IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG\DURBAN

Not reportable

Case No: D1277/2019

In the matter between:

SITHEMBISO INNOCENT COLLIN KHANYILE **Applicant**

and

DEPARTMENT OF TRANSPORT FOR THE PROVINCE OF KWAZULU - NATAL **First Respondent**

C VAN NIEKERK *N.O* **Second Respondent**

APPEALS AUTHORITY: DEPARTMENT OF TRANSPORT FOR THE PROVINCE OF KWAZULU-NATAL **Third Respondent**

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL **Fourth Respondent**

Heard: **3 October 2019**

Delivered: **8 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicant approached this Court on an urgent basis to seek an interim order interdicting and restraining the first respondent from implementing the sanction of suspension without pay for three months issued against him following the outcome of an internal disciplinary enquiry. The outcome was issued by the second respondent on 30 July 2019, and was confirmed by the

third respondent on 13 September 2019. The order is sought pending the finalisation and determination of an unfair labour practice dispute referred to the fourth respondent (GPSSBC).

[2] The first respondent opposed the application without filing an answering affidavit. The urgent application was launched against the following background;

2.1 The applicant is currently in the employ of the first respondent at its Road Traffic Inspectorate (RTI) in Pinetown. He was employed since 2005 and is also a shop steward of POPCRU.

2.2 The incidents leading to disciplinary action being taken against the applicant arose in October and December 2018. It was alleged that on 26 October 2018, the applicant together with his colleague, Mr Ndlovu, had improperly released a truck from the RTI premises in Pinetown, which was initially impounded for exceeding the legal weight limit. It was further alleged that the applicant had on 3 December 2018, parked an official vehicle in a public place in a manner that brought the RTI into disrepute.

2.3 Flowing from the incidents, the applicant and Ndlovu, and another employee (Ms Dladla), were then advised that they were to be issued with warnings. Dladla and Ndlovu accepted their sanction of written warnings. The applicant refused to accept the sanction of a final written warning and insisted that he be subjected to a formal disciplinary enquiry.

2.4 The applicant was granted his wish and was placed on precautionary suspension in March 2019. He was served with a notice to appear before a disciplinary enquiry in May 2019 to answer to four allegations of misconduct related to the release of the heavy motor vehicle from the Pinetown premises; the parking of the official vehicle in the Durban CBD; his behaviour in a meeting; and breach of the conditions of his precautionary suspension.

2.5 A disciplinary enquiry into the allegations was held from 29 May 2019 and concluded in July 2019. The applicant was found guilty on some of the charges. (There is a dispute as to which charges he was found guilty on) After the parties had made submissions in mitigation and aggravation, the second respondent, had issued an outcome on sanction on 30 July 2019, in terms of which the applicant was issued with a final written warning valid for six months; counselling and three months unpaid suspension.

2.6 An appeal lodged with the third respondent on 6 August 2019 was dismissed in an outcome issued on 13 September 2013. The applicant avers that the outcome only came to his attention on 23 September 2019, and that he was further advised that his suspension would take effect from 1 October 2019.

2.7 Having consulted with his attorneys of record and counsel between 25 September 2019, the applicant launched this application on 1 October 2019.

[3] The facts of this case are quite unusual, as the internal disciplinary proceedings have taken their course and produced an outcome, which enforcement the applicant seeks to have stayed pending the determination of a dispute before the GPSSBC which was referred on or about 27 September 2019.

[4] Effectively the relief that he seeks, being interim in nature, is premised on the referral to the GPSSBC. The difficulty however as raised by the Court with Mr. Mfeka for the applicant and as also raised by Ms Naidoo for the respondents, is that as can be gleaned from a copy of that referral, the dispute referred relates to the interpretation and/or application of the PSCBC Resolution 1 of 2003. In the referral, the applicant alleged that in issuing the outcome, the second respondent incorrectly applied the provisions of the Resolution, as the sanction was effectively punitive in nature. In the referral, he sought an outcome in terms of which he was not to be found guilty of all the charges against him.

[5] Mr Mfeka was of the view that the contents of the referral should not have a bearing on the substance of the dispute referred, which was a challenge to the suspension without pay for three months. I accept that a referral form does not constitute pleadings in the ordinary sense, and that ultimately, it is for an Arbitrator seized with a matter to determine the nature of the dispute referred, which determination might necessarily require evidence.[1] Even if that may be the case, to the extent that interim relief is sought in this Court on the grounds of a particular cause of action pending in another forum, at the very least, the referral should at least support the basis upon which the relief in this Court is sought. *Prima facie*, the relief sought in this case in the light of the nature of dispute referred to the GPSSBC is inappropriate.

[6] Even if there is *cause* to hold that the defective referral to the GPSSBC is not of a nature as to deprive the applicant of the relief that he seeks in this Court, there are further inherent difficulties that this application is faced with. At the heart of this application is whether it is competent for this Court to interdict and restrain an employer from implementing the outcome of its own completed internal disciplinary enquiry, in which the applicant fully participated. Unlike in incomplete or yet to commence internal disciplinary proceedings, the Court can, in instances where compelling and/or exceptional circumstances have been demonstrated, intervene in such proceedings.[2]

---

[1] See *September and Others v CMI Business Enterprise CC* 2018 (4) BCLR 483 (CC); (2018) 39 ILJ 987 (CC); [2018] 5 BLLR 431 (CC), where it was stated;

> "[42] The approach to be followed by a commissioner in arbitration proceedings under section 138(1) of the Labour Relations Act has been explained in *CUSA*:
>
> > "A commissioner must, as the Labour Relations Act requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature." (Footnote omitted.)
>
> [43] In my view, the commissioner is not bound by a party's categorisation of the nature of the dispute. Rule 15 clearly intended the commissioner to have the right and power to investigate and identify the true nature of the dispute. The majority judgment in *Driveline* categorically held that the parties are not bound by the commissioner's description of the dispute in the certificate of outcome"

[2] See *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46; and also, *Booysen v Minister of Safety and Security and Others* (2011) 32 ILJ 112 (LAC) at para 54 where it was held;

[7] To the extent however that the applicant seeks to interdict the implementation of a sanction arising out of completed internal disciplinary proceedings in which he fully participated, it is my view that an even more onerous burden rests on the applicant to demonstrate extreme exceptional circumstances justifying such an intervention by the Court. This is so in that these types of cases are not different from multitude of other cases, where employees on a daily basis are issued with suspensions without pay as a sanction, or at worst, dismissed. Employees who find themselves in such positions ordinarily refer their disputes to appropriate dispute resolution bodies, because that is what the dispute resolution scheme of the Labour Relations Act dictates. For this Court to now interdict employers from implementing the decisions and outcomes of their own internal disciplinary enquiries is indeed a big ask. It would not only open the floodgates for all such disputes to brought before it, but would effectively render the dispute resolution scheme designed in the LRA nugatory. In a nutshell, a lack of a salary consequent upon a suspension without pay for three months is not an exceptional, let alone extreme exceptional circumstance, as those are the consequences that flow from such internal processes and their outcomes.

[8] In dismissing this application, a further consideration is that the requirements for urgent interim relief have clearly not been satisfied. The applicant has not demonstrated a *prima facie* right to the relief that he seeks. This is so in that his alleged *prima facie* right is grounded on his right to the adjudication of disputes and the enforcement of his constitutionally enshrined rights to fair labour practices. His case unfortunately collapses at this point, as it is trite that it is impermissible for an employee to approach this Court for urgent relief on the basis of an alleged infringement of a constitutional right to fair labour practices as found in Section 23(1) of the Constitution.[3] This is so in that other

'… 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.'

[3] See *SANDU v Minister of Defence and Others* (2007) 28 ILJ 1909 at para 51, where it was held that;

'.... where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'

than this right being constitutionally guaranteed, it nonetheless finds expression in section 186(2) of the LRA, and to the extent that such rights are infringed, the provisions of section 191 of the LRA are equally available for the determination of any such disputes.

[9] Mr Mfeka had notwithstanding the contents of the founding affidavit, disavowed any reliance on the constitutional right to fair labour practices, and submitted that the applicant instead relied on the provisions of section 158(1)(a) of the LRA. It nonetheless gets worse for the applicant, as first, reliance on those provisions was not pleaded, and second, these provisions are not an open invitation for any disputes to be considered by the Court, and for it to grant any order. This Court under those provisions *may* make appropriate orders including those under (i) – (vii). The Court's powers however to grant any of these orders cannot be said to extent to instances where other provisions of the LRA specifically cater for those instances. In this regard, the Court's powers under the provisions of section 158(1)(a) of the LRA as explained in *Gradwell* and *Booysen*s, cannot be understood to imply that it can intervene in completed internal disciplinary proceedings. The overall scheme of the provisions of section 191 of the LRA specifically and adequately covers for such instances.

[10] The bulk of assertions in regards to the alleged *prima facie* right as can be gleaned from the founding affidavit also related to the charges that led to the disciplinary hearing, the conclusions and outcome of the second and third respondents. These are however issues which are not even for this Court to venture into, as there is a proper forum to determine them.

[11] To the extent that the applicant has not established a *prima facie* right to the relief that he seeks, that ought to be the end of the matter. For the sake of completeness however, and in regards to the other requirements of the relief sought, the applicant further contended that there is reasonable apprehension of irreparable harm, if he is not granted the relief he seeks. This is so he alleged, as he is of the view that it is highly unlikely that his referral to the GPSSBC would be finalised before his suspension without pay ends on 13 December 2019. He contends that he would suffer grave injustice in being

subjected to the sanction in circumstances where the sanction was granted in irregular circumstances.

[12] Again, the above contentions do not demonstrate irreparable harm, and at worst, the applicant is simply saying he cannot like multitudes of other employees wait for his turn in the litigation queue before the GPSSBC. As already indicated, it is not for this Court to determine the merits or otherwise of the outcome of the disciplinary enquiry, especially since the main issue in that regards is that of fairness. If the applicant succeeds in challenging the sanction at the GPSSBC, his suspension will be set aside and he will be paid the salary that was withheld in full. There cannot therefore be irreparable harm in circumstances where the applicant may be vindicated.

[13] Equally so, the applicant cannot complain of a lack of alternative satisfactory remedy in circumstances where he has already referred a dispute to the GPSSBC. Furthermore, the balance of convenience cannot be in favour of the applicant in circumstances where the first respondent has gone through all phases of disciplinary processes in arriving at an outcome that the applicant seeks to have the implementation thereof interdicted. As already indicated elsewhere in this judgment, whilst the applicant's other colleagues had accepted their sanctions rather than going through disciplinary proceedings, the applicant dared the first respondent and chose the route that resulted in the very outcome that he seeks to not have implemented. If he is unsatisfied with that outcome, the GPSSBC will determine his dispute in due course. It would clearly be prejudicial to the first respondent and its internal disciplinary processes if it cannot be allowed to implement its disciplinary outcomes, especially in circumstances where affected employees refuse to challenge disciplinary decisions through the normal statutory channels.

[14] The last requirement which the applicant has equally failed to satisfy is that of urgency. The fact that an application was brought before the Court with the necessary haste does not imply that the Court must accord it urgency. In fact, as shall be demonstrated below, the applicant failed to do so. There is a further requirement that a party seeking urgent relief must set out the reasons for urgency, and why urgent relief is necessary. Equally so, an applicant is not

entitled to rely on urgency that is self-created when seeking a deviation from the rules, nor can the matter be treated as urgent, when there are alternative appropriate remedies.[4]

[15] The applicant in claiming that the matter was urgent relied on the fact that the sanction was to be implemented on 1 October 2019. This fact on its own does not create urgency. Bearing in mind that he was indeed informed on 23 September 2019 that the implementation would take effect on 01 October 2019, this application was launched on that date and the matter came before the Court on 3 October 2019. Thus, at the time that the application was launched and heard, the proverbial horse had bolted. To the extent that the application was brought belatedly, the invariable conclusion to be reached is that the urgency is also self-created. Other than these considerations, and as already indicated elsewhere in this judgment, the applicant clearly has alternative remedies available to him which he had utilised.

[16] In summary, the applicant has not satisfied the requirements of the relief that he seeks. Furthermore, it is not for this Court to interdict the implementation of internal disciplinary outcomes where those processes have taken their full course. As it was stated in *Motaung v Minister of the Department of Correctional Services*[5], it is not the function of the urgent court to micromanage workplace discipline, let alone interfere with any outcomes flowing from completed disciplinary proceedings, especially where employees seek to rely solely on their constitutional rights to fair labour practices.

[17] In regards to costs, it is trite that this court has a broad discretion to make orders for costs upon a consideration of the requirements of the law and

---

[4] See J*iba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 I*LJ* 112 (LC); *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6, where it was held;

> '…. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[5] (J1693/19) [2019] ZALCJHB 220 (16 August 2019) at para 4

fairness. This Court has always approached the issue of costs against individuals with caution, especially in instances where legitimate grievances against employers are pursued. Employees have every right to pursue these grievances. It does not however imply the urgent Court is the first port of call in every instance when employees are aggrieved. The applicant was adequately represented by attorneys and counsel. Surely given the circumstances and the facts of this case, a proper reflection was required prior to persisting with this matter on the urgent roll, especially during recess. In my view, there was no basis for this Court or the respondents to be burdened with this application as it had no merit from the beginning. In the circumstances, I see no reason in law or fairness, why the first respondent should be burdened with its costs.

[18] Accordingly, the following order is made;

Order:

1. The Applicants' application is dismissed with costs.

_____

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. NSV Mfeka, instructed by Linda Mazibuko & Associates
For the Respondent:	Adv. L Naidoo, instructed by GNG INC