



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case number: J3742/18

In the matter between:

DIPSY DIPHIMOTSWE WECHOEMANG

Applicant

and

ROAD TRAFFIC MANGEMENT CORPORATION

First Respondent

**ADV MAKHOSI MSIBI
(CHIEF EXECUTIVE OFFICER)**

Second Respondent

NISHLAN MOODLEY N.O.

Third Respondent

Heard: 08 November 2018

Delivered: 09 November 2018

JUDGMENT

BALOYI AJ

INTRODUCTION

1. This application concerns relief sought by the applicant on urgent basis to interdict the respondents from continuing with the disciplinary hearing against herself. There were no issues regarding urgency, as such I proceeded to hear the matter on urgent basis.
2. The applicant's reason that the proceedings should be put on ice is primarily rested on the unfair labour practice dispute she referred to the CCMA based on a claim of having made a protected disclosure to be dealt with first. In other words, pending the finalization of the CCMA dispute, the first respondent should dare not exercise any disciplinary powers over her. In the alternative, the applicant is seeking an order interdicting the third respondent from presiding over the disciplinary proceedings. Further alternatively that, the respondents be interdicted from proceeding with the disciplinary hearing pending finalization of the review application still to be filed in challenge of the third respondent's recusal ruling. The further alternative relief was not pursued during arguments. The first and second respondents opposed the application

BACKGROUND

3. The Applicant is the first Respondent's Group Executive: Human Capital reporting to the second Respondent who is the CEO. The circumstances leading to the institution of disciplinary proceedings arose out of the letter generated by the Applicant on 18 March 2018 addressed to the CEO titled "Personal letter to the CEO". The letter which by Applicant's admission was written out of high emotions ended up being leaked and fell into the hands of three employees of the first respondent who subsequently lodged grievances against the applicant. The gist of the grievances was that the applicant ridiculed and defamed them in the said letter. The grievance hearing was convened, the result thereof was a recommendation that disciplinary steps be taken against the applicant hence the formulation of charges.

4. The first respondent relied on the contents of the personal letter which consists of 18 pages when crafting the charges against the applicant. In this instant case the applicant also relies on the very personal letter in support of her protected disclosure. The applicant subsequently addressed a letter to the CEO dated 04 June 2018 apologizing over what she said in the personal letter. That the language used in the personal letter might have been overstretched, strong and inedible is her own description of its contents.
5. The charges preferred against her were crafted as follows:

'Charge 1

"Gross Misconduct"

You grossly misconducted yourself in that on or about 18 March 2018, in a letter addressed to the CEO you challenged the authority of the CEO, Adv. MS Msibi, and further demonstrated therein an insolent, provocative, racially provocative, aggressive, and intimidating manner towards the CEO and his management team. Your conduct disrupted a harmonious working relationship which directly impacts on the service delivery of the organization.

Charge 2

"Bringing the name of RTMC into serious disrepute"

Your gross misconduct as stated above has resulted in bringing the employer's name into disrepute'.

6. The hearing was scheduled to commence on 18 October 2018 and was rolled over to 19 October 2018. That was after the applicant's attorney had addressed the third respondent specifically, requesting postponement pending finalization of the unfair labour practice dispute that she referred on 17 October 2018 as well as the grievance she had lodged under her attorneys letterhead on the same date. The third respondent was also confronted with

an application for his recusal over his business relationship with the first respondent for having previously acted on behalf of the first respondent as attorney of record in other matters. When the proceedings reconvened on 19 October 2018, the third respondent handed down a ruling dismissing the application for his recusal. The third respondent's relationship with the initiator was just after the handing down of the recusal ruling brought to spotlight by the applicant through another recusal application. The second recusal application was accompanied by further submissions that the applicant had also reported the third respondent to the Law Society. The hearing did not proceed because the third respondent postponed the matter to 05 November 2018 to enable the applicant to file this application as her intention were declared to the effect.

7. Now before this court, it was argued for the applicant that though the letter was not drafted with precision, it was ascertainable that its contents constituted a protected disclosure. The dispute before the CCMA deserves to be ventilated first as its resolution would eradicate all prejudice the applicant is faced with. Furthermore, the resources in terms of time and money would be saved. The relationship which the third respondent has with the first respondent is more than sufficient to establish that the applicant will not receive a fair hearing. The court is thus in a position to intervene as the grave injustice is set to prevail.
8. As argued on behalf of the first and second respondents, the court can only intervene under exceptional circumstances. Challenging the decision of the disciplinary chairperson on piece meal basis has never secured approval from the courts. Exceptional circumstances can only be established if the manner in which the employer conducts itself brews grave injustice which does not avail any recourse for the employee to deal with such conduct. In this matter the applicant has recourse, that is, to refer any unfavourable outcome of the hearing to the CCMA. The first and second respondents sought the order dismissing the application with costs.

EVALUATION

9. The position adopted by the courts in dealing with applications to which the cause of action arose out of incomplete disciplinary hearings in the form of interdicts, declarators and review of chairpersons' rulings is now settled. The courts' cautious approach is inescapably permeated by application of discretion on whether based on presented set of facts, do the exceptional circumstances exist. In *Jiba v Minister of Constitutional Affairs and Development and Others*¹ the court held as follows at paragraph 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. The Labour Appeal Court further restated the position in *Booyesen v*
11. *Minister of Safety and Security*² and held as follows at paragraph 54:

"To answer the question that was before the court *a quo*, 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

¹ (2010) 31 ILJ 112 (LC)

² (2011) 32 ILJ 112 (LAC)

injustice or whether justice might be attained by other means. ^[25] The list is not exhaustive.”

12. I omitted to deal succinctly with the contents of the applicant's personal letter to the CEO. This is for a simple reason that is, avoiding to pass an opinion on whether there is merit in a case against the applicant or otherwise. It is within the ambit of the disciplinary chairperson to determine the applicant's guilt or otherwise. Similarly, it is the commissioner's duty to rule on whether there is a sustainable case for a protected disclosure dispute or not. In determining this application, it is highly imperative to look at the conduct of the applicant, most particularly her attitude towards the disciplinary proceedings. Based on her case alone, she seem to acknowledge that the first respondent as her employer is entitled to discipline her once there are allegations of misconduct against her.

13. Her apology alone, that was made before the institution of grievance proceedings establishes an acknowledgement of wrong doing. As the disciplinary proceedings were instituted, to be precise, a day before the sitting of her hearing the very letter that ridiculed her colleagues became a protected disclosure worth referring to the CCMA thereby creating a ground for a postponement application. A grievance lodged on the same day as the CCMA referral became part of the package. At the end of the first day of the hearing as it may be imagined, the applicant through her attorney prepared a complaint to the Law Society against the chairperson in anticipation of the unfavourable ruling on recusal application that was due to be handed down the next day. The reading of the applicant's case conspicuously reveals that, this move was intended to secure a second bite in attempting to postpone the matter and to create a ground to argue another recusal application. In the mix of things, the filing of this application became a new issue calling for a postponement which the third respondent granted.

^[25] *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959(3) SA 133 (AD).

14. Cumulatively, the conduct of the applicant does not at all show any sign of approach to the disciplinary hearing with clean hands. Her grievance against the CEO and the employees who previously lodged grievances against her, grossly negates her letter of apology. The only objective conclusion to be reached under these circumstances is that, she bears no willingness to appear in the hearing in order to respond to the charges against her. All these objections that were followed by this application have no better description than not so wisely calculated moves to delay the disciplinary hearing indefinitely. This is more visible from her other prayers calling for the disciplinary hearing to wait for finalization of the review application still to be filed, her only intention is clearly not to subject herself to the first respondent's disciplinary processes. The court cannot under the circumstances come to the assistance of employees who conduct themselves in the same manner as the applicant. Consequently, I do not find anything exceptional calling for the court to intervene in the incomplete disciplinary proceedings between the first respondent and the applicant. This applicant is overwhelmingly destined to fail. This is one of those cases warranting the awarding of costs against the applicant. In application of the broad discretion that the Court has in this respect, I am however loathe to make cost order in the light the employment relationship between the parties that is still in subsistence.

ORDER

15. In the premises, the following order is therefore made:

1. The forms and service provided for in the Rules for the conduct of proceedings in this court are dispensed with.
2. The application is dismissed.
3. There is no order as to costs.

Baloyi AJ

Acting Judge of Labour Courts of South Africa

APPEARANCES

For the Applicant:

Adv. Y. Saloojee instructed by Scholtz attorneys

For the Respondent:

Adv. T. Bruinders SC. Instructed by Diale Mogashoa Inc