IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J135/22

In the matter between:

NEHAWU obo N. PHATHELA	**Applicant**
and	
OFFICE OF THE PREMIER	**First Respondent**
C.S. MATHABATHA	**Second Respondent**
M.V. SESHIBE	**Third Respondent**
REAKGONA TRAVEL SERVICES AND PROJECTS	**Fourth Respondent**
J. MOHALE	**Fifth Respondent**
E.F NEMUHUYUNI	**Sixth Respondent**

Heard: **24 February 2022**

Delivered: **05 April 2022**

(In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 05 April 2022)

JUDGMENT

PHEHANE, J

Introduction

[1] This is an opposed application brought on an urgent basis for an interim interdict restraining the first, second and third respondent from continuing with the disciplinary enquiry in which the applicant (Mr. Phathela) is to answer to allegations of misconduct, pending the adjudication of a dispute launched by the applicant at the General Public Service Sectoral Bargaining Council (GPSSBC). Mr. Phathela is employed as a Director: International Relations by the first respondent.[1] He is also a shop steward of the applicant trade union (NEHAWU).[2]

[2] Mr. Phathela's case is that the disciplinary hearing constitutes an occupational detriment as defined in the Protected Disclosure Act[3] (PDA), subsequent to him having made a protected disclosure. He accordingly seeks to restrain the first respondent from subjecting him to an occupational detriment on account of him having made a protected disclosure.

[3] At the time that this application served before me, the dispute at the GPSSBC was yet to be conciliated. Judgment was reserved, during which time, the applicant delivered a notice of set down for conciliation before the GPSSBC which records that conciliation was scheduled for 8 March 2022. The certificate of outcome of the conciliation was also delivered at Court during this time. As is evident from such certificate, the dispute referred is one as contemplated in section 186(2)(d) of the Labour Relations Act[4] (LRA).

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[1] Founding affidavit, at para. 1, p. 6.
[2] Answering affidavit, at para 14.2, p.152.
[3] Act No. 26 of 2000.
[4] Act No. 66 of 1995, as amended. Section 186(2)(d) of the LRA reads as follows:
'(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an *employee* involving –

…

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.'

Background

[4] The first respondent is the office of the Premier, Limpopo Province. The second respondent is the executing authority in the office of the Premier. The third respondent is the presiding officer in the disciplinary hearing against Mr. Phathela. The fourth respondent is a travel agent appointed by the first respondent to procure flight tickets for a trip undertaken by Mr. Phathela which is the subject matter of the disciplinary enquiry against him. The fifth respondent is the director of the fourth respondent, and the sixth respondent is employed as a director of the first respondent's supply chain management department.

[5] Mr. Phathela was charged with allegations of misconduct on 4 February 2021. The allegations are in essence, that he contravened the provisions of the Public Service Regulations[5], relating to the receipt, soliciting or acceptance of any gifts from any person in the course of his employment in return for performing or not performing his official duties. In addition, his failure to disclose interests. To briefly elaborate further, the charges stem from an internal investigation that was undertaken by the first respondent which states that Mr. Phathela flouted procurement processes by instructing the fourth and fifth respondents during July 2018, to change his economy class flight ticket to business class, in respect of an international work trip; and this, contrary to Treasury Regulations or instructions.[6] Mr. Phathela alleges that these allegations against him were made after a raid that was conducted by the Directorate for Priority Crimes Investigation Unit (Hawks) to uncover corruption that was reported by him in 2019, in respect of procurement processes between the first and fourth respondents. According to Mr. Phathela, this reporting by him was a protected disclosure.

[6] The disciplinary hearing was scheduled for 16 and 17 February 2021. Pursuant to two applications before the third respondent, the first, an

[5] GNR 877 of 29 July 2016.
[6] Answering affidavit, pp 146 to 148.

application to compel discovery of documents, and the second, an application that the third respondent recuse himself from the proceedings, both of which were dismissed, on 4 March 2021, Mr. Phathela launched an urgent application in this Court under case number J183/2021, for an order, *inter alia,* that the decision of the third respondent to proceed with the disciplinary enquiry/proceedings while the discovery of documents was not finalised, be set aside. The urgent application was dismissed by this Court. Subsequent thereto, a further application was launched by Mr. Phathela for the recusal of the third respondent from the disciplinary proceedings, which application was also dismissed.

[7] Mr. Phathela brought yet another urgent application in this Court on 24 November 2021, under case number J480/2021, against the same respondents, seeking final interdictory relief to restrain the first respondent from subjecting him to an occupational detriment and to stay the disciplinary proceedings against him. In the judgment by Tulk AJ dated 7 February 2022, this Court dismissed that application for lack of jurisdiction. In essence, Tulk AJ found that this Court lacked jurisdiction to adjudicate the application, as a dispute had not been referred to conciliation and a certificate of non-resolution of the dispute had not been issued.

[8] According to the first, second and sixth respondent (the respondents), it was in the aforesaid urgent application (in November 2021), that they became aware that Mr. Phathela had allegedly made a protected disclosure to the Hawks. The respondents dispute that Mr. Phathela made a protected disclosure and that his disciplinary enquiry is an occupational detriment as defined in the PDA.

[9] Following the judgment of Tulk AJ, on 8 February 2022, Mr. Phathela was notified of the continuation of the disciplinary hearing on 9 to 11 February 2022. Mr. Phathela referred a dispute to the GPSSBC regarding a protected disclosure on 9 February 2022. He further launched this present application on 10 February 2022. Mr. Phathela avers that he participated in the hearing under protest, having launched this application and having referred a dispute

to the GPSSBC. The disciplinary hearing was postponed and was scheduled to continue on 17, 21 and 26 February 2022.[7] According to Mr. Phathela, the continuation of the disciplinary hearing is the basis of the urgency of this application.[8] It is trite that a litigant is to make out his or her case on the founding papers. Mr. Phathela makes out no case for urgency in his founding affidavit. I deal with this below.

Legislative framework

[10] Section 186(2)(d) of the LRA defines an occupational detriment other than a dismissal in contravention of the PDA, as an unfair labour practice.[9]

[11] Section 191 of the LRA makes provision for the dispute resolution mechanism of unfair labour practice disputes. Section 191 provides as follows:

> '(1)(a) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to –
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> (i) a *council*, if the parties to the dispute fall within the registered scope of that *council*; or
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> (ii) the Commission, if no *council* has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within –
>
> (i) 30 days of the date of *dismissal* or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the *dismissal*;
>
> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the *employee* became aware of the act or occurrence.
>
> …
>
> (4) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.

[7] Replying affidavit, at para 16.5, p 172.
[8] *Ibid.*
[9] See fn. 4.

(5) If a *council* or a commissioner has certified that the *dispute* has remained unresolved, or if 30 days or any further period as agreed between the parties have expired since the *council* or the Commission received the referral and the *dispute* remained unresolved –

(a) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if –

(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct or capacity, unless paragraph (b)(iii) applies;

(ii) the *employee* has alleged that the reason for *dismissal* is that the employer made continued employment intolerable or the employer provided the *employee* with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the *employee* alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the *employee* does not know the reason for the *dismissal*; or

(iv) the *dispute* concerns an unfair labour practice; or

(b) the *employee* may refer the *dispute* to the Labour Court for adjudication if the *employee* has alleged that the reason for dismissal is –

(i) automatically unfair;

(ii) based on the employer's *operational requirements*;

(iii) the *employee's* participation in a *strike* that does not comply with the provisions of Chapter IV; or

(iv) because the *employee* refused to join, was refused membership or was expelled from a *trade union* party to a closed shop agreement.'

[12] In view of the aforegoing, it is clear that the resolution of an unfair labour practice dispute, and therefore, a dispute pertaining to an occupational detriment in contravention of the PDA, must firstly, be attempted through conciliation, and thereafter, arbitration.

[13] Section 3 of PDA provides that an employee who makes a protected disclosure may not be subjected to any occupational detriment by his or her employer on account of, or partly on account of having made a protected disclosure. Section 1 of the PDA defines an occupational detriment in relation to the working environment of an employee as being *inter alia*, subjected to any disciplinary action.[10] The objective of the PDA includes protecting an employee from being subjected to an occupational detriment on account of having made a protected disclosure and to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure.[11]

[14] Section 4 of the PDA provides as follows:

> '(1) Any *employee* who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, or anyone acting on behalf of an *employee* who is not able to act in his or her own name, may –
>
> (a) approach any court having jurisdiction, including the Labour Court…for appropriate relief; or
>
> (b) pursue any other process allowed or prescribed by any law.
>
> (1A) …
>
> (1B) If the court or tribunal, including the Labour Court is satisfied that an *employee* or *worker* has been subjected to or will be subjected to an *occupational detriment* on account of a *protected disclosure*, it may make an appropriate order that is just and equitable the circumstances, including –
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> (a) payment of compensation by the *employer* or client, as the case may be, to that *employee* or *worker*;
>
> (b) payment by the *employer* or client, as the case may be, of actual damages suffered by the *employee* or *worker*; or
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> (c) an order directing the *employer* or client, as the case may be to take steps to remedy the *occupational detriment*.

[10] Section 1 of the PDA.
[11] Section 2(1)(a) and (b) of the PDA.

(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court –

(a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such dismissal must follow the procedure set out in Chapter VIII of that Act or any other process to recover damages in a competent court; and

(b) any other *occupational detriment* in breach of section 3 is deemed to be an unfair labour practice as contemplated in section 186(2) of that Act, and the dispute about such unfair labour practice must follow the procedure set out in section 191: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

(3) Any *employee* who has made a *protected disclosure* and who reasonably believes that he or she may be adversely affected on account of having made that *disclosure*, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the *disclosure* to another post or position in the same division or another division of his or her *employer* or, where the person making the *disclosure* is employed by an *organ of state*, to another *organ of state*.

(4) The terms and conditions of employment of a person transferred in terms of subsection (3) may not, without his or her written consent, the less favourable than the terms and conditions applicable to him or her immediately before his or the transfer.' (Emphasis added).

Argument

[15] The respondents contend that the application is not urgent, as no case is made out by Mr. Phathela for urgency. Alternatively, that urgency is self-created, as Mr. Phathela alleges that he made a protected disclosure in 2019, raised for the first time in 2021, and now in 2022, some two years later, brings this application on an urgent basis with unjustified abridged timeframes and fails to take into cognizance that the first respondent is a state-owned entity. Further, the respondents contend that the disciplinary proceedings have run

over a period of a year and are close to completion, with the full participation of Mr. Phathela, having led and challenged the evidence, and him launching two urgent applications in this Court, which have been dismissed. The respondents accordingly seek that this application be dismissed with punitive costs.[12]

[16] Mr. Phathela denies that he only realised that he made a protected disclosure in November 2021. He avers that when he made a protected disclosure in 2019, he was not aware of his rights regarding such disclosure and, despite being an elected shop steward, he was not trained on the PDA. He only became aware of the available remedies in law after consulting his legal practitioner on 12 November 2021.

[17] Mr. Phathela maintains that the disciplinary hearing is an occupational detriment and as such, he is entitled to the relief that he seeks, that this Court should interdict the continuation of the disciplinary enquiry pending the finalisation of the dispute at the GPSSBC.

Analysis

[18] When this application was launched on 10 February 2022, the subsequent dates of the hearing in February 2022 were not pleaded.[13] In oral argument, Mr. Mavhunga for the applicant, mentioned that the disciplinary hearing was scheduled to continue on 25 February and 12 March 2022. This means, as at the time of the launching of this urgent application, there was no urgency – the hearing dates sought to be interdicted had come, and by the time this application was heard, they had passed. Certainly, by the time the dispute was conciliated at the GPSSBC on 8 March 2022, the hearing dates as scheduled had come and gone. Urgency is thus, stillborn.

[19] Mr. Phathela was charged in 2021, yet, he failed to invoke the remedies available to him in terms of the PDA and LRA. It was only after the judgment

[12] Answering affidavit, pp 155 to 156.
[13] See: founding affidavit at paras 61 to 66, pp 20 to 22.

by Tulk AJ, that he invoked his remedy by launching a dispute at the GPSSBC and simultaneously approaching this Court for interim relief.

[20] His explanation that he was not aware of the remedies available to him is untenable. On his own version, he is an elected shop steward of NEHAWU and had the policies and procedures available to him when he, again on his own version, made the protected disclosure. In my view, this is the classic case of self-created urgency.

[21] Urgency is not the only problem Mr. Phathela faces. There is a jurisdictional issue.

[22] I have mentioned above, that the certificate of outcome was furnished to this Court when judgment was reserved. It is clear from such certificate that the dispute concerns an unfair labour practice on account of Mr. Phathela having made a protected disclosure and being subjected to an occupational detriment as contemplated in section 186(2) of the LRA. In my view, on a reading of section 4(2)(b) of the PDA, the unresolved dispute at conciliation is to be resolved through arbitration. The parties have not advised this Court whether the dispute has been referred to arbitration as a next step, or whether it may be referred to this Court for adjudication. The applicant, it seems, referred his dispute to the GPSSBC and to this Court simultaneously. The fact remains, when this dispute was referred to this Court, it was referred prematurely and at the time it was so referred, this Court lacked jurisdiction.

[23] I debated with Mr. Mavhunga, whether the application was prematurely before this Court, as the dispute referred to conciliation was yet to be determined. In reply, he stated that section 4(2)(b) gives the applicant direct access to this Court for interim interdictory relief. I disagree. Section 4(2)(b) of the PDA specifically states that the procedure in section 191 must be followed. Section 4(2)(b) provides that an unfair labour practice dispute may be referred to this Court for adjudication – there is a qualification, and that is, before the matter may be referred to this Court, conciliation must have failed to resolve the matter. The matter remained unresolved on 8 March 2022. The fact remains, I

reiterate, that when this application was heard, the dispute had not yet been conciliated at the GPSSBC. Therefore, at the time this application was heard, this Court lacked jurisdiction.[14]

[24] Mr. Mavhunga further stated that section 191(13)(a) of the LRA makes provision for the applicant to approach this Court once conciliation fails. I disagree. Section 191(13)(a) and (b) read with section 191(5)(b) of the LRA, find no application, as these sections make provision for the referral of a dispute to this Court, following a failed conciliation, where an employee was *dismissed* for making a protected disclosure and the dismissal constitutes an automatically unfair dismissal.[15]

[25] In view of the afore-going, I find that this Court lacks jurisdiction to adjudicate this dispute, as, the Court was not clothed with jurisdiction when this matter was launched and heard. Even if I am wrong, I am of the view that the application is not urgent for the reasons as set out above. The disciplinary hearing had already taken place with the participation of Mr. Phathela, a year before this application was launched in this Court. Mr. Phathela did not refer a dispute to the GPSSBC when he, on his own version, became aware of his rights. Further, at the time of the hearing of this matter, the disciplinary hearing dates had come and gone. This makes any order restraining the disciplinary hearing obsolete.

Costs

[14] See: *Grieve v Denel* (2003) 24 ILJ 551 (LC). See also: *Feni v Pan South African Language Board* (2011) 32 ILJ 2136. These cases state that conciliation must first take place and a certificate of non-resolution of the dispute be issued, to confer jurisdiction on this Court to order interdictory relief.

[15] Section 191(13)(a) and (b) of the LRA reads as follows:

'(a) An *employee* may refer a *dispute* concerning an alleged unfair labour practice to the Labour Court adjudication if the *employee* has alleged that the *employee* has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5)(b).'

Section 191(5)(b) is quoted in para 11 of this judgment. This subsection refers to a referral of a dispute to this Court pursuant to a dismissal that is automatically unfair. Section 187(1)(h) of the LRA defines an automatically unfair dismissal as, *inter alia*, a dismissal the reason for which is a contravention of the PDA by the employer on account of an employee having made a protected disclosure.

[26] This is the fourth application (and third urgent application) by Mr. Phathela in an effort to halt the disciplinary hearing. Mr. Phathela is a senior employee and shop steward, who pleads ignorance to the remedies available to him regarding the protected disclosure, he states he made in 2019, but only sought to enforce his rights in 2021, after being advised of his rights. Yet, still, this urgent application for interim relief is launched after an unsuccessful urgent application on the same merits, for final interdictory relief. Mr. Phathela launched this application *in tandem* with the launch of his dispute at the GPSSBC. In my view, his conduct in so doing, pays lip service to the role of conciliation proceedings in attempting to resolve disputes. In November 2021, when he approached this Court for urgent final interdictory relief, he had not at that point in time, launched his dispute at the GPSSBC, although he claims he was informed of his rights then. The conduct of Mr. Phathela amounts to an abuse of Court process, as it would appear he aimed to get one foot in the door of this Court, while the other was at conciliation, in an effort to expedite the adjudication of his dispute by this Court. If such conduct is condoned, it would make a mockery of the dispute resolution mechanism and processes in the LRA. This Court expresses its displeasure with such conduct by the applicant in proceeding with this application before this Court. In the circumstances, an order as to costs is appropriate.[16]

[27] In the premises, the following order is made:

Order

1. The matter is struck off the roll for lack of urgency.
2. The applicant is to pay the costs of this application.

M. T. M. Phehane
Judge of the Labour Court of South Africa

[16] Section 162 of the LRA.

Appearances:

For the Applicant: Mr. Mavhunga
Instructed by:

For the First and Second Respondent: Adv. Sokone
Instructed by: