



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 3521/18

NKULULEKO POYA

Applicant

and

RAILWAY SAFETY REGULATOR

First Respondent

DR ZETHU QUNTA N.O

Second Respondent

BOARD OF RAILWAY SAFETY REGULATOR

Third Respondent

MINISTER OF TRANSPORT

Fourth Respondent

Heard: 26 October 2018

Delivered: 6 November 2018

Urgent application to declare disciplinary proceedings invalid and to interdict the Respondents from proceeding with the current disciplinary hearing. Application is dismissed.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant approached this Court on an urgent basis to *inter alia*, declare the disciplinary proceedings scheduled for 12 November 2018 invalid and to interdict the Respondents from proceeding with the current disciplinary proceedings.
- [2] The application is opposed by the First, Second and Third Respondents and they have filed an opposing affidavit. The Fourth Respondent (the Minister) filed an answering affidavit on a limited aspect only. The Applicant elected not to file a replying affidavit, which Mr Mooki for the Respondents, submitted was not insignificant but rather fatal to the Applicant's case.

Background

- [3] The Applicant has been employed by the First Respondent (RSR) as Chief Executive Officer (CEO) since October 2011. In his letter of employment, the Applicant was informed that the terms and conditions of his employment will be based on the RSR's approved conditions of service.
- [4] On 3 November 2017, the Minister issued the Applicant with a notice of intention to suspend him and invited him to make written representations as to why he should not be suspended. The Applicant made written submissions on 10 November 2017, which submissions did not persuade the Minister and he was placed on precautionary suspension with effect from 27 November 2017.
- [5] On 18 January 2018, the Applicant received a notice of an internal disciplinary hearing, containing seven charges of misconduct. The notice was signed by the Second Respondent, the chairperson of the Board, and the hearing was set down for 25 January 2018.
- [6] On 25 January 2018, the Applicant was informed that the RSR was still conducting investigations and that the hearing would be postponed pending the outcome of the further investigations. On this day the Applicant raised the point *in limine* regarding the RSR and the Second Respondent's authority to issue the

charge sheet in the absence of the Minister. The Applicant was informed that this issue would be dealt with at a later stage when the hearing resumed.

- [7] On 3 April 2018, the Applicant attended an interview with the forensic investigators, PriceWaterhouseCoopers, as part of the ongoing forensic investigation into various allegations of wrongdoing at the RSR.
- [8] On 2 August 2018, the Applicant was served with an amended charge sheet containing 13 charges levelled against him, as well as seven lever arch files containing documents that relate to the said charges. On 21 August 2018, a further amended charge sheet was sent to the Applicant and an extended set of documents was sent to him on 20 September 2018.
- [9] Subsequent to correspondence between the parties, they agreed that the disciplinary hearing would resume on 2 October 2018, on which date the Applicant requested a postponement in order to secure legal representation. The postponement was granted and the hearing resumed on 4 October 2018. On this occasion the Applicant's attorney raised a point *in limine* regarding the RSR and the Second Respondent's authority to issue the charge sheet in the absence of the Minister. The Applicant's attorney argued and demanded that the charges against the Applicant be withdrawn as a result of same not having been instituted by the Minister. As the Respondents insisted that the hearing could proceed, the Applicant approached this Court for relief.
- [10] The Respondents took issue with urgency in that the Applicant raised the same point *in limine* regarding the RSR and the Second Respondent's authority to issue the charge sheet in the absence of the Minister in January 2018, he repeated his reservation on 2 August 2018, was aware that the disciplinary enquiry would proceed on 2 October 2018 and raised the same issue once again and only on 4 October 2018. The Applicant should have known, or his lawyers should have advised him that the chairperson of the disciplinary hearing has no authority to determine whether the person or authority that preferred the charges was competent to do so and that only a Court could make such a determination. Notwithstanding, holding the same view since 25 January 2018,

the Applicant approached this Court for the first time on 18 October 2018, for hearing of the matter on 26 October 2018.

- [11] The Respondents' averments in respect of urgency or rather the lack thereof are not without merit. However, this Court has a discretion and in exercising my discretion, I am inclined to deal with the matter notwithstanding the valid objections in respect of urgency as, in my view, it is in the interest of the parties that the issues raised be decided.
- [12] In his founding affidavit, the Applicant addressed the charges levelled against him as well as his answer to or version in respect of each charge. The Applicant explained that he had done so to illustrate to this Court that the true nature of the disciplinary action against him does not relate to any improper conduct on his part. The Respondents took issue with this and stated that the charges involve serious contraventions relating to the abuse of the Applicant's position, dishonesty, excessive expenditure, gross dereliction of duty and defying the authority of the Board. Suffice to state that the allegations against the Applicant are the subject of an ongoing and incomplete disciplinary process initiated against the Applicant and not only is this Court not competent to express any view on the merit or otherwise of these allegations, it would also be improper to do so. Furthermore, the nature or the content of the charges levelled against the Applicant is not relevant for the relief sought and the issues this Court has to decide. For these reasons will I not consider or deal with the contents of the charges levelled against the Applicant in this application.

The relief sought

- [13] The Applicant seeks an order to declare the disciplinary proceedings scheduled for 12 November 2018 invalid, an order to interdict the Respondents from proceeding with the current disciplinary proceedings, to set aside the delegation of the Minister dated 26 June 2018 as it is unlawful and to declare that all steps taken subsequent to 27 November 2017 to, *inter alia*, charge the Applicant with misconduct and notifying him to attend a disciplinary enquiry are invalid, null and void.

- [14] The gist of the Applicant's case is that section 9(4) of the National Railway Safety Regulator Act¹ (RSR Act) states that only the Minister may discharge the CEO from office for misconduct and it is patently unfair to be subjected to a hearing by a functionary that is his peer, and not the Minister, who should choose the forum at which the Applicant would be required to answer to in his disciplinary enquiry.
- [15] The gist of the opposition is that section 9(4) of the RSR Act deals with the discharge of a CEO and it does not deal with disciplinary proceedings against the CEO. The Applicant is not an employee of the Minister, but he is an employee of the RSR and the RSR Board exercises all the rights and privileges of an employer in its dealings with the Applicant.

Jurisdiction

- [16] The Respondents raised a point *in limine* in respect of jurisdiction and submitted that this Court has no jurisdiction to adjudicate this matter. This is so because the Applicant's primary attack on being subjected to a disciplinary process is that the RSR Act vests exclusive authority on the Minister to discipline the Applicant and that the RSR Act does not permit the Minister to delegate such authority, wherefore the conduct of the Second Respondent and the Third Respondent (the Board) in charging him and initiating disciplinary proceedings against him, is based on an unlawful delegation.
- [17] The Respondents' submitted that the Applicant's contention requires the Court to interpret the RSR Act and to make a finding on the lawfulness or otherwise of the decisions by the RSR and the Minister and this Court has no jurisdiction nor power to interpret the RSR Act for purposes of determining the powers or competence of the Minister under that legislation.
- [18] The jurisdictional challenge is without merit and has to fail for the following reasons: Firstly, section 157(2) of the LRA gives the Labour Court jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from employment and

¹ Act 16 of 2002, as amended.

labour relations and any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct by the State in its capacity as an employer.

[19] In *Gcaba v Minister for Safety and Security and Others*² the Constitutional Court held that:

‘Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, s 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.’

[20] In summary the position is this: The concurrent jurisdiction as provided for in section 157(2) of the LRA is exercisable when there is a violation of the designated constitutional rights that occurs in one or other of the circumstances referred to in paragraphs (a)-(c)³. Section 157(2) refers to a ‘fundamental right entrenched in Chapter 2 of the Constitution’ and it has been accepted that it refers to a ‘fundamental right’ as set out in the ‘Bill of Rights’⁴.

² (2009) 30 ILJ 2623 (CC) at para 71.

³ M S M Brassey, *Employment and Labour Law* Vol 3 at A7:97.

⁴ See: *Walters v Transitional Local Council of Port Elizabeth and another* (2000) 21 ILJ 2723 (LC).

[21] The first enquiry relates to whether an allegation is made that a fundamental right has been infringed or whether a threat to violate such a right has been made and whether it arose from an employment relationship.

[22] In considering whether this Court has jurisdiction, the affidavits placed before Court have to be evaluated. This is based on *Gcaba*⁵ where it was held that:

‘Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba’s case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court’s jurisdiction being challenged at the outset (*in limine*), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the content of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction...’

[23] As per *Gcaba* pleadings are the determining factor and the content of the supporting affidavits must be considered to establish what the legal basis of the applicant’s claim is. It is not for the Court to say that the facts asserted by the applicant would also sustain another claim.

[24] A perusal of the Applicant’s papers shows that his case is premised on his right to the adjudication of disputes and the enforcement of his Constitutionally enshrined rights, the rights being the right to fair labour practices, fair administrative action and those contained in the Constitution of the Republic of South Africa⁶. The relief sought by the Applicant is to preserve his right to be subjected to a lawful and fair disciplinary process, an issue that falls within the jurisdiction of this Court.

⁵Id n 2 at para 75.

⁶ Act 108 of 1996.

- [25] Secondly, the Minister deposed to an affidavit wherein he explained that the RSR and not the Minister is the Applicant's employer and that the RSR, acting through its Board, is entitled to subject the Applicant to a disciplinary process, as is provided for in his contract of employment. The delegation signed by the Minister on 26 June 2018 has no legal consequence as the Applicant is employed by the RSR, which is entitled to discipline him and effectively there was no need to issue a delegation in this regard.
- [26] It is evident from the affidavits deposed to by the Minister and by the Applicant that this Court is not required to interpret the RSR Act for purposes of determining the powers or competence of the Minister under that legislation. This Court is in fact not required to consider or interpret the RSR Act beyond the allegations made by the Applicant in respect of his disciplinary hearing and the lawfulness of such process. This Court has the power to interpret legislation in the course of resolving issues of law and fact as between employers and employees and has done so on many occasions in the past.

The Applicant's employment

- [27] The crisp issue in dispute between the parties relate to the Board's powers to institute disciplinary action against the CEO. The Applicant's case is that the Board does not have such powers, as such powers reside with the Minister of Transport. The Respondents' case is that the powers to discipline the CEO resides with the RSR Board, as his employer, and not with the Minister.
- [28] In my view the starting point is to consider the terms of the Applicant's contract of employment.
- [29] Section 9(1) of the RSR Act provides that the Minister must, after consultation with the Board, appoint a person with suitable qualifications as the CEO of the RSR. On 23 September 2011, the Minister of Transport informed the RSR Board that Cabinet has endorsed the appointment of the Applicant as CEO of the RSR. The Minister subsequently appointed the Applicant as CEO and in his appointment letter, the Applicant was informed that he was expected to enter into an annual performance agreement with the Board.

- [30] Section 9(8) of the RSR Act provides that the CEO must exercise all the powers and perform all the duties conferred or imposed upon the accounting officer by the RSR Act, the Public Finance Management Act⁷, (PFMA) or the Board.
- [31] It is undisputed that the Applicant is bound by the terms and conditions recorded in his contract of employment.
- [32] The Applicant's contract of employment stipulates *inter alia* that:
- 32.1 The Applicant is employed by the RSR;
 - 32.2 The Minister, acting in terms of section 9(1) of the RSR Act, has appointed the Applicant as CEO and that the Applicant accepted the appointment to perform the functions outlined in the RSR Act and on terms and conditions of the contract of employment;
 - 32.3 The Applicant agreed to abide by the employer's conditions of service;
 - 32.4 The Applicant's employment may be terminated in the following ways: on completion of the period stated in the contract, discharge in terms of clause 15 of the conditions of service or discharge in terms of section 9(4) of the RSR Act.
- [33] The RSR's 'conditions of service for employees', which applies to all employees, stipulates in clause 16.2 thereof that all employees are subject to the RSR's disciplinary code and procedure (the disciplinary code), as amended from time to time.
- [34] Clause 6 of the disciplinary code provides for the application of the disciplinary code and stipulates that it applies to all RSR employees, whereby the provisions of the RSR Act would apply. Clause 8 of the disciplinary code provides for the procedures to be followed and sets out that the RSR has the right to institute any of the following actions, depending on the severity of the misconduct or if the situation is such that in the opinion of management, such action is justified: informal action, formal action or final written warning. Where

⁷ Act 1 of 1999.

the alleged misconduct justifies a more serious form of disciplinary action, the employer must initiate a disciplinary enquiry and appoint an initiator to initiate the enquiry. Clause 9.5 of the disciplinary code provides for the conducting of the disciplinary hearing and provides that the chairperson of the disciplinary hearing is to be appointed by the employer.

- [35] The Applicant does not dispute that he is employed by the RSR, he does not dispute the terms and conditions of his contract of employment, nor does he dispute the application of the disciplinary code. He only challenges the authority of the Board to initiate disciplinary proceedings and to charge him with misconduct. His case is that the Minister, as the authority to whom the RSR reports, has the authority and power to take disciplinary action against him.
- [36] There is no merit in the Applicant's contention and challenge for a number of reasons.
- [37] First, the Applicant is an employee of the RSR and not the Minister. It is trite and has been accepted by this Court in the past that an employer has the right to discipline its employees, of course in a lawful and fair manner. The RSR, as represented by its Board, is entitled to discipline its employees, which includes the Applicant as it is undisputed that he is an employee of the RSR.
- [38] Ms Lancaster for the Applicant submitted that *Litha v Madonsela N.O and Others*⁸ is authority for the Applicant's case that only the Minister has the authority to institute disciplinary action against the CEO and to discharge the CEO. In my view, *Litha* does not assist the Applicant *in casu* as it is distinguishable from the Applicant's case in a material respect. In *Litha* the employment contract was signed between the CEO and the Government of the Republic of South Africa, as represented by the Minister and the Court found that the State was the CEO's employer. The contract provided specifically that in the case of inefficiency and misconduct, the employer may deal with the CEO in accordance with the relevant labour legislation and any

⁸ (2006) 27 ILJ 780 (W).

directive issued by the Minister. The board only exercised a supervisory capacity over the CEO and the Minister had exclusive authority to discipline and dismiss the CEO.

- [39] *In casu*, the Applicant's contract of employment specifically provides differently and the relationship between the CEO, the RSR Board and the Minister is not on par with *Litha* wherefore reliance on *Litha* is misplaced and of no assistance to the Applicant.
- [40] The Applicant's argument that the RSR Board and the CEO are beholden to the Minister and report to him, wherefore he can only be subjected to discipline by the Minister, has no merit.
- [41] Secondly, in July 2013, the RSR Board commissioned a report on allegations of nepotism and wrongdoing by the Applicant in relation to the appointment of staff. Based on the findings of the report, the Board issued a warning letter to the Applicant. The Applicant did not challenge the warning letter and the Respondents' case is that in not challenging the warning letter, the Applicant accepted the Board's authority to admonish him and by subjecting him to a disciplinary process, the employer is acting no differently from the past in exercising its right as employer to discipline the Applicant. I have already alluded to the fact that the Applicant has not filed a replying affidavit and I have no reason not to accept that the Applicant previously accepted the Board's authority to reprimand him and to issue him with a warning letter.
- [42] Thirdly, section 9(4) of the RSR Act provides that the Minister may discharge the CEO from office for misconduct. This is the obvious flipside of the coin that provides for the Minister to appoint a CEO, after consultation with the Board. This does not entail that the Minister has to initiate the disciplinary proceedings and prosecute the allegations of misconduct. The RSR Act does not stipulate that the Minister must be involved in the disciplinary enquiry of the CEO. Instead, the Applicant's contract of employment incorporated a disciplinary code which provides for the manner in which a disciplinary hearing should be conducted.

- [43] In the affidavit deposed to by the Minister, he explained that section 9(4) of the RSR Act entitles him to discharge the CEO for misconduct, but it is the RSR as employer that has to call the Applicant to account on allegations of wrongdoing. The Minister can exercise his authority to discharge the CEO only once he had been informed of the CEO's misconduct as the Minister has no mechanism to subject the CEO to a disciplinary process and the RSR Act does not contemplate the Minister constituting a disciplinary process for purposes of acting in terms of the provisions of section 9(4) of the RSR Act. The Minister made it clear that being informed by the RSR that the Applicant had been found guilty of misconduct is no different from the RSR making a recommendation about the appointment of a particular individual as the CEO.
- [44] It is evident that the RSR is entitled to convene a disciplinary hearing against the CEO in respect of allegations of misconduct and that it is entitled to do so in accordance with the procedure set out in the disciplinary code. The Minister has the power to discharge the CEO. The power to discharge does not necessarily mean the obligation to initiate and conclude a disciplinary hearing, just as the power to appoint does not necessarily mean that the Minister had to conduct the recruitment and selection exercise before appointing the recommended candidate.
- [45] Fourthly, the Applicant's contention that it is unfair to submit him to a hearing by a functionary that is his peer, is misguided. The Applicant is not a peer of the Board and his understanding in this regard is ill-conceived. The fact that the Applicant is not a peer of the Board is evident from *inter alia*, the fact that section 9(8) of the RSR Act provides that the CEO must exercise all the powers and perform all the duties conferred or imposed by the Board and the fact that the Applicant was informed in his appointment letter that he was expected to enter into an annual performance agreement with the Board.
- [46] It is further supported by the provisions of section 8 of the RSR Act which provides that the RSR is governed and controlled by a Board of Directors, that the Board represents the RSR and all acts performed by the Board or on its authority, are acts of the RSR. The CEO is *ex officio* a member of the Board and certainly not a peer to either the Second Respondent or the Board.

- [47] Considering the facts placed before me, I cannot but conclude that the RSR, as the Applicant's employer, is entitled to discipline him in accordance with the provisions of the disciplinary code.

The urgent application

Exceptional circumstances

- [48] It is trite that in applications such as the present, the applicant has to show that there are exceptional circumstances that justifies intervention in the pending disciplinary proceedings. *In casu*, the Applicant's case is that his circumstances are exceptional as the Board is not entitled to take disciplinary action against him.

- [49] In *Jiba v Minister: Department of Justice and Constitutional Development and others*⁹ 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.’

- [50] I am not satisfied that there are any exceptional circumstances where the Applicant does not dispute that he is an employee of the RSR and does not dispute the terms of his contract of employment, which include the disciplinary code. The disciplinary code provides for the RSR, as employer to take disciplinary action and to appoint a chairperson of the disciplinary hearing.

- [51] This case is no more than an employer subjecting its employee to a disciplinary enquiry and there is nothing exceptional to that. The Applicant has failed to make out a case that the Respondents have not followed the correct

⁹ (2010) 31 ILJ 112 (LC) at para 17.

procedures in instituting disciplinary action against him or that the Respondents have acted unlawfully.

Requirements for an interdict

- [52] The Applicant seeks a final interdict and he has to satisfy the requirements for such an interdict, namely the existence of a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.

Clear right

- [53] The Applicant submitted that he has a clear right to fair and reasonable labour practices in terms of the LRA, which includes the Respondents undertaking correct procedures, should it need to institute disciplinary action against him.
- [54] The averments regarding the Applicant's clear right, are empty and unsubstantiated allegations. I say so for a number of reasons. The Applicant's right to fair labour practices and any claim to an entitlement thereto, arises as between an employer and an employee, *in casu* the RSR and the Applicant. The RSR in its capacity as employer, is subjecting the Applicant to a disciplinary process, as provided for in the disciplinary code. The Applicant has not specified, apart from stating that the Minister should be the one to take disciplinary action against him, what the correct procedure is that should have been followed.
- [55] The Applicant alleged in his founding affidavit that '*the RSR Act clearly prescribes who has the power to institute disciplinary proceedings*' against him and his case is that it is only the Minister. It is evident that the RSR Act does not provide for the disciplining of the CEO, it does not provide a procedure to be followed and most certainly does it not prescribe who has the power to institute disciplinary proceedings. In fact, the Applicant has failed dismally to identify the source and the content of what he contends the 'correct procedural step' should be.

- [56] The disciplinary code, incorporated into the Applicant's contract of employment, is the only instrument for subjecting the Applicant to a disciplinary process, and no averment has been made that the procedure set out in the disciplinary code, has not been followed.
- [57] The Applicant's misguided understanding that the Minister should take disciplinary action against him, is evident in his submissions that he has a clear right to the relief he seeks. I have already alluded to the fact that this case is no more than an employer taking disciplinary action against its employee and the Applicant failed to show any right that merits protection or intervention by this Court.

Harm

- [58] In respect of harm, the Applicant's case is that if he is not granted the relief he seeks now, he will be seriously prejudiced in that he will have to participate in a disciplinary hearing that is aimed at getting rid of him and where the Respondents made no effort to follow the correct procedure. I have already dealt with the allegations made regarding the 'correct procedure' and I do not intend to repeat them herein. The Applicant claims that the charges are trumped up and are a direct attempt to get rid of him, which is clear from the fact that more charges are added to the charge sheet.
- [59] There is nothing untoward in an employer adding to or amending a charge sheet, more so where it is done prior to the commencement of the disciplinary hearing. The Applicant has been called to a disciplinary hearing to answer to the allegations against him and the merits of the charges against the Applicant are to be addressed and tested at the disciplinary hearing. To say that the charges are a direct attempt to get rid of the Applicant, is to speculate at best at this point, prior to the hearing and without any conclusive outcome.

[60] In *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and others (Ngobeni)*¹⁰ this Court confirmed that it does not ordinarily intervene in incomplete disciplinary proceedings and held that:

‘Further, the applicant is entitled, should he be dismissed and should he contests the procedural fairness of his dismissal, to refer a dispute to that effect to the relevant dispute resolution body. The applicant remains suspended on full pay. There is no irreparable harm to him consequent on an incomplete hearing and there remains the prospect that he will be acquitted of the charges levelled against him.’

[61] *In casu* the same principles apply as the Applicant is suspended on full pay and still has the prospect of being acquitted of the charges he has to face in the pending disciplinary process.

Alternative remedy

[62] In respect of an alternative remedy, the Applicant stated that he is unable to challenge the fairness of the disciplinary proceedings in terms of a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or relevant bargaining council, as it does not fall within the definition of an unfair labour practice. This averment is without merit. The Applicant can approach the CCMA or relevant bargaining council to adjudicate an unfair labour practice dispute alternatively he can refer an unfair dismissal dispute, should he be dismissed and should his case be that the correct procedures were not followed when he was disciplined.

[63] Strangely enough the Applicant stated that the balance of convenience favours him in that if the current process is corrected, the Respondent can continue with disciplinary steps against him and he shall face the allegations in a forum properly constituted by his employer, as he is lawfully entitled to and the hearing should be reconstituted through the office of the State Attorney and by a chairperson appointed by his employer. In my view this is

¹⁰ (2016) 37 ILJ 1704 (LC) at para 16.

already the reality in this matter as it is undisputed that the RSR is the Applicant's employer and the RSR initiated steps for the Applicant to answer allegations against him in a properly constituted forum, where the chairperson had been appointed by the Applicant's employer.

[64] The Applicant has not satisfied the requirements for an interdict.

[65] In my view it is in the interest of the parties that the allegations against the Applicant be tested and answered expeditiously, as labour disputes should be dealt with. The disciplinary hearing scheduled for 12 November 2018 should proceed to afford the parties an opportunity to deal with the allegations and to bring the process closer to finality. This is more so where the Applicant has been on suspension with pay for almost 12 months at the expense of the taxpayers of this country.

[66] In view of my findings, it follows that the Applicant is not entitled to the relief he seeks on an urgent basis.

Costs

[67] The last issue to be decided is the issue of costs.

[68] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[69] Ms Lancaster submitted that there should be no order as to costs as the parties have an ongoing relationship and because the Applicant raised a valid legal point which he wanted this Court to consider.

[70] Mr Mooki on the other hand submitted that, considering the facts of this case, the Applicant should be ordered to pay the Respondents' costs, which costs should include the costs of two counsel.

[71] In *Ngobeni* the Court has lamented the fact that the 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. All of this is indicative of an attempt to use this Court and its processes to frustrate the workplace proceedings which are already underway. 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 micro-manage discipline in workplaces.

[72] The Court in *Ngobeni* also issued a warning to the effect that litigants should be warned that it is not often that this Court will intervene in incomplete workplace disciplinary hearings and that similar abuses of the right to urgent relief that this Court affords in appropriate circumstances will be met with punitive orders for costs.

[73] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*¹¹ it was emphasized that:

'...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

[74] In *Ngobeni* this Court has granted an order for costs on a punitive scale because the Court considered the application to be wholly misguided and one that served to frustrate one of the fundamental purposes of the LRA, which is the expeditious resolution of workplace disputes within a defined structure. In the Court's view the applicant's conduct warranted an order for costs on a punitive scale.

[75] *In casu*, the application was also wholly misguided and meritless and the Applicant dismally failed to satisfy the requirements for the relief he seeks.

¹¹ (2012) 33 ILJ 2117 (LC) at para 176.

The Applicant did not heed the stern warning from this Court as set out in *Ngobeni* and the fact that there is an ongoing relationship between the parties cannot save him from a cost order.

[76] In my view, the existence of a continued relationship and the potential prejudice a cost order might cause to that relationship, is irrelevant in this instance. The fact that the Respondents pursued an order for costs against the Applicant is an indication that, at least as far as the employer was concerned, a future relationship with the Applicant would not be prejudiced by any order for costs. In my view the existence of an ongoing and existing relationship *in casu* does not militate against an order for costs.

[77] The Respondents had to defend a meritless urgent application and fairness dictates that it cannot be expected to endure enormous costs in defending litigation that ought not to have been brought in the first place. Ultimately, the Applicant is the author of his own misfortune as he is quite capable of considering the consequences of instituting meritless litigation and he had to put in some earnest thought and consideration into the merits of this case and the warning issued in *Ngobeni* before filing this urgent application. Fairness will be compromised where parties who file meritless urgent applications can escape costs simply because there is an ongoing relationship. This is more so where the costs incurred by the Respondents are paid from taxpayers' money and I can see no reason why the taxpayers should be burdened to pay the costs in this application.

[78] In my view this is a case where it is appropriate to award costs, including the costs of two counsel.

[79] In the premises I make the following order:

Order:

1. The application is dismissed;
2. The Applicant is to pay the Respondent's costs; which costs are to include the costs of two counsel.

Connie Prinsloo
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms S Lancaster of Lancaster Kungoane Attorneys

First, Second and

For the Third Respondents: Advocate O Mooki SC with

Advocate B Roode

Instructed by: Gildenhuys Malatji Inc Attorneys

Fourth Respondent: Advocate O Mooki SC

Instructed by: State Attorney, Pretoria