THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no J 514/16

In the matter between

STEPHEN NGOBENI	Applicant
And	
PRASA CRES	First Respondent
ADV NAZEER CASSIM SC *N.O*	Second Respondent
NORTON ROSE FULBRIGHT INC	Third respondent
PASSENGER RAIL AGENCY OF SA	Fourth Respondent

Application heard and order made: 18 March 2016

REASONS FOR JUDGMENT

VAN NIEKERK J

[1] This morning, 18 March 2016, I dismissed with costs on the scale as between attorney and client an urgent application brought by the applicant seeking, amongst other things, to postpone a disciplinary hearing pending the final determination of a review application or a CCMA referral, whichever occurs first, alternatively, for an order that the first respondent, Adv. Cassim SC, recuse himself from presiding at the applicant's disciplinary hearing.

[2] When the matter was called, Mr Shongwe, who appeared for the applicant, pursued only that part of the application which sought to have the court order that Adv. Cassim recuse himself.

[3] As far back as August 2014, the applicant was placed on suspension pending an investigation into various acts of misconduct. In December 2015 and January 2016, charges of misconduct were formally handed to the applicant. These charges relate to breaches of the code of ethics, signing agreements in excess of the relevant delegation of authority, gross negligence in respect of the extension of a cleaning services contract, gross misconduct in relation to that contract and the failure or refusal to return a laptop computer while on suspension.

[4] Advocate Cassim was appointed to chair the internal disciplinary hearing, on the basis that is finding on the fact would be binding on the employer and that in the event of the applicant being found guilty, his recommendation as to sanction would serve as a recommendation to the board.

[5] When the disciplinary hearing was convened on 16 February 2016, Adv. Cassim heard a number of preliminary points. These were dealt with by way of oral submissions on 20 February 2016. The preliminary points related to the first respondent's failure to comply with its disciplinary code, the continued suspension of the applicant, the suggestion that the first respondent had waived its right to continue with the disciplinary hearing and fourthly, the application for

recusal.

[6] On 26 February 2016, Adv. Cassim filed a written ruling on the preliminary points. For present purposes, only the point in respect of the application for recusal is relevant. Three grounds in support of the contention of bias had been raised. These were that Adv. Cassim had previously acted for PRASA against a senior employee of PRASA CRES (a division of PRASA), that at the first hearing of the matter, Adv. Cassim had suggested to the applicant that he could resign and thirdly, that because PRASA pays Adv. Cassim's fee to conduct the hearing, he is biased.

[7] In his ruling, Adv. Cassim held that the belief that he was involved in a conspiracy to get rid of the applicant was 'far-fetched, implausible and lacking any reasonable basis whatsoever'. Further, Adv. Cassim affirmed that his independence, integrity and self-worth and his conscience to his as is the object of safeguard that he would apply the law to the fact without fear, favour or prejudice. Adv. Cassim concluded that none of the issues raised and relied on by the applicant created an object of reasonable basis that subjectively, the applicant can believe that he would not get a fair hearing and that there was therefore no merit in the recusal application.

[8] In his founding affidavit, the applicant avers that following the ruling dismissing the points in *limine*, he instructed his attorney to file an application to review the ruling, which was duly done on 10 March 2016. The review application has been opposed. At the same time, he also lodged a dispute with the CCMA relating to his suspension, waiver, recusal and the constitution of the disciplinary hearing. The applicant then sought for the disciplinary hearing to be postponed. On 9 March 2016, the applicant's attorneys advised the applicant that the disciplinary hearing scheduled for 18 March 2016 before Adv. Cassim would proceed. On 15 March, the present application was filed.

[9] In short, what the applicant seeks in the face of a pending review of the ruling on the points in *limine* (which includes a ruling to the effect that the application for recusal be dismissed) and a referral to the CCMA is a final order to the effect that Adv. Cassim be removed as chairperson of the disciplinary hearing.

[10] I will assume in the applicant's favour that the application is urgent. It is incumbent on the applicant to establish a clear right to the relief that he seeks, the absence of an alternative remedy, irreparable harm and the balance of convenience is in his favour.

[11] I deal first with the issue of a clear right. The LRA grants an employee accused of misconduct the right to state his or her case before any decision is made as to whether the employee committed the misconduct and if necessary, what the appropriate sanction should be. A disciplinary hearing is not a criminal trial, and ordinarily this court will hold an employer to no more than the statutory Code of Good Practice or, if they are more generous, the terms of the employer's disciplinary code and procedure (see *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* (2006) 27 *ILJ* 1644 (LC)). The standards by which any contention of bias in a workplace disciplinary hearing is measured must necessarily be viewed in that context. In other words, the test for bias is not that which applies in a civil or criminal court. The applicant was afforded a right to a hearing before an independent legal practitioner, a senior counsel. There can be no doubt that this appointment more than satisfies any requirement of an independent-minded enquiry.

[12] In any event, this court does not ordinarily intervene in incomplete disciplinary proceedings. In *Booysen v Minister of Safety & Security & others* (2011) 32 *ILJ* 112 (LAC), the LAC made it clear that the Labour Court may only interdict unfair conduct in the course of the disciplinary proceedings 'in exceptional circumstances', such as where a grave injustice would result. In Jiba *v Minister: Department of Justice & Constitutional Development & others* (2010) 31 ILJ 112 (LC) at para [17], this court held that:

> Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145.

[13] The policy underlying this approach was explained in *Trustees for the time being of the Bioinformatics Network Trust v Jacobson & others* [2009] 8 BLLR 833 (LC), the court said the following in relation to incomplete arbitration proceedings:

> There are at least two reasons why the limited basis for intervention in criminal and civil proceedings watered extended to and completed arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slowed intervene in those proceedings. The first is a policy-related reason – for this court to routinely intervening and completed arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this court.

The principle is equally applicable (if not more so) to incomplete disciplinary proceedings.

[14] The urgent roll in this court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings. The present application is a prime example, and is exacerbated by the preceding application to review and set aside Adv. Cassim's ruling on recusal. To grant the applicant the final relief he now seeks

would obviously put an end to that component of the review, as well as the referral to the CCMA. All of this is indicative of an attempt to use this court and its processes to frustrate the workplace proceedings already underway. The abuse goes further – what the applicant effectively seeks to do is to bypass the statutory dispute resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of these structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute resolution system. The court's proper role is one of supervision over the statutory dispute resolution bodies; it is not a court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micro-manage discipline in workplaces. In my view, the applicant has no clear right to the relief he seeks and the application stands to fail for that reason.

[15] In any event, the applicant has alternative remedies. As I have noted, he has filed an application to review Adv. Cassim's ruling and that application remains pending. I express no view on the merits of that application, but would note that in view of the recent amendment to the LRA which effectively prohibits piecemeal reviews, the review application stands to suffer a similar fate to the present proceedings.

[16] Further, the applicant is entitled, should he be dismissed and should he contest the procedural fairness of his dismissal, to refer a dispute to that effect to the relevant dispute resolution body. The applicant remains suspended on full pay. There is no irreparable harm to him consequent on an incomplete hearing and there remains the prospect that he will be acquitted of the charges levelled against him.

[17] In so far as costs are concerned, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and

fairness. I granted an order for costs and a punitive scale because I considered this application to be wholly misguided and one that, as I have indicated, serves to frustrate one of the fundamental purposes of the LRA, which is the expeditious resolution of workplace disputes within a defined structure. Further, the application represents an unwarranted if not scurrilous attack on the integrity of a senior member of the Johannesburg Bar. Clearly, the applicant has no understanding of the concept of independence that is fundamental to the practice of any member of the Bar. Adv. Cassim drew to the applicant's attention the issues of dignity, integrity and self-worth that were necessarily raised by his application for recusal and explained the safeguards in the form both of conscience and the role of the ultimate arbiter, being a commissioner or arbitrator appointed to determine the fairness of any disciplinary action taken against the applicant. The applicant failed to heed these wise words; indeed, he persisted with this application in the face of them. In my view, the applicant's conduct warrants an order for costs on a punitive scale.

[18] Litigants should be warned that it is not often that this court will intervene in incomplete workplace disciplinary hearings and that similar abuses of the right to urgent relief that this court affords in appropriate circumstances, will be met with punitive orders for costs, including orders to the effect that the legal representatives concerned should forfeit their fees in respect of the application.

[19] For the above reasons, I ordered as I did this morning.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr IM Shongwe, Shongwe Attorneys.

For the first and fourth respondents: Adv. Mosam, instructed by Norton Rose Fulbright South Africa Inc.