REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 878/13

In the matter between:

Lebohang John MAHOKO	**Applicant**
and	
MANGAUNG METROPOLITAN MUNICIPALITY	**First Respondent**
JEROME MTHEMBU	**Second Respondent**
ADV PIETER VENTER	**Third Respondent**

Heard: **30 April 2013**
Delivered: **8 May 2013**

Summary: Urgent application to interdict disciplinary hearing and quash charges. Application dismissed, but Municipality ordered to provide documents.

JUDGMENT

STEENKAMP J

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Introduction

[1] This is an urgent application to interdict a disciplinary hearing and to quash the charges against the applicant.

Background facts

[2] The applicant is employed as the General Manager: Fleet Management Services of the first respondent, Mangaung Metropolitan Municipality. He has been suspended on full pay for more than a year, since 23 April 2012, pending a disciplinary hearing to consider allegations of unauthorised expenditure in excess of R2 million. That the ratepayers of Bloemfontein should have been paying the salary of an employee who is not rendering services for more than a year without the disciplinary process having been concluded, is untenable.[1] The question is whether that disciplinary hearing should now continue, or whether it should be stopped, as the applicant contends.

[3] The Municipality instructed the applicant to appear before a disciplinary hearing on 20 November 2012, more than five months ago. It was postponed at his request. He was represented by an attorney, Mr GBA Gerdener of McIntyre and Van der Post attorneys in Bloemfontein.

[4] On 5 December 2012 the applicant's attorney requested that he be legally represented, despite the fact that the collective agreement of the South African Local Government Bargaining Council pertaining to local government employees and embodied in a Disciplinary Code provides only that:

> "An employee shall be entitled to representation at any enquiry by a fellow employee, a sop steward or a trade union official."

[5] The Municipality conceded to the applicant having legal representation provided that it would likewise appointed legally qualified people to act as initiator and chairperson, despite clause 6 of the Disciplinary Code, that

[1] It was reported a few days ago that financial misconduct by public service employees cost South Africa more than R930 million in the 2011-12 financial year: N Maswanganyi, "Officials 'let off' as public service theft nears R1 bn", *Business Day* 2 May 2013.

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envisions that the chairperson and initiator would be more senior employees of the Municipality or of provincial or national government.

[6] The municipality and the applicant's then attorneys and counsel, Adv Cronjé, agreed in March 2013 that the hearing would commence on 25 April 2013. On 8 March 2013 McIntyre & Van der Post withdrew as the applicant's attorneys. The applicant then instructed his current attorney, Mr Mokhele.

[7] On 11 March 2013 the third respondent, Adv Venter ("the initiator") wrote to Mr Mokhele and noted that the hearing was set down for 25-30 April 2013. He enquired whether Mr Mokhele would represent the applicant on those dates and confirmed that the applicant had been given two bundles of documents to be used at the hearing. On 13 March 2013 Mr Mokhele responded:

> "I hereby confirm my appearance on behalf of Mr Mahoko and further confirm that the dates are in order."

[8] On 15 March 2013 Mr Venter wrote to Mr Mokhele again and asked him to "confirm whether any other document or information would be required and whether you would raise any preliminary issues which might be dealt with in advance and on paper." The applicant's attorney did not respond, and on 19 March 2013 Venter wrote to him again and asked him to do so. Later that evening, Mr Mokhele sent Venter a "request for further particulars". He did not raise any preliminary points. On 24 March 2013 Venter wrote to him again, attaching the response to the request for further particulars, and added:

> "Kindly indicate, as a matter of urgency, whether you have any further issues or preliminary issues."

[9] The applicant's attorneys did not raise any preliminary issues, despite these requests and reminders from the initiator, and on 3 April 2013 Venter recorded in a further email to Mokhele that:

> "You were requested to raise any preliminary issues in advance and none was forthcoming.

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> Both parties are therefore ready to proceed with the hearing on the 4 days that were agreed upon."

[10] Nothing further was heard from the applicant's attorneys or counsel. On 25 April the applicant arrived at the hearing, accompanied by an union official of SAMWU, a Mr Grootboom. Mokhele attorneys had not withdrawn as the applicant's representatives. Grootboom raised certain preliminary points – despite the earlier assurance by Mr Mokhele that none would be raised – and the hearing was postponed to the next day, 26 April 2013.

[11] On 26 April 2013 the applicant was accompanied by his attorney, Mr Mokhele; and his counsel, Adv Mene. Mr Mene then raised the following preliminary points, contrary to his attorney's earlier assurance:

11.1 The Municipality had delayed the disciplinary hearing beyond the time period envisaged by the Disciplinary Code. Clause 6.3 of that agreement states that:

> "The employer shall proceed forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three (3) months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC."

11.2 The Municipality appointed an attorney and an advocate respectively as the chairperson and initiator, whereas that is not envisaged by the Disciplinary Code.

11.3 The Municipality did not abide by clause 6.1 of the Disciplinary Code. This clause provides that:

> "An accusation of misconduct against an employee shall be brought in writing before the Municipal Manager or his authorised representative for investigation."

11.4 The evidence of Mr Hein Strydom from ens[2] forensics or its report should not be allowed, as that entity was "illegally appointed".

[2] Edward Nathan Sonnenbergs.

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[12] The chairperson (the second respondent) did not determine the first point relating to the delay. It appears that he was of the view that the complaint in that regard should be referred to the Bargaining Council.

[13] The chairperson dismissed the second preliminary point relating to legal representation.

[14] With regard to the application of clause 3.1 – the referral of a complaint in writing – the chairperson does not appear to have made a ruling.

[15] With regard to the disclosure of documents, the chairperson ruled that the applicant should have brought an application to the CCMA in accordance with s 16 of the LRA[3] or an application to court in terms of the Promotion of Access to Information Act.[4]

[16] The disciplinary hearing was adjourned in order for the applicant to approach this court on an urgent basis.

Evaluation / Analysis

[17] In order to consider the applicant's claim I shall have regard to the well-known requirements for interim relief[5], i.e. the existence of a *prima facie* right; the apprehension of irreparable harm; the absence of an alternative remedy; and the balance of convenience. I should also consider whether the applicant has established grounds for the matter to be heard on an urgent basis as set out in rule 8.

The relief sought

[18] The applicant has framed the relief he seeks in the form of a rule *nisi* asking for the disciplinary hearing to be halted. He initially styled it as an application to review and set aside the decisions of the chairperson and the disciplinary hearing as a whole, coupled with a mandatory order "that the charges against the applicant be quashed."

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[3] Labour Relations Act 66 of 1995.

[4] Act 2 of 2000.

[5] *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F.

[19] Mr *Mene*, for the applicant, stated in oral argument that the relief he sought was not in terms of s 158(1)(h) of the LRA, i.e. to review any decision taken by the state in its capacity as employer – in this case, the Municipality. Instead, he argued in the alternative that the Municipality should be interdicted from proceeding with the disciplinary hearing; and, in the further alternative, that the Municipality be ordered to provide the applicant with the documents he had requested.

[20] Mr *Mene*'s argument was initially based squarely on the judgment by Jones J in *Van Eyk v Minister of Correctional Services.*[6] In that case, the High Court reviewed the decision by the Department of Correctional Services to proceed with a disciplinary hearing and declared that the disciplinary action "had fallen away". The matter was decided with reference to the LRA – albeit not to s 158(1)(h) – "read with the Promotion of Administrative Justice Act 3 of 2000" (PAJA). It was handed down before the decision of the Constitutional Court in *Gcaba v Minister of Safety & Security*[7] that PAJA does not apply to employment and labour relationship issues.[8] I doubt, after *Gcaba*, that *Van Eyk* is still good law. In any event, though, in oral argument Mr *Mene* abandoned the prayers for review and instead argued that the disciplinary proceedings should be interdicted.

[21] The first question to be decided is whether the applicant has made out a case for urgency as envisaged by rule 8(2).

Urgency

[22] The applicant was given notice of an investigation into his alleged misconduct and suspended with pay more than a year ago, on 23 April 2012. He has not challenged the suspension[9] or the pending disciplinary action during that year. Following a complaint by a Mr Tollie, the Municipal Manager appointed forensic consultants (ens forensics) to conduct an

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[6] [2005] 6 BLLR 639 (EC).

[7] 2010 (1) SA 238 (CC)

[8] *Gcaba (supra)* para [64].

[9] The applicant withdrew an earlier urgent application in this court to have his suspension uplifted and tendered the Municipality's costs.

investigation. Given the number of alleged contraventions and amounts involved, the forensic investigation took some time, from June to November 2012. On 12 September 2012 the applicant withdrew an application to have his suspension uplifted and tendered the Municipality's costs. On 13 November 2012 the Municipality notified the applicant of a disciplinary hearing to commence on 20 November 2012. He did not object to the hearing itself; instead, through his then attorney, he requested and was granted a postponement. On 5 December 2012 he requested legal representation. The Municipality agreed, provided that it would also use legal practitioners to act as chairperson and initiator. In the first week of March 2013, the applicant's then attorneys agreed to the hearing date of 25 April 2013. On 8 March 2013 those attorneys withdrew. On 13 March 2013 the applicant's current attorney, Mr Mokhele, confirmed the hearing dates. Despite numerous requests from Mr Venter, he did not raise any preliminary points until the hearing commenced.

[23] The urgency that the applicant now claims is entirely self-created. The matter should be struck from the roll for that reason alone. However, little purpose would be served if the matter were to be re-enrolled on the opposed motion roll. I have heard full argument from both parties – both of whom insisted that the application be heard and that they did not need to file further affidavits – and it would be in the interests of justice to rule on the merits.

Prima facie right?

[24] The principle applicable to interdicting disciplinary proceedings has been outlined by Tlaletsi JA in *Booysen v Minister of Safety & Security*[10]*:* that is that such an intervention should be exercised in exceptional cases only. Among the factors to be considered would be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.

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[10] (2011) 32 *ILJ* 112 (LAC) para [54].

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[25] In order to decide whether this is such an exceptional case, I will consider the four complaints raised by the applicant, together with the test for urgent interim relief to be granted.

Delay

[26] The Municipality did not start the disciplinary hearing within three months of the date upon which it became aware of the alleged misconduct. It could be argued that it did "proceed" with the disciplinary process by appointing a forensic consultant to investigate the allegations and, once that had been done, to call the applicant to a hearing in November 2012. However, clause 6.3 of the Disciplinary Code compels the employer to proceed with a "disciplinary hearing" within three months. That is peremptory.

[27] The clause does allow for a relaxation of that time period, though. It provides that:

> "Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC."

[28] The Municipality did apply for condonation to the SALGBC on 8 August 2012. Inexplicably, the bargaining council has to date not issued a ruling in that regard. However, on the same day, the Municipal Manager wrote to the applicant's first attorneys, Horn & Van Rensburg, advising them of the application. On the papers before me, he did not object.

[29] The fact that the SALGBC has not yet provided the parties with its ruling, does not justify interdicting the disciplinary hearing. These are not exceptional circumstances. The Municipality did apply for condonation and the applicant did not object until eight months later. It would not lead to grave injustice, were the hearing to proceed. And in any event, justice could be obtained by other means: the applicant – who has been legally represented throughout – could have opposed the application for condonation before the bargaining council and could have asked the council for an expedited ruling. As matters stand, the bargaining council is not a party to these proceedings and I cannot order it to issue such a

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ruling; but I would urge the parties before court to approach the bargaining council on an urgent basis and to request the ruling.

Legal representation

[30] In terms of the provisions of the Disciplinary Code, neither party is entitled to legal representation. It is the applicant who sought, and was granted, such representation nevertheless, with the proviso that what was good for the goose, was good for the gander. It does not lie in his mouth now, five months after he had done so, to object to the fact that the Municipality has also appointed legal practitioners to act as chairman and initiator. There is nothing exceptional about that appointment.

Complaint in writing

[31] Clause 6.1 of the disciplinary code provides that:

> "An accusation of misconduct against an employee shall be brought in writing before the municipal manager or his authorised representative for investigation."

[32] The employee complains that there was no complaint in writing. In his answering affidavit, the municipality's head of corporate services, Mr Willem Boshoff, says that "an official complaint was lodged to the accounting officer (the city manager/municipal manager) by a Mr Tollie and the accounting officer subsequently referred the matter to consultants to conduct a forensic investigation." He does not state whether this complaint was in writing and the applicant did not reply.

[33] In these circumstances, it is not clear whether the applicant's complaint has merit. In any event, though, he has an alternative remedy. If his complaint is about procedural fairness, he can pursue his remedies. In terms of the LRA after the disciplinary hearing, should he so wish. It is common cause that there was a complaint and that it was investigated. If the question whether the complaint was in writing is important, it can be pursued in due course. It does not constitute exceptional circumstances and the continuation of the disciplinary hearing will not lead to grave injustice.

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Appointment of ens forensics

[34] The same considerations apply to the appointment of the forensic consultants. It is common cause that the city manager appointed those consultants on recommendation from the municipality's general manager: anti-fraud and corruption that he deviate from the prescribed policy. Should the applicant consider this improper, he can pursue it in due course. It does not render the disciplinary hearing void.

Apprehension of irreparable harm?

[35] The only harm foreseen by the applicant is that he is "facing serious charges, which could lead to my dismissal if I am found guilty."

[36] That is the same harm that any employee may suffer if he is guilty of misconduct and if he is subsequently dismissed. That is why the labour relations act sets out an extensive dispute resolution procedure, as the Labour Appeal Court pointed out in *MEC for Education, North West Provincial Government v Gradwell.*[11] Any harm that he may suffer as a result of the outcome of the disciplinary hearing will not be irreparable.

An alternative remedy?

[37] The employee has an alternative remedy. Should it be found that it did commit the misconduct, and should the chairperson deem dismissal to be a fair sanction, he can refer an unfair dismissal dispute to the Bargaining Council. That is his remedy, as prescribed by the LRA.

Balance of convenience

[38] In a subjective since, the balance of convenience may favour the applicant. Seen objectively, though, and taking into account the interests of justice, the balance of convenience favours the municipality. It is in the interests of not only the ratepayers of Bloemfontein, but the public interest generally, that the serious allegations of misconduct against the applicant be pursued expeditiously.

[11] [2012] 8 BLLR 747 (LAC) para 46].

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Conclusion

[39] The applicant has failed to make out a prima facie right to the relief sought. He will not suffer any irreparable harm and he has an alternative remedy.

[40] However, one issue remains. The applicant has asked in the alternative that, should the disciplinary hearing proceed, the municipality be ordered to make certain documents available to him. I now turn to that question.

Alternative relief: documents to be provided

[41] The applicant has requested certain documents that appear to be directly relevant to the allegations against him. They included a tender document known as MD 43; proof of payment to a contractor, Maluti Plant Hire; and a transcript of an interview between him and the forensic consultant, Mr Hein Strydom, on 19 July 2012.

[42] The municipality has indicated that it does not deem some of the requested documents relevant, and that it does not have a copy of the MD 43 document. On the papers before me, the requested documents do appear to be relevant. It would lead to unnecessary delay if the applicant had to refer a dispute to the CCMA in terms of section 16 of the LRA or the approach another court in terms of the Promotion of Access to Information Act in order to obtain these documents. In the interests of justice and expeditious resolution of the dispute, the Municipality must make available such documents as are relevant and in its possession.

Costs

[43] The applicant has been unsuccessful in his main claim. He has been partially successful with regard to his alternative claim. There is still an ongoing relationship between the parties. Whether that relationship will endure is dependent upon the outcome of the current disciplinary hearing. Taking into account all of these circumstances that the principles of law and fairness, I do not deem it prudent to make a costs order at this stage.

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<u>Order</u>

[44] I therefore make the following order:

44.1 The main application is dismissed.

44.2 The first respondent is ordered to make available to the applicant those documents that he requested in his request for further particulars, if those documents are in the possession of the first respondent.

44.3 The order in paragraph 44.2 shall operate as an interim order pending the return day on 13 June 2013, unless the parties agree that this order should be made final.

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Steenkamp J

APPEARANCES

APPLICANT: BS Mene

Instructed by LM Mokhele, Bloemfontein.

FIRST RESPONDENT: P Venter

Instructed by Molifi Thoabala, Bloemfontein.

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