



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J2689/2018

In the matter between:

RAKWENA REGINALD MPHO MONARENG

Applicant

and

MINISTER OF ARTS & CULTURE

First Respondent

PAN SOUTH AFRICAN LANGUAGE BOARD

Second Respondent

DENGA MULIMA N.O

Third Respondent

Heard: 07 November 2018

Delivered: 06 February 2019

Summary: Powers of the Minister in regard to CEO's disciplinary issues is in terms of the Pan South African Languages Board Act 59 of 1995, as amended - limited to determination of an appeal of the Board's decision – the minister has no powers to institute disciplinary proceedings against the CEO - Rule *nisi*

declaring lack of such authority and setting aside of the notice to attend a hearing confirmed.

JUDGMENT

BALOYI, AJ

Introduction

[1] It was on 08 August 2018 when the applicant approached this Court on an urgent basis essentially seeking an order declaring that the first respondent (The Minister of Arts and Culture) lacked authority to discipline him and that the notice to attend a disciplinary hearing that was due to commence on 13 August 2018 be set aside. The disciplinary hearing process was undertaken at the instances of the first respondent. This application was filed amid a legal battle between the parties at the High Court, Gauteng Division. The High Court judgment was still to be handed down at the time of the filing of this application. In the very High Court application the applicant sought an order setting aside the suspension imposed on him by the first respondent together with an order declaring the suspension unconstitutional or of no force. The second respondent is a public entity established under Pan South African Language Board Act¹ (the Act) and is accountable to the first respondent in the course of its activities. The third respondent is cited in his capacity as Chairperson of the disciplinary hearing in which the applicant was summoned to appear, however no specific relief is sought against him.

[2] It is of essence to point out at this juncture that when the applicant filed his urgent application on 10 August 2018 he was seeking relief in the following terms:

¹ 59 of 1995, as amended.

- “1. That the non-compliance with the rules be condoned and that the matter be heard as an urgent application in terms of rule 6(12) (a);
2. Pending the handing down of the judgment in the High Court (Gauteng Division, Pretoria) in respect of the urgent application brought under case number 43870/18, heard on 11 July 2018, the respondents are restrained and interdicted from proceeding with disciplinary proceedings against the applicant.
3. A *rule nisi* is hereby issued, calling on the first respondent to show cause, on a date determined by the Registrar, as to why the following relief should not be granted.
 - a. It is declared that the first respondent, the Minister of Arts and Culture, lacked authority to bring or authorize disciplinary proceedings against the applicant in respect of his employment with the second respondent;
 - b. It is declared that the such disciplinary proceedings are unconstitutional, invalid and of no force or effect;
 - c. The notice to attend a disciplinary inquiry, signed on 31 July 2018, is set aside;
 - d. The first respondent is ordered to pay the applicant's costs, including costs of two counsel;
4. Pending the return date, the respondents are interdicted from proceeding with any disciplinary proceedings against the applicant, save with the leave of this court or a court of similar standing;
5. Further or alternative relief.”

[3] This application was first heard on 10 August 2018 when Snyman AJ granted an interim order returnable on 19 September 2018 as follows:

- “1. Non-compliance with the rules is condoned and this matter is heard as an urgent application in terms of Rule 8.
2. A *rule nisi* is hereby issued, calling on the first respondent to show cause, on 19 September 2018, as to why the following relief should not be granted.
 - 2.1 It is declared that the first respondent lacked authority to bring or authorize disciplinary proceedings against the applicant in respect of his employment with the second respondent.
 - 2.2 It is declared that the such disciplinary proceedings are unconstitutional, invalid and of no force or effect.
 - 2.3 The notice to attend a disciplinary inquiry, signed 31 July 2018 is set aside.
3. The respondent's counter application shall be enrolled for hearing along with the hearing of the *rule nisi* on 19 September 2018.
4. The parties are directed to file their respective answering and replying affidavits within the time limits prescribed by Rule 7 of the Labour Court Rules.
5. The issue of cost is reserved for argument on the return date.”

[4] On 19 September 2018 the matter came before Van Niekerk J, and was stood down to 20 September 2018. On the other hand, the High Court handed down its judgment on the very day of 19 September 2018. In terms of the said

judgment the applicant's application was struck off the roll for lack of urgency. It bears mention that this application was hugely founded on the High Court's decision that was pending at the time of its filing. Based on what appeared in the applicant's line of arguments little or no regard was placed on the High Court matter. This comes as no surprise as the applicant was already sitting with an interim order that makes no reference to the High Court application. The court was at the outset simply required to determine whether the interim order should be confirmed as well as to determine the counter-application following Snyman AJ's order of 10 August 2018.

[5] On 20 September 2018 without any reference to the decision of the High Court Van Niekerk J made the following order:

1. "The *Rule Nisi* by Acting Justice Snyman under case number J2689/18, on 10 August 2018, is extended to the return date of 7 November 2018.
2. The parties are directed to exchange papers as follows:
 - 2.1 The applicant to apply for condonation for the late filing of its replying affidavit on or before **26 September 2018**.
 - 2.2 The first respondent to file its answering affidavit to the condonation application as well as any answering affidavit on or before **10 October 2018**.
 - 2.3 The applicant to file any replying affidavit on or before **17 October 2018**.
 - 2.4 The applicant to file its heads of argument, if any, on or before **19 October 2018**.
 - 2.5 The respondent to file its heads of argument on or before **31 October 2018**.

2.6 The first respondent's counter application shall be enrolled for hearing along with the hearing of the *Rule Nisi* on **7 November 2018**.

3. The issue of costs of **10 August 2018** and the costs of today's proceedings are reserved for argument on the return date."

[6] The purpose of this order was primarily to provide time lines as to the further handling of the matter coupled with a direction for simultaneous hearing on confirmation or discharge of the rule *nisi* and the counter-application. When the matter came before me on 7 November 2018 all processes making the matter ready for hearing were filed. The ventilation of the main issue in the application was not as smooth since the court was also called upon to rule on preliminary points raised by the first respondent. Firstly, issues were taken with the applicant's lateness regarding the filing of his replying affidavit that eventually necessitated a condonation application. Secondly, this Court's lack of jurisdiction to hear the application. Thirdly, the applicant's non-compliance with the practice manual. Fourthly, absence of notice of proceedings against the second respondent. Regarding the last point, no basis was laid for its advancement and without any facts suggesting that the application is defective, I shall regard it as a point made in passing with nothing to be made of it. It is therefore not worthy of the Court's determination.

Factual Background

[7] It is of high importance to lay out the background of the dispute for clearer understanding of the pertinent issues. This will also assist in assessing the relevancy of the preliminary points raised. The Honorable Minister of Arts and Culture, Mr Nathi Mthethwa (the first respondent) is by virtue of his office an Executive Authority over the second respondent, namely Pan South African Language Board (PanSALB). For purposes of this judgment it is not necessary to detail the constitutional mandate and functions of PanSALB. It is however necessary to state that the Board, which its members are appointed by the

Minister, is tasked with governance over the affairs of PanSALB towards achieving its objectives. The management and administrative functions of PanSALB fall squarely within the Chief Executive Officer (CEO) duties, who is appointed by the PanSALB Board in consultation with the first respondent. The CEO by virtue of his position is also a member of the PanSALB Board and is entitled to make deliberations with no voting rights.

- [8] The applicant was appointed as the CEO of PanSALB on 01 July 2015. On 12 January 2016 the first respondent, acting in terms of his powers under s 5 (5A) of the Act, dissolved the PanSALB Board. The PanSALB Board members unsuccessfully approached the High Court in challenge of the first respondent's decision to dissolve the PanSALB Board.² The appeal was launched and no details on the progress of the said appeal were brought to this Court's attention. At all material times post the dissolution of the PanSALB Board the applicant remained in his position as a CEO. He continued as such until 11 June 2018 when the first respondent suspended him on account of allegations of misconduct.
- [9] The applicant in his papers gave a detailed narration to the effect that his presence at the second respondent post the dissolution of the PanSALB Board rendered him the only active member of the PanSALB Board. He was as a result performing the functions of the PanSALB Board and accountable to the National Treasury and Parliament. In opposition, the first respondent indicated that in terms of the Act the PanSALB Board is required to have a minimum of 11 and maximum of 15 members. This part of the matter bears no significance as the PanSALB Board was dissolved in its entirety. This is certainly a side issue which deserves no attention from this Court and I will accordingly not base my decision on same. The only relevancy to be attached to this issue will only relate to determination of costs.
- [10] As already illustrated above, the application before this Court is about the challenge to the first respondent's authority to discipline the applicant.

² See: *Madiba and others v Minister of Arts and Culture and others* [2017] 4 ALL SA 111 (GP).

According to the applicant the first respondent does not have the requisite authority to suspend and discipline him. The first respondent's conduct is thus *ultra vires* the Minister's powers and is therefore unlawful.³ It bears mention that the first respondent did not directly or precisely respond to these allegations as set out in his answering affidavit deposed to by the Director General of the Department of Art and Culture. It further deserves noting that the Director General averred that he was duly authorized to depose and oppose the application on behalf of the first respondent, specifically by the first respondent. The most notable point as to the merits of the matter in the first respondent's opposition is that the absence of the PanSLAB Board that has since been dissolved renders the applicant 'employer less'. The dissolution of the PanSALB Board, according to the first respondent, terminated the applicant's employment by operation of law. The counter-application flows from this contention and the relief sought is crafted as follows:

1. "The applicant is not a member of the Board of the Pan South African Language Board.
2. The employment relationship between the applicant and the pan South African Language Board terminated *ex lege* upon the dissolution of its Board by the Minister of Arts and Culture.
3. The applicant has no legal entitlement to enter any of the premises occupied by the Pan South African Language Board
4. The applicant has no legal entitlement to draw any salary from Pan South African Language Board."

[11] It came out explicitly in the replying affidavit for the counter application deposed to by the first respondent himself that indeed he has no powers to discipline the

³ These allegations have been repeated in various formats in paragraphs 11,16,22,29,50 and 53 of the applicant's founding affidavit.

applicant. Regardless of this, the first respondent still persisted with his preliminary points as well as the counter-application. The first respondent makes further reference to the gentleman's agreement in terms of which the applicant consented to being accountable to the first respondent. Since this last statement was made in passing, nothing can be made of it and effectively deserves no further attention from this Court.

Jurisdiction

[12] It is of high necessity to first deal with a jurisdictional issue as I take a view that it deserves disposal as a first and foremost affair. This point had been categorically and emphatically canvassed in the first respondent's heads of argument. It becomes obvious that it was raised with a purpose of finding synchronicity with the counter-application which in essence has been brought to drift the applicant away from the second respondent. The first respondent conceded that he has no powers to discipline the applicant and these are indeed the powers that are available to the employer. It bears mention that the first respondent did raise a jurisdictional point in the High Court. He contended that that this Court is the one with relevant jurisdiction to deal with a dispute founded on the employment relationship and that the applicant fell into the very category. Since the suspension was the subject matter of the High Court application, absence of the first respondent's powers was the main issue there. It was also common cause that the powers to suspend are powers only exercised by an employer. The first respondent in the High court answering affidavit which he personally deposed to articulated his jurisdictional point in paragraphs 10 and 13 thereof as follows:

"10. I am advised and respectfully submit that it is plain that the dispute that forms the subject matter of this application involves the employment relationship between the applicant, on the one hand, as an employee of the Pan South African Language Board ("the governing"), and on the other hand, the institution ("the second respondent") by which he is employed.

11. ...

12. ...

13. While the applicant has instituted proceedings in this Court, I am advised that section 157(2) of the Labour Relations Act 56 of 1996 ("the LRA") confers concurrent jurisdiction of this honorable Court with the Labour Court in respect of violations of fundamental rights entrenched in the Bill of Rights arising from employment and labour relations. I am advised further that the Constitutional Court and the Supreme Court of Appeal have made it clear that section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning matters such as the present which arise from employment and labour relations, rather than to extend the jurisdiction of the court to those matters."

[13] The High Court ultimately found that it had jurisdiction to hear the application since the remedy sought by the applicant was, in view of the pleaded facts, not exclusively determinable by this Court under the LRA. The High Court, however, struck the matter off the roll due to lack of urgency. The first respondent's counsel relied on *NEHAWU v University of Cape Town and others*⁴ in support of the contention that this Court lacks jurisdiction specifically at paragraph 6. It appears that paragraph 6 was read in isolation of the court's findings in this respect. The *NEHAWU* supra decision in fact supports the applicant's case. The Court per Mlambo J (as then he was) noted in its findings that the matters covered are wide-ranging and that this Court's jurisdiction does not depend on the conduct complained of only but on the whole context within which the conduct is taking place⁵. I specifically refer to the following wherein the court laid this issue to rest as follows:

⁴ [2000] 7 BLLR 819 (LC).

⁵ Ibid at para 7.

“[9] In my view it would lead to undesirable consequences if a piecemeal approach was adopted regarding the jurisdiction of the Labour Court. The provision equating the Labour Court to the High Court in status regarding matters under its jurisdiction must mean that those matters that were incidental to labour disputes or the resolution thereof that were referred to the High Court were so referred because there was no court equal in status to the High Court to deal with those matters. The old Industrial Court comes to mind and according to the 1956 LRA that court was a court of equity only whose jurisdiction was circumscribed in section 17 of the Act. In those days the High Court played a very active role in the resolution of disputes not within the jurisdiction of the Industrial Court. The High Court also had review jurisdiction over the Industrial Court. On the other hand, the Labour Court is, in terms of section 151, established as a court of law and equity and equal in status to the High Court regarding matters under its jurisdiction. This must mean that the role of the High Court is excluded in matters arising from and/or incidental to the relationship between employer and employee. The injunction to interpret the LRA’s provisions in a purposive way must mean that the interpretation of the provisions of the LRA must not be done in a manner that will lead to a proliferation and multiplicity of court proceedings. In my view the Labour Court has jurisdiction to consider whether the resolutions of the council of the university were properly adopted and also whether the council was properly constituted. In fact, the adoption of those resolutions is incidental to the resolution of the section 189 and section 197 disputes.”⁶

[14] What has been pleaded in the High Court matter certainly demonstrates that the first respondent had from the onset a clear understanding that this Court has jurisdiction. He brilliantly unpacked the provisions of s 157 of the LRA in

⁶ Ibid at para 9.

advancement of his preliminary point before the High Court. It is not difficult to puzzle out that this point was brought as a stepping stone to the counter-application. More about the counter-application appear hereunder. In the circumstances there is no basis for the upholding of the first respondent's jurisdictional point.

Condonation application

[15] The late filing of the applicant's replying affidavit incorporating opposition to the first respondent's-counter application is the subject matter of the condonation application. When the matter first came before this Court on 10 August 2018, the parties were, in terms of the order, directed to file the answering and replying affidavits in terms of Rule 7 of the Rules of this Court, which is ten days in respect of the answering affidavit and five for the replying affidavit. These are the time frames applicable in ordinary motion proceedings. It bears mention that when the order was made the first respondent had already filed his answering affidavit with a counter application incorporated therein. The applicant was certainly the party who was required to get the ball rolling when coming to compliance with the order made on the very first day of the hearing of this matter. The first respondent was only required to file a replying affidavit in respect of the counter-application within five days upon receipt of the answering affidavit from the applicant.

[16] The applicant conceded to not having filed his answering and replying affidavits timeously. In his condonation application, as deposed to by his attorney, these pleadings were delivered on 11 September 2018 thus causing a delay of fifteen and twelve days respectively. The Registrar's filing stamp bears the date of 27 September 2018. I must express a view at this stage that what the applicant did certainly does not complete delivery as defined in Rule 1 which is to '*serve on the other parties and file with the registrar*'. The first respondent took issue with the degree of lateness because the applicant was trying to minimize the degree of the delay which should correctly reflect seventeen and fifteen days. This argument was based on Van Niekerk J's observations as conveyed to the parties on 19 September 2018. What can be drawn from the above is that the

period of delay is way more than the period alleged by the applicant's attorney. The first respondent certainly has a point in this respect.

- [17] As it is trite that the degree of delay is not the only issue for consideration in determining applications for condonation, it is thus of extreme importance for this court to consider other relevant factors. These factors are founded on the test for condonation which is without doubt well settled in our law. In *National Union of Mineworkers v Council for Mineral Technology*⁷ the Labour Appeal Court held as follows:

“The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative lack of diligence or the insufficiency of the explanation tendered.”

⁷ [1999] 3 BLLR 209 (LAC) at para 10.

- [18] In *Mankayi v Anglogold Ashanti Ltd*⁸ the Constitutional Court held on this point as follows:

“The test for the grant of condonation is whether the interests of justice permit. Factors relevant to this inquiry include, but are not limited to, the extent and cause of the delay, the prejudice to the opposing litigant, the reasonableness of the explanation, the importance of the issues to be decided and the prospects of success. The inquiry entails weighing each factor against the others and determining where the interests of justice ultimately lie. Mr Mankayi’s written submissions were filed six days late. Mr Spoor, who appeared on his behalf, has ascribed his failure to lodge the written submissions timeously to lack of funds. AngloGold does not oppose the application for condonation. There is, in my view, a satisfactory explanation for the delay. The delay was minimal and there was no prejudice to AngloGold. The issues raised in the application for leave are important and it cannot be said that the application has no prospects of success. In these circumstances, it is in the interests of justice to grant condonation”

- [19] The application for condonation is opposed and I must state that the reason advanced by the applicant’s attorney is in my view not compelling. It is hugely rested on some far-fetched misconstruction of the court order. The merit of the main dispute certainly raises a public interest together with the fact that the cause of the delay was not rested on the applicant personally. When taking this into account together with absence of show of any prejudice to be suffered by any of the respondents if the application is granted, with all the discretion this Court is loaded with, I am of the view that the interests of justice require that the condonation application be granted.

The merit of the application

⁸ [2011] 6 BLLR 527 (CC) at para 8.

[20] As highlighted above, this Court has to decide whether to confirm or to discharge the rule *nisi* as extended. The first respondent has indicated that he has subsequently been legally advised that the correct legal position regarding PanSALB is that it is an independent constitutional body and that in law he does not have the power to discipline the applicant. This is indisputably a legal concession that is not binding on this Court. In arriving to this conclusion I took guidance from *Harrington v Panayodites*⁹ where the following was said:

“Here we are concerned with a legal concession. It is trite law that this Court is not bound by a legal concession if it considers the concession to be wrong in law.... [T]his Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, ' if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it'. Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct, in fact, it is inconsistent with the Constitution.”

[21] The gist of the applicant's case is that the first respondent lacked authority to bring or authorize disciplinary proceedings against him in respect of his employment with the second respondent. The reason being that the Act vests exclusive authority on the PanSALB Board to discipline him. Effectively, the Act does not authorize the first respondent to discipline him. This argument is rooted on first respondent's dissolution of the PanSALB Board in that until he appoints a new Board, there is no properly and legally appointed Board which can suspend or initiate disciplinary proceedings against him.

[22] While the dissolved Board as a governing body of the institution is no longer in existence, the PanSALB as an institution remains intact. The crucial point in this regard is to consider the real employer of the applicant. The applicant's

⁹ (A921/2015) [2017] ZAGPPHC 1187 (10) November 2017 at para 29, read with *Matatiele Municipality v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC) para 67.

case is that he has been employed by the PanSALB Board. Since the first respondent has dissolved the PanSALB Board acting under s 5(5A) of the Act, the dissolved Board lacks jurisdiction to discipline him. This argument appears to be based on the applicant's misunderstanding of the term "*Board*". I find myself in agreement with the High Court's interpretation in *Madiba and others v Minister of Arts and Culture and others*¹⁰ where Tuchten J had this to say:

"[21] It seems to me that the term "Board" is used in two senses in the Act: firstly, as the governing body of the institution and, secondly, as the institution as such. Although this subject was not addressed in argument, it was implicit in the arguments advanced by both counsel that s 5(5A) contemplated the dissolution of the governing body and not the institution."

[23] It follows that the Board dissolved by the first respondent acting under section 5(5A) was the governing body of the institution, namely PanSALB Board. In essence the first respondent did not dissolve the institution. Prior to its ministerial dissolution, the governing body of the institution appointed the applicant as the CEO of the Board. He was appointed as the CEO or as an employee of the institution. Consequently, the real employer is not the dissolved governing body of the institution, but the institution itself which is a juristic person statutorily established by s 2(1) of the Act which is separate from its governing body. As a juristic person the institution speaks through its governing body.

[24] The power to appoint and dissolve the governing body of the institution is vested upon the first respondent acting under s 5(1)(a) and s 5(5A) of the Act. After been appointed a CEO the applicant accepted the appointment to perform the functions as set out in the Act and on terms and conditions of the contract of employment. Since then up until today he is still in the employ of the institution receiving remuneration from the institution. The applicant is in

¹⁰ [2017] 4 ALL SA 111 (GP) at para 21.

fact an employee of the institution and not the dissolved governing body of the institution.

- [25] In terms of the Act read with Regulations made by the minister under s 10(7), the Minister appoints the Board as a governing body of the institution and may dissolve it. The PanSALB Board in its capacity as the governing body of the institution appoints the CEO. Its chairperson may suspend him. The PanSALB Board chairperson's power to suspend CEO from duty until an investigation or disciplinary hearing with regard to a charge of misconduct, includes the power to discipline. In *Mlengana v Minister of Agriculture Forestry and Fisheries*¹¹ where Ranchod J held:

"The power to discipline is a managerial prerogative and is an incident of the management of an employee. The power to discipline includes the power to suspend. This is because, as Murphy AJA (as he then was) states: '..... as a precautionary suspension invariably forms part of the procedure leading to disciplinary action it is inherently disciplinary in nature.'"

- [26] It is common cause between the parties that the CEO is an employee of the second respondent. The first respondent in his capacity as the cabinet minister is not a manager of the CEO. Consequently, he has no power to discipline the CEO. In *Mlengana's* case the Court went on to say in paragraph 31 that:

"In any event, the general rule is that where a power is given to a person to appoint it implies a power to dismiss. The power to dismiss has been described as 'an essential corollary' of the power to appoint. Suspension of an employee pending disciplinary proceedings is often the first step in what may ultimately lead to the dismissal of the employee".

¹¹ [2018] ZAGPPHC 547 (23 April 2018) at para 28.

- [27] In the present matter the power to appoint the CEO is given to the Board in terms of s 10(1) and s 10(4) of the Act. This power implies a power to institute a disciplinary action against the CEO and to decide whether or not he/she is guilty of a disciplinary offence and if so, to decide whether or not to dismiss him/her. Put differently, the first respondent has no express or implied power to appoint or dismiss the CEO. Sections 10(7) and 10(8) of the Act empower the minister to make regulations to, *inter alia*, govern the requirements for discharge and disciplinary steps. One such regulation is Regulation 17(b) which confers power upon the Board's chairperson to suspend the CEO, which power, as already held above, includes the power to discipline.
- [28] Regulation 16(14) provides that the CEO, if aggrieved by the appeal decision made by the Board, may appeal further to the Minister. The first respondent cannot therefore play the role of disciplinary chairperson in matters where he has executive appellate authority in terms of the law. The first respondent is thus not competent to discipline the applicant as he is by law required to be an appeal authority. The applicant will otherwise be left without a remedy should the first respondent assume the disciplinary powers over him. What follows in these circumstances is that the first respondent had no lawful authority to bring or authorize disciplinary proceedings against the applicant in respect of his employment with the second respondent.
- [29] Having found that the decision by the first respondent to discipline the applicant unlawful, this also impacts on the notice to attend a disciplinary hearing signed on 31 July 2018. The same applies to the disciplinary proceedings which could have taken place had the applicant not obtained an interim order on 10 August 2018. This, however, does not simply imply that the disciplinary charges would fade away¹². There is nothing in law that precludes any new PanSALB Board from instituting a fresh disciplinary action against the applicant based on the same or similar charges listed in the annexure to the first respondent's notice of disciplinary proceedings.

¹² See: *Takalani v Sedibeng Water Board* [2018] ZALCJHB 186 (23 May 2018) at para 23.6.

- [30] It is indisputable that the applicant is facing serious allegations of misconduct, this certainly cannot be ignored. On the other hand, he is adamant that he wishes to clear his name at a disciplinary hearing conducted by a new Board to be appointed by the first respondent. All that needs to happen to allow the applicant to have his day in the disciplinary hearing, is for the first respondent to appoint a new PanSALB Board, be it an interim or otherwise, which may in turn exercise its disciplinary powers by instituting disciplinary action against the applicant.
- [31] The first respondent does not deny the applicant's allegation that since the dissolution of the previous PanSALB Board on 12 Jan 2016, he has to date not appointed a new Board. This situation is lamentable as it brings about unintended consequences and risks. It promotes disruption and disorder. PanSALB as an institution that has been left in a 'headless institution' at the time when it was supposed to be fulfilling its constitutional obligations to promote, and create conditions for and ensure respect for South African languages as required by s 6(5) of the Constitution of the Republic of South Africa¹³. This is against the interests of the public. A fair and equitable remedy in the circumstances is to confirm the rule *nisi*.

The Counter-application

- [32] The first respondent's counter-application to declare the applicant as 'employer less', is simply meritless. As already indicated above, the real employer of the applicant is the institution PanSALB, the second respondent, not the dissolved governing body of the institution. Under these circumstances I am inclined to agree with the applicant that the absence of the dissolved PanSALB Board cannot by any stretch of the imagination imply that the second respondent has ceased to exist. I see no basis for the granting of this counter-application.

¹³ Act 108 of 1996.

Costs

- [33] Both parties vigorously sought costs against each other including costs of two counsel. This is surely one of those matters where the Court's discretion is pivotal in determining the awarding of costs. The first respondent caused unnecessary expenses in having raised a jurisdictional point challenging this court's jurisdiction despite having informed the High Court that it did not have jurisdiction but that this Court did. Furthermore, the counter-application asking for the applicant to be declared as 'employer less' was highly unfounded and unnecessary in the circumstances. It was only in late October 2018 that the first respondent expressly conceded that the correct legal position regarding PanSALB is that it is an independent constitutional body and that in law he does not have the power to discipline the applicant. This late concession was only made after the first respondent had already induced the applicant into initiating proceedings which could have been avoided.
- [34] Had the applicant's attorney acted promptly there could have been no need for a condonation application. The applicant's insistence that he is the sole remaining board member might to a certain extent have provoked the first respondent into initiating the counter application for an order declaring him 'employer less'. The applicant is one of the members of the dissolved governing body. When the Minister dissolved the governing body, the CEO also lost membership of the Board as the governing body of the institution. The applicant as the CEO simply exercises the powers and functions of PanSALB as an institution. He cannot claim to be exercising the powers and functions of the dissolved governing body.
- [35] For these reasons, the court has to exercise its discretion in either limiting the extent of the claim of the costs, or depriving a successful party of portion or all of his costs or, in a proper case, order a successful party to pay portion or all of the costs of the unsuccessful party. To this end the applicant as a successful party cannot be awarded a blanket order as to costs in light of his conduct during litigation, most particularly his failure to comply with the order of the Court. He is thus not entitled to costs incurred in the prosecution of the

condonation application. These costs must be awarded to the first respondent together with the wasted costs incurred by the first respondent in respect of postponements on 19 and 20 September 2018. All the costs awarded below include the costs of two counsels where applicable.

[36] In the circumstances, I am constrained to make the following order:

Order

1. The court has jurisdiction to hear and determine this matter;
2. Applicant's condonation application is granted;
3. The rule *nisi* is confirmed with costs, including the costs reserved on 10 August 2018;
4. First respondent's counter-application is dismissed;
5. The applicant is ordered to pay the costs incurred by the first respondent in opposing the condonation application, but excludes the costs for physical appearance (not preparation) on 07 November 2018 during oral arguments;
6. The applicant is ordered to pay the first respondent's wasted costs occasioned by the postponements on 19th and 20th September 2018.

MM Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate G. Fourie (SC) with Advocate Z. Ngwenya

Instructed by: Ngcingwana Incorporated

For the First respondent: Advocate F. R. Memani with Advocate V. J. Chabane

Instructed by: State Attorney

LABOUR COURT