IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D657/2019

Reportable

In the matter between:

WILLIE STEVE MKASI Applicant

and

DEPARTMENT OF HEALTH: KWAZULU-NATAL First respondent

ADVOCATE C.M KULATI N.O Second Respondent

Heard: 24 May 2019

Delivered: 31 May 2019.

Summary: Urgent application – stoppage of internal disciplinary hearing – right to review – chair wrongly holding that he was *functus officio* – applicability of absolution from instance principle in internal disciplinary hearings – right to interdict found to exist pending outcome of review.

JUDGMENT

CELE J

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Introduction

[1] It is on urgent basis in terms of section 158 (1) (a) of the Labour Relations Act[1] that, the applicant sought to be granted an order to interdict and restrain the disciplinary hearings between the applicant and the first respondent pending the finalisation of the review application launched under case number D657/2019. This application was opposed by the first respondent, in its capacity as the current employer of the applicant, on the simple basis that the urgent and the review applications are misconceived.

Factual Background

[2] The first respondent, also hereafter referred to as the employer, is pursuing misconduct charges against the applicant. There are three charges which relate to the allegations of assault on one Mr Chambers, a colleague of the applicant, which assault allegedly took place on 15 September 2017 at their workplace. The disciplinary hearing is presided over by the second respondent. Upon the employer closing its case the applicant made substantive applications seeking inter alia to:-

1) Quash the charges on the basis of waiver of discipline due to delayed prosecution;

2) Quash the charges on the basis of the employer having elected to proceed by way of a formal grievance in terms of its policies and then the employer turning around and charged the applicant for the same complaints while the grievance was still pending; and

3) An absolution from instance.

[1] Act Number 66 of 1995 hereafter referred to as the LRA.

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[3] The second respondent issued a ruling on the substantive applications effectively dismissing all three points and ordering the disciplinary enquiry to proceed. The applicant subsequently instituted review proceedings in terms of section 158(1)(h) of the LRA seeking to review and set aside the ruling of the second respondent. The review papers have been served on both respondents and filed at this Court under case number D657/2019. Subsequent to the serving and filing of the review application, applicant's attorneys sent a letter to the first and second respondents; inter alia requesting an undertaking that pending the finalization of the review application, the disciplinary enquiry in *cas*u shall be held in abeyance. The second respondent responded on 25 April 2019. The second respondent said that the hearing would proceed irrespective of the review application pending and he said that only a court order would stop the disciplinary hearing from proceeding.

[4] Attorneys of the applicant wrote to first respondent's representative enquiring from them what their attitude was with regards to the continuation or otherwise of the disciplinary enquiry pending the review application. The first respondent had remained silent about the enquiry even though they are the ones in charge of the disciplinary process. Once again there was no response from the first respondent. The applicant felt that the clock was ticking for this application to be made in the event that, the answer was to the negative towards the non-continuation of the disciplinary enquiry. On the 2nd of May 2019 applicant's attorneys telephoned Mr Shaun Henman, the representative of the First respondent in the disciplinary enquiry, to enquire if he has received all applicant's communications to which he indicated that he only received the letter sent to both parties. Mr Henman then requested that the second letter addressed to the first respondent be forwarded to him in an alternative email address which was done. The applicant's attorneys told Mr Henman that in the event that he remains silent about the employer's attitude on the continuation or otherwise of the disciplinary enquiry, the applicant would be left with no option but to approach this Court on an urgent basis seeking to restrain the continuation of the disciplinary enquiry. It was further

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emphasised to him that such a manoeuvre would attract costs against the respondent as it was their view that approaching the Court in the circumstances of this case was wholly unnecessary. It was only on 6 May 2019 that Mr Henman replied, simply stating that the first respondent abided the decision of the second respondent. On 24 April 2019 the applicant initiated the present application.

Analysis

Functus officio

[5] It remained undisputed that the second respondent was called upon by the applicant to consider whether the employer had waived its right to discipline the applicant when it failed to charge him within a period of sixty (60) days after it had suspended him, from the date of suspension of the applicant a period of about eight months had elapsed when the employer charged him. During the internal disciplinary hearing, the applicant challenged the delayed charging and he called on the second respondent to rule on it. The second respondent did not rule on the issue and both parties in this application are *ad idem* on that aspect. When the applicant raised the failure to rule on the issue, the second respondent was adamant that he had ruled on it and directed the parties to proceed with their evidence. One of the orders sought to issue by the reviewing court is a directive to the second respondent to determine the waiver issue.

[6] The employer opposed the granting of the urgent relief based on this issue. The second respondent's submission is that in the context of an administrative functionary it must be established on the probability that the official has in fact exercised the decision-making power. If it is accepted, as the applicant is constrained to do, that the second respondent did not issue a ruling in respect of the issue of waiver and delay, then it must per force be accepted that he was not *functus officio*. That, until such time that he has

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done so, no review can follow. It cannot help a litigant to contend that the parties must be put through expense, time and effort only for the very issue to be remitted to that functionary. The employer's contention is that it cannot therefore be said that the second respondent has finally performed his duties in relation to the point and that he has consequently exhausted his powers and discharged his mandate.

[7] Both parties in this application are also *ad idem* that the second respondent is not *functus officio* on the waiver issue, hence a prayer by the applicant that the reviewing court should remit the matter for the second respondent to reconsider the issue. I am in total agreement with the parties that the second respondent is not *functus officio* on the waiver issue. The attitude of the second respondent to refuse to consider the waiver issue leaves the applicant with no suitable alternative remedy than to review his decision not to reconsider the issue. The serving of the review application papers on the second respondent gave him a second chance to reconsider his position. He was undeterred. The serving of the papers of this application gave the second respondent a third opportunity to revisit the issue and inform the parties accordingly. He is still unwavering.

[8] In respect of the applicability of a waiver, in the case of *Department of Public Works, Roads and Transport v Motshoso and Others*[2] Court upheld the view that an unreasonable delay which has not been explained by the employer should result in the employer waiving its right to discipline. Court cited with approval the case of *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria*[3] where the court had held that:

> "The failure to convene an enquiry promptly in a similar in casu is so grossly unfair that it vitiates the decision to dismiss."

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[2] (JR795/03) [2005] ZALC 62 (17 March 2005)

[3] 1992 (1) ILJ 1563 (IC).

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[9] In *Moroenyane v Station Commander of the South African Police Services - Vanderbijlpark*[4] the Court remarked that:

> ” because of the delay, it has to be inferred that that employer has waived its right to take disciplinary action against the employee”[5]

[10] The review application seeks to set aside the decision of the second respondent in dismissing the applicant's substantive application. Section 158 (1) (h) of the LRA permits the court to review the decision taken or acts performed by the first respondent in its capacity as the employer. Such decision manifested itself in the ruling of the second respondent handed down on 05 April 2019. The second respondent, while chairing the disciplinary hearing acts as *qua* employer,[6] and as such, his conduct is subject, like that of the first respondent to be reviewed under section 158 (1) (h) of the LRA. In *Hendricks v Overstrand Municipality and Another*,[7] the Labour Appeal Court stated that:

> “In sum therefore, the Labour Court has power under s158 (1) (h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; (iii) in accordance with the requirements of the constitutional principles of legality, such being grounds ‘permissible in law.” [8]

[11] The second respondent's ruling that he has dealt with the waiver issue is patently wrong and liable to be reviewed and set aside. It stands to reason

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[4] (J1672/2016) [2016] ZALCJHB 330 (26 August 2016)

[5] Paragraph 43.

[6] *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another* [20009] ZASCA 123.

[7] (2015) 36 IJL 163 (LAC). See also *Ramonetha v Department of roads and Transport Limpopo and Another* (JA104/2016) (2017) ZALAC.

[8] Paragraph 29.

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therefore that without an explanation for the delay of about eight months, the review application has some merits on the waiver point. The applicant has successfully demonstrated that he stands in good chances of the reviewing court to find in his favour. It behoves this court to therefore come to his assistance this regard.

Absolution from the instance.

[12] The second ground of review is that the second respondent's ruling on the absolution from the instance be reviewed and set aside and replaced with an order that the applicant be absolved from the instance. Unlike the first ground with a remittal power, this ground, if successful is capable of disposing off the whole disciplinary enquiry. After the employer closed its case, the applicant applied for an absolution from the instance with no success.

[13] One of the later amendments to the LRA appears to be apposite here. In terms of Section 158 (1) (B) the Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any Bargaining Council in terms of the provisions of this Act before the issue in dispute has been finally determined by such a body. The except is where the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined. The first respondent contends that it would be inimical to the LRA if it is generally impermissible to review a ruling of an Arbitrator but to permit an employee to doing so.[9]

[14] The second consideration militating against the granting of absolution from the instance in these circumstances is that the Industrial Court, as it was then known, ruled as far back as 1991 that "the essence of a decree of absolution from the instance is that the party against whom it is granted is free to enter

[9] See *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at paragrapg 40

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once again upon the disputes and such a notion is quite inconsistent with the finality the Industrial Court is enjoined to bring about.[10]The Commission for Conciliation, Mediation and Arbitration (CCMA) has also found that absolution from the instance was not a competent order in arbitration proceedings. The CCMA is a creature of statute. The first respondent said that, if the CCMA does not have the power to grant absolution from the instance, it is impossible to conclude that a Chairperson of an enquiry has such a power. The power must be obtained from the empowering legislation or instrument

[15] A submission by the first respondent is that it is impermissible for a party who has domestic remedies available to him such as closing his case or testifying, or appealing if he is found guilty, or even lodging arbitration proceedings to bring review proceedings to this Court before exhausting those domestic remedies[11]. In his founding affidavit for the review application the applicant had the following to say:

> "It is constitutionally unsound law that an employee in a disciplinary hearing has to make an election between two equally risky options of either closing his or her case without leading evidence or open his or her case to answer baseless allegations with a possibility of incriminating himself or herself, whereas this election need not be made in criminal or civil matters. Closing ones case in exercise of a right to remain silent carries a big risk of an adverse finding being made against the employee. Similarly, testifying on a case where the employer has failed to discharge its onus equally carries a risk of self-incrimination. This distinction on disciplinary matters can only be unconstitutional. There is no rational basis for suggesting that the labour laws did not intend for the presumption of innocence until proven guilty defence to operate in disciplinary matters whereas this is a constitutionally guaranteed right. The requirements of section 138 (1) of the LRA will surely be met in an absolution ruling because the trier of facts would have heard evidence on the

[10] *Textile Works Union (TVL) and Another v Sandown Clothing Manufacturing* (Pty) Ltd (1991) 12 ILJ 890 (IC)

[11] See *Union of Refugee Women and others v Director Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 CC at para71.

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merits of the dispute and based and based the absolution decision on that evidence. The merits of a dispute do not necessarily mean hearing the versions of both parties. Merits can lawfully be determined from the version of one party to the dispute."

[16] It is certainly arguable that a presiding officer who complies with section 138 (1) of the LRA and deals with a matter fairly and quickly by granting absolution from the instance cannot be said to be acting ultra vires when the case before him or her, fairly considered, warrants such, provided there is enabling law so to do. Presently no such law exists. For instance court refused such relief in *Moroenyane v The Station Commander of the South African Police Services Van Der Bijl Park*[12] where Court stated that the applicant had two alternative remedies at her disposal. The first of course was to participate in the proceedings and if those went against her could challenge these by way of arbitration proceedings in terms of the Act.[13]

[17] What the applicant seeks to do here is to challenge the applicability of a right to silence until proven guilty as part of a right exercisable in labour disputes. To my knowledge no such constitutional challenge has yet been made. It remains clear that, without such a constitutional challenge, the decision of the second respondent stands to be found to fall within a range of reasonableness, as there already are cases decided along the same way the second respondent made his decision. As already alluded to, in my view, the applicant has presented an arguable case on this issue.

[18] In the light of the view I have expressed on the two issues herein-above discussed, I deem it unnecessary to have to pronounce on the grievance issue.

The interdict

[12] (J1672/2016) [2016] ZALCJHB 330 (26 August 2016).

[13] Moroenyane, para 56.

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[19] Section 158 1) (h) of the LRA permits the court to review the decision taken or act performed by the first respondent in its capacity as the employer. Such decision manifested itself in the ruling of the second respondent handed down on 05 April 2019.The review application seeks to set aside the decision of the second respondent in dismissing the applicant's substantive application and if the second ground is successful, it has the potential of putting an end to the disciplinary hearing. He therefore has a right to review.

[20] To say that the applicant has a right to further internal remedies is only cold comfort when he could be dismissed and be deprived of resources to utilize in the exercise of such rights. He has demonstrated that he brought the urgent application after a failed attempt to settle the matter outside court. He has successfully demonstrated the presence of urgency. If this court did not intervene the internal hearing would have proceeded thus depriving him of his right to review, which right would be rendered more academic then real.

[21] In, *Pinetown Council v President of the Industrial Court and Others*,[14] the court held that:

> "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions precedent to jurisdiction are known as "jurisdictional facts"…which must objectively exist before the tribunal has power to act; consequently a determination on the jurisdictional facts is always reviewable by the courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it…"

[22] There is no merit in proceeding with the disciplinary hearing as the continuation of the hearing is dependent on the existence of a particular state of affairs yet to be decided upon by this Court, which has a potential to put a

[14] 1984 (3) SA 174 (N). Paragraph C

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permanent end to the disciplinary hearing. The application to interdict and restraint the continuation of the disciplinary hearing pending the finalisation of the review application should succeed. I have reflected on the law and fairness on the costs issue.

Order:

1) The order is granted as prayed for in paragraphs 1 and 2 (1) of the notice of motion.
2) The first respondent is ordered to pay the costs hereof.

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J Cele.

Judge of the Labour Court of South Africa.

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