THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J280/20

In the matter between:

ENOCH KUBHEKA **Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL: HUMAN SETTLEMENTS (GAUTENG PROVINCIAL GOVERNMENT) **First Respondent**

YANGA GIYOSE, NO. **Second Respondent**

Heard: **4 and 20 March 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 05 May 2020.**

Summary: **Urgent interdict – stay of the parallel in-house disciplinary hearing section – section 188A tripartite agreement – the employer is divest of its prerogative to institute the in-house disciplinary hearing pending the final determination of the allegations before the pre-dismissal arbitration.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this urgent application the applicant, Mr Enoch Kubheka (Mr Kubheka), seeks an order in the following terms:

1.1 Firstly, declaring that the second and parallel in-house disciplinary hearing which has been instituted against him while there is a pending pre-dismissal arbitration in terms of section 188A of the Labour Relations Act[1] (LRA) is unlawful;

1.2 Secondly, declaring that the first respondent, the Member of the Executive Council: Gauteng Department of Human Settlements (MEC) or the Gauteng Department of Human Settlements (Department), collectively referred to as the Department, does not have powers or prerogative to institute an in-house parallel disciplinary hearing against him while there is a pending pre-dismissal arbitration, to which the parties have agreed upon, before an arbitrator appointed by the GPSSBC; and

1.3 Thirdly, interdicting and restraining the Department and the second respondent, Mr Yanga Giyose (Mr Giyose) - the chairperson of the parallel in-house disciplinary hearing, from proceeding with the parallel in-house disciplinary hearing pending the finalisation of the pre-dismissal arbitration before the GPSSBC.

[2] The Department is opposing the application but initially elected not to file an answering affidavit and proceeded by way of oral legal submissions in Court on 4 March 2020, mainly challenging the issue of urgency. I handed down an extempore judgement wherein I found that the matter is urgent. By agreement between the parties, the matter was postponed to 20 March 2020 in order to allow the Department an opportunity to file an answering affidavit on the merits.

[1] Act 66 of 1995 as amended.

Pertinent facts

[3] On 5 March 2019, the Acting Head of Department, Mr Daniel Molokomme (Mr Molokomme), served Mr Kubheka, who was the acting Chief Financial Officer at that time, with a letter informing him of the impending disciplinary hearing against the him following the findings and recommendations from the Gauteng Audit Services (GAS) report regarding the 'Construction of 150 ablution and Sanitation Infrastructure and Ablution Facilities at Sicelo Shiceka: Phase1'. He further opined that, given the seriousness of the allegations against Mr Kubheka, the disciplinary hearing should be presided over by an independent person for purposes of fairness and an objective conclusion under the auspices of the GPSSBC in terms of clause 2.7(5)(a) of Chapter 7 of the Senior Management Service, Handbook of 2003 (SMS Handbook). Clause 2.7(5)(a) and (c) of the SMS Handbook provides that:

> '(a) The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only subject to review by the Labour court.
>
> (b) …
>
> (c) For the purposes of a disciplinary hearing in terms of paragraph 2.7(5)(a), both the employer and the employee may be represented by a legal practitioner.

[4] The provisions of clause 2.7(5) of the SMS Handbook are premised on section 188A of the LRA which provides that:

> '(1) An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into the allegations about the conduct or capacity of that employee.
>
> (2) The request must be in the prescribed form.

(3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of-

(a) payment by the employer of the prescribed fee, and

(b) the employee's written consent to the enquiry.

(4) (a) An employee may only consent to the enquiry in terms of this section after the employee has been advised of the allegation referred to in subsection (1).'

[5] Attached to Mr Molokomme's letter of 5 March 2019 is the notice of a disciplinary hearing which also contains the following charges of misconduct levelled against Mr Kubheka:

'**CHARGE 1: CONTRADICTION OF TREASURY REGULATIONS 15.10.1.2(C)**

You are charged with misconduct in that you accepted and recommended for advance payment of R9 690 000.00 in December of 2017 which led to AMAQAKALA CONSTRUCTION & PROJECTS CC to be paid for work not completed in line with contractual agreement signed between the Department and AMAQAKALA & PROJECTS CC.

CHARGE 2: FAILURE TO ADHERE TO OR ENFORCE THE PROVISIONS OF THE APPROVED CONTRACT BETWEEN THE DEPARTMENT AND THE SERVICE PROVIDER

You are charged with failure to adhere to or enforce the contractual obligations entered into between the Department and AMAQAKALA CONSTRUCTION & PROJECTS CC in that you accepted and recommended for payment to the service provider before the Project Quality Assurance Unit of the Department had undertaken the quality verification and approval of the work done and completed by the service provider in line with the contract.

CHARGE 3: IRREGULAR, WASTEFUL AND FRUITLESS EXPENDITURE

You are charged with irregular, wasteful and fruitless expenditure in that you accepted and recommended for payment of an invoice without a project management report to substantiate that the work had been done in line with the contractual deliverables, therefore causing the Department a financial loss amounting to R9 960 000.00 for ablution and sanitation infrastructure that was not effected at the Sicelo Shiceka Informal Settlement.'

[6] Initially the first disciplinary hearing was scheduled to sit on 15 March 2019. On 26 April 2019, the parties signed the prescribed requisite form in terms of section 188A of the LRA, mutually agreeing that the disciplinary hearing against Mr Kubheka be conducted by way of a pre-dismissal arbitration.

[7] Thereafter, there was a hiatus in the commencement of the pre-dismissal arbitration which is not accounted for by either of the parties. It must be mentioned that Mr Kubheka was not placed under precautionary suspension and as such he continued performing his duties.

[8] On 15 November 2019, Mr Kubheka was served with the second notice to attend a disciplinary hearing (parallel in-house disciplinary hearing) that was scheduled to sit on 18 November 2019 under the chairpersonship of Mr Giyose. Attached thereto is a second charge sheet with the following allegations of misconduct:

'It is alleged that you committed the following act/s of misconduct as provided in the Disciplinary Code and Procedure; and based on the finding of the Auditor-General in its audit report for the financial year 2018/2019 of the Department's state of financial affairs, we hereby inform you of the following charges against yourself: -

'<u>Charge 1:</u> You performed poorly/ inadequately reasons (sic) other than incapacity to misconduct,

In that, amongst other things, and while you were on duty, you:

(i) Did not ensure proper application of applicable legislative measures or review and monitor compliance with the Division of Revenue Act 2 of 2013, the Public Finance Management Act 1 of 1999;

(ii) Did not prepare or see to the proper preparation of true and reliable Annual Financial Statements which were adequately supported and evidenced by credible information;

(iii) Failed to prevent misstatements to occur in the Annual Financial Statements of the Gauteng Housing Fund and the Vote 8;

(iv) Failed to deliver to the Auditor-General sufficient and appropriate financial statements to complete an audit of the Department;

(v) Failed to properly and adequately supervise the preparation of the Department 's 2018/2019 financial statements;

(vi) Failed to ensure compliance of the Department's Annual Financial Statements to be submitted for audit;

(vii) Did not ensure preparation of the Annual Financial Statements in terms of Modified Cash Basis and/or Generally Recognised Accounting Practice, respectively.

<u>Charge 2:</u> Dereliction of duties

In that, and while you were on duty and during an Audit Committee Meeting, and in the face of having assistance offered to yourself by the Acting Head of the Department to ensure the proper completion of accurate and credible financial statements, you refused assistance and again gave assurance to prepare credible financial statements.'

[9] The reality of the matter is that Mr Kubheka is, in essence, presented with a situation where he has to appear before two parallel disciplinary hearings; one in terms of section 188A of the LRA (pre-dismissal arbitration) and the other, an in-house in terms of SMS Handbook. On 27 November 2019, Mr Kubheka, through his attorneys of record, requested the Department to combine the two charge sheets and for the matter to be heard and determined by the arbitrator in terms of the pre-dismissal arbitration. Pertinently, in his communication to Mr Amukelani Shibambo (Mr Shibambo), the deponent to the Department's answering affidavit,

consequent to their telephonic discussion, Mr Justice Lebea (Mr Lebea), Mr Kubheka's attorney of record, states that:

> '2. We have noted that our client has been subjected to two disciplinary hearings with two separate charge sheets at different forums on chargers relating to his role as the Acting Chief Financial Officer of the Gauteng Department of Human Settlements. At this stage, both disciplinary hearings have not yet commenced, and therefore not part-heard.
>
> 3. As discussed, we suggest that the two charge sheets should be consolidated and be heard before one forum to minimise costs and time consuming process caused by the necessity of attending and appearing into two different *fora*. As our client has already received a notice of set down from the GPSSBC for the Pre-Dismissal hearing schedule for 24th January 2020, it would be prudent and convenient to conduct a single disciplinary hearing at the aforementioned Bargaining Council as it will be less costly and less time consuming for both parties.
>
> 4. In light of the aforegoing, we kindly request that you consider our suggestion to consolidate the aforementioned charge sheets brought against our client in two different forums in order to hold a single disciplinary hearing before one tribunal.'

[10] The Head of Department, Ms Phindile Mbanjwa (Ms Mbanjwa), responded to Mr Lebea's letter through a letter dated 13 December 2019 but transmitted and received by Mr Lebea's office on 10 January 2020. In refusing the suggestion to consolidate the two charge sheets against Mr Kubheka and for the matter to be dealt with in terms of pre-dismissal arbitration, she states that:

> 'The Department wishes to indicate that the disciplinary charges against Mr Kubheka should proceed separately due to the fact that charge sheets were issued on different dates with different timelines. It is therefore important to finalise each of the disciplinary charges within the prescribed timelines in line Chapter 7 of the SMS Handbook of 2003.

Based on the above, it is the Department's view that the disciplinary hearings against Mr Kubheka should proceed as planned and that all the stakeholders ensure that these matters are finalised without any further delays.'

[11] As mentioned in Mr Lebea's letter of 27 November 2019, the pre-dismissal arbitration was scheduled to commence on 24 January 2020, with the parties having been notified of the set down date as early as 18 November 2019. On 24 January 2020, both parties attended the pre-dismissal arbitration. Mr Kubheka raised a point *in limine*, objecting to the parallel in-house disciplinary hearing while the pre-dismissal arbitration is still pending before the GPSSBC. Alternatively, he sought the consolidation of the second charge sheet with the one already before the pre-dismissal arbitration. The arbitrator reserved his ruling and directed the parties to deliver written submissions on issues raised by Mr Kubheka. Mr Kubheka filed his written submissions on 31 January 2020, while the Department's written submissions were only filed on 17 February 2020.

[12] Notwithstanding, the parallel in-house disciplinary hearing sat on 10 February 2020. By the same token, Mr Kubheka raised a point *in limine* pertaining to the legality of the in-house disciplinary hearing in the light of the pending pre-dismissal arbitration before the GPSSBC. He also requested for the in-house disciplinary hearing to be postponed pending the GPSSBC's ruling on the point *in limine*. Mr Goyise also directed the parties to submit written arguments, which both parties did.

[13] On 24 February 2020, Mr Goyise issued his ruling wherein he dismissed Mr Kubheka's point *in limine*. He also directed that the second disciplinary hearing proceed on 4 March 2020. On 25 February 2020, Mr Kubheka through his attorneys of record, advised the Department that Mr Lebea would not be available on 4 March 2020 due to prior commitments and suggested that the hearing be postponed *sine die* pending the outcome of the ruling by GPSSBC on the point *in limine*. They also suggested 30 and 31 March 2020 as possible dates to reconvene. In response, the Department, through its erstwhile attorney, Mr Combrick Nel (Mr Nel) of Kruger &

Pottinger Attorneys, insisted on continuing with the parallel in-house disciplinary hearing as directed by Mr Goyise, hence this application.

Non-joinder

[14] Before I deal with the merits, I need to quickly dispose of the Department's point *in limine* of non-joinder of the GPSSBC. In this regard Mr Mahlangu, counsel for the Department, submitted that, given the reliance placed by Mr Kubheka on the finalisation of the pre-dismissal arbitration before the GPSSBC and the arbitrator's finding on the point *in limine* on the consolidation of the two charge sheets, he ought to have joined the GPSSBC in these proceedings. This is so because the GPSSBC has a direct and substantial interest in the determination of whether it should consolidate the second charge sheet to the charge sheet before pre-dismissal arbitration, so the submission went further.

[15] In response, Mr Kubheka disavows reliance on the GPSSBC ruling on the point *in limine*. Mr Marcus, counsel for Mr Kubheka, submitted that the crux of Mr Kubheka's case is that the Department has no power to institute a parallel in-house disciplinary hearing pending the final determination of the pre-dismissal arbitration before the GPSSBC. In fact, the GPSSBC ruling had since been issued and the arbitrator ruled that he has no powers to interfere with the employer's internal processes and accordingly dismissed Mr Kubheka's point *in limine*. However, the arbitrator did not discount the possibility of the parties entering into any agreement to consolidate the two charge sheets and be determined under the auspices of the GPSSBC.

[16] In my view, the arbitrator correctly found that he has no power to pronounce on the legality of the parallel in-house disciplinary hearing against Mr Kubheka as his jurisdiction is limited to the first charge sheet. Having come to that conclusion, it is clear that the GPSSBC has no substantial interest in these proceedings.

[17] Mr Kubheka's impugn pertains to the legality of the parallel in-house disciplinary hearing which has no bearing on the GPSSBC. It is only when

the parties agree to the consolidation of the charges and that they be determined by way of the pre-dismissal arbitration that the arbitrator would be properly clothed with powers to deal with issues emanating from the second charge sheet as well.

[18] To the extent that these proceedings do not impact on the first charge sheet before the GPSSBC and there no order sought against it, in any event, I fail to understand how can it have a direct and substantial interest. While the legal principles articulated in the *dicta* referred to in the Department's written submissions in this regard are indubitable, they are not applicable in this instance.[2] As such, the non-joinder impugn is untenable and stands to be dismissed.

Section 188A of the LRA

[19] The prime assertion by Mr Khubeka is that the Department is debarred from instituting the parallel in-house disciplinary hearing against him pending the final determination of the pre-dismissal arbitration before the GPSSBC. This assertion is pegged on the unreported decision of this Court in *Virgil Rabie v Department of Trade and Industry and Another*[3] wherein I referred with approval to dicta in *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others,*[4] as per Van Niekerk J, and *Mchuba v Passenger Rail Agency of South Africa,*[5] as per Lallie J. Pertinently I stated that:

> '[15] …In *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others,*[6] the Court, as per Van Niekerk J, articulately explained the purpose of section 188A as follows:

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[2] See: *Numsa v Steinmuller (Pty) Ltd* [2012] 7 BLLR 733 (LC); *Barkhiezen v Napier* 2007(5) SA 323 (CC); *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2016] 1 All SA 520 (WC).
[3] (J515/18) [2018] ZALCJHB 78 (5 March 2018).
[4] (2013) 34 ILJ 706 (LC) at para 11
[5] [2016] 6 BLLR 612(LC);
[6] [2012] ZALCD 10; (2013) 34 ILJ 706 (LC) at para 11.

> '[11] Section 188A (despite its unfortunate title which on the face of it, assumes the outcome of the arbitration hearing) has as its purpose a means of expediting dispute resolution by avoiding duplication between internal and external hearings. In effect, in terms of a tripartite agreement between the employee, the employer and the CCMA, an arbitrator steps into the shoes of the employer and assumes the right normally considered a sacrosanct element of the managerial prerogative - the right to exercise discipline, including the right to dismiss. The benefit for all is the elimination of the duplication that inevitably occurs when court-like in-house hearings are inevitably followed by an arbitration hearing conducted on a *de novo* basis.'

[16] The court stated further that:

> '[15] It seems to me from the wording of s 188A that once an employer and an employee consent to refer the determination of allegations of misconduct or incapacity to an arbitration hearing in terms of s 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its internal disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. <u>That being so, and since the consent of the affected employee and the CCMA is necessary to achieve that result, it is not open to the employer to abandon the process on a unilateral basis</u>.' (Emphasis added)

[17] The principle in *MSC Depots* has been endorsed in *Mchuba v Passenger Rail Agency of South Africa,*[7] where the Court stated that:

> [16] '…By referring the matter to pre-dismissal arbitration, the respondent lost the right to take decisions on the relevance of documents the applicant requested as it had handed it over to Tokiso. <u>When the tripartite agreement was reached, the respondent had no residual power to take any step against the</u>

[7] [2016] 6 BLLR 612 (LC) at para 16.

> applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration, the applicant acted in breach of the applicant's contract of employment.' (Emphasis added)'

[20] The legal principles articulated in the above dicta are prudently conceded by the Department. Yet, it mooted a similar argument as that of the employer party in *Rabie*[8] that they are distinguishable given the fact that it has no intention to abandon the pre-dismissal arbitration. The Department adds that there is nothing precluding it from exercising its prerogative, as the employer, to institute the parallel in-house disciplinary enquiry on charges that are different from the ones before the pre-dismissal arbitration given the explanation it has proffered, which I deal with hereunder.

[21] The Department argued that the allegations contained in the second charge sheet are serious because they emanate from the adverse findings by the Auditor-General (AG) against the Department issued on 28 August 2019 in the 2018/2019 annual report. Unlike the internal audit findings by the Gauteng Audit Services (GAS) that led to the allegations contained in the first charge sheet, the AG's findings carried a disclaimer and are open to public consumption. Also, given the seriousness of the disclaimer, there must be consequence management unlike in the case of the GAS findings.

[22] Mr Kubheka deplored this explanation as illogical and as a vain attempt by the Department to minimise the extremely serious allegations contained in the first charge sheet before the pre-dismissal arbitration. There is merit in this argument. It would seem that the Department is oblivious to the motivation it presented Mr Kubheka when it sought his consent to the pre-dismissal arbitration, which was the seriousness of the allegations contained in the first charge sheet and a promise of a fair and expeditious hearing under the auspices of the GPSSBC. Clearly, the Department's attempt to

[8] *Supra* n 4.

draw a solid line between the nature of the allegations and the source thereof is misconceived.

[23] At issue is that while the pre-dismissal arbitration lingers, the Department is clearly disrobed of its prerogative to institute a parallel in-house disciplinary hearing. Interestingly, Mr Mahlangu conceded that the Department has no qualms with the capabilities of the arbitrator to deal with the allegations contained in the second charge sheet. It would seem that the only hurdle to the consolidation of the two charge sheets is the delay in commencing with the pre-dismissal arbitration, which the Department attributes to the GPSSBC. However, it is clear from the papers before the Court that the Department ought to own up to its contribution to the delay as it had a lackadaisical approach to the pre-dismissal arbitration despite the gravity of the allegations against Mr Kubheka. It only got a wakeup call sometime in November 2019, owing to the AG's findings. Instead of rekindling the pre-dismissal arbitration and consolidating the two charge sheets, the Department decided to trigger the parallel in-house disciplinary hearing. That is so despite the fact that when Mr Kubheka was served with the second charge sheet, the arbitration date had already been set for 24 January 2020.

[24] The Department also asserts that the parallel in-house disciplinary hearing is necessitated by the fact that Mr Kubheka had been placed on precautionary suspension because it considered the AG's findings more serious. So, the SMS Handbook enjoins it to hold a disciplinary hearing within 60 days from the date of suspension, a deadline it would fail to meet given the history of delay at the instance of the GPSSBC. In my view, if indeed the Department is hamstrung by the 60-day period in terms of the SMS Handbook, its answer lies in the pre-dismissal arbitration, a process that is already underway. As correctly submitted by Mr Marcus, had the Department simply amended the first charge sheet before the pre-dismissal arbitration by adding the charges contained in the second charge sheet, it would have easily complied with the 60-day requirement in terms of the SMS Handbook.

[25] In any event, nothing turns on the Department's misgivings about the manner in which the GPSSBC handled its request for the pre-dismissal arbitration, particularly, the delay. As stated in the authorities referred to above, once the section 188A of the LRA process has been triggered and the arbitrator appointed, the employer has no residual power to institute a parallel in-house disciplinary hearing against the employee on new or related allegations of misconduct.

[26] The section 188A of the LRA scheme catapults the disciplinary process to the statutory arbitration at the instance of the employee's consent to forgo the right to the security and comfort of both processes. Equally, the employer relinquishes its prerogative to enforce the disciplinary measures to the arbitrator. The yield to both parties is the impartial adjudicator, costs saving and expeditious outcome. It stands to reason, therefore, that the employer's attempt to unilaterally revoke the pre-dismissal arbitration agreement cannot be permitted as it would essentially negate the statutory dispute resolution scheme.

[27] It can be clearly deduced from the Department's decision to prioritise the parallel in-house disciplinary hearing that it is merely paying a lip service to its commitment to the pre-dismissal arbitration. Equally, as in *Rabie,*[9] unembellished, the Department's intent is to obviously use the parallel in-house disciplinary hearing 'to parachute from the pre-dismissal arbitration aircraft, so to speak'. When parachuted, it would be impracticable to return to the pre-dismissal arbitration as the dismissal of Mr Kubheka consequent to the parallel in-house disciplinary hearing would render the pre-dismissal arbitration moot. That is the nub of Mr Kubheka's impugn against the parallel in-house disciplinary hearing.

[28] The Department, both in its written and oral submissions, repeatedly mischaracterised Mr Kubheka's case as seeking to dictate to the Department as to how to effect discipline against him. Conversely, it is the Department that approached Mr Kubheka and sought his consent to the pre-dismissal

[9] *Supra* n 4.

arbitration with a promise of fairness and convenience instead of an in-house disciplinary hearing. I asked Mahlangu what would have been the situation had the allegations contained in the first charge sheet been before an in-house disciplinary hearing instead of pre-dismissal arbitration. He correctly conceded that the Department would have amended that charge sheet and added the allegations contained in the second charge sheet instead of initiating a parallel in-house disciplinary hearing.

[29] It boggles one's mind as to why then the Department changed its mind about the equitableness of the pre-dismissal arbitration, which is, in essence, a disciplinary hearing *sui generis*. Its hallmark is that the employer bestows its prerogative to determine the manner in which that process is conducted and the outcome to the arbitrator. Certainly, Mr Kubheka or the arbitrator cannot dictate to the Department to consolidate the two charge sheets, which is, in my view, a sensible thing to do. However, to allow the Department to stage two parallel disciplinary processes simultaneously would, not only muddle the purpose of the disciplinary hearing, but would also undermine the section 188A of the LRA scheme.

[30] Also, the Department's argument that Mr Kubheka ought to have reviewed the findings of both Mr Giyose and the arbitrator is unmeritorious. The arbitrator correctly found that he had no powers to consolidate the charge sheets in the absence of an agreement by the parties. Nonetheless, there is nothing stopping the arbitrator from proceeding with the allegations contained in the first charge sheet. It is trite, in any event, that the GPSSBC cannot decide its own jurisdiction. It is the Labour Court that has the power to decide whether the GPSSBC has jurisdiction in a particular matter.[10]

[31] The converse is true for the Department. It cannot proceed with the parallel in-house disciplinary hearing while the pre-dismissal enquiry is pending. Either it agrees to the consolidation of both charge sheets and be dealt with by the arbitrator, or await the final determination of the allegations contained

[10] See: *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 *ILJ* 2218 (LAC) at paras 39 - 40.

in the first charge sheet before the arbitrator. It is the Department's choice, but it can't have it both ways, so to speak.

[32] Moreover, in *Rabie,*[11] this Court deals with another constraint to abandoning the pre-dismissal arbitration and stated the following:

> '[27] Another reason why abandoning the pre-dismissal arbitration is unlawful is that it is impermissible in terms of the doctrine of the right of election which has since been endorsed by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*.[12] The Constitutional Court referred with approval to *Chamber of Mines of South Africa v National Union of Mineworkers and Another*[13] where it was stated that:
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> 'One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 786:
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> 'It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant… He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. *Quod semel placuit in electionibus amplius displicere non potes*t (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place.'

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[11] *Supra* n 4.
[12] 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC); [2008] 29 ILJ 2507 (CC) at para 54.
[13] 1987 (1) SA 668 (AD) at 690 D-G.

The above statement of the principle may require amplification in the following respect indicated by Spencer Bower *Estoppel by Representation* (1923) para 244 at 224 - 5:

> 'It is not... quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke's phraseology: *quod semel in electionibus placuit amplius displicere non potest*, as if mere mutability were for its own sake alone banned and penalized by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none."'

In this instance, likewise, the Department exercised its election to consent to the pre-dismissal arbitration in terms of section 188A of the LRA and as such waived its prerogative to institute the parallel in-house hearing pending the final determination of the allegations contained in the first charge sheet before the pre-dismissal arbitration. Accordingly, Mr Kubheka's objection to the Department's *volte face* must be upheld.

[33] To my mind, it follows that there are exceptional circumstances to justify this Court's intervention to interdict the incomplete parallel in-house disciplinary hearing.[14]

<u>Conclusion</u>

[34] In the circumstances, in terms of the section 188A of the LRA tripartite agreement; alternatively, in terms of the doctrine of election, the Department is disrobed of its power and prerogative to institute any parallel in-house disciplinary enquiry against Mr Kubheka pending the finalisation of the pre-dismissal arbitration, including dismissing him consequent to those proceedings. Clearly, Mr Kubheka has made a case for the grant of the relief he seeks.

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[14] 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; *Jiba v Minister*: *Department of Justice and Constitutional Development and others* [2009] 10 BLLR 989 (LC), (2010) 31 ILJ 112 (LC) at para 17.

Costs

[35] On the issue of costs, the parties agreed that the costs of the appearance on 4 March 2020 shall be costs in the cause. Also, despite the trite principle that costs do not follow the result in this Court, I am persuaded that this instance is peculiar. Mr Kubheka went out of his way to avoid approaching the Court without success. The Department ought to have been better advised on the prospects of the course it had taken by instituting the parallel in-house disciplinary hearing while still locked in the pre-dismissal arbitration. Notwithstanding, I am disinclined to award punitive costs as requested by Mr Marcus.

[36] In the circumstances, I make the following order.

Order

1. The parallel in-house disciplinary hearing which has been instituted against Mr Kubheka while there is a pending pre-dismissal arbitration in terms of section 188A of the LRA is unlawful.
2. The Department does not have the prerogative to institute a parallel in-house disciplinary hearing against Mr Kubheka while there is a pending pre-dismissal arbitration before the arbitrator appointed by the GPSSBC.
3. The Department and Mr Giyose are interdicted from proceeding with the parallel in-house disciplinary hearing pending the finalisation of the pre-dismissal arbitration before the GPSSBC.
4. The Department to pay Mr Kubheka's costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M Marcus
Instructed by:	Lebea & Associates Attorneys
For the Respondent:	Advocate S Mahlangu
Instructed by:	The State Attorney, Johannesburg