



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J683/23

In the matter between:

THABO LETAKGOMO

Applicant

and

JOHNSON MATTHEY (PTY) LTD

Respondent

Heard: 23 May 2023

Order: 23 May 2023

Reasons: 31 May 2023

Summary: Urgent application seeking confirmation that the applicant has been subjected to an occupational detriment; directing that all disciplinary steps against the applicant be terminated and that the disciplinary proceedings be conducted at the CCMA in terms of section 188A (11) of the LRA and payment of legal costs.

Where an employee has not made a disclosure within the meaning of section 1 of the Protected Disclosure Act (PDA), the provisions of section 188A (11) cannot be invoked. Reporting a crime to an employer is not tantamount to a disclosure.

Where an employer objects to a section 188A (11) request, such an employer may not be compelled to pay the request for an inquiry prescribed fee. Rule 34 (9) of the CCMA Rules gazetted on 21 April 2023 is inconsistent with the provisions of the LRA.

In an instance where the jurisdictional requirements of section 188A (11) of the Act have not been met, the commenced internal disciplinary inquiry cannot be terminated.

When it comes to costs, the Labour Court is guided by section 162 of the LRA. This Court has in a *plethora* of its judgments lamented the conduct of senior employees approaching this Court urgently and without *just cause* in order to terminate incomplete disciplinary inquiries. As a mark of displeasure, costs orders are issued and in some instances punitive costs. This is one of such matters to which this Court must express its displeasure by awarding costs against the applicant. Held: (1) The application is dismissed. Held: (2) The applicant is to pay the costs.

REASONS

MOSHOANA, J

Introduction

[1] On 23 May 2023, after listening to both parties, this Court issued an order in the following terms:

- 1.1 The application is dismissed.
- 1.2 The applicant is to pay the costs.

[2] In terms of section 34 of the Constitution of the Republic of South Africa, 1996, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court. To my mind, the

only way a Court may demonstrate the application of law to its decision is by providing reasons for any order the Court makes. Additionally, owing to the fact that in terms of section 165 (5) of the Constitution, the Court issues an order or decision that binds all persons, it is imperative that a Court must issue or make reasoned order or decision. What then follows hereunder are the reasons for the order outlined above.

[3] Before Court was an urgent application, in terms of which, the applicant, Mr. Thabo Letakgomo (Letakgomo) sought certain urgent reliefs against the respondent, Johnson Matthey (Pty) Ltd (Matthey). The granting of such reliefs was duly opposed by Matthey.

Background facts and evidence

[4] Letakgomo is employed as a Plant Manager/Managing Director of Matthey. Matthey is part of the Johnson Matthey Group (Group), a specialty chemical and sustainable technologies provider. The Group operates in more than 30 countries. The Group produces platinum group metal (PGM). Specifically, it produces PGM catalytic converters (converters). Converters are a part that lies between a car's engine and its exhaust pipe which contains catalysts to remove pollutants from the car's engine by converting them into harmless emissions.

[5] During 2022, Matthey began noticing PGM losses from its plant in Germiston. In a hotline set up by Matthey known as "Speak Up", it was intimated anonymously that certain employees of Matthey may be accountable for the losses experienced. Resultantly, Matthey took an effort and reported the losses to the South African Police Services (SAPS), Germiston and initiated its own internal investigations. At the beginning of 2023, Matthey made known its PGM losses and its efforts to identify employees who may be complicit in the losses. On 17 January 2023, Letakgomo alerted company officials of his discovery of a rejected converter in the possession of his tenant. He also related the confession made by his tenant.

[6] Of course, this revelation ignited an investigation into the matter. Given the fact that Letakgomo as a landlord played some role in this revelation, Matthey decided to place him on a precautionary suspension on 28 January 2023. I pause to state that Letakgomo did not challenge the said precautionary suspension, nor allege any occupational detriment. After the completion of the investigations, on 3 April 2023, three months after the suspension, Letakgomo was charged with allegations of misconduct, which broadly alleged gross negligence and recklessness on his part. Three days before the appointed date for a disciplinary hearing, on 14 April 2023, Letakgomo made a request in terms of section 188A (11) of the Labour Relations Act¹ (LRA), on allegations that he had made a protected disclosure. This notwithstanding, the disciplinary hearing commenced and was postponed on 17 April and 10 May 2023 respectively. The hearing was postponed to 24 May 2023 for continuation.

[7] On or about 18 May 2023, Letakgomo launched the present application to be heard on the urgent Court roll of 23 May 2023. As indicated earlier, this Court issued the order reasoned in this judgment.

Evaluation

[8] It has since become fashionable that in order to stall a disciplinary hearing, a request in terms of section 188A (11) of the LRA is made by employees to be disciplined. In so doing, the employees feign a disclosure within the meaning of section 1 of the Protected Disclosures Act² (PDA). On the day this Court heard the present application, another similar application was enrolled. Mercifully, that application was withdrawn and settled by the parties involved. Ebulliently employees, particularly senior employees who are of pecuniary endowment, take a view that once they request a section 188A (11) inquiry or allege a protected disclosure having been made, they shall be endowed with insulation against being disciplined. This ebullience was nipped in the bud by this Court in its judgment of *Mamodupi v*

¹ Act 66 of 1995, as amended.

² Act 26 of 2000.

*Property Practitioners Regulatory Authority and another*³ (*Mamodupi*). Prior to the handing down of *Mamodupi*, there was a misconception that a mere request for a section 188A (11) inquiry is enough to have the internal disciplinary hearing terminated. That remains a misconception. An internal disciplinary inquiry gets terminated only when the CCMA accepts jurisdiction. The logical reason for that is simply to avoid duplication of processes. The one process acquires an unlawfulness status because it is considered an occupational detriment whereas the other does not amount to an occupational detriment – section 188A (12) of the Act. Accordingly, in order for the internal inquiry to terminate, it must first be donned with an occupational detriment garment. If it is not, there is no legal basis to have it terminated. Put differently, there is nothing unlawful in an employer internally disciplining its employees.

How then does an internal disciplinary hearing don an occupational detriment apparel?

[9] If it quacks like a duck and swims like a duck, it is probably a duck. Where an employer chooses to call a duck a bird, that nomenclature shall fail if the bird swims and quacks. In order to acquire swimming and quacking traits, the departure point is, for a disciplinary hearing to sequence, the disclosure that would have happened before the disciplinary hearing is conceived. Section 1 of the PDA defines a disclosure as:

‘any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following...’

[10] The above is the technical meaning afforded to the word ‘disclosure’. This technical meaning differs markedly from the grammatical meaning of the word. Grammatically, the word ‘disclosure’ when employed as a noun means “*the action of making new or secret information known*”. Whilst at it, this Court accepts that on 17

³ Unreported judgment case no J68/23 delivered 13 February 2023.

January 2023, Letakgomo made known to his employers, what he discovered at his leased premises. For that reason, he made a disclosure in the grammatical sense. However, the disclosure in the context of the PDA must bear the following discernible bells:

- 10.1 Any conduct of an employer, employee or worker of the employer;
- 10.2 That information must concern one or more of the factors mentioned in (a) - (g) of the section.

[11] The primary difficulty with the disclosure made by Letakgomo is that it is not attributable to any conduct of Matthey, its employees or workers. In the email, sent by Letakgomo to Steven Brown and Paul Neal (officials of Matthey), Letakgomo himself captioned it as *“information that could assist with the investigations”*. In that long email he sends, nowhere does he mention Matthey and or any of its known officials. Instead, he mentioned that a “white guy” was behind this unlawful activity as informed by his tenant. It is true that the information so disclosed concerns criminal conduct. Sadly, that criminal conduct is not that of Matthey, its employees or workers. Effectively, what Letakgomo did was simply to report a possible crime to an employer which may be linked to the investigations underway. It is not a disclosure within the meaning of section 1 of the PDA.

[12] A forceful submission by Mr. Geldenhuys, who appeared for Letakgomo, that the conduct alleged could be of one of the employees of Matthey is devoid of candour and is brimming with conjecture. More particularly, Letakgomo failed to back up the submission by making the necessary allegations in his founding papers. Mr. Geldenhuys gleefully submitted that such an allegation is not necessary to be made in the founding papers. I disagree. It is elementary that in motion proceedings, a party makes its case in the founding papers. Even though the allegation that it could be one of the employees is brimful of conjecture, it ought to have been made in the founding papers. Such would have afforded Matthey an opportunity to deliver an answer, after which this Court would assess the probative value of such an aberration.

[13] For all the above reasons, this Court concludes that Letakgomo did not make a disclosure within the meaning of the PDA. It is at this point that all the vital organs of any alleged occupational detriment wean off. Absent a disclosure within the meaning of the section, the planned disciplinary hearing (if it constitutes a disciplinary action) is denuded of its occupational detriment apparel.

Is there a connection between the alleged disclosure and the disciplinary hearing?

[14] Even if for some weird reasons, this Court were to accept that the disclosure made by Letakgomo on 17 January 2023, was a disclosure in terms of section 1 of the PDA, a further oddity egresses with sufficient pronouncement. The oddity is this, section 3 of the PDA requires that the occupational detriment must be on account or partly on account of having made the protected disclosure. In other words, there must be a causal connection between the alleged disclosure and the detriment. Section 6 protects a disclosure made to an employer. Without considering other requirements of section 6, this Court is prepared to assume that Letakgomo would have made a protected disclosure on 17 January 2023.

[15] The fact that it took Matthey a period of three months to unleash the detriment is concerning. Ordinarily, a detriment is in the form of retaliation. It seems improbable that Matthey would waylay, as it were, Letakgomo for three months before unleashing the detriment. Where a sufficient amount of time passes between the alleged disclosure and the detriment, it is difficult to make a connection. The causal link must be factual and legal. Absent a causal link, this Court cannot veritably make a connection between the disclosure and the detriment. To my mind, there is no connection between the continuing disciplinary hearing and the disclosure allegedly made. For this reason, too, the quest must fail.

Is there a section 188A (11) protection?

[16] For reasons already outlined above, the jurisdictional requirements to invoke the section 188A (11) protection are lacking. Thus, there is no legal basis to terminate the current disciplinary enquiry.

Rule 34 (9) of the CCMA Rules.

[17] The issue of this rule arises because from the question of the bench to Mr. Geldenhuys, on what should obtain with the discipline of Letakgomo should the Court order terminating the ongoing internal hearing, to which he retorted that Matthey shall then be compelled to pay the prescribed fee so as to enable the CCMA to start the process, even in the circumstances where Matthey shows serious resistance and objection to the CCMA process.

[18] Before I consider the rule, I must lay out my fundamental difficulties. I take the view that “any disciplinary action” mentioned in section 1 (a) of the PDA does not refer to a disciplinary hearing. The phrase “*disciplinary action*” is also used by the legislature in section 186 (2) (b) of the LRA. In there, the said disciplinary action is one short of dismissal. It is by now trite that disciplinary actions like employment warnings and demotions imposed as sanctions are disciplinary actions short of dismissal. Accordingly, a disciplinary hearing is an action by an employer that may produce a disciplinary action or nothing. It is a managerial process to manage or deal with discipline in the workplace. In general terms, a disciplinary hearing is a meeting between an employer and an employee when the employer wishes to discuss allegations of misconduct or any other behaviour that merits disciplinary action. To my mind, there is a huge difference between a disciplinary hearing and a disciplinary action. As an indication subsection 1 (h) of the PDA, considers a threat with actions referred in (a) to (g) as an occupational detriment. If disciplinary action involved a disciplinary hearing, then being threatened with a disciplinary hearing is detrimental. This Court fails to see any detriment in a disciplinary hearing. On the other side of the coin, a disciplinary hearing is beneficial to an employee who faces allegations of misconduct. This is where an employee shall be afforded an *audi alteram partem*. Fundamentally, in my view, there is no legal basis to consider something beneficial to be symbiotically detrimental.

[19] The conclusion I reach is that a disciplinary hearing is incapable of being a disciplinary action within the meaning of section 1 (a) of the PDA. In *Grieve v Denel*

(Pty) Ltd⁴ (*Grieve*), Pillemer AJ, disagreed with a sound and valid submission that an inquiry is not contemplated in the disciplinary action mentioned in section 1 (a) of the PDA. In disagreeing with this valid submission, the learned Acting Justice reasoned thus:

'It was argued on behalf of the Respondent that the Applicant will not suffer occupational detriment by simply being subjected to the disciplinary enquiry. It was contended that the term disciplinary action in the definition did not include an enquiry but rather a sanction of a lesser kind than that set out in subparagraph (b) of the definition. The term is not defined and in my view is wide enough to include a disciplinary enquiry. There is considerable prejudice in being faced with such an enquiry. The Applicant has also been informed that if he is found guilty he may be dismissed and accordingly has been threatened with dismissal in the notice and in the process of the disciplinary enquiry. In my view the disciplinary enquiry the Applicant faces is disciplinary action as contemplated by the Act and so the only remedy available to the Applicant to protect his right conferred by section 3 of the Act would be the interim interdict which he presently seeks...'

[20] With considerable regret, I do not agree with the reasoning of the learned Acting Justice. I do so for two principal reasons. The first being that what the legislature is concerned about is a detriment and not a prejudice. Grammatically, the word detriment means the state of being harmed or damaged. On the other hand, the word prejudice, although it may literally mean some harm, contextually, it is more of an inconvenience than a damage. Think of a situation where an employee is hauled before an interminable hearing and only to be found not guilty at the end. Although cleared, such an employee would have been hugely inconvenienced, time and resources wise. The second is that a disciplinary hearing does not always lead to a dismissal. The suggestion that an employee may be dismissed in *Grieve* depended on being found guilty of the allegations. Thus, on the reasoning of the Acting Justice, an innocuous action may only become harmful or offensive only at the end. For these and other reasons expounded below, I do not regard myself to be

⁴ (2003) 4 BLLR 366 (LC).

bound by *Grieve* because, in my respectful view, it is wrong with regard to the issue of the meaning of disciplinary action. I agree that if an employer threatens an employee with a suspension, a dismissal, a final written warning and other forms of sanction, it may be said that something detrimental would visit an employee. Same cannot, in my view, be the case with a mere disciplinary hearing.

[21] It is for that reason that I have a conceptual difficulty with the provisions of section 188A (11) of the LRA. The section created room for employees to allege that “holding of an inquiry” potentially contravenes the PDA. As indicated above, I take the view that the holding of an inquiry *per se* cannot contravene the PDA. I take that view for two reasons. Firstly, in terms of section 188A (1), the inquiry contemplated in section 188A is one into allegations about the conduct or capacity of an employee. It must then follow that the inquiry mentioned in subsection 188A (11) is one into allegations of misconduct and or capacity. That being the case, I struggle to understand how a holding of an inquiry into allegations of conduct and capacity could potentially contravene the PDA. When one has regard to the memorandum to the Labour Relations Amendment Bill 2012, one observes what the mischief was that the legislature sought to curb by inserting section 188A (11) into the Act. The following is stated:

‘In addition, the section is amended to avoid disputes where an employee claims that the holding of an enquiry into allegations of misconduct and suspension pending such an enquiry, breaches the provisions of the Protected Disclosures Act. By permitting either party to insist on an enquiry under this section the amended provisions reduces the risk of collateral litigation, including High Court litigation, which has been common in these circumstances.’

[22] Primarily, the legislature was seeking to avoid disputes. Such disputes graced the Courts of this country where employees, once faced with discipline, allege a breach of the PDA. Secondly, the legislature was hopeful that by allowing parties to insist on an enquiry, the risk of collateral litigation will be reduced. To my mind, the section was introduced to manage a particular prevalent crisis of collateral litigation.

It was not introduced with a view to render a holding of a disciplinary enquiry to be in breach of the PDA *per se*. Section 3 of the PDA specifically provides that no employee may be subjected to any occupational detriment, as defined in section 1 of the Act, by his or her employer on account, or partly on account of having made a protected disclosure. Should an employer subject an employee to an occupational detriment as defined, then that employer contravenes the PDA. If I am right that a holding of an inquiry has no potential of contravening the PDA, then section 188A (11) is actually superfluous. In my reading of the PDA, nowhere does the legislature remotely, in my view, suggest that the holding of an inquiry into allegations of conduct or capacity amounts firstly to an occupational detriment and secondly contravenes the PDA.

[23] Logic dictates that in order for an inquiry to be held there must exist first conduct or capacity issues. Unless the suggestion is that an inquiry to be held is dissimilar to the one contemplated in section 188A (1), that is, one that does not inquire into allegations of conduct or capacity. One wonders what type of an inquiry is that one which is held to inquire into nothing. The urgent Court is inundated with applications seeking to halt the 'holding of disciplinary hearings' on allegations that the holding happens as a result of having made a protected disclosure. To my mind, this unfortunate situation is created by section 188A (11) by suggesting that a 'holding of an inquiry into allegations of conduct or capacity' potentially contravenes the PDA. Perhaps it is time that the legislature must reconsider the import of the section. It may be necessary to add a distinguisher between subsection (11) and (12) by adding in subsection (11) "*holding of an inquiry by the employer*". Leaving it to "*holding of an inquiry*" forces the reader to revert to subsection (1) in order to identify what that inquiry is about. The reader is so forced because subsection (11) states that "*despite subsection (1)*".

[24] Ultimately, it boils down to this. An inquiry into the same allegations of conduct or capacity if conducted by an arbitrator, even if it arose after making a protected disclosure, does not contravene the PDA, whereas, the same inquiry if conducted by an employer has the potential of being labelled by an employee in *good faith* to be a breach of the PDA. As indicated above, this permutation would

make sense if the PDA in particular prohibits the holding of an inquiry by an employer in instances where an employee has made a protected disclosure. As matters stand, I do not read holding of an inquiry to be an occupational detriment as defined.

[25] Having said that, the issues outlined above did not squarely arise in this matter to the point of calling for this Court's decision. However, what squarely arose is the obligation to pay the CCMA fees. Rule 34 of the unamended rules of the CCMA did not deal with the situation contemplated in section 188A (11), particularly where the request is made by an employee and not the employer. On 21 April 2023, the CCMA published its amended rules⁵. Rule 34 (8) and (9) were inserted to cater for the section 188A (11) situation. Although section 188A (11) contemplates a request by the employer as well, I fail to see how an employer would invoke a request in this subsection, when it could comfortably and with no blemish do so under subsection 188A (1). To my mind, subsection 188A (11) is designed for employees to make requests. That being the case, in my view, a clash occurs when an employee requests an inquiry under sub-section (11) and the employer insists on holding an internal inquiry. It is unexpected for an employer to support a request that is predicated on allegations of contravention of the PDA albeit made in good faith.

[26] Section 188A (3) (a) of the LRA, appropriately so, in my view, compels an employer to pay a prescribed fee. This is appropriate in my view because the employer would have requested the inquiry within the contemplation of subsection 188A (1) of the Act. It is to be observed that section 188A (11) is silent on the issue of the prescribed fee, particularly in an instance where the request is made by an employee. Because more often than not an employer would be opposed to the premise of a section 188A (11) enquiry, it is logical for the employer to refuse to pay. Under such circumstances, an arbitrator cannot be appointed by the Commission. Could an employer be compelled to pay? In my view, an employer may not be compelled to pay. A contestation on who should pay the prescribed fee may put a spoke in the wheel in the continuation of discipline in the workplace. Could this be in line with section 23 of the Constitution? In my view, it is not. As part of fair labour

⁵ GG No 48445 dated 21 April 2023.

practice, an employer enjoys the right to fairly dismiss an employee⁶. Clearly, an employee seeking to delay discipline would relish such stalemates.

[27] Nevertheless, the point to be made is this. Rule 34 (9), contrary to section 188A (11) in my view, seems to compel the employer to pay the prescribed fee in an instance where an employee requests the inquiry. The question is why should an employer be obliged to pay for a process it is opposed to? To my mind, there exists no policy considerations for such compulsion. It is downright unfair to an employer. Yet, the rule does not make suggestions as to what should happen to the process of discipline should an employer resist paying. As I see it, this rule is a fertile ground for interlocutory applications to compel payment, which is the further addition of salt to the wound in that it shall delay work discipline in the circumstances where such a delay is inconsistent with the entire scheme of the LRA.

[28] As I conclude, although not conclusively since the issue did not squarely arise for decision, I take the view that the holding of an inquiry is incapable of breaching the PDA, even if it sequences a protected disclosure. Additionally, forcing the employer to pay a prescribed fee for a request made by an employee is inconsistent with the enabling section. For all the above reasons, the order exposed above is issued.

The issue of costs

[29] There is a barrage of judgments in this Court which discourages interruption of incomplete internal proceedings. The matter before me, even if it is predicated on some form of alleged unlawfulness of the disciplinary hearing, falls within the category of those matters that seek to stall disciplinary hearings in the absence of exceptional circumstances. As a mark of displeasure and disapproval of the conduct, this Court shall consistently and without fail award costs. I did so in this matter for the same reasons as the other matters in this Court.⁷

⁶ See para 67 of *Numsa and others v Aveng Trident Steel* 2021 (2) BCLR 168 (CC) – A right to resort to retrenchment is a right to fair labour practices.

⁷ See *Monnahela v Ministry of Forestry Fisheries and the Environment and others* unreported judgment case no: 18/2023 delivered 19 January 2023; *Sibiya v Ekurhuleni Metropolitan Municipality*

G. N. Moshwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. C J Geldenhuys of C J Geldenhuys Attorneys,
Pretoria.

For the Respondent: Ms P Maharaj-Pillay.

Instructed by: Eversheds Sutherland (SA) Inc, Sandton.

and another unreported judgment case no: J24/2023 delivered 23 January 2023; and *Sibeko v Department of Tourism and others* unreported judgment case no: J39/2023 delivered 23 January 2023.