THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 1906/2016

In the matter between

ELIZABETH LEE MING **Applicant**

and

MMI GROUP LTD **First Respondent**

KAREN DE VILLIERS *N.O.* **Second Respondent**

Heard: 9 September 2016

Judgment: 12 September 2016

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks, amongst other things, to halt a disciplinary hearing, to substitute the second respondent as the chairperson of the hearing with an independent chair and to afford her (the applicant) the right to legal representation at a *de novo* hearing.

[2] The relevant facts are canvassed in the papers, and I need not deal with them in any detail here; they are largely a matter of common cause. It is sufficient to record for present purposes that on 12 July 2016 the applicant received a charge sheet and a request to attend a disciplinary hearing on some five charges of misconduct. The notice advised her that she would not be permitted legal representation during the hearing but would be entitled to be represented by any permanent staff member of the first respondent's staff and specifically, 'you have to make your own arrangements in this regard'. The first respondent's disciplinary code and procedure provides for legal representation to be permitted in exceptional circumstances.

[3] The hearing commenced on 20 July 2016 when the applicant was advised that she could apply for legal representation. A substantive application was prepared and filed. The second respondent, the chair of the hearing, did not consider the application; it was referred to another member of the first respondent staff, a legal adviser, who after considering the application, ruled that legal representation would not be permitted. The disciplinary hearing continued thereafter. During the course of early August 2016, the applicant received an anonymous message that resulted in her contacting a Mr Fraser, an employee of the first respondent, to request that he represent her at the hearing. The applicant and Fraser consulted in preparation for the hearing but Fraser later contacted the applicant and informed her that he would not be able to represent her. In a subsequent discussion between the applicant and Fraser, which the applicant surreptitiously recorded, it would appear that Fraser stated that he was being placed under pressure and that his prospects of negotiating a contract to provide services to the first respondent post his retirement would be placed in

jeopardy should he act as the applicant's representative.

[4] The applicant contends that Fraser has been intimidated, by persons undisclosed by him but who are employed by the first respondent, not to represent the applicant at the disciplinary hearing. The applicant seeks to have the disciplinary enquiry halted, and to have the proceedings commence *de novo* before an independent dispute resolution agency, with the applicant legally represented. The applicant emphasises that she is prepared to face a disciplinary hearing and that she was indeed prepared to do so before the second respondent on the basis that she was represented by Fraser. Given the inference that the applicant has drawn from Fraser's refusal to represent her, the applicant contends that the second respondent ought properly to be replaced by an independent chairperson and that she be entitled to legal representation.

[5] When this application was called, the primary relief pursued by the applicant was for the right to legal representation during her disciplinary hearing. In this regard, her counsel contended that this was an exceptional case that warranted intervention by the court. Counsel contended that the present was indeed such a case. He referred to *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) and *MEC Department of Finance, Economic Affair and Tourism; Northern Province v Mahumani* [2005] 2 All SA 479 (SCA), in which the court referred to the right to legal representation is an element of a procedurally fair administrative proceeding.

[6] The disciplinary hearing convened by the first respondent is not an administrative proceeding, nor has the second respondent or any other member of the first respondent's management called on to make any administrative ruling that might constitute administrative action. The approach to be adopted in a matter such as the present is well-established. While this court has jurisdiction to intervene in incomplete disciplinary proceedings (see *Booysen v Minister of Safety and Security & others* (2011) 32 ILJ 112 (LAC)), it does not do so lightly,

but only in exceptional circumstances. In *Jiba v Minister: Department of Justice & Constitutional Development* (2010) 31 *ILJ* 112 (LC), the court said the following:

> 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.

[7] The policy underlying this approach was made clear in *Jiba* and in *Trustees, National Bioinformatics Network Trust v Jacobson & others* [2009] 8 BLLR 833 (LC), where the court noted that there were at least two reasons why it ought not routinely to intervene in incomplete arbitration proceedings and observed that the same considerations applied to incomplete disciplinary hearings:

> The first is a policy -related reason – for this court to routinely intervene in incomplete 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.

[8] More recently, in *Ngobeni v Prasa Cres & others* (J 514/16, 18 March 2016) the court said the following at paragraph 14 of the reasons for judgment:

> 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 Advocate

> Cassim's ruling on recusal…. 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 the 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 as one of supervision over the statutory dispute resolution body; it is not a court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micromanage discipline in workplaces.

[9] In my view, the applicant has failed to establish that there are any exceptional circumstances that warrant intervention by this court in her pending disciplinary enquiry. The benchmark in matters where some form of procedural unfairness is alleged remains *Avril Elizabeth Home for the Mentally Handicapped c Commission for Conciliation, Mediation and Arbitration* (2006) 27 *ILJ* 1644 (LC) where the court stated that it will ordinarily hold an employer to no more than the statutory code of good practice or, if they are more favourable, the terms of the employer's disciplinary code and procedure. The test to be applied is not that which applies in a criminal trial.

[10] In the present instance, the applicant has no right to legal representation. At best for her, the first respondent has a discretion to allow legal representation in exceptional cases. An application for legal representation was submitted on the applicant's behalf and considered by a senior legal adviser in the first respondent's employ. The adviser considered the issue and ruled, in a considered response to the application and on behalf of the first respondent, that legal representation ought not to be permitted. There is nothing to suggest that this decision was improper or that it had the consequence of a grave injustice. The fact of a practice of referring any application to legal representation at an internal hearing to a person other than the chair of the hearing is not denied by the applicant; she simply asserts that that the practice is unlawful. However,

there is nothing in the LRA or the code of good practice that compels the chair of an enquiry to make such a decision or, put another way, there is nothing to preclude an employer from assigning an employee other than the chair of the hearing to make a decision on legal representation on its behalf. As I have indicated, whether the decision is correct or even fair, is not for this court to determine. I would add that in my view, the decision can hardly be said to amount to one that is arbitrary or capricious. Further, the ruling was made as early as 25 July 2016. The disciplinary hearing continued thereafter, with the applicant clearly having acquiesced in the ruling.

[11] In so far as the applicant's case for intervention is based on the circumstances in which Fraser elected not to act as a representative, those are not in themselves a basis for this court to intervene. The applicant has a right to be represented by a co-employee. Whether the applicant's chosen representative wishes to represent her is of no concern to the first and second respondents, and of even less concern to this court. It remains open to the applicant to secure a representative other than Fraser, or to act on her own behalf. The applicant is not an unskilled worker who requires the assistance of a shop steward – she is a senior member of management and obviously more than capable of responding to the clear charges brought against her.

[12] In short, the applicant has failed to establish either a right to legal representation at her disciplinary hearing, or that her case is so exceptional that this court should intervene in the conduct of the hearing. In any event, the applicant has an adequate alternative remedy at her disposal. Should she pursue her claim of procedural unfairness on any of the grounds set out in her founding affidavit, these claims will be considered in due course (on the assumption of course that the applicant is dismissed, as she fears she will be) in an arbitration hearing. As the court pointed out in *Avril Elizabeth Homes*, true justice for employees resides in an independent arbitration hearing where the onus is on the employer to justify the substantive and procedural fairness of any disciplinary action that it takes.

The application therefore stands to be dismissed. Obviously, the conclusion to which I have come and the reasons for my decision are not relevant to any future determination of the procedural fairness or otherwise of the current disciplinary hearing - the applicant is fully entitled to raise all or any of the submissions made in these proceedings during the course of any subsequent arbitration hearing.

[13] 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. Although this court is conventionally reluctant to make orders for costs against genuinely aggrieved employees who seek recourse against their employers, the present case constitutes an exception. First, this court, as I have indicated, has made clear in a number of recent cases that generally speaking, it is not open to employees to seek intervention in incomplete disciplinary hearings, and that to do so save in the most exceptional cases constitutes an abuse of the process of this court. That notwithstanding, the applicant has approached this court, seeking intervention on a broad base of grounds. Secondly, only one of the grounds (i.e. that of the first respondent's refusal of legal representation) was pursued at the hearing. However, the first respondent was obliged to answer to a case that was more far-reaching and incorporated many aspects of the hearing that were not pursued. For these reasons, in my view, the interests of the law and fairness require that the first respondent should not be denied the costs of opposing the application.

For the above reasons, I make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv H Gerber, instructed by Welman and Bloem Inc

For the first respondent: Adv van der Westhuizen, instructed by Savage Jooste.