REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No. J552/13

In the matter between:

PATRICIA DISS **Applicant**

and

SHELTERED EMPLOYMENT FACTORIES **First Respondent**

(under auspices of the Department of Labour)

and

SYLVIA VAN DER MERWE **Second Respondent**

(Human Resource Manager)

and

DENNIS MASEPE **Third Respondent**

Heard: **18 March 2013**

Delivered: **19 April 2013**

Summary: **Urgent application to interdict disciplinary hearing dismissed.**

JUDGMENT

VISAGIE, AJ

Introduction

[1] This is an application by the applicant requesting various interdictory relief relating to a disciplinary hearing instituted by her employer, the first respondent. The application was brought on an urgent basis although at the hearing of the matter it became clear that the urgency dissipated when the disciplinary hearing was postponed sine die.

Background Facts

[2] The applicant is employed as a senior admin clerk by the first respondent. On 15 March 2013, the applicant received a notification from the first respondent of a disciplinary hearing which was to take place on 19 March 2013. The events leading up to the disciplinary charge sheet being provided to the applicant are as follows.

[3] On 1 March 2013, the applicant was requested by the Factory Manager ("the factory Manager") of the respondent to assist with some debtor query from one of the clients of the respondent. The query from the client related to a payment allegedly made by the client, but not picked up by the debtor's department which resulted in the goods/products being put on hold until payment was confirmed. In dealing with the instructions from the factory Manager, the applicant requested the necessary documentation from the debtor department. When the factory Manager phoned the applicant on 4 March 2013 and informed the applicant that the client and the CEO of the first respondent will have a meeting at 10h00 that day, he requested that the documentation be provided by 10h00 in order to facilitate the meeting with the client. The applicant indicated to the factory Manager that after requesting the documentation from the debtors department, she was still awaiting the documentation.

[4] During the morning of 4 March 2013, the applicant received a visit from the third respondent, a senior manager of the first respondent. The third respondent informed the applicant that she had 5 minutes to get the required information for the factory Manager and the CEO for the meeting

with the client. The applicant informed the third respondent that she had not received the information and that it "didn't matter who climbed on the bandwagon." An argument then ensued between the applicant and the third respondent during which the third respondent claimed that the applicant shouted at him and disrespected him. The applicant's manager, Mr Fourie, intervened and explained to the third respondent that the applicant's personality is such that she normally speaks loud. Mr Fourie also indicated to the third respondent that he personally contacted the debtors department for the information. Not accepting the explanation from Mr Fourie, the third respondent continued with his argument with the applicant up until the point where the applicant uttered the following words, "Fok julle almal". At this point, the third respondent left the office.

[5] The applicant and her manager were informed on 10 March 2013 by the second respondent, who is the HR manager of the first respondent, that the third respondent had lodged an official complaint against the applicant. The second respondent then had a meeting with the applicant and provided the applicant with a copy of a written letter of complaint that she had received from the third respondent. The second respondent suggested to the applicant that the applicant should prepare a letter of apology for the third respondent. The second respondent also undertook to draft the letter of apology for the applicant, which the applicant needed to sign and provide to the third respondent. The second respondent also undertook to speak to the third respondent to enquire from him whether he would be happy with a written apology. The third respondent refused to accept any apology even before the letter of apology could be signed and provided to the third respondent. On 12 March 2013, the second respondent informed the applicant of the third respondent's refusal and his insistence that the applicant be disciplined for her conduct. The applicant was then provided with the disciplinary notice.

[6] On 15 March 2013, the applicant's attorneys wrote a letter to the first respondent relating to her disciplinary hearing. In the letter they deal, amongst others, with the second respondent's refusal to allow the applicant's manager, Mr Fourie to represent her at the disciplinary enquiry.

They also pointed out that Mr Fourie is a key witness and the disciplinary enquiry should not proceed because Mr Fourie was not available. They requested that the hearing be postponed to allow the applicant representation by her manager, Mr Fourie. They further indicated that should the first respondent not agree to postpone the hearing for the reasons motivated in the letter, they will seek urgent relief from this court.

[7] The applicant states that the second respondent initially indicated that Mr Fourie could not represent her because he was apparently not an employee of the first respondent. The second respondent also indicated that as the third respondent is going to call Mr Fourie as a witness, he could not be a representative as well.

[8] The applicant also had a problem with the chairperson appointed for the disciplinary hearing. The chairperson is a Mr Smith and the applicant states in her founding affidavit that she had an argument with Mr Smith in the past. As a result thereof she could not count on whether Mr Smith will deliver a fair and just outcome in respect of the disciplinary enquiry. On this basis she says Mr Smith will not be an impartial chairman. She also indicated that Mr Smith holds a lower position than the third respondent and that he might be intimidated by the third respondent at the disciplinary hearing.

[9] For the above reasons, the applicant stated that she needed more time to prepare for the disciplinary hearing with her representatives and that the representatives intend making an application at the disciplinary hearing for her to be legally represented at the disciplinary hearing.

[10] On 15 March 2013, the second respondent wrote to the appointed chairperson of the disciplinary hearing asking him to consider postponing the disciplinary hearing to a date that suits all parties in light of the fact that Mr Fourie would not be available on 19 March 2013. In response, the chairperson indicated that the second respondent should inform all parties of the request for postponement and that the parties should provide him with at least three alternative dates that would be suitable for the reconvening of the disciplinary hearing.

[11] On 17 March 2013, the applicant was informed via email by the second respondent of the postponement granted by the chairperson of the disciplinary hearing. The second respondent also informed the applicant that she will provide a notice to all parties on 18 March 2013 for new dates that will suit everyone.

[12] The applicant then filed this urgent application on the morning of 18 March 2013 and set it down for hearing at 14h00 that same day. The matter was eventually heard by this court at 15h00 on 18 March 2013.

Relief sought

[13] The applicant seeks various relief that includes declaratory relief as well as interdictory relief. The declaratory relief was not pursued during argument (for good reasons, in my view) and it was only the interdictory relief that the applicant persisted with. In this regard, the applicant seeks this court to interdict the disciplinary hearing of 19 March 2013; that the first respondent be ordered to allocate a non-biased chairperson; and that the hearing be postponed sine die. The applicant also asked for costs irrespective of whether the application is opposed or not.

Legal Principles

[14] The requirements for an interdict are that the applicant must show that the applicant has a clear right, a reasonable apprehension of harm and that no alternative remedy exists. [See the case of *Langebaan Ratepayers and Residents Association v Dormell Properties 391 (Pty) Ltd and Others].*[1]

[15] Although not clearly spelt out in the applicant's founding affidavit, which I might add consists of 44 pages (excluding annexures), the applicant's case appears to be that her right to a fair hearing will be infringed if this court does not provide her with the relief that she is seeking in relation to the disciplinary hearing. Although this court has the jurisdiction to intervene in disciplinary hearings, the circumstances under which it will do so must be

[1] 2013 1 SA 37 (WCC) at para 37.

exceptional. This is what Labour Appeal Court stated in the case of *Booysen v Minister of Safety and Security and Others,*[2]

> 'To answer the question that is before the court, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be an exercise in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would, in my view, be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.'

[16] In a recent judgment of this court Steenkamp, J,[3] in answer to an employee claiming that there is no merit to sexual harassment charges that were brought against him, had the following to say,

> '… The complaints to which the applicant has to answer comprise clear instances of sexual harassment. They are not factually and legally complex and he has been aware of them since April 2010. There is little reason why he should not, if they are without merit, be able to defend himself adequately without legal representation like other employees do every day.
>
> Even if the complaints were proven; and even if they were to be considered serious enough to dismiss him, the applicant has an adequate alternative remedy. Like any other employee, and as envisaged by the dispute resolution system established by the LRA, he can then refer an unfair dismissal dispute to the relevant Bargaining Council. He would suffer no irreparable harm.'

Exceptional circumstances

[17] As indicated above, by the time that the applicant moved for this application in this court, the chairperson, together with the second respondent, already agreed for the postponement of the disciplinary hearing sine die in light of the applicant's request for such postponement. The main reason for the

[2] 2011 (1) BLLR 83 (LAC), at para 54.
[3] *GW Hermanus vs Overberg District Municipality*, Case no: 144/12, dated 1 March 2012 at paras 28-29

postponement as appears from the papers was that the second respondent was aware of Mr Fourie's unavailability for the original date of the disciplinary hearing and therefore requested a chairperson to postpone the disciplinary hearing. The fact that there may have been previous correspondence between the second respondent and the applicant relating to the role to be played by Mr Fourie at the disciplinary hearing is irrelevant because it was superseded by the email from the second respondent informing the applicant of the postponement granted by the chairperson, which email was sent to her on 17 March 2013. There was therefore no need for the applicant to approach this court on an urgent basis and on such short notice for a request to postpone the disciplinary hearing sine die. In fact, at the hearing of the matter, it was put to the applicant's counsel, Ms Olivier, that the request for postponement could in any event have been made at the commencement of the disciplinary proceedings.

[18] Ms Olivier did inform this court of the postponement that was granted and focused her arguments on two other points. The one was that applicant requested that the court grants an interdict requiring the first respondent to replace the chairperson that was appointed with an independent chairperson. As indicated in the background facts above, the only basis upon which the applicant claims that her right to a fair hearing will be affected if the chairperson that was appointed is not replaced, is due to a previous argument that she had with the chairperson. The applicant does not state what the argument was all about. The applicant does not state when the argument occurred. The applicant does not state what the chairperson's response and attitude was towards her in respect of the alleged argument. She also made further allegations in her founding affidavit relating to disciplinary charges that the chairperson faced in the past, but provided no detail other than the chairperson previously faced fraud charges at a disciplinary hearing. The other point that she takes for purposes of motivating why the chairperson is to be replaced is because the chairperson is more junior to the third respondent who was the complainant.

[19] When it was put to Advocate Olivier that the applicant has provided no detail in her founding affidavit to suggest any basis for her concluding that the chairperson may be biased in the disciplinary hearing, she conceded that the allegations relating to the chairperson are just bland allegations unsupported by any factual basis upon which this court may have enquired as to whether or not the chairperson would show any inclination of biasness.

[20] In my view, the applicant has shown no exceptional circumstances envisaged by *Booysen.* If one has regard to the guidelines for the sanctions which were attached to the disciplinary charge sheet, it is clear from the charge sheet that the transgressions that the applicant is required to face at the disciplinary hearing do not provide for the dismissal of the applicant as a first offence. It does not therefore appear to be serious charges that may lead to a dismissal. In addition, all the issues that the applicant complained about are issues which, in my view, could easily have been dealt with by the chairperson at the disciplinary hearing. In fact, this is what happened concerning the postponement of the hearing. In order to ensure the availability of Mr Fourie at the disciplinary hearing, although not based exclusively at the applicant's request, but also at the request of the second respondent, the postponement was granted.

Conclusion

[21] In conclusion, therefore, it is my view that the applicant has not met the requirements for the relief sought in the notice of motion. The applicant has shown no exceptional circumstances for this court to interfere in the disciplinary process. As a result the applicant has failed to show that she has a clear right for this court to interdict the disciplinary proceedings. The application is therefore dismissed. To the extent that the applicant has requested this court to award costs against the respondents, even in circumstances where the respondents did not oppose the application, the fact that the applicant has failed in her application for interdictory relief the applicant must also therefore fail in her request for costs.

Order

[22] In the result, the following order is made.

22.1 The application is dismissed.

22.2 There is no order as to costs.

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Visagie,.AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Van Jaarsveldt Attorneys

For the Respondent: