THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J1827/19

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS

UNION (SAMWU) **First Applicant**

DOMINION T PHALA **Second Applicant**

and

EKURHULENI METROPOLITAN MUNICIPALITY **First Respondent**

MBULELI KOLISI N.O **Second Respondent**

Heard: 3 September 2019

Judgment delivered: 5 September 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application, brought on an urgent basis, to interdict a disciplinary hearing pending the outcome of an application to review and set aside rulings made by the second respondent, who is the chairperson of the hearing. On 8 August 2019, the second respondent dismissed an objection to his appointment; on 13 August 2019 he issued a ruling to the effect that it would be unreasonable not to allow the first respondent legal representation at the hearing.

[2] I accept that the application is urgent. The applicants seek an interim order, and are required to establish a clear or *prima facie* right, a well-grounded apprehension of irreparable harm if interim relief is not granted, the absence of a satisfactory alternative remedy, and that the balance of convenience is in their favour.

[3] I do not intend for present purposes to canvass in any detail the merits of the review application, save to observe that the application is brought in terms of s 158 (1) (h), and cast as what the applicants' representative referred to as a legality review. In essence, the applicants' case is that the chairperson's appointment constituted a breach of a collective agreement regulating workplace disciplinary procedures, as did his ruling that the first respondent was entitled to legal representation. I fail to appreciate on what basis it can be said that the chairperson's rulings constituted the exercise of a public power. The disciplinary hearing was convened to enquire into acts of alleged misconduct by an individual employee, in terms of a collective agreement that bound the first applicant and the first respondent, in their capacities as employee and employer respectively. The second respondent, in the present context, does not, it seems to me, exercise a public function that is subject to the principle of legality. In any event, as a general rule, this court does not intervene in uncompleted disciplinary proceedings. It will do so only in exceptional circumstances, to remedy a manifest injustice. There is no basis to treat the present application as exceptional, and a refusal to intervene in the disciplinary hearing will not cause any grave injustice. The second applicant is being afforded the right to respond to the allegations made against him – that is the substance of the right to a fair

procedure established by the LRA. If the applicant is aggrieved at the manner in which the enquiry is being conducted, he has the right in due course to contest the fairness of the procedure. For these reasons, I am not satisfied that the applicants have established a *prima facie* right to the relief that they seek.

[4] In so far as the balance of convenience is concerned, I have no doubt that this lies in favour of the respondents. The second applicant appears intent on challenging every aspect of his disciplinary hearing. The first sitting of the disciplinary hearing took place on 30 May 2019. Some three and a half months later, little if any progress has been made. This is not what the Code of Practice: Dismissal envisages. The review application was filed a week before the present application. It is common knowledge that the back log in the opposed motion court is such that it is not likely that the review application will be finalised within the next 18 months. In the interim, the first respondent would be obliged to continue employing the second applicant for that period, at the ratepayer's expense. In my view, the balance of convenience requires that the matter be brought to finality as soon as possible. As I have mentioned, the applicants have available to them the remedy of a right to procedural fairness should they wish in due course to contest any decision by the second respondent to impose any disciplinary sanction. In short: the applicants have failed to establish a right to the interim relief sought.

[5] Finally, in relation to costs, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. The respondents have succeeded in their opposition to the application, a significant factor to be taken into account. Although the first applicant and the first respondent are parties to a collective bargaining relationship, there is no indication that an order for costs will prejudice that relationship. Further, it appears to me that the conduct of the applicants has been directed at frustrating the disciplinary proceedings underway, and avoiding an expeditious and informal determination of the substance of the allegations made against the second applicant. In my

view, the interests of the law and fairness are best satisfied by an order that costs should follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Ms.G Phakedi, Phakedi Attorneys

For the respondent: Adv. A Cook, instructed by Tshiqi Zebedela Inc.