(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

03/12/2019
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: **J 2302 / 2019**

In the matter between:

KARIN BRITS	**Applicant**
and	
JOHANNESBURG METROPOLITAN BUS SERVICE (SOC) LTD	**First Respondent**
MELISSA SCHEEPERS N.O.	**Second Respondent**
OSBORNE MOLATUDI N.O.	**Third Respondent**

Heard: **26 November 2019**

Delivered: **3 December 2019**

Summary: **Jurisdiction – Labour Court does have jurisdiction to consider urgent applications to intervene in the case of incomplete disciplinary proceedings – exceptional and compelling reasons however required – exceptional circumstances not shown**

Urgency – applicant must establish compelling considerations of urgency – unreasonable delay in bringing application – urgency self-created – existence of urgency not shown

Interdict – nature of relief sought considered – applicant in effect seeking final relief – applicant must show clear right and lack of alternative remedy – clear right not shown – applicant has alternative remedy available

Clear right – principle that dispute process as prescribed by LRA must be applied – applicant cannot circumvent this process by relying on employment contract and regulations – all issues raised by applicant can be fully dealt with in unfair dismissal proceedings in the normal course

Alternative remedy – applicant has proper alternative remedy available in the form of unfair dismissal proceedings in the normal course should she be dismissed – alternatively a review application in the normal course – issues raised in the current application can be raised in such proceedings – applicant can obtain full redress in the ordinary course

Companies Act – provisions relating to company secretary considered – company secretary ex officio position – does not stand in the way of the applicant being dealt with as employee in the ordinary course

Costs – proceedings an abuse of process – costs ordered

JUDGMENT

SNYMAN, AJ

Introduction

[1] In writing this judgment, I am compelled to articulate a question that is asked more and more in the context of the state our country currently finds itself in where it comes to maleficence and corruption. This question is that if one is innocent of allegations of wrongdoing, then why fight so hard to prevent participation in disciplinary proceedings which should surely be the most opportune moment in which to demonstrate such innocence. In my mind,

common sense and logic dictates that an innocent person would welcome such opportunity.

[2] However, it would seem that this common sense is absent in the public service and state owned enterprises, where employees at the highest echelons of management and responsibility often show a complete aversion to participate in disciplinary proceedings, despite always propagating complete innocence. These employees, who are highly remunerated and can thus afford it, often rush off to this Court on the back of clever lawyering, to stop such disciplinary proceedings and thus prevent having to answer the allegations of misconduct.

[3] These kind of applications clog the urgent roll in this Court virtually every week, despite often not being urgent, because the case relied on by applicants to establish urgency is regularly self-created. Further, these kind of applications are regularly brought virtually a day or two before disciplinary proceedings are set to commence, with the deliberate design to derail such proceedings.

[4] Disciplinary proceedings are an integral part of the process of fair dealing with employees that are accused of misconduct, and constitute the second part of the dual requirement of substantive and procedural fairness under the Labour Relations Act ('LRA').[1] In *Chirwa v Transnet Ltd and Others*[2], the Court said:

> 'The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. ...'

[5] Because of this deliberate design, this disciplinary process must as a matter of general principle be allowed to run its course. It should only be interfered with if exceptional circumstances exist. In *Booysen v Minister of Safety and Security and Others*[3], it was held that:

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[1] Act 66 of 1995 (as amended).
[2] (2008) 29 ILJ 73 (CC) at para 42.
[3] (2011) 32 ILJ 112 (LAC) at para 54. See also *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46.

> '.... the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. ...'

[6] In thus follows that the very first step in an application such as this is to demonstrate the existence of exceptional circumstances. If there are no such exceptional circumstances, then this Court should decline to step in before the process is completed.[4] As to what exceptional circumstances may be, there are of course no specific hard and fast rules. In *Booysen supra* the Court said:[5]

> '... 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. ...'

The simple point is that this Court will only entertain applications to intervene in uncompleted disciplinary proceedings in truly exceptional circumstances and if material irremediable prejudice or injustice is shown to exist.[6]

[7] The above being said, I turn to the matter at hand. In the notice of motion, the applicant asks that the matter be considered as one of urgency. The applicant has divided the substantive relief she seeks into two parts. In part B, she prays for an order reviewing and setting aside the decision of the disciplinary hearing chairperson, the second respondent, in which the second respondent rejected objections *in limine* raised by the applicant to the continuation of the disciplinary hearing against her. In part A, the applicant then seeks what she calls an '*interim order*' to interdict the first respondent from continuing with the conducting of the disciplinary hearing against her, until the review application in Part B has been decided.

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[4] See *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 38; *Gallocher v Social Housing Regulatory Authority and Another* (2019) 40 ILJ 2732 (LC) at para 4.
[5] See fn 3 *supra*.
[6] *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 *ILJ* 112 (LC) at para 17; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 12; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 17

[8] All considered, what the applicant wants in this case is not interim relief, but final relief. The division of the relief sought into two parts is an artificial creation, designed to obtain final relief under the guise of interim relief. The reason for this is that the requirements for obtaining interim relief is far less stringent that when seeking final relief. In *Zondo and Another v Uthukela District Municipality and Another*[7], the Court dealt with a situation very similar to the application *in casu*, where the applicants also sought to label the relief sought as interim relief pending a review application, and said:

> '... The applicants have couched the relief sought as an interim order. However, and to simply call the relief sought an interim order in the notice of motion does not make it so. To just attach a particular label to substantive relief sought in a notice of motion cannot change the true nature of what it is that is being applied for. There is of course good reason why applicants would want to have an application determined on the basis of seeking interim relief, being that the more stringent requirements the applicants would have to prove have been met, when final relief is sought, is avoided. Therefore it is always important to establish from the outset what the nature of the relief being sought by applicants actually is. ...'

[9] In this case, part A of the application is inextricably linked to part B thereof. In other words, relief under part A will last until part B is decided. Because part B is a review application, there is simply no reason or basis why it could and should not be dealt with in the ordinary course in full compliance with provisions of Rule 7A of the Labour Court Rules.[8] In any event, the review application cannot be decided without the record of the proceedings before the second respondent, which will be discovered and filed in the ordinary course.[9] It is also well known that it ordinarily takes in excess of a year for a review application to be heard in the normal course in the Labour Court. Practically speaking

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[7] (2015) 36 ILJ 502 (LC) at para 2. See also *Mashiya v Sirkhot NO and Others* (2012) 33 *ILJ* 420 (LC) para 19

[8] See *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others* (2009) 30 *ILJ* 2513 (LC) at para 3 where the Court said: *'...In criminal and civil proceedings, intervention by way of interdict in uncompleted proceedings is exceptional — the exercise of this power has been held to be confined to those rare cases where a grave injustice might otherwise result or where justice might not by other means be attained. In general the court will hesitate to intervene, having regard to the effect on the continuity of the proceedings in the court below and to the fact that redress review or appeal will ordinarily be available ...'.*

[9] *Uthukela District Municipality* (*supra*) at para 3.

therefore, the relief sought by the applicant under part A is indefinite. In *Uthukela District Municipality supra*[10] the Court held as follows:

> '... what the applicants were actually seeking is that the disciplinary proceedings against the applicants be interdicted from in any way proceeding until the applicants' review application in respect of the legal representation ruling has been finally determined. This is clearly not interim relief, but final relief. 1 In effect, the disciplinary proceedings would be permanently stayed until the event of the outcome of the legal representation review application. As matters stand, this is indefinitely.'

[10] Therefore, and because the applicant is seeking final relief, the applicant must satisfy three essential requirements, being: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[11] Also, and because the applicant is seeking such final relief in motion proceedings, any factual disputes between the parties must be determined on the basis of the principles set out in the judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[12] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[13] these principles were aptly summarized as thus:

> '... it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is

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[10] Id at para 4.
[11] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) at para 2; *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (2013) 34 ILJ 3314 (LC) at para 7.
[12] 1984 (3) SA 623 (A) at 634E-635C; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38; *Uthukela District Municipality* (*supra*) at para 5; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 26.
[13] 2009 (3) SA 187 (W) at para 19.

justified in rejecting that version on the basis that it obviously stands to be rejected.'

[11] This matter came before me for argument 26 November 2019, and was opposed by the first respondent. According to the first respondent, the matter was not urgent, and there was no basis to intervene in the disciplinary proceedings on the basis of what was final relief, before the conclusion thereof. The thrust of the first respondent's case was there were simply no exceptional circumstances justifying intervention at this stage. After hearing argument by both parties, and on 26 November 2019, I granted the following order:

'1. The applicant's application is dismissed with costs.

2. Written reasons for this order will be handed down on 3 December 2019.'

[12] This judgment now constitutes the written reasons referred to in paragraph 2 of my order, *supra*. I will do so by first setting out the relevant background facts, followed by dealing with the issue of urgency, and the requirements for final relief as sought by the applicant.

The relevant background

[13] The relevant background facts relevant to deciding the issues forming the subject matter of this judgment are in essence undisputed. For ease of reference I will refer to the first respondent as 'Metrobus'.

[14] The applicant is employed by Metrobus as the 'legal counsel' (legal advisor) and company secretary. Metrobus is a juristic person and municipal entity under the sole control of the City of Johannesburg. In essence, Metrobus is a state owned enterprise established in terms of the provisions of the Local Government: Municipal Systems Act ('the Systems Act').[14] Being a state owned enterprise (in the context of a municipality), Metrobus is subject to the provisions of the Municipal Finance Management Act ('MFMA').[15]

[14] Act 32 of 2000.
[15] Act 56 of 2003.

[15] The applicant was employed in terms of a written fixed term contract of employment ending 30 November 2020, and was employed in the legal department of Metrobus. She commenced employment effective 7 December 2015. The provisions of section 57 of the Systems Act was made applicable to the applicant's contract of employment, which means she was considered a senior manager.[16] Clause 14.1 of her employment contract provides that '*The Employee is bound by the Employer's disciplinary code and procedures and other relevant legislation shall be applicable.*'

[16] Of relevance to this application, the applicant served as a member of the Bid Adjudication Committee ('BAC') of Metrobus. The BAC is tasked to evaluate bids made by prospective service providers to Metrobus, and then make recommendations to the managing director (MD) of Metrobus for approval thereof. The MD is the accounting officer of Metrobus as contemplated by the MFMA.

[17] The applicant was first served with a notice to attend a disciplinary hearing on 12 August 2019. The disciplinary hearing was scheduled to commence on 22 August 2019. The applicant faced two charges. The first charge related to alleged misconduct in her capacity as a member of the BAC. The charge had four components, being an alleged contravention of section 105(1)(c) of MFMA which deals with the duties of an official fulfilling financial management responsibilities to ensure against irregular expenditure, fruitless and wasteful expenditure and other losses. The second component concerned a contravention of Regulation 4(4) of the Preferential Procurement Policy Framework Act which requires that no tender shall be regarded as an acceptable tender if it does not achieve the minimum qualifying score. The third component is a contravention of paragraph 2 of the Code of Conduct. Finally, it was alleged that the applicant violated her duties under clause 18.1.4 of her contract of employment.

[18] The second charge related to an allegation that the applicant's actions led to an irregular awarding of a tender in which the successful bidder did not meet

[16] Section 57 of the Systems Act requires a written contract of employment and the conclusion of a performance agreement.

the approved bid specifications. It was contended that the applicant acted in breach of Municipal Regulations on the Financial Misconduct Proceedings and Criminal Proceedings read with sections 171(3) and 172(2) of the MFMA.

[19] The chairperson of the disciplinary hearing was the second respondent, who was an independent counsel practising in Johannesburg, whilst the third respondent was the evidence leader (initiator) employed by an independent firm of attorneys.

[20] The aforesaid charges arose from Bid number TECH 04/2015 which related to the storage and supply of diesel fuel to Metrobus. There were various allegations of irregularities relating to this tender, which included that it was awarded to a bidder that did not qualify. It was contended that the applicant failed in her duties as member of the BAC where it came to this tender.

[21] The applicant then consulted her current attorneys of record, and in particular Bertus Maritz ('Maritz'). Counsel's opinion was also obtained, and a letter was sent by Maritz to the third respondent on 21 August 2019, in which it is contended that the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings ('the Financial Regulations')[17] applied to the misconduct allegations the applicant. The applicant asked for discovery of all the documents relating to the application of the Financial Regulations to the misconduct allegations against the applicant. In particular, it was said that:

> 'We are of the opinion that if the abovementioned procedures were not followed, the constitution of the disciplinary process and the disciplinary chairperson/committee are unlawful and the disciplinary process ought therefor to be terminated with immediate effect …'

It was also threatened that if the disciplinary proceedings were not terminated, an urgent application would be brought to the Labour Court to interdict the proceedings.

[22] In response to receiving this letter, the third respondent contacted Maritz and indicated that the disciplinary hearing scheduled for 22 August 2019 would be

[17] GN403 in GG No 37699 of 30 May 2014.

postponed to 30 August 2019 so that the charge sheet could be amended. The applicant was however required to attend at the disciplinary hearing on 22 August 2019 to attend to the formalities of the postponement, and so that she could be presented with the amended charge sheet. In the interim, the third respondent and Maritz had agreed that the disciplinary hearing would not take place on 30 August 2019, but would be reconvened on 16 and 17 September 2019.

[23] The applicant was then presented with the amended charge sheet on 22 August 2019. The first charge remained unchanged. The second charge was amended to specifically remove the reference to and the reliance upon any breach of Financial Regulations read with sections 171(3) and 172(2) of the MFMA. The first charge was not amended because it did not relate to financial misconduct.

[24] In her founding affidavit, the applicant says that it was clear to her upon being presented with the amended charge sheet that despite the aforesaid amendment, the misconduct allegations against her still resorted under the ambit of the Financial Regulations, that these regulations had still not been complied with, and Metrobus was simply trying to 'side step' these regulations. This belief was 'confirmed' in a consultation between the applicant and counsel on 29 August 2019.

[25] On 30 August 2019, Maritz sent another letter to the third respondent. In this letter, much of what was said in the letter of 21 August 2019 was repeated. It was again specifically contended that the provisions of the Financial Regulations were applicable and were not complied with. It was further demanded that the first respondent supply, by an imposed deadline of 4 September 2019, the documentary proof of compliance with the Financial Regulations. In this letter, the applicant required of Metrobus to postpone the disciplinary hearing to give the applicant an opportunity to bring an application in the normal course to determine the issue of whether the Financial Regulations indeed applied. It was stated that if Metrobus did not adhere to this 'reasonable request', an urgent application would be brought. The applicant also requested further documents as part of a request for further particulars to the misconduct charges. Of importance, the letter concludes as follows:

> 'Further note that should your client refuse to allow our client her right to approach the Labour Court in order to obtain a declaratory order regarding our concern raised above we will approach the Presiding Officer on 16 September 2019 with the same request and should she not concur with our concern and allow us to approach the Labour Court, we will request the Presiding Officer to let the proceedings stand down until such time that we have filed an urgent application at the Labour Court ...'

[26] The third respondent answered on 4 September 2019. In this answer, the third respondent makes a number of pertinent points on behalf of Metrobus. The first is that insofar as the applicant consistently threatened urgent applications, any issue of urgency has long since dissipated and that any urgency going forward was self-created. It was said that the Financial Regulations did not apply in this case, as it is up to the employer to decide on what basis to bring charges against an employee. The third respondent pointed out that the dates of 16 and 17 September 2019 had been agreed to with Maritz and the disciplinary hearing was to proceed on those dates.

[27] The applicant did not proceed with the threatened Labour Court application. Instead, the applicant attended at the disciplinary hearing on 17 September 2019 and raised a number of points *in limine*. The first point was that the disciplinary hearing was not lawfully convened, in that the requisite authority to appoint the chairperson and the evidence leader did not exist. The parties exchanged written submissions on this point. The second respondent, as chairperson, considered this point and in a ruling dated 15 October 2019 dismissed the same.

[28] The second point *in limine* relating to the applicability of the Financial Regulations was then also ventilated by way of an exchange of written representations between the parties on 18 and 23 October 2019, respectively. In a ruling handed down on 31 October 2019, the second respondent also dismissed this point *in limine*.

[29] On 1 November 2019, Maritz writes to the third respondent, indicating that the ruling of the second respondent was noted, and that the applicant would now

bring an urgent Labour Court application, with papers expected to be filed by no later than 8 November 2019.

[30] The third respondent answered on 5 November 2019. It was stated that Metrobus had never waived its rights and that this threatened application had to have been brought far earlier, and the dates of 21 and 30 August was mentioned in this regard. According to the third respondent, it was also indicated in the disciplinary hearing on 17 September 2019 that the disciplinary enquiry on the merits should proceed without delay. With the points *in limine* having been disposed of, it was indicated by the third respondent that the next hearing dates would now be arranged with the second respondent. The second respondent indicated on 7 November 2019 that the hearing would proceed on 27, 28 and 29 November 2019.

[31] On 13 November 2019, the applicant was then given formal notice of the disciplinary hearing proceeding on 27, 28 and 29 November 2019. At this point it was indicated that the applicant's counsel had been briefed on other matters in this period. In a letter on 13 November 2019, Maritz informed the third respondent that counsel was unavailable and that alternative dates would be communicated. In this letter, reference was made to an alleged agreement between the third respondent and the applicant's counsel to the effect that after the second respondent's rulings on the issues *in limine* was handed down, the parties would approach this Court on a 'semi-urgent' basis to have this matter heard, with agreed dates for exchange of affidavits and the set down of the matter. It was finally said that because the third respondent had reneged on this agreement, an urgent application would now be brought.

[32] It may be added that Metrobus, in the answering affidavit, specifically refuted the existence of any such agreement, and has invited the applicant to have regard to the recordings of the disciplinary proceedings on 17 September 2019 which established that no such agreement was concluded. The applicant failed to take up this invitation. The third respondent also insisted on 13 November 2019 that the disciplinary hearing must proceed on the merits.

[33] It finally took a further seven days for the applicant to submit the current application to Court on 19 November 2019, setting it down on 26 November 2019, the day before the disciplinary hearing was due to commence. Inexplicably, the respondents were given until 29 November 2019, after the actual hearing date, to file an answering affidavit.

Urgency

[34] As stated above, I will first consider the issue of urgency. Urgent applications are governed by Rule 8. In considering Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[18] said:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[35] Another important consideration to be applied when deciding whether a matter is urgent, is the determination of whether an applicant would not be afforded substantial redress in due course, and the duty is on the applicant to provide proper reasons in support of such a case.[19] As succinctly described by the Court in *Maqubela v SA Graduates Development Association and Others*[20]:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. ...'

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[18] (2010) 31 ILJ 112 (LC) at para 18.
[19] *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) at para 17; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6.
[20] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) at para 11.

[36] Because the applicant *in casu* is actually seeking final relief on an urgent basis, the Court must be even more circumspect when deciding whether or not urgency has been established.[21] In *Tshwaedi v Greater Louis Trichardt Transitional Council*[22] the Court said:

> '... An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ...'

[37] When considering urgency, it is not just about the interests of the applicant party. The interests of the respondent party must also be considered. In particular in this regard, it must be considered what the prejudice the respondent may suffer if the matter is urgently disposed of. In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[23] the Court held as follows:

> 'But it is not just about the applicant. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.'

[38] Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[24] As the Court said in *Northam Platinum supra*[25]:

> '... the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. ...'

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[21] *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at para 28.
[22] [2000] 4 BLLR 469 (LC) at para 11.
[23] (2016) 37 ILJ 2840 (LC) at para 26. See also *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) SA 108 (C) at 113D-114C.
[24] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50.
[25] Id at para 26. See also *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 ILJ 1692 (LC) at para 18.

[39] As touched on above, the applicant's current application is in essence aimed at seeking intervention in disciplinary proceedings that are not concluded. This consideration has a direct impact on the urgency consideration as well. The exceptional circumstances consideration has an urgency component attached to it. Seeking immediate intervention has to mean that action taken to obtain such intervention must be done as expeditiously as feasibly possible. The following *dictum* in *Mmatli and Others v Department of Infrastructure Development (Gauteng Province)*[26] is apposite:

> 'In exceptional circumstances the Labour Court may intervene on an urgent basis to interdict an unfair dismissal. Thus, there is no inherent jurisdictional obstacle to obtaining such relief. As the Labour Appeal Court observed in the *Booysen* decision there is no closed list of factors to consider, but in my view employees should not even consider seeking this extraordinary relief if the unfairness is not glaringly obvious and of a very fundamental nature which can be easily redressed. ...'

[40] I am satisfied that, after due application of the above principles to the facts of this matter, the applicant has fallen far short of making out a proper case of urgency. I am compelled to conclude that there simply exists no basis on which to urgently intervene in this matter, for the reasons set out hereunder.

[41] As a point of departure, the applicant has made out no case why the normal statutory dispute resolution processes under the LRA should in effect be bypassed. It must be considered that having regard to the true nature of the relief sought by the applicant, she in effect seeks to permanently dispose of the disciplinary proceedings against her, without even affording the prescribed dispute resolution process an opportunity to come to her aid, should the outcome of the disciplinary hearing ultimately go against her. Because of the final nature of the relief the applicant sought, she needed to make out a particular compelling case for urgent intervention, and show that it would not be possible for her to get full redress in the ordinary course. As will be set out later

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[26] (2015) 36 ILJ 464 (LC) at para 13.

in this judgment, she in fact can get full redress in the ordinary course, and there is no compelling consideration of urgency.

[42] I also consider the applicant to have unduly procrastinated in bringing the current application, to the extent of it being destructive of any urgency. Considering the basis of the applicant's challenge to the disciplinary proceedings, as set out above, it remained in essence the same throughout. This case was simply that the disciplinary proceedings were incompetent because the prescribed pre-process in the Financial Regulations had not been complied with. To put the time taken in its real perspective, the applicant first raised this complaint on 21 August 2019 and called on Metrobus to abandon the disciplinary proceedings because of this. Metrobus was in fact threatened with an urgent application if it did not do so. Metrobus refused to comply, but no application followed. On 30 August 2019, the applicant sent a similar letter to Metrobus, this time giving a deadline of 4 September 2019 to it to in effect postpone the disciplinary proceedings scheduled for 16 and 17 September 2019 *sine die* so the applicant could bring an application to declare the disciplinary proceedings unlawful in the ordinary course. Again, an urgent application was threatened in the event of non-compliance with this demand, Metrobus refused to comply and insisted that the disciplinary hearing proceed, but no urgent application followed. The applicant has provided no proper explanation as to why she did not bring the application at least shortly after 4 September 2019, when it was certainly the appropriate and opportune time to do so, based on her own demands.

[43] What happened next is however a classic case of self-created urgency. The applicant elected to attend at the disciplinary proceedings on 17 September 2019 and raise her objection as to the lawfulness of the proceedings before the second respondent. She thus made her election to participate in the proceedings, and thus cannot later use this election to establish a case of urgency when the finding of the second respondent goes against her. In short, she either relies on urgency to stop the proceedings before it gets underway, or she participates in the proceedings and then challenges any outcomes she may be dissatisfied with in the ordinary course of the LRA dispute resolution

process. To use the second respondent's ruling of 31 October 2019 as an explanation to justify a case of urgency is contrived, and thus self-created.

[44] But what puts the nail in the coffin of any case of urgency is the fact that the applicant, upon receiving the ruling on 31 October 2019, writes on 1 November 2019 and threatens an immediate urgent application. Metrobus answers on 5 November 2019 indicating there was no basis for it. It then still takes the applicant some two weeks to file the application, which period is simply not properly explained. The letters written by the applicant in this period making all kinds of statements and proposals as to urgency is yet another case of self-created urgency. Either bring the application or not, and debating it with the opponent does not explain away the undue time taken to actually bring it.

[45] Added to the above, and when the application is finally bought, the respondents are given until 29 November 2019 to file an answering affidavit, which is after the hearing date. That being said, and considering the application was set down for 26 November 2019, the day before the disciplinary hearing was due to recommence on the merits, the respondents were in effect given four working days to answer an application which, at best for the applicant, took almost three weeks to bring after the ruling of the second respondent was handed down. In this context, the Court in *Golding v HCI Managerial Services (Pty) Ltd and Others*[27] said:

> 'In support of his argument that this amounted to an abuse of court process, Mr *Pretorius* cited the case of *Gallagher v Norman's Transport Lines (Pty) Ltd*. In that case, Flemming DJP expressed the view that allowing only two working days for the delivery of answering affidavits in an urgent application was inadequate. In the case before me, the applicant took nine days to draft its founding papers and then afforded HCI less than one day to deliver answering papers. Mr *Kahanovitz* argued that the application is urgent by its very nature. The matter was heard on Friday. The disciplinary hearing is due to commence today. He says that the relief sought is in the form of a rule nisi; and that, in any event, the respondents could have asked for more time. But, had they done so,

[27] (2015) 36 ILJ 1098 (LC) at paras 23 – 24.

> it would in any event have had the desired effect for the applicant, ie to prevent the hearing from going ahead today.
>
> As Prest points out, a matter which is inherently urgent may be rendered not urgent and fall outside the provisions of the [High Court] rules where an applicant delays in bringing the application as one of urgency. A delay of nine days may not appear to be lengthy, given the deploringly slow pace at which the wheels of justice often turn; but in circumstances where the applicant knew when the disciplinary hearing was due to commence and yet gave the respondents less than one day before this application was to be heard to file answering papers, having taken nine days to draft his own lengthy founding papers, I agree with Mr *Pretorius* that the urgency is self-created.'

In my view, the same kind of considerations apply *in casu*, based on what I have summarized above.

[46] As stated above, and as part of any case of urgency, the interests of the respondents must also be considered. The disciplinary proceedings have been delayed since the end of August 2019 due to the constant preliminary objections raised by the applicant. Even worse, the applicant in effect asks that these disciplinary proceedings be delayed indefinitely until the Court at some unknown time in the future pronounces on whether the proceedings are in contravention of the Financial Regulations, whilst the application of the same is very much in issue. In this period, the applicant will remain in employment, whilst fully paid, all at the expense of the ratepayers of the City of Johannesburg, in circumstances where the financial predicaments of most municipalities are common knowledge. If there is no substance to the charges against the applicant, I simply cannot fathom why the applicant would not welcome attending at the hearing to exonerate herself. There is no case made out, nor any indication, that the applicant would not receive a fair and proper hearing, and the fact that a completely independent and experienced chairperson has been engaged to preside over the matter surely confirms an impartial and fair process. I must say that I have read the two *in limine* rulings

issued by the second respondent, which were well written and properly motivated, and indicates she knows what she is doing.

[47] In an effort to overcome her difficulties with regard to her case of urgency, the applicant has sought to rely on alleged agreement concluded with Metrobus at the hearing on 17 September 2019, to the effect that if the ruling went against the applicant, the parties would then approach the Court on a 'semi-urgent' basis with agreed time limits for the exchange of affidavits and an expedited hearing date. I have difficulty with the proposition that parties can decide for themselves what is urgent, and then in effect design their own time limits for pleadings and an expedited hearing date, so bypassing all the litigants waiting patiently in line for a hearing date. It for this Court to decide if the requirements of urgency has been satisfied. It is not for the parties to agree what may be considered urgent. Only if this Court, after exercising its discretion in line with the principles as set out above, considers the matter to be urgent, will the normal processes of this Court be allowed to be departed from, no matter what the parties may believe or have agreed to.

[48] In any event, Metrobus has throughout specifically disputed the existence of such an agreement. It has invited the applicant to listen to the hearing recordings of 17 September 2019 which confirms its version in this regard. This dispute of fact must be resolved on the basis of the principles in *Plascon Evans.* That being so, there is simply nothing palpably implausible, far-fetched or clearly untenable in the denial of the existence of this alleged agreement by the first respondent, Certainly, its past conduct in this matter in my view indicates that it is highly unlikely that it would conclude such an agreement. As said in *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another*[28]:

> 'The dispute of fact in this matter cannot be resolved on paper, even on a robust approach, as whatever nuances may nibble at the edges of either version, neither can be dismissed out of hand. Credibility is only capable of being

[28] (2017) 38 ILJ 2721 (LAC) at para 29.

addressed on paper when the assertions are palpably absurd or demonstrably false. The threshold that had to be cleared is 'wholly fanciful and untenable'. Moreover, the appetite to resolve paper contests by reference to the probabilities, though ever present, is not appropriate. …'

[49] In the end, it is now more than three months after the applicant first raised the same objections about the lawfulness of the disciplinary proceedings. The applicant is still clinging to the same issue as a basis for establishing urgency. This is the epitome of self-created urgency. The insurmountable obstacle the applicant has is that she decided to rather raise this issue in the context of the disciplinary hearing, which hearing is part of the dispute resolution process envisaged by the LRA, and she thus needs to pursue the issue to finality within the context of that same process. In that process, she can still raise the issue of the alleged unlawful disciplinary proceedings, should she be dismissed, in any challenge of this dismissal, and if she succeeds, obtain relief in the form of the complete restoration of the *status quo ante*. An example of such a situation can in fact be found in *SA Municipal Workers Union on behalf of Jacobs v City of Cape Town and Others*[29]. In that case, the issue actually concerned whether the dismissal of an employee was null and void, because the disciplinary hearing was held outside the time-limits prescribed by collective agreement. The arbitrator in this case held that he did not have the power to determine whether the dismissal was null and void based on non-compliance with the collective agreement. The Court held that this finding of the arbitrator was indeed reviewable, as the arbitrator had the power to issue a declaratory order that the employer is in breach of the collective agreement, and if that was the case the disciplinary hearing and consequent dismissal was invalid and of no force and effect.[30]

[50] In the end, one can hardly describe the situation any better than referring to the following *dictum* in *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others*[31] where it was said:

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[29] (2015) 36 ILJ 484 (LC).
[30] See paras 13 and 18 of the judgment.
[31] (2016) 37 ILJ 1704 (LC) at para 14.

> '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 ... All of this is indicative of an attempt to use this court and its processes to frustrate the workplace proceedings already underway. 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 these 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 is one of supervision over the statutory dispute-resolution bodies; 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. ...'

[51] Therefore, the applicant has failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied. This is clearly a matter of self-created urgency. Exceptional circumstances justifying urgent intervention have not been shown to exist. The Court in *February v Envirochem CC and Another*[32] accepted that urgency was not established, but the Court nonetheless proceeded to dismiss the matter. For the reasons to follow, I believe that this is a similar situation where the matter must be finally disposed of, and dismissed, and not just struck from the roll.

Clear right and alternative remedy

[52] The applicant has to show that she had a clear right to the relief sought. In this regard, she has equally fallen far short of what is required. There are a number of reasons for my findings in this regard, which will now follow.

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[32] (2013) 34 ILJ 135 (LC) at para 17. See also *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC) at para 33; *Bethape v Public Servants Association and Others* [2016] ZALCJHB 573 (9 September 2016) at para 53; *Ntombela* (*supra*) at para 37.

[53] I will firstly deal with the issue of a postponement of the disciplinary hearing. The argument presented by the applicant in this regard is that she was represented by the same counsel throughout, and that the reconvened disciplinary hearing dates for 27, 28 and 29 November 2019 was not arranged with her counsel, who was not available. This simply cannot serve as a basis for this Court to intervene and interdict the disciplinary hearing. I take note of the fact that the applicant was notified of the disciplinary hearing dates about two weeks in advance, which in my view, especially considering what happened before, constitutes sufficient prior notice to make arrangements for the representation of the applicant at the disciplinary hearing. However, this being said, there is simply no basis for this Court to usurp the functions of the second respondent as chairperson to decide on the issue of a possible postponement of the hearing because counsel is not available. Such an application must be brought before the chairperson, who is the one that must decide whether it should be granted or not. If the applicant is dissatisfied with the outcome of such an application, then the applicant is free to challenge the same on the basis of a procedural unfairness case, in the ordinary course. It is in fact, in my view, an abuse of process to run straight to this Court to interdict a disciplinary hearing on this basis when the chairperson was not even called on to decide the same.

[54] Next, I turn to the issue of the Financial Regulations. In the Financial Regulations, '*financial misconduct*' is defined as contraventions of either sections 171 or 172 of the MFMA. According to regulation 4 of the Financial Regulations, where financial misconduct on the part of a senior manager is alleged, then a specific process must be applied. In summary, this process entails the establishment of a disciplinary board to investigate the misconduct, which board is considered to be an independent advisory body that provides recommendations on how to proceed with possible disciplinary proceedings.[33] The disciplinary board is tasked with conducting what is called a preliminary investigation into the allegations of misconduct, and if it should find the allegations to have substance, make a recommendation as to whether a full

[33] See regulations 4(1) and 4(2). The constitution of the disciplinary board is also prescribed in regulations 4(3), (4) and (5).

investigation is warranted.[34] If this recommendation of a full investigation is made, it is also the disciplinary board or a team of investigators (as the case may be) that conducts the full investigation.[35] The outcome of the investigation is then compiled into a report submitted in terms of regulation 6, and pursuant to a recommendation in this report in terms of regulation 6(8) that disciplinary action be taken against the senior manager, further disciplinary proceedings then follow in terms of Local Government: Disciplinary Regulations for Senior Managers ('the Disciplinary Regulations').[36]

[55] The applicant's case is that above prescribed pre-process applicable to financial misconduct has not been followed by Metrobus, and as such, the disciplinary proceedings against her in terms of the Disciplinary Regulations was unlawful. In this regard, there is also a material dispute between the parties. The applicant thus contends that the Financial Regulations are applicable to the misconduct with which she has been charged. Metrobus disputes this, and states that it decided to discipline the applicant in terms of the Disciplinary Regulations, for misconduct that was not financial misconduct.

[56] I will accept, without deciding, that the provisions of the Financial Regulations and the Disciplinary Regulations have been incorporated into the applicant's employment contract as part thereof. I will also accept that if any of these regulations have not been complied with where the same is indeed applicable, the disciplinary proceedings could well be considered to be unlawful. As held in *Mere v Tswaing Local Municipality and Another*:[37]

> 'There is no doubt that regulation 6 of the Municipal Regulations does apply in this case. These regulations also form part of the applicant's contract of employment, by incorporation therein. If regulation 6 has not been complied with by the second respondent in effecting the suspension of the applicant, the applicant's suspension would be unlawful, and the applicant would succeed in demonstrating the existence of a clear right. In considering this question, I will only have regard to the judgments post the *McKenzie* and *Gradwell* judgments

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[34] Regulations 5(1) and (2).
[35] Regulations 5(4) and (5)
[36] GN 344 as contained in *GG* No 34213 dated 21 April 2011.
[37] (2015) 36 ILJ 3094 (LC) at para 35.

> of the SCA and LAC respectively, in that the determination of this issue following these judgments is no longer contaminated by general consideration of fairness and fair labour practices ...'

The Court in *Mere supra* was dealing with an issue of suspension under the Disciplinary Regulations, but clearly the same considerations would equally apply to any contravention of the regulations at stake in this instance.

[57] It was common cause that none of the pre-process as prescribed by the Financial Regulations were followed. So the crisp question then is a simple one. Does the Financial Regulations apply in the first place? This entails considering whether the alleged misconduct by the applicant is indeed *'financial misconduct'* as defined in the Disciplinary Regulations? Metrobus is a 'municipal entity' and as such, the provisions of section 172(2) of the MFMA are applicable. The section reads:

> 'A senior manager or other official of a municipal entity exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 106, commits an act of financial misconduct if that senior manager or official deliberately or negligently-
> (a) fails to carry out the delegated duty;
> (b) contravenes or fails to comply with a condition of the delegated power or duty;
> (c) makes an irregular or fruitless and wasteful expenditure; or
> (d) provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection (1)(d).'

Section 106 of the MFMA provides that any power or duty of the accounting officer may be delegated in writing, subject to any conditions or limitations the accounting officer may impose, and that the delegation does not divest the accounting officer of responsibility.

[58] Applying the provisions of section 172, the applicant's case that the charges against her constitutes financial misconduct collapses right out of the starting blocks, on her own version. Firstly, section 172 can only apply if there is an actual delegation of the powers of the accounting officer to the applicant. In this case, the accounting officer is the managing director (MD) of Metrobus. Some

of the functions of the MD have indeed been delegated to other persons in terms of a document called the Delegation of Authority Policy and Matrix ('the Delegation Policy') dated October 2018. Where is comes to bids by prospective service providers in respect of a contract value of more than R5 million, which was common cause was applicable, clause 3.2.8 of the Delegation Policy does not delegate the power to award such bid to the BAC, but it remains specifically with the MD. The BAC only makes recommendations to the MD. Thus, if there is no delegation in the first place, then there can be no failure to carry out the duty. And that must be the end of it insofar as an allegation of financial misconduct is concerned, for the simple reason that the applicant's duties and functions on the BAC was not the exercise of a delegated power of the accounting officer in terms of section 106 of the MFMA.

[59] The charge sheet against the applicant specifically refers to section 105(1)(c) of the MFMA, which reads: '*Each official of a municipal entity exercising financial management responsibilities must take all reasonable steps within that official's area of responsibility to ensure- … (c) that any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented …*'. This is clearly misconduct unrelated to financial misconduct as defined in the Financial Regulations. In the Disciplinary Regulations, '*misconduct means '… any of the misconduct set out in Annexure A of these Regulations/ and also includes less serious misconduct and serious misconduct as set out in Part I and II of Annexure A …*'.[38] In addition, the Disciplinary Regulations specifically distinguish between financial misconduct and ordinary misconduct (for the want of a better description) by specifically defining financial misconduct as meaning '*… any misappropriation/ mismanagement, waste, or theft of the finances of a municipality and also includes any form of financial misconduct specifically set out in section 171 of the Local Government: Municipal Finance Management Act …*'.[39] Section 171 is essentially the same as section 172, with the first being applicable to Municipalities, and the latter being applicable to Municipal Entities (such as Metrobus) Significantly, the applicant was not charged with anything as contained in this definition.

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[38] Regulation 1(g).
[39] Regulation 1(e).

[60] Therefore, and in the end, the misconduct with which the applicant was charged cannot qualify as financial misconduct as defined in the Financial Regulations. Also, and even applying the definitions in the Disciplinary Regulations, the applicant was not charged with any of the elements of financial misconduct as defined therein. However, the misconduct charges against the applicant fall squarely within what is described as serious misconduct in annexure "A" to the Disciplinary Regulations.[40] Applying the two sets of regulations as they stand, the applicant was simply not charged with financial misconduct, nor does the substance of the allegations her constitute financial misconduct. It follows that the Financial Regulations are not applicable.

[61] In any event, Metrobus contended that it is not for the applicant to say on what basis it should bring charges against the applicant. It decided not to hold the applicant financially accountable, for the want of a better description, where it came to the problematic issues with the bid referred to above. Rather, and crystalizing the two misconduct charges down to its basic premise, the misconduct is based on serious neglect by the applicant in the discharge of her duties as member of the BAC. This is the kind of misconduct that can be competently brought in terms of the Disciplinary Regulations. The current disciplinary process the applicant has been subjected to is also fully in line with the provisions of the Disciplinary Regulations.[41] Insofar as there is a factual dispute concerning the basis of the charges, that must in any event be resolved in favour of Metrobus, based on *Plason Evans*. As a result, the contentions of Metrobus have substance, and that is the basis on which the applicant is in fact being disciplined.

[62] The applicant has sought to rely upon a judgment by Molitsoane J in the Free State High Court in the matter of *Stephen Mzilozi Molala v Metsimaholo Local Municipality and Others*[42] in support of her argument that the Financial Regulations apply. In my view, this judgment does not assist the applicant. Firstly, it is distinguishable on the facts, as a reading of the judgment shows

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[40] See Part II of annexure "A" which reads: (1) fails to comply with or contravenes any Act, regulation, or legal obligation relating to the employment relationship, and (12) performs poorly or inadequately for reasons other than incapacity.
[41] See Regulations 8, 9 and 10.
[42] Unreported case no 5464 / 2018 dated 20 August 2019.

that it was undisputed that the employee concerned was charged with misconduct as contemplated by the Financial Regulations.[43] In that context, it was held by the Court that the Financial Regulations were applicable, and that non-compliance with the same rendered the disciplinary proceedings unlawful,[44] which is simply not the case *in casu*. The other concern I have with this judgment is that the learned Judge appeared to have no regard to the impact of the prescribed dispute resolution processes of the LRA, which I will deal with below. Insofar as this judgment is sought to be relied upon to the effect that provisions of the LRA should not be considered, this in my view cannot be correct.

[63] This only leaves the applicant's reliance on the provisions Companies Act[45] relating to the appointment of a company secretary. In terms of her contract of employment, the applicant was employed as company secretary and legal counsel. It was argued on her behalf that her appointment as company secretary, because it is a prescribed position required by the Companies Act, in essence immunized her from disciplinary action without a specific board resolution relating to her removal as company secretary. It is true that in terms of section 86(1) of the Companies Act, a public company or state-owned company must appoint a company secretary. Section 86(2) prescribes the requirements for a person to be appointed as company secretary, and there is no requirement that the company secretary must be employed by the company. In fact, and in section 87, a juristic person may be appointed as company secretary. The duties of a company secretary, in terms of section 88, are principally administrative and advisory.[46] Finally, and in terms of section 89(2), the company secretary may be removed from office by the board.

[64] In my view, there is no particular magic in the applicant's appointment as company secretary. It is an *ex officio* appointment under the Companies Act, which is an appointment distinct and separate from her employment. It may be added that the applicant was appointed as both the company legal adviser and

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[43] See para 27 of the judgment.
[44] Id at para 36.
[45] Act of 71 of 2008 (as amended)
[46] See section 88(2)(a) to (g).

the company secretary, in terms of her contract of employment. Her duties and responsibilities clearly extended far beyond those functions allocated to a company secretary under section 88 of the Companies Act. To describe it as simply as possible, and of specific relevance *in casu*, a company secretary does not sit on the BAC to decide on whether bids qualify and should be recommended or not. Rather it is a senior manager and legal adviser of Metrobus, the other and principal capacity of the applicant that fulfils such functions.

[65] It must also be considered that under the Companies Act, as it stands, the company secretary can simply be removed by board resolution. There is no requirement of fair dealing, *audi alteram partem*, or substantive reason, for this to be done. I am quite sure that if the board of Metrobus simply convened a meeting, resolved to remove the applicant as company secretary, and then pursuant to such resolution advised the applicant that her employment also ended as a result, she would cry foul to the greatest extent possible. I have no hesitation in accepting that in such a case, the applicant would insist that the provisions for a fair dismissal as contemplated by the LRA be first complied with. Comparable is the judgment in *SA Post Office Ltd v Mampeule*[47] where the Court held that a managing director holds two positions and acts in two different capacities in that he is a director of a company and qua director he is governed by the Companies Act but he is also an employee of the company and qua employee the relationship must fall squarely within the ambit of the LRA. Because the employment contract in that case provided for termination of employment on the basis of fair labour practices, the mere removal as a director could not automatically end the employment contract. The Court concluded as follows:[48]

> '... Thus Mampeule, like any other employee, enjoyed the right not to be unfairly dismissed or more appropriately unfairly removed. ... The right not to be unfairly dismissed is not only essential to the enjoyment of this constitutional imperative but is one of the most important manifestations thereof and further forms the

[47] (2010) 31 ILJ 2051 (LAC) at para 21(a).
[48] Id at para 21(b).

foundation upon which the relevant sections of the Act are erected and is consonant with the spirit and the letter of the Act ...'

[66] In my view, the same considerations as in *Mampeule supra* would equally apply to the applicant's position of employee, on the one part, and company secretary, on the other. It is thus far more appropriate to first deal with the applicant as an employee, and in the context of disciplinary proceedings, where misconduct is alleged. If those proceedings lead to the dismissal of the applicant, then there may well be proper cause for the board of Metrobus to convene a board meeting in order to adopt a resolution to remove her company secretary.[49] The point however is that her dismissal as employee does not remove her from the *ex officio* position of company secretary. And because the applicant has been subjected to a proper disciplinary process, the kind of concerns articulated in *Mampeule supra* would not exist.

[67] In sum therefore, the applicant has not been charged with financial misconduct, and as such, the Financial Regulations do not apply. Also, the Companies Act provisions relating to the applicant's appointment as company secretary does not assist her case. Overall considered, there is nothing unlawful in the current disciplinary proceedings conducted against the applicant.

[68] It is my view that as a matter of legal principle, the dispute resolution processes under the LRA must be applied, irrespective of whether any of the regulations may find application. The disciplinary proceedings must be allowed to run its course to conclusion. If the applicant is dismissed, then she should pursue an unfair dismissal dispute to the CCMA like all other dismissed employees. Where it comes to the applicable policy considerations in this regard, this was specifically dealt with in *Chirwa supra*[50] where the Court held:

> 'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue.

[49] In terms of Section 86(4) of the Companies Act, Metrobus will have 60 days to fill this vacancy.
[50] Id at para 41.

> Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alléges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.'

The Court was critical of the fact that an election that effectively bypasses the provisions of the LRA would relegate what the Court called the finely tuned dispute-resolution structures created by the LRA and would allow a dual system of law to 'fester'.[51]

[69] In *Gcaba v Minister for Safety and Security and Others*[52] the Court said the following, in applying the ratio in *Chirwa*:

> 'Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees. ...'

[70] Therefore, in my view, at a level of policy and principle, it should generally be accepted that the right to a fair process prior to termination of employment is firmly grounded in the LRA, and should only be dealt with by way of the provisions of the LRA. This finally also means that the enforcement of this right is subject to all the limitations and prescriptions in the LRA. This should include all those so-called peripheral issues, such as objections *in limine*, postponement applications, representation issues, and whether the disciplinary proceedings are lawful. On the basis as already elaborated on in full above, this should only be departed from in truly exceptional circumstances. The following *dictum* from the judgment in *Jiba supra*[53] is apposite:

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[51] Id at para 65.
[52] (2010) 31 *ILJ* 296 (CC) at para 59. See also *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union and Others* (2015) 36 ILJ 152 (LAC) at paras 30 and 32; *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 27.
[53] Id at para 17.

> '... 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 ...'

[71] Finally, and as touched on above, the applicant has proper alternative remedies available to her in the course of which she can obtain full redress. She can also raise the issue of whether the disciplinary proceedings against her was lawful in the context of a legality review in the ordinary course, as a possible option. Or she can raise these same issues in an unfair dismissal arbitration, because if it is found that Metrobus was not entitled to discipline her, her dismissal is without proper substantive reason, and thus must be substantively unfair. It is trite that primary remedy for a substantively unfair dismissal is fully retrospective reinstatement. Either way, it is not essential for this Court to become involved in this matter at this stage.

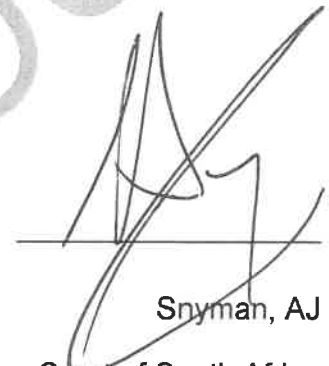
Conclusion

[72] As a result of all of the above, it is my view that the applicant has failed to demonstrate a clear right to the relief sought, and in any event has suitable alternative remedies available to her. The application thus falls to be dismissed on the basis of the absence of the requisite urgency and the applicant's failure to satisfy two of the essential requirements that need to be satisfied in order to obtain the interdictory relief she seeks. On this basis, I decided that the applicant's application be dismissed.

[73] This then only leaves the issue of costs. The applicant was legally assisted throughout these proceedings. The applicant should thus have known, from the outset, especially considering it was brought on the basis of non-existent urgency, that her application was doomed to fail. I also consider that the applicant in fact deliberately designed the current application to try and scupper the disciplinary proceedings the very day before it was to reconvene. I get the distinct impression from the applicant's conduct that she is trying to stop the disciplinary proceedings from happening, at all costs, in circumstances where

there was nothing standing in the way of her simply participating in the same. This kind of behaviour is not conducive to the fundamental requirement of the expeditious resolution of employment disputes, and should be frowned upon. And finally, the continuous failure by litigants to heed the numerous warnings by this Court where it comes to these kind of applications must now be visited with adverse consequence. In terms of the broad discretion I have with regards to costs, in terms of section 162(1) of the LRA, I believe this is a situation where a costs order against the applicant was certainly earned, and justified.

[74] It is for all the reasons set out above that I made the order that I did, as reflected in paragraph 11 of this judgment, *supra*.



Snyman, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant:	Adv C Roodt
Instructed by;	Bokwa Attorneys
On behalf of the Respondents:	Adv O Mooki SC
Instructed by:	Poswa Inc Attorneys