Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2870/16

In the matter between:

SOUTH AFRICAN POLICE UNION	**First applicant**
G G MAISTRY	**Second applicant**
and	
THE SOUTH AFRICAN POLICE SERVICE	**First Respondent**
THE MINISTER OF POLICE N.O.	**Second Respondent**
NATIONAL COMMMISSIONER OF SAPS N.O.	**Third Respondent**
DIVISIONAL COMMISSIONER : OPERATIONAL RESPONSE SERVICES, SAPS N.O.	**Fourth Respondent**
COLONEL PARSOTAM N.O.	**Fifth respondent**

Heard: 13 December 2016
Delivered: 15 December 2016

Summary: Urgent application to interdict disciplinary hearing pending legality review in terms of LRA s 158(1)(h).

JUDGMENT

STEENKAMP J

Introduction

[1] The applicants (SAPU and its member, Mr G G Maistry) seek an interim order for urgent relief against the South African Police Services. On 25 November 2016 they delivered an application in terms of s 158(1)(h) of the LRA[1] to have a ruling set aside and to declare that disciplinary proceedings against the employee is in breach of the SAPS regulations. Pending the hearing of that review application, they seek an interim order preventing the disciplinary hearing from going ahead on 30 and 31 January 2017.

Background facts

[2] The chairperson of the disciplinary hearing, Col Parsotam[2], ruled that the employer (SAPS) has the right to appoint anyone as a disciplinary officer. The applicants have brought an application to have that ruling set aside in terms of s 158(1)(h) of the LRA. It is a legality review. Their complaint is not one of procedural unfairness; they say that the disciplinary proceedings are unlawful.

[3] Pending the hearing of that application, the applicants seek to interdict the pending hearing. They say that, should they be successful on review, the disciplinary hearing would be null and void; ergo, it would serve no purpose to proceed with the hearing now and run the risk of it being declared unlawful.

[1] Labour Relations Act 66 of 1995.

[2] The fifth respondent.

Evaluation / Analysis

[4] The applicants seek to obtain urgent interdictory relief of an interim nature pending the review application. They must satisfy the requirements set out in *Setlogelo v Setlogelo*.[3]

Prima facie right?

[5] The main application is squarely based on s 158(1)(h). It is a legality review based on unlawfulness, not unfairness.

[6] In *Hendriks v Overstrand Municipality*[4] the LAC held:

> 'The judicial review of contractual disciplinary proceedings is permitted in our law and consequently the first respondent's application for review is permitted on these grounds, which are "permissible in law" as contemplated in section 158(1)(h) of the LRA.'

[7] That is the review that the applicants are pursuing. Without expressing a view on its merits, it does appear to me that they have made out at least a *prima facie* right, though open to some doubt, to have the disciplinary proceedings stopped pending a determination of its lawfulness. On the papers before me, it appears that SAPS have not complied with its own collective agreement in terms of the disciplinary regulaitons.

[8] It is common cause that the regulations comprise a binding collective agreement.

[9] Ms *Tulk,* for the respondents, countered that it is for that very reason that the applicants should fail. She argued that the real dispute is the interpretation and application of a collective agreement. if that is so, she is correct that this Court has no jurisdiction; the applicants' alternative remedy is to refer a dispute to the Bargaining Council in terms of s 24 of the LRA.

[10] The LAC has considered the sometimes fine distinction between the interpretation and application of a collective agreement (a matter that should be referred to bargaining council arbitration in terms of s 24); and

[3] 1914 AD 221 at 227.

[4] [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) para 25.

the breach of a collective agreement (over which this court has jurisdiction). In *HOSPERSA obo Tshambi v Department of Health, KwaZulu-Natal*[5] Sutherland JA had this to say:

> '[19] The idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by section 24 is wrong. Section 23, which provides for the enforceability of collective agreements and section 24 need to be read together. Together they create the legal edifice for the legal effect of collective agreements and certain disputes which take place about them. Sections 23 and 24 are located in chapter III of the LRA. That chapter deals with collective bargaining. Part A of chapter III addresses organisational rights, and Part B addresses collective agreements. Section 23 and 24 are in part B. Parts C and D address bargaining councils. It is plain that section 24 is a procedure to oil the wheels of the collective bargaining process and an efficient resolution of disputes about collective agreements.
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> [20] Thompson and Benjamin, *South African Labour Law*, AA1-141, remarked at the time of the enactment of section 24 in the initial 1995 statute that:
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> 'Collective agreements are legally enforceable instruments. Any dispute over the interpretation or application (which would include enforcement) of a collective agreement is a rights dispute, a resort to power to settle differences is not permitted. In a massive policy shift that attracted surprisingly little debate or protest from employers or unions, the 1996 LRA privatised all dispute resolution associated with the enforcement of collective agreement disputes. By the same token, it transferred the very considerable costs associated with such dispute resolution from the state judicial system to the parties and their members.'
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> [21] This perspective of section 24 articulates the significance of locating this category of disputes about collective agreements in the arbitral process; i.e., the advantage of a speedy resolution of disputes and an absence of the use of power in the form of a strike or lock-out. By contrast, individual disputes about employer unfairness are provided for in chapter VIII of the LRA, where section 186(2) is to be found.

[5] [2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC) paras 19-30.

[22] The bald statement by Thompson and Benjamin that "application" includes enforcement is unmotivated and is, in my view, insupportable, if what is meant is that any breach of a collective agreement triggers a right to invoke the collective agreement as a cause of action to be adjudicated, pursuant to section 24. A better reading of Thompson and Benjamin is that it is implied that once "application" is proven, the referring party can procure more than just a declaratory order, and can obtain, pursuant to such finding, substantive relief.

[23] Revelas J in *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk* commented about "enforcement" thus:

'Whether a dispute about the "application" of a collective agreement, referred to in section 24(1) of the Act, would include the enforcement of a collective agreement when it is breached, is a further question which needs to be decided.

Enforcement of an agreement only becomes an issue when there is some form of non-compliance with that agreement. When a party wishes to enforce the agreement it would be, at least inter alia, because it believes the agreement is applicable to the party who is in breach thereof. Therefore a "dispute about the application of a collective agreement" (section 24(1) of the Act) applies to the situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. Consequently, the CCMA, and not the Labour Court, should entertain disputes arising from the non-compliance with collective agreements.

[24] It seems plain that the notion of enforcement articulated by Revelas J was of a step that followed upon the "applicability" of the collective agreement being proven, rather than a facet of the notion of "application".

[25] In my view, the phrase "interpretation or application" are not disjunctive terms, and ought to be read as being related; i.e., disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining.

[26] A not dissimilar matter was dealt with in *PSA (Hohne) v Department of social Development, Free State*. There, the bone of contention was whether an employer had timeously responded to a request

to consider special medical leave for an employee. The collective agreement was the source of the entitlement. The arbitrator examined the facts put forward, purportedly to substantiate an allegation of a section 24 dispute. The arbitrator correctly recognised the true dispute was an unfair labour practice dispute. *Arend and Others v SALGBC* illustrates an attempt to disguise a dispute about the grading of employees preparatory to a migration to a new pay structure as a section 24 dispute which was unmasked as misdirected because the gravamen of the controversy did not turn on the interpretation or application of the collective agreement.

[27] Martin Brassey, in *Employment and Labour Law*, Vol III, Commentary on the Labour Relations Act, A3-46, expresses the opinion that a general rule exists that section 24 "…is inapplicable to disputes for which remedial processes are especially created in the statute". The proposition is based on the decision in *G A Winders (East Cape) CC and Another v Director, CCMA* (2000) 21 *ILJ* 323 (LAC) in which, this Court dealt with an award purporting to have been made pursuant to section 24 enforcing the provisions of a collective agreement upon an employer who had claimed not to be bound. Upon a proper characterisation of the dispute, it was held that the controversy was a demarcation dispute and should have been dealt with in terms of section 62. The point can be made, in my view, that the LRA creates several "special remedial processes" to address different kinds of disputes, assigning some to particular fora, and others to be dealt with in accordance with particular procedures; one of which is a class of unfair labour practices as contemplated in section 186(2).

[28] …

[30] There is accordingly no need nor any justification to understand section 24 in a sense so broad that any alleged breach of a term of a collective agreement means the dispute automatically falls within section 24. In the result, the arbitrator misdirected himself by not determining objectively the true dispute and had he done so he would have found that the true dispute was one contemplated by section 186(2)(b) of the LRA, and, in consequence, startlingly out of time, requiring an application for condonation.'

[11] The LAC has held, it appears to me, that 'enforcement' of the terms of a collective agreement is something different from its 'application'. The same must hold true for the alleged breach of a collective agreement, as is

alleged in this case. That is not a matter of interpretation or application that should be referred to arbitration in terms of s 24.

[12] The case of *SAMWU obo Dlamini v Mogale City Local Municipality*[6] to which Ms Tulk referred should, in my view, be distinguished from the one before me. In that case, the parties were in dispute over the meaning of a clause in the collective agreement. that does concern the interpretation and application of that clause of the agreement. In the case before me, the applicants allege a breach of the collective agreement; they have no qualms with its interpretation or application.

Exceptional circumstances?

[13] Ms *Tulk* also argued that the applicants have not shown exceptional circumstances as required by the LAC in *Booysen:*[7]

> ' To answer the question that was before the court *a quo*, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised 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. The list is not exhaustive.'

[14] But *Booysen* dealt with an allegation of unfairness, not unlawfulness. An employee alleging procedural or substantive unfairness in a disciplinary hearing has an alternative remedy. That is the dispute resolution system envisaged by the LRA. In this case, the only remedy the applicants have is a review in terms of s 158(1)(h); and it would serve little purpose to continue with a process when it appears, on the facts before me at this stage, that it may well be unlawful.

[6] [2014] 12 BLLR 1236 (LC).

[7] *Booysen v The Minister of Safety & Security* [2011] 1 BLLR 83 (LAC) para 54.

Apprehension of irreparable harm

[15] Should the hearing proceed pending the review, the potential harm would be done before the review application is heard. The employee would have to continue with a potentially unlawful process. And insofar as it may be argued that the harm is not irreparable insofar as he has other remedies, it must be borne in mind that he alleges unlawfulness: the remedies arising from procedural unfairness or, potentially, an unfair dismissal do not come into play here.

Balance of convenience

[16] The balance of convenience favours the applicants. There is very little inconvenience to SAPS to put the disciplinary hearing on hold pending the review. The employee, on the other hand, will suffer significant prejudice.

Altrnative remedy?

[17] As I have mentioned, the applicants do not have the alternative remedies available to them envisaged by the LRA's dispute resolution regime in the form of an eventual unfairness complaint at the bargaining council. They have alleged unlawfulness and the employee has exercised his remedy to bring a legality review in terms of s 158(1)(h); but that remedy does not assist him in the interim.

Urgency

[18] I am satisfied that the application is urgent. The hearing is set to continue in January 2017. The applicants brought the review application on 25 November 2016. They asked SAPS to consent to the suspension of the disciplinary hearing pending the review. SAPS refused. The application is sufficiently urgent to be heard on that basis.

Costs

[19] This is a preliminary skirmish in a longer battle. Mr Maistry is still an employee of SAPS. I do not consider a costs award to be prudent at this stage.

Order

The respondents are interdicted from proceeding with the disciplinary hearing against the second applicant, Mr Maistry, set down for 30 January 2017 pending the adjudication of the application to review the disciplinary proceedings filed under case number JR 2518/16.

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Steenkamp J

APPEARANCES

APPLICANTS:	Mr C Goosen Instructed by Thapelo Kharametsane.
RESPONDENTS:	Ms R Tulk Instructed by the State Attorney.