IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1892/2019

In the matter between:

DIRK WILLEM POTGIETER **Applicant**

and

MODIKWA PLATINUM MINE **First Respondent**

MR C GRIFFITHS (CEO OF ANGLO AMERICAN PLATINUM) **Second Respondent**

MR M SCHMIDT (CEO OF AFRICAN RAINBOW MINERALS) **Third Respondent**

Heard: **3 October 2019**
Delivered: **8 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicant approached the Court on an urgent basis to seek an order interdicting the respondents from proceeding with any disciplinary action against him. In the alternative, he seeks an order that the disciplinary proceedings against him be conducted under the provisions of section 188(A) of the Labour Relations Act (LRA).

[2] This urgent application, which the first respondent (Modikwa) opposed, is brought before this Court against the following background;

2.1 The applicant is currently in the employ of Modikwa. He complains about four different disciplinary proceedings related to allegations of misconduct instituted against him since April 2017. It is common cause that Modikwa withdrew three charges of misconduct against the applicant.

2.2 The fourth and most recent disciplinary proceedings against the applicant which triggered this application were instituted in September 2019. As with the previous disciplinary proceedings instituted against him, the applicant had sought that these be conducted in accordance with the provisions of section 188(A) of the LRA, which request was declined by Modikwa.

2.3 The applicant as apparent from his founding affidavit, holds the view that the charges against him are either unwarranted, unjustified, or that the issues leading to those charges could have been amicably resolved, or that at best, that they can be properly dealt with under a section 188(A) of the LRA process. He further holds the view that he would not receive a fair internal disciplinary hearing.

[3] Modikwa in opposing the application raised two preliminary points which are dispositive of this matter. The first is that the second and third respondents ought not to have been joined in these proceedings as there is no employment relationship between them and the applicant. In this regard, it was submitted that the Court lacks the requisite jurisdiction to grant any relief that the applicant seeks against either the second or third respondent.

[4] It needs to be stated from the onset that it is not apparent from the founding affidavit as to the reason the second and third respondents were cited in these proceedings. In his replying affidavit, the applicant's response to this preliminary point is that Modikwa had in any event 'joined the second and third respondents as 'Respondents'' and that Modikwa had also conceded that the Modikwa is a joint venture between the second and third respondents.

[5] It is appreciated that the applicant in this case not only appeared in person but had also drafted his own pleadings. However, to the extent that this is the

path that the applicant chose, when in an answering affidavit a preliminary point is raised, that point ought to be sufficiently dealt with, to indicate why it should not be upheld. The applicant woefully failed to do so. There is nothing to indicate in the papers, what direct and substantial interest in the outcome of this litigation do the second and third respondents have. To the extent that it was not disputed that there is no employment relationship between the applicant and the second and third respondents, and further to the extent that it was not demonstrated as to what material interest to the outcome of these proceedings the second and third respondents had, it follows that there was a material misjoinder.

[6] The second preliminary point is even more profound. The applicant seeks that his disciplinary proceedings be conducted in terms of section 188(A) of the LRA on account of the special circumstances of his case, and further on the basis that this Court can 'make any order that it deems appropriate'. The provisions of section 188(A) of the LRA are clear and requires that a request for such proceedings be made by the employer with either the CCMA or relevant bargaining council; or when a provision is made in the employee's contract of employment or a Collective Agreement; or where the employee has alleged in good faith that the holding of the disciplinary enquiry contravened the Protected Disclosures Act.

[7] In this case, and as was correctly pointed out on behalf of Modikwa, the applicant cannot seek the alternative relief as he has no right to the enquiry being conducted under the provisions of section 188A of the LRA. The fact that he had made a request for such an enquiry does not entitle him to it, as the requirements as set out above ought to be met. As it was further submitted on behalf of Modikwa, it would be untenable for this Court to grant such relief especially in circumstances where the applicant seeks an enquiry in terms of section 188A of the LRA, simply because he does not trust that he will get a fair hearing at the internal disciplinary enquiry. The fact that an employee has no confidence in the objectivity of an internal disciplinary enquiry is not a basis for seeking a section 188A of the LRA process.

[8] Notwithstanding the fact that the applicant has not established any right to the section 188A of the LRA enquiry, central to these types of applications is that the applicant must satisfy the requirements of urgency as contemplated in Rule 8 of its Rules.[1] The applicant is thus required to set explicitly the circumstances and objective facts which he contend renders the matter urgent. He is further required to explain in the founding affidavit why he cannot get substantial redress at a hearing in due course.[2]

[9] In this case, no basis was laid out in the founding papers as to the reason the matter should be treated as urgent, and why the rules of this Court should be abridged. The founding affidavit is silent on this issue and no explanation was proffered whatsoever as to the reason the Court was only approached on 2 October 2019, when the charges leading to the disciplinary enquiry arose on 16 September 2019, and when the enquiry was scheduled to take place on 19 September 2019, or at most, when the internal enquiry had commenced. Clearly any urgency claimed in this case is self-created.

[10] It is further trite that this Court does not as a rule, intervene in on-going internal disciplinary proceedings unless there are exceptional circumstances that require its urgent intervention, such as that a grave injustice would occur.[3] In *Jiba v Minister: Department of Justice and Constitutional Development and others*[4] this Court pertinently 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

[1] **8 Urgent relief**
(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
(2) The affidavit in support of the application must also contain-
(a) the reasons for urgency and why urgent relief is necessary;
(b) the reasons why the requirements of the rules were not complied with, if that is the case; and
(c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

[2] See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) (11/33767); [2011] ZAGPJHC 196 (23 September 2011) at para 6.

[3] See *Booysen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC), (2011) 32 ILJ 112 (LAC) at para 36; *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and others* [2009] 8 BLLR 833 (LC) [2009] at para 3; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and others* (2016) 37 ILJ 1704 (LC)

[4] [2009] 10 BLLR 989 (LC), (2010) 31 ILJ 112 (LC) at para 17.

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.'

[11] In this case, the fact that the applicant holds the view that he might not get a fair hearing for reasons that do not appear to be clear, can surely not amount to compelling or exceptional circumstances that justified the urgent intervention of this court. Any harm or injustice arising out of the completion of the disciplinary enquiry cannot be regarded as grave in the light of substantial redress to be obtained at some point if the outcome of the internal disciplinary enquiry is unfavourable to the applicant.

[12] In a nutshell, the applicant has not satisfied the requirements of urgency, nor has he demonstrated that he has met the requirements of the final relief he seeks. In the end, there is no basis for this Court to intervene with the internal disciplinary proceedings against the applicant.

[13] This then bring me to the issue of costs. In accordance with the provisions of section 162 of the LRA, this Court may make an award of costs upon a consideration of the requirements of law and fairness. In deciding whether to order payment of costs, the court may take into account, among others, the conduct of the parties in proceeding with the matter before the court and during the proceedings.[5] In my view, this application ought never have seen

[5] *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others* (JA15/2014) [2017] ZALAC 2 (10 January 2017) at para where it was held that;

'[10] The awarding of costs in the Labour Court is governed by s 162 of the Labour Relations Act 66 of 1995 (LRA) which provides that in making orders for payment of costs, the Court has to have regard to the requirements of law and fairness. In deciding whether to order payment of costs, the court may take into account, among others, the conduct of the parties in proceeding with the matter before the court and during the proceedings. In *Moloi v Euijen,* it was observed that the framework of s 162 supports the proposition that when making orders of costs the requirements of law and fairness are paramount. The requirements of law and fairness are on equal footing, and none is secondary to the other. See in this regard *Callguard Security Services v T&GWU* and *Xaba v Portnet Ltd*.

[11] The rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court and such orders are made in accordance with the

its way through this Court's urgent roll. It was ill-considered and had no merit from the beginning. Inasmuch as the applicant may have felt aggrieved by the manner with which the internal disciplinary proceedings were dealt with or are unfolding, that in itself was not sufficient for either the Court or the respondents to be burdened with this application. Upon receipt of the answering affidavit, the applicant ought to have reflected on his stance and the folly of pursuing this matter. He failed to do so, and I see no reason in law or fairness, why he should not be burdened with the costs of this application.

[14] Accordingly, the following order is made;

Order:

1. The Applicants' application is dismissed with costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	In Person
For the Respondent:	Adv. M Van As, instructed by Cliffe Dekker Hofmeyr INC

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requirements of law and fairness. See in this regard *MEC for Finance (KZN) and Another v Dorkin NO and Another* where Zondo JP explained the rationale for that approach:
'[T]he norm ought to be that costs orders are not made unless those requirements (of law and fairness) are met. In making decisions on costs orders this court should strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employer organisations from approaching the Labour Court and this court to have their disputes dealt with, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. This is a balance that is not always easy to strike, but if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes…' (Citations omitted)