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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J 2195/07

DATE: 2007-09-21

In the matter between

PIETER HENDRIK BOTHMA Applicant

and

TRANSPORT EDUCATION TRAINING AUTHORITY 1st Respondent

MINISTER OF LABOUR 2nd Respondent

J U D G M E N T

MOSHOANA AJ

In the haste the Court has been able to prepare a judgment which if necessary, the Court may supplement the reasons given the fact that this was an urgent application.

This is an application brought on an urgent basis for an order in the following terms:

1. Dealing with this application as a matter of urgency in terms of Rule 8 of the Rules of this Honourable Court.
2. Interdicting the first respondent from continuing with the applicant's disciplinary hearing on 25 September 2007.
3. Interdicting the first respondent from conducting any disciplinary hearings against the applicant pending the relaxation/termination of the applicant's bail conditions under case number 16/140/07 in Cape Town Magistrate Court preventing the applicant from any contact with witnesses that may give evidence at his disciplinary hearing or whom he needs to consult and/or call as his witnesses in his disciplinary hearing.
4. Directing the first respondent to pay the costs of this application on the attorney and own client scale.

There is an alternative further relief that is being sought.

Perhaps I should just pause and comment that the paragraph 3 as it stands suggests that the bail conditions prevent contact with the witnesses that would give evidence at his disciplinary hearing.

It will become clear when I deal with this matter in my judgment that no evidence was presented in the papers by the applicant to suggest that the first respondent is intending to call as witnesses the people listed in the bail conditions which are as follows, all TETA Board members, officials

and/or employees, Mr D Narran, Mr J de Jongh, Mr R Bam, Mr N Simpson, Ms N Stephens.

At a superficial level it may be argued that the fact that it says all TETA Board members, officials and employees, then the Court must conclude that that means all possible witnesses that ought to be called by the respondent at the disciplinary hearing. However, the Court's view is that at best some basis should have been laid out to say this are the witnesses that I know for a fact are going to be called. In the papers there was reference to KMPG report. It may be possible that only KMPG employees shall be called to testify. Nonetheless my judgment does not turn on that fact, it was just mentioned as something considered by myself in passing.

Mr Dorfling, appearing for the applicant, submitted that insofar as prayer 2 is concerned, the applicant is seeking a final interdict and prayer 3, the applicant is seeking an interim relief as it were, pending the relaxation of the bail conditions.

The Court, during argument of this matter, as it would be expected, since no heads of argument had been filed and it being an urgent application, raised a number of issues with Mr Dorfling.

He conceded that the applicant can, for instance, apply for a postponement of the disciplinary hearing. However, he had put a rider that the difficulty is that by going to the place of the disciplinary hearing or his representative going there to apply for a postponement, that in itself

may be in breach of the conditions of bail.

He further conceded that the unavailability of counsel on its own, is not a fact that will entitle the applicant the relief sought. He further conceded that in the papers the applicant does not set out the steps taken to remove the bar to exercise his right, afforded to him to be heard. He did not even in his papers, state that he will take what steps in the event the court grant him prayer 3 of the notice of motion which had already been quoted.

The first respondent is an organ of state, there is no doubt in the Court's mind. The right which the applicant suggests is being threatened by the respondent through the state in these proceedings is his right to a fair hearing.

Since the first respondent is an organ of state, the question arise. Can it be said that the provisions of the Promotion of Administrative Justice Act finds application?

In terms of Section 3 of the said Act the following is apparent, administrative action which materially and adversely affect the rights or legitimate expectation of any person must be procedurally fair. A fair administrative procedure depends on the circumstances of each case. In order to give the right to procedural fair administrative action and subject

to subsection 4, must give a person referred to in the subsection:

i) Adequate notice of the nature and purpose of the proposed administrative action.

ii) A reasonable opportunity to make representation.

iii) A clear statement of administrative action.

iv) Adequate notice of any right of review or internal appeal where applicable, an adequate notice of the right to request reasons in terms of Section 5.

Then the question remains whether the disciplinary inquiry that will be taking place on the 25 September 2005 would be in exercise of public power to the extent that the right that emanates from Section 3 becomes of utmost importance.

Fortunately the Supreme Court of Appeals recently held in the matter of **Transnet v Chirwa (2006) 27 ILJ 2294 (SCA)**, that where no exercise of public power is involved PAJA does not find application and this is so irrespective of whether a state organ is involved.

In any event, the case before Court is not pleaded in the context of PAJA. However, the Court thought that in its judgment it should make reference to the provisions of that Act to the extent that they may be relevant.

In this matter the applicant has been afforded an opportunity to be heard. It is the applicant himself who says in no uncertain terms in his papers that I cannot exercise that right or that opportunity to be heard due to the bail conditions. So this is not a case where the applicant is denied the opportunity to be heard.

So the question is what exactly is the clear right or *prima facie* right that is being threatened by the respondents before court. It ought to be mentioned that the respondent before court is an entity established in terms of the Skills Development Act. The Minister of Labour had to come to court because he has interest in the proceedings and not only that in the running of the state organ being the first respondent over and above being cited as a party.

The bar that appears to be the basis upon which the applicant is unable to exercise his right to a fair hearing seem to be one created or brought into being by the state. In this particular instance it could be the Department of Justice and/or the Department of Public Prosecutions that deals with Public Prosecutions.

However, it does appear from the papers that those conditions were agreed conditions and that point is being made by counsel appearing for the second respondent.

The Court is not placed in a position to can understand why the right to a

fair hearing is being threatened by the respondents before Court. Both respondents submit that the first respondent in particular performs critical functions and its CEO performs critical functions too as set out in Section 16 of the Skills Development Act, but above all the applicant seem to want to hold the respondents at ransom by flagging the bail conditions.

The court is inclined to believe that the applicant indeed wishes to hold the respondents at ransom. This is so because he has not been candid enough in the Court's view to say these are the steps I had followed in order to remove that bar and I have not been successful and therefore the court must come to my assistance because I have no other alternative but to approach the court.

This Court cannot allow such to happen. The applicant cannot have his cake and eat it. He has a duty in the Court's view to remove the bar since he set out to accept with open arms the opportunity to be heard. Why should the first respondent suffer simply because there exists agreed bail conditions.

This then brings me to the other requirement of an interdict. Even if it is on an interim basis, that is now reference to prayer 3, lack of substantial redress in due course. On that note the court would firstly refer to the decision of **Clemson v Clemson (2000) 1 SA 622 (W)** where the court

said:

"It requires an applicant for urgent relief to furnish reasons why he claimed that he would not be afforded substantial redress at a hearing in due course. The fact that someone has taken the law into their own hands can hardly be classified as a reason in this *context".*

I quote that judgment on the basis that it seems to be the applicant's contention that the first respondent by affording him the opportunity to be heard wants him to commit breach of his conditions of bail.

Clearly the court must be satisfied that that is indeed so and the court must be satisfied that the applicant will be without any substantial redress in due course.

The principle was confirmed in the decision of **Cape Killarney Property Investments v Mahamba and Others 2000 (2) SA 67 (C)**, where the learned Deputy Judge-President of the Cape Provincial Division stated at page 77 G the following:

"The applicant also failed to set out explicitly why it would not be afforded substantial redress at the hearing in due course. Why it would suffer any real loss or disadvantage unless a rule nisi was issued rather than normal court proceedings adopted".

It is clear that this principle of substantial redress is paramount particularly when the court has to exercise this kind of a discretion by disregarding its own rules by inconveniencing the other parties to the proceedings bringing them on an urgent basis and in this particular matter have them sit in court until five to six when I am busy delivering my judgment. Clearly there is a duty on the applicant, as the authorities have pointed out, to show that

there is no substantial redress in due course that will flow out of this right that is being threatened.

As soon as the hearing proceeds which is set to proceed, and the applicant is for some reason dismissed in *abstentia*. That does not mean it being the worst that he is left without any remedy. He can refer a dispute to the CCMA, to the Bargaining Council or to the Labour Court. Of importance is that the CCMA, this Court and the Bargaining Council has powers to, amongst others, reinstate a dismissed employee. Such definitely would be a substantial redress.

However, the most important aspect of this case is that the complaint is squarely on the right to a fair hearing as opposed to a right not to be charged at all. However, this Court, the CCMA and the Bargaining Council at an arbitration process it being a hearing *de novo* or court proceedings, he can set out his defence there and the outcome thereof being that he get afforded again that paramount right to be heard. At that time the decision to dismiss would have been taken. The CCMA and this Court have powers, to reverse the decision.

The other important factor which ought not to be ignored is the fact that the independent chair may still find that the charges preferred by the first respondent are not proven and find the applicant not guilty in *abstentia*.

Such is not unheard of.

So, in fact, the Court is faced with a matter where it is asked to dispense with its urgent relief powers as if the applicant shall be without rights if the hearing proceed. He will not suffer an irreparable harm if the court does not come to his assistance and that is another requirement for an interdict.

There are various judgments of this Court and the High Court where the courts have refused to interdict disciplinary hearings for a simple reason that all is not lost. (See for instance **Mohlala v Citibank and others (2003) 5 BLLR 455 (LC)** where the court refused to stay proceedings because criminal proceedings are pending. See also **Davis v Tipp NO and others 1996 (1) SA 1152 (W)**, **Fourie v Amatola Water Board (2001) 22 ILJ 694 (LC)**, **Commissioner Staff Association obo Members v CCMA and others (2000) 8 BLLR 918 (LC)**, **Ndlova v Transnet Ltd t/a Portnet (1997) 7 BLLR 887 (LC)**).

In holding a disciplinary inquiry, it ought to be mentioned that the prerogative is that of the employer but the employer in exercising that prerogative to bring its employees to a disciplinary hearing ought to do that in a fair manner. This is a matter where the first respondent itself, this is apparent from the papers, has invited the applicant to be heard and the applicant is saying I do not want that right until a bar is being removed. I

can also remove that bar as conceded by counsel appearing for the applicant.

That then brings me to the issue of costs. The fact that costs should follow results in this matter is beyond any doubt. The question that has been argued by both counsel appearing for the applicant and appearing for the first respondent, is whether it should be punitive costs.

I need to point out that in the **Clemson** decision that I had quoted which was an urgent application as well and which in the Court's view was ill founded, the following was said by the court insofar as costs at page 628 F:

"In my view, the conduct of Mr Guldenfinger in advising the applicant in this case to bring the present application was of a wilful and deliberate nature. The attorney is the party who should be responsible for the costs. It is furthermore my view that the applicant himself should not be liable to his attorney for the wasted costs incurred in bringing the present application.
The following order is therefore made:

1. *The application is struck from the roll for want of emergency.*
2. *Attorney Guldenfinger is ordered to pay the costs <u>de bonis propriis</u> on a scale between attorney and own client and the attorney is precluded from collecting any fee in regard to this application from his client, the applicant".*

Then the question is should I adopt that course, what are the factors that may persuade me to adopt that course? One of the factors that troubled the Court with this application is the fact that there is a plethora of decisions of this Court, the High Court and even the Supreme Court of

Appeals, that you cannot interdict disciplinary proceedings, particularly because all would not be lost. Very few cases not even cited before could have.

I am not sure whether I can conclude that when this application was conceived, that did not reign supreme in the mind of the applicant's attorneys or even the applicant himself.

It does appear to me that the applicant and his attorney were told the following on 17 September 2007 by the representative for the applicant:
"We are in receipt of your letter dated 13 September 2007 which was received on the reopening of our offices today. We are currently taking instructions from our client and note your client's inability to prepare for his disciplinary hearing under his current bail conditions and the fact that you contend this would preclude him from submitting a proper defence to the allegations brought against him. The writer is currently abroad and not in a position to take instructions at this stage, however, will do so on his return on 20 September 2007".

Low and behold, 17 September 2007 an urgent application is brought to be heard by this Court today.

The Court is not quite impressed with the manner in which this application was handled. The Court is not quite impressed with the manner in which the applicant was advised.

However, I do not intend to follow the course in the **Clemson** decision, but I am inclined to make a punitive cost order against the applicant himself.

In the result I make the following order:

1. The application is dismissed with costs on an attorney and own client scale.

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G N MOSHOANA
Acting Judge of the Labour Court

Date of Hearing: 21 September 2007

Date of Judgement: 21 September 2007

APPEARANCES:

For the Applicant: Adv D Dorfling

Instructed by: Martini-Patlansky

For the 1st Respondent: Mr AC Soldatos for Fluxmans Inc.

For the 2nd Respondent: Adv S Mathibedi

Instructed by: The State Attorney