IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J07/2024

In the matter between:

VANGILE MASISI **Applicant**

and

AFGRI POULTRY (PTY) LTD t/a DAYBREAK FARMS **Respondent**

Heard: **4 January 2024**

Delivered: **5 January 2024**

JUDGMENT

MAKHURA, J

[1] The applicant approached this Court on an urgent basis seeking an interim order interdicting the respondent from continuing with the disciplinary process initiated on 27 December 2023 and ordering the respondent to comply with the provisions of its Disciplinary Policy. It is common cause between the parties that the disciplinary policy is incorporated into the contract of employment.

[2] The facts relevant to the application for the above relief are not in dispute. Briefly, the applicant was employed as the Chief Financial Officer of the respondent, effective from January 2022. On 6 October 2023, following discussions with Richard Manzini, the respondent's Chief Executive Officer, the applicant

tendered her 3 months' notice of resignation. Her resignation was to take effect on Saturday, 6 January 2024.

[3] From 4 December 2023, the applicant was off duty due to ill-health. She returned to work on 27 December 2023. On this day, she met the CEO. The CEO presented her with a letter setting out seven allegations of misconduct. The letter called upon the applicant to provide written representations in response to these allegations and to set out why she should not be found guilty and dismissed. The written representations were to be submitted on 2 January 2024.

[4] Some of these allegations are formulated in broad terms and relate to conduct prior the applicant's employment.[1] This prompted the applicant, through her attorneys, to transmit a letter to the respondent on 30 December 2023. In this letter, the applicant denied the allegations and argued that the disciplinary process embarked on by the respondent was unfair, unlawful and in breach of her contract of employment. She questioned a process where she was required to submit her representations to the CEO, who also acted as the initiator of the disciplinary process against her. She further complained that she was not provided with evidentiary material on which the allegations are based and that she was deprived of the opportunity to challenge the evidence presented by the respondent. She then sought clarity on whether an independent chairperson would be appointed, whether she would be afforded an opportunity to cross examine the witnesses and call her own witnesses or to be informed on how disputes of facts would be resolved in the absence of cross examination. In conclusion, the applicant requested extension to submit her written submission in the event the respondent failed to respond timeously to her letter.

[1] For example, the applicant was required to respond to the allegations that (1) she failed to adhere to Daybreak's procurement policy and acted in contravention thereof in the appointment of Blue Apple Tree for the integrated brand marketing communications proposal plan, (2) between 7 June 2021 to 7 November 2022, she authorised, effected and/or approved payment and/or permitted payments or did not prevent payment of invoices to Blue Apple Tree and (3) she failed to timeously effectively manage creditors in relation to the working capital crisis, including by failing to engage them regarding modified payment terms.

[5] On the same day, 30 December 2023, the respondent addressed a letter in response to the applicant's letter. The respondent, without addressing the issues raised in the applicant's letter, simply extended the time period from 2 to 4 January 2024 at 12h00 for the applicant to submit her written representations.

[6] On 2 January 2024, the applicant, through her newly appointed attorneys of record, addressed a letter to the respondent demanding, *inter alia* that the respondent abandons the disciplinary process initiated on 27 December 2023, failing which she would approach this court on an urgent basis. The respondent did not adhere to the demand.

[7] On 3 January 2024, the applicant filed this application and enrolled it for hearing on 4 January 2024. She argued that the respondent breached her contract of employment and sought an order that the respondent complies with the disciplinary policy. As already stated above, the disciplinary policy is incorporated into the applicant's contract of employment. In response, the respondent served a notice of intention to oppose the application on the same day, and later issued a notice of summary dismissal to the applicant. The dismissal letter or notice is signed by the CEO. It would appear that the CEO acted as the chairperson.[2]

[8] As a result, when the matter came before court on 4 January 2024, the applicant no longer enjoyed the status of an employee of the respondent. This is also raised as one of the respondent's grounds of opposition of the relief. Referring to this intervening event of summary dismissal, the respondent argues that the application is moot and academic and that the relief sought is incompetent because the conduct sought to be interdicted has already occurred.

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[2] Clause 7.4.6 of the Disciplinary Code and Procedure provides that if an employee is found guilty of the alleged misconduct, 'the chairperson must decide on an appropriate sanction'. Clause 7.4.8 provides that the 'decision to dismiss should be taken with considerable care and the chairperson must be able to justify his/her decision. The decision to dismiss is the decision of the chairperson alone.' Clause 7.4.9 provides that the chairperson should advise the employee of his por her decision in writing. [Own emphasis].

[9] The crisp question is therefore whether this application is academic and moot. The applicant's legal representative did not dispute that the relief sought in its notice of motion is moot. Having considered the arguments, I agree that since the disciplinary process sought to be interdicted has been concluded, there is no live controversy. The matter is indeed moot and academic.

[10] However, the applicant argued that she has now sought, in her supplementary affidavit, an order that '*the dismissal notice be set aside*'. She therefore argued that this court should set aside her dismissal. It is plain that the supplementary affidavit introduced a new cause of action.

[11] No order was sought to declare the dismissal notice to be in contravention of the contract of employment. In addition, the applicant did not file an amended notice of motion, nor did she move for an amendment of the notice of motion during the hearing of the matter. Therefore, the court had to determine the matter based on the relief sought in the notice of motion. Even if I am to accept that the applicant has properly introduced the new cause of action, she did not make out a case for the setting aside of the dismissal notice. I deal with this below.

[12] In support of this new relief, the applicant stated the following in her supplementary affidavit:

> 'The respondent and specifically Mr Manzini have sought to usurp the powers of this Honourable Court to enforce the Contract and its terms and have acted contemptuously in doing so.
>
> I respectfully submit that if parties are allowed to act as the respondent has, while legally represented and whether acting on legal advice or not, then the entire basis of our legal system would be irretrievably undermined.

I further submit that the Court should jealously guard their right to exercise oversight in matters such as these and not allow a delinquent employer to act as the respondent seeks to.'

[13] The applicant sought to rely on *Booysens v Minister of Safety and Security and others* (Booysens),[3] and argued that this court has the power to exercise oversight of disciplinary hearings. In *Booysens*, the Labour Appeal Court held that this Court has jurisdiction to interdict unfair conduct by the employer, including disciplinary action. However, so said the LAC, this should be limited to exceptional circumstances.[4] I do not understand the LAC to suggest that courts have unfettered and inherent powers, even where no case has been made out, to intervene in disciplinary hearings.

[14] The challenge facing the applicant is that in her case, the disciplinary process was concluded – whether the process followed was in accordance with the terms of the contract is a question that has been overtaken by the dismissal notice. Therefore, the relief sought in the notice of motion is academic and moot. Her introduction of the new cause of action in the supplementary affidavit is not substantiated. She has not pleaded the applicable terms of contract, the breach and/or legal basis for this court to set aside the dismissal notice. She has also not pleaded exceptional circumstances. Even if she had pleaded exceptional circumstances, the matter has since progressed beyond that stage and entered a different terrain. Therefore, the application falls to be dismissed because it is moot. The new case the applicant sought to introduce failed to take off and equally falls to be dismissed.

[15] Regarding costs, the applicant sought to convince this court that regardless of the outcome of her application, she should be entitled to costs. The respondent opposed this argument. It did not however seriously pursue costs. I am aware

[3] (2011) 32 ILJ 112 (LAC).
[4] Ibid para 54.

that this is a contractual dispute. I do not agree with the applicant's submission that this matter is brought partly in terms of the Labour Relations Act[5]. That this is a contractual claim is clear from the relief sought in terms of the notice of motion.

[16] The respondent argued that the applicant should have, after receipt of the dismissal notice, reflected and reconsidered her approach and should have known that the application has become moot. Whilst it may be so that the applicant perhaps should have considered withdrawing the application after she was summarily dismissed, I do not believe that the application before me was misguided.

[17] The respondent is not without fault in this matter. It waited for a period of two months, discounting the period when the applicant was off duty, before charging her and asking her to submit representations. Despite the allegations purportedly emanating from a forensic investigation report, the respondent did not provide this report to the applicant, nor did it provide a single evidentiary record to enable her to meaningfully respond thereto. The respondent's flippant approach to that disciplinary process led to the applicant, with justifiable reasons in my view, approaching this court. After approaching this court, the respondent, despite granting the applicant extension to file written submissions at 12h00 on 4 January 2024, terminated that process and dismissed her.

[18] Having considered all the factors above, I am of the view that despite success, the respondent should not be entitled to costs. Fairness dictates that no costs order should be made.

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

Order

1. The application is dismissed.

[5] No. 66 of 1995, as amended.

2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. M Lennox
Instructed by:	Schindlers Attorneys
For the Respondent:	Adv. R Itzkin
Instructed by:	Webber Wentzel