merit in Ms Smith's argument that non-joinder ought to have been raised in the pleadings. It is clear from the authorities quoted in *SITA* that the issues can be raised any time during the hearing of the matter or, as a matter of fact, by the Court, *mero motu*

- [14] In my view, the *res judicata* test demonstrates that the affected interest is direct and substantial. The Minister may, for example, seek a declaratory order

endorsing the NLC's power to discipline a member of the DA and the order sought in these proceedings, if granted, cannot be pleaded as *res judicata*.⁶

[15] Accordingly, on this point alone, this application stands to be dismissed.

Alternative remedy

[16] Another hurdle to the grant of the declaratory order in this instance is the existence of alternative remedies. Although not an absolute bar, the fact that alternative remedies are available is certainly a consideration which the Court takes into account in exercising its discretion as to whether or not to make a declaration of rights.⁷

[17] The annotations in *Jiba v Minister of Justice and Constitutional Development & others*,⁸ are instructive. In that case, Ms Jiba had approached this Court on urgent basis seeking a declaratory order that the decision to commence and proceed with disciplinary proceedings against her was unlawful, that the decision to suspend her was unlawful, and an order to be reinstated with immediate effect.

[18] Having affirmed this Court's jurisdiction to interdict disciplinary proceedings on exceptional circumstances, the Court declined to intervene. The Court was of the view that it is not ideal for this Court to entertain applications to review and set aside rulings made in uncompleted proceedings as such intervention would undermine the informal nature of the system of dispute resolution established by the LRA, frustrate the expeditious resolution of disputes and utterly emasculate the statutory dispute resolution scheme.⁹ In essence, as is in the present case, when the applicant requests this Court to pronounce on the lawfulness of the disciplinary proceedings, she is, in reality, asking the Court to circumvent the relevant dispute resolution tribunal.

⁶ *City of Johannesburg and Others v South African Local Authorities Pension Fund and Others* (20045/2014) [2015] ZASCA 4 (9 March 2015) at para 10.

⁷ *Trinity Asset Management (Pty) Limited and Others v Investec Bank Limited and Others*; 2009 (4) SA 89 (SCA) at para 40; *National Employers' Association of South Africa and others v Minister of Labour and Others* [2012] 2 BLLR 198 (LC) at paras 17 and 18.

⁸ [2009] 10 BLLR 989 (LC).

⁹ *Supra* at paras 11 and 12.

[19] Similarly, Ms Smith is not yet dismissed. Her approaching this Court on urgent or expedited basis to bar her disciplinary enquiry is clearly ill-considered. In *Jiba*, the Court, pertinently, stated the following:

[15] For at least two reasons, the ratio of the *Tshavhunga* decision is distinguishable from the facts of the present case. In *Tshavhunga*, the applicant had been dismissed, and challenged the lawfulness of his dismissal *inter alia* on the basis that the executive committee that took the decision to terminate his services was not authorised to do so. In the present circumstances, there is no dismissal - the applicant has been called to account for her conduct in a disciplinary enquiry; she has not been dismissed. Secondly, there being no dismissal, the issue of authority to effect a dismissal is prematurely raised - the applicant has the right to raise as a defence at the disciplinary hearing the alleged unlawfulness of her employer's actions, or those of any of the other respondents, a defence that may be upheld. In the event that the applicant is found guilty of any of the charges against her, it remains open for her to contend that only the Minister has the right to make any decision to dismiss her. In this event, the chairperson (should she be persuaded to uphold the applicant's contentions on authority to dismiss) might elect to make only a recommendation to the Minister, based on the evidence led at the hearing. It is not for this court, in motion proceedings brought on an urgent basis, to anticipate events that might equally give substance to the applicant's contentions or not.

[16] Further, the *Tshavhunga* judgment is not authority for the proposition that the dispute resolution structures established by the LRA can be undermined by piecemeal attacks brought by way of motion proceedings in this court on interlocutory rulings and decisions made by chairpersons of disciplinary hearings, or by commissioners and arbitrators. When the court in that matter stated that a contested termination of employment should be brought before the appropriate forum without delay, it meant no doubt that this should be done subject to the procedures established by the LRA and the time frames that it provides. In short: there is no reason why the question of authority to dismiss should be determined by this court in motion proceedings, initiated on an urgent basis, in circumstances where no

dismissal is apprehended, and where the chairperson of a disciplinary enquiry (and I would add, a commissioner or arbitrator in unfair dismissal proceedings) have not been seized with the question of authority and have made no ruling on it.'

[17] In summary: 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 generally best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145.¹⁰ (Emphasis added)

[20] I fully concur with the sentiments expressed by the Court in *Jiba*. Apparent also in the present case is the fact that Ms Smith has not been dismissed. She is only presented with an opportunity to respond to the allegations of misconduct levelled against her. In fact, she has already expressed her *prima facie* defence to these allegations in the founding affidavit. It is not for this Court to speculate on the outcome of the disciplinary proceedings; save to state that Ms Smith would have a recourse in the comprehensive LRA machinery in the event she is unlawfully or unfairly dismissed.¹¹

[21] Clearly, there are no exceptional circumstances to justify interference with the uncompleted disciplinary proceedings. Put otherwise, no grave injustice or a miscarriage of justice may perhaps transpire due to this Court's refusal to intervene.¹²

Urgency

[22] The NLC raised a concern about the manner in which the matter was allocated given the fact that, hardly a month after it had been dismissed for

¹⁰ *Supra* at paras 15 to 17.

¹¹ *Member of the Executive Council for Education, North West Provincial Government v Gradwell* [2012] 8 BLLR 747 (LAC) at para 46.

¹² *Booyesen v The Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC) at para 54.

lack of urgency, it was again allocated on expedited basis despite Ms Smith's dismal failure to make a case for urgency.

[23] Mr Kennedy submitted that the Judge President's permission to have the matter allocated on expedited basis should not be interpreted to mean that the Court hearing the matter is stripped of its power to decide on urgency or the circumstances surrounding the expedited allocation.

[24] In view of the fact that the NLC raised this issue solely as a concern but was amenable to the hearing of the matter on merits, I do not deem it necessary to be arrested by this issue. In passing, I, nonetheless, agree with the NLC that a concerning trend is developing in this Court where matters struck off the roll for lack of urgency are re-enrolled on expedited basis, as typified in the present case.

Conclusion

[25] In all the circumstances, I am not inclined to grant a declaratory order, firstly, on the basis of non-joinder; and, secondly, on the basis that the Applicant has alternative remedies in terms of LRA. It is, therefore, not necessary to deal with the remainder of the issues that arose in the application.

Costs

[26] Ms Smith is an individual litigant who is funding this litigation from her own pocket and, in any event, the parties have a persisting relationship. I, therefore, make no order as to costs.

[27] In all the circumstances, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

P. Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate Phetho

Instructed by

Kalamore Chipu Incorporated

For the respondents:

Advocate P Kennedy SC

Instructed by

Hogan Lovells South Africa Incorporated

LABOUR COURT