

SOUTH AFRICA / JUDGMENT

Futshane v Millard NO and Others (J1309/21) [2021] ZALCJHB 432 (3 November 2021) [2021] ZALCJHB 432

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

J1309/21

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J1309/21

In

the matter between:

ADV

PUMEZA

FUTSHANE Applicant

and

ADV

KARENSA MILLARD

N.O. First

Respondent

NATIONAL

DIRECTOR OF PUBLIC

PROSECUTIONS Second

Respondent

DIRECTOR-GENERAL

OF THE DEPARTMENT

OF

JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third

Respondent

MINISTER

OF

JUSTICE Fourth

Respondent

Heard: 26 October 2021

Delivered: 03 November 2021 (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 03 November 2021)

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicant brings this application on an urgent basis, for relief as set out in the notice of motion.[1] In summary, to interdict the first respondent (the chairperson appointed to preside over the applicant's disciplinary hearing)(the chairperson), from continuing with the disciplinary hearing in the applicant's absence, until a "pre- arbitration hearing" is held between the chairperson and the representatives of the applicant and second respondent, for the purposes of arranging new hearing dates for the pending disciplinary hearing against the applicant. She further seeks that any findings that have been made by the chairperson in the disciplinary hearing in her absence, be declared null and void and be set aside. Further, that the disciplinary hearing against her commence de novo and be held on the dates to be arranged in the "pre-arbitration" hearing. In conclusion that this Court order the chairperson to make a ruling that the investigation report of Dimo Labour Law Specialist (Pty) Ltd in respect of her conduct as a chief prosecutor in Johannesburg, be furnished to her.
- [2] In essence, the applicant seeks to enforce her right to a fair labour practice, as provided for in the Constitution[2] and in the Labour Relations Act[3] (LRA), as she alleges that this right is being violated by the conducting of the disciplinary hearing in her absence.
- [3] The application is opposed by the second respondent. Urgency is not seriously challenged, save to contend that the application is not urgent, as the applicant was aware on 8 September 2021, that the hearing would proceed on the 19, 20, 21, 22, 27 and 28 October 2021 as directed by the chairperson; thus, urgency is self-created.

Background

- [4] The relevant factual background is common cause.[4] The applicant is employed in the capacity of chief prosecutor in the Gauteng Local Division of the second respondent. The applicant was suspended from employment and charged with allegations of gross misconduct including engaging in discriminatory and racist conduct, intimidation and victimization.
- [5] The disciplinary hearing was first set down for enquiry on 16 April 2021. What ensued, was amendments to the initial charge sheet, a request for further particulars by the applicant, a failed application by the applicant for the recusal of the chairperson and postponements of the hearing.
- [6] On 8 September 2021, after the parties had failed to agree to the dates of the resumption of the hearing, the chairperson directed in writing, that the hearing would resume on 19 to 22, and 27 and 28 October 2021. The representatives of the applicant and the second respondent at the time, acknowledged the dates of the hearing as directed by the chairperson and did not express any difficulty with the hearing dates as directed by the chairperson.
- [7] On 13 October 2021, some 34 days after the chairperson had issued a directive indicating the dates upon which the hearing was to continue, the applicant dispatched a letter to the chairperson, indicating that the dates as directed by her were imposed on the applicant and that both her and her counsel were not available on the dates, that a junior counsel was briefed who was only available on 19 October 2021, and would appear to move application for the postponement of the hearing; and therefore, the applicant sought that the hearing be postponed.[5]
- [8] The application for postponement was heard on 19 October 2021. The applicant's reason for postponement as per its written submission,[6] was the failure by the second respondent to provide her with documentation and the "change of legal teams". The second respondent opposed the application for postponement.[7] The chairperson refused the application for postponement essentially, on the basis that pursuant to the amendment of the charges of misconduct (which she noted were amended thrice) and the provision of supplementary documents to the applicant on 30 September 2021, and in the absence of a request for further particulars following the last amendment, there was no valid reason to postpone the hearing; that the charges contained sufficient particularity for the applicant to know the case she is to meet and that timely notice had been given for her to prepare for the hearing. The chairperson remarked that hearings must be disposed of expeditiously, informally and fairly.

[9] The applicant and her legal representative walked out of the hearing after the application to postpone was refused, and this, after the applicant was informed that the hearing would continue in her absence. The applicant thereafter, launched this application on 21 October 2021, seeking the relief in the notice of motion.

[10] The full transcript of the proceedings of 19 October 2021 appears at annexure “MS6”. [8] It transpires from the transcript, that the applicant’s counsel made a concession that the unavailability of counsel is not a valid reason for a postponement. [9] In this application, the applicant distances herself from such concession and she persists that the unavailability of her counsel

was the reason for her requesting postponement, which the chairperson failed to take into consideration. [10]

Argument and analysis

[11] The applicant’s pleaded case is that her right to a fair labour practice as underpinned by the Constitution and LRA is being violated by the continuance of the hearing in her absence. [11]

[12] During oral argument, Mr. Mkhabela for the applicant submitted that the application is urgent, as the hearing was proceeding and was at a close.

[13] Making submissions from the Bar, Mr. Mkhabela stated that the applicant seeks to amend her relief by requesting this Court to order that the hearing commence “de novo”, by ordering that the second respondent’s witnesses be recalled to enable the applicant to cross-examine them, the applicant having had the benefit of reading the record of the transcribed proceedings. Mr. Fourie for the second respondent submitted that this would be prejudicial to the second respondent, which had closed its case at the time that this application was heard.

[14] To say the least, this revised relief by the applicant is extraordinary, it is at odds with the definition of “de novo” and in the absence of an amended notice of motion and a supplementary affidavit to support this extraordinary relief, nothing more needs to be said.

[15] In her pleadings, the applicant falls short of mentioning the sections of the Constitution and LRA upon which she relies. It may well be that these sections are trite; [12] this Court being a creature of statute, it is necessary to set out the sections upon which the applicant relies, in order to determine

the cause of action and whether this Court has jurisdiction to adjudicate the dispute.

[16] The second respondent contends that in the absence of applicant showing that there are exceptional circumstances on which this Court should assume jurisdiction and intervene in incomplete disciplinary hearings, the matter is not urgent and the court lacks jurisdiction. In addition, that the principle of subsidiarity prohibits parties from claiming direct reliance on the Bill of Rights when the right in question has been given effect to through specific legislation. [13] In that instance, that right is to be protected by way of direct reliance on the

specific subsidiary legislation, unless a party

claims that legislation does not adequately protect the underlying fundamental right, which is not alleged in casu. I agree. The applicant is prohibited from placing direct reliance on the fundamental right of fair labour practice in the Constitution.

The LRA provides her with a remedy.[14] Insofar as the LRA provides the applicant with a remedy relating to disputes regarding unfair labour practices, this Court is not a Court of first instance. The LRA is clear on the dispute resolution mechanism that is available to the applicant. This Court has, on numerous occasions, cautioned applicants from approaching it on an urgent basis, as a Court of first instance, thus frustrating the dispute resolution mechanisms in the LRA. On this basis alone, this application stands to be dismissed.

[17] Mr. Mkhabela's repeated submissions that the chairperson "misdirected" herself in refusing to allow the postponement and that this is the basis for the court's intervention, together with the applicant's pleaded case, point squarely to the lack of this Court's jurisdiction to adjudicate a dispute relating to alleged unfair procedure and unfair conduct by the second respondent "in conducting the disciplinary hearing in her absence". I deal with the applicant's election to walk out of the hearing and the consequences thereof below. First, an evaluation of this Court's jurisdiction on the applicant's case as pleaded.

Is there a jurisdictional basis for the court's interference in the incomplete hearing; if so, are there exceptional circumstances that justify its interference?

[18] In *Booyesen v Minister of Safety and Security & Others*[15] the Labour Appeal Court (LAC) held that the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary

action, but it should do so only in exceptional circumstances. In *Lieutenant Shezi v SAPS and Others*[16] (Shezi) this Court held that an applicant seeking intervention in incomplete disciplinary hearings must establish first that the application

embodies a proper cause of action on the intervention sought, and secondly, that the circumstances warranting intervention are

exceptional. The Court made it clear that it lacks jurisdiction to determine claims based on an alleged unlawful or unfair conduct

during the course of disciplinary proceedings.

[19] In *Shezi*, this Court stated the following at paragraphs [8] to [10]: -

[8] ... There is however a more fundamental objection to jurisdiction, one that the court is obliged to raise, and which relates to the nature of the relief sought by the applicant. The issue is whether the court has jurisdiction to entertain a claim for final relief applicant seeks relief on the basis of what is alleged to be unlawful on the part of the employer, without locating the claim in a cause of action justiciable by this court. (see *Phahlane v SAPS and others* J736/2020,

11 August 2020).

[9] This court is a creature of statute is inherent powers authority and standing equal to that of the division of the High Court but only in relation to matters and his jurisdiction see section 951 two of the LRA there is a misconception that the court has jurisdiction over war disputes that arise in the context of an employment relationship it does not some 20 years ago the judge president bemoaned the fact that the court did not enjoy jurisdiction over employment relations disputes and urged the legislature to remedy this shortcoming regrettably the legislation did not respond to the squalid import terms the jurisdiction of the squad remains to be determined in terms of the act as well as it was drafted in 1996.

[10] Section 157(1) provides that subject to the Constitution and s 173, and except where the LRA provides otherwise, the court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the court. What this requires is that a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this court to adjudicate the dispute. It is thus incumbent on an applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this court to entertain the claim. Jurisdiction, of course, is to be determined strictly on the basis of the applicant's pleadings; the merits of the claim are not material at this point. What is required is the determination

of the legal basis for the claim, and then an assessment with the court has jurisdiction over (see *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC) at par 155, *Gcaba v Minister of Safety and Security*

(2010) 1 SA 238 (CC) para 75).

[20] The Court went on to state the following at paragraphs [13] and [14]:

[13] Further, this court has no jurisdiction to determine the fairness of employer action where the nature of the dispute is one that requires it to be determined by arbitration. Section 157(5) provides as follows:

Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute of this Act or any employment law requires the dispute to be resolved through arbitration.

- [14] Where disputes concern the fairness of any procedure adopted by the employer in the course of disciplinary action, it will be record the section 188 of the LRA provides that an employer must prove that any dismissal was effected in accordance with a fair procedure. Any dispute about the existence or otherwise of a fair procedure must be referred to arbitration in determined in terms of section 191 by the CCMA bargaining council have jurisdiction. It follows that this court has no jurisdiction, at least not in the first instance, to make any decisions about the fairness otherwise of the procedure adopted by the employer in the course of exercising disciplinary action.’
- [21] The second respondent contends that the basis for seeking the postponement in the first place is unclear and that the applicant has failed to set out a proper basis and any exceptional circumstances for the intervention of the Court.
- [22] In *Ngobeni v PRASA Cres and Others*[17] (*Ngobeni*) this Court observed that urgent applications where it is asked to intervene in disciplinary hearings, run the risk of bypassing the statutory dispute resolution mechanisms of the LRA and this should be discouraged.
- [23] In view of the afore-going, in my view, the applicant has failed to establish jurisdictional grounds for this Court’s interference, as her cause of action as pleaded, is premised on an unfair labour practice. In addition, the applicant has failed to set out any exceptional circumstances for this Court’s interference in an incomplete disciplinary hearing. Her case runs the risk of bypassing the dispute resolution mechanisms as provided in the LRA and to echo *Ngobeni*, this is to be discouraged.

The consequence of walking out of a disciplinary hearing.

- [24] In *CEPPWAWU & Others v Metrofile Pty Ltd*[18] way the LAC stated as follows at para 55:

‘The right to a fair hearing before one’s dismissal is indeed an integral part of our law. This right is explicitly recognised by the Act and has been restated in numerous decisions of this Court. However, once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or to refuse to attend the enquiry. Should the employee refuse to attend the enquiry, such employee must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made’.

- [25] The right to fair hearing and thus a fair procedure in disciplinary hearings, is a fundamental right. This right that was extended to the applicant and a right she deprived herself of by walking out of the disciplinary hearing when postponement was refused. This is the right she seeks to enforce, albeit on her own terms, in prescribing how the hearing should commence and directing her own process. This, she seeks to do, by asking this Court to assist her in directing her own processes and procedures that suit her. There is no clearer definition of abuse of Court process and this conduct must be discouraged.

- [26] On an overview of the common cause facts, the chairperson was at pains to ensure that the applicant was afforded a fair procedure when regard is had to the postponements, rulings on the amendment of the charges and the furnishing of documents. As stated above, it is common cause that the chairperson directed that the hearing was to resume in October 2021 and that both parties took no issue with this directive[19] until, 34 days later, when the applicant requested a postponement, the basis of which was unavailability of her representatives and later, the basis of the postponement changed to the alleged failure by the second respondent not to provide her with documents. From the record of 19 October 2021, the applicant's own representative states that he was briefed on 4 October 2021, thus the version of unavailability was jettisoned during the hearing on postponement. The unavailability of counsel now resurfaces in this urgent application, as a reason for the court's interference to interfere with the chairperson's decision to refuse postponement and order a hearing de novo following a pre-hearing to discuss hearing dates.
- [27] The applicant's pleaded case does not, in my view, form a jurisdictional ground for this court's interference. The cause of action is premised on an unfair labour practice. This court lacks jurisdiction as a Court of first instance. No exceptional circumstances are pleaded for this court's interference in an incomplete hearing. On the interim interdictory relief that the applicant seeks, the applicant has deprived herself of the right to be heard and to defend her case against the allegations of misconduct and any apprehension of irreparable harm is self-invited, as she chose not to participate in the hearing after dates were communicated in early September 2021 and no objection was noted about the unavailability of her legal counsel then; the balance of convenience does not favour the applicant who chose to walk out of a hearing, unprepared, as conceded by her legal representative, despite adequate notice being provided to her; the applicant has an alternative remedy (the dispute resolution mechanism in the LRA discussed above). Therefore, the applicant fails to satisfy the requirements of the relief she seeks.[20]

Costs

- [28] The second respondent asserts that the applicant should be visited with an order as to costs for pursuing a hopeless case before this Court to intervene in an incomplete hearing on an urgent basis. Further, that the applicant's statements[21] that the chairperson and the second respondent's representative, in the hearing colluded in having the hearing postponed and that the second respondent's representative influenced the chairperson, are spurious, scandalous, reckless and defamatory of both senior counsel. In the premises, in that this Court should show its displeasure by ordering the applicant to pay costs on a punitive scale.[22]
- [29] I agree that the applicant's case is hopeless. The applicant is an advocate, who holds a senior position as a chief prosecutor. At all material times, was and is legally represented by legal practitioners in the form of the same attorney and counsel. In my view, the applicant approached this Court with the objective of frustrating and attempting to delay the hearing that was underway as she was unhappy with the decision of the chairperson to refuse

postponement. It is trite that postponement is not for the mere asking; further, in refusing postponement, in the interest of expeditious dispute resolution, the hearing dates having been communicated approximately more than a month earlier, there was nothing amiss about the hearing continuing. This much, the applicant's counsel acknowledged when he stated the following:

'MR BADELA: And I am being honest when I say, and I agree with you that one would have anticipated that it would go either way, but I did not receive any instructions to say that if it does not go our way this is what we were going to do. I was instructed to do the postponement, and therefore I could not think beyond, sometimes beyond that.'[23]

[30] It transpires from the above quoted portion of the record of the hearing on 19 October 2021, that the applicant was aware that the postponement could be granted or refused and was not prepared to proceed with the hearing when it was refused. In walking out of the hearing, the applicant is the author of her own misfortune and her remarks about the conduct of the chairperson and second respondent's representatives are spurious. It is for this reason, that I exercise my discretion to make an order as to costs against the applicant on a punitive scale.

Order

[31] In view of the afore-going, the order is as follows:

1. The application is heard as urgent in terms of Rule 8.
2. The application is dismissed.
3. The applicant is to pay the second respondent's costs on a scale as between attorney and own client, such costs to include the costs of employing two counsel.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Mr

Mkhabela

Instructed by: The

State Attorney

For the Second Respondent: Mr Fourie

Instructed by: Frans

Mashele Incorporated Max Services Offices

[1] Notice of motion, pp 2 to 3.

- [2] Act 108 of 1996.
- [3] Act 66 of 1995, as amended.
- [4] Second respondent's heads of argument, para 2 to 9.
- [5] "MS5", pp 104 to 106.
- [6] "PF1", pp 22 to 33.
- [7] The second respondents written submissions opposing postponement appear at "MS7", pp 153 to 171,
- [8] pp 107 to 152.
- [9] p120, lines 4 to 14.
- [10] Replying affidavit, para7, pp 178 to 179.
- [11] Founding affidavit, para 8, p 9.
- [12] Section 23(1) of the Constitution provides that everyone had the right to fair labour practices. Section 185(b) of the LRA provides that every employee has the right not to be subjected to an unfair labour practice.
- [13] *Solidarity v South African Police Service & Others* [2019] 2 BLLR 187 (LC) at para 18.
- [14] This remedy is found in section 185(b) of the LRA. See fn. 12 above. Section 186(2) of the LRA defines an unfair labour practice as follows: 'Unfair labour practice' means any unfair act or omission that arises between and employer and an employee involving – (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and (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'. Section 191 of the LRA makes provision for the dispute resolution mechanisms in the Commission for Conciliation, Mediation and Arbitration or bargaining council with jurisdiction, as a starting point.
- [14] This remedy is found in section 185(b) of the LRA. See fn. 12 above. Section 186(2) of the LRA defines an unfair labour practice as follows:
- 'Unfair labour practice' means any unfair act or omission that arises between and employer and an employee involving –

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
- (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- (c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and
- (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’.

Section 191 of the LRA makes provision for the dispute resolution mechanisms in the Commission for Conciliation, Mediation and Arbitration or bargaining council with jurisdiction, as a starting point.

[15] (2011) 32 ILJ 112 (LAC).

[16] Unreported case no. J8521/20, dated 15 September 2020.

[17] [2016] JOL 36588 (LC) at paras [13] and [14].

[18] (2004) 2 BLLR 103 (LAC).

[19] In paragraph 3.4 of the applicant’s heads of argument, it is stated that neither party objected about any inconvenience of the hearing dates as directed by the chairperson. In para 11 of her replying affidavit, the applicant admits the facts that gave rise to the chairperson’s directive.

[20] In *Mokoena v Merafong City Local Municipality & Another* [2020] JOL 48399 (LC), this Court, per Tlhotlholemaje, J, found, on the final relief sought by the applicant on an urgent basis to interdict the disciplinary hearing and to have the hearing commence de novo, that the applicant had failed to satisfy the requirements of a final interdict. In that case, the applicant, a senior public official, sought to enforce her right to be heard, but, the court found, she was the author of her own misfortune by not participating in the hearing at her own instance. At para [29], the Court held: ‘To reiterate, the applicant had not established the basis of the clear right she relied on. Any injury committed upon the applicant is clearly self-inflicted, as through her obtuse conduct, she steadfastly refused, avoided and obstructed the holding of a disciplinary

hearing, and thus deprived herself of the right to be heard, and an opportunity to defend herself against the allegations of misconduct preferred against her. Further as already indicated, the applicant flowing from her dismissal has alternative remedies under the provisions of section 191 of the LRA at her disposal. It therefore follows that this application ought to be dismissed.

[20] In *Mokoena v Merafong City Local Municipality & Another* [2020] JOL 48399 (LC), this Court, per Tlhotlhlalemaje, J, found, on the final relief sought by the applicant on an urgent basis to interdict the disciplinary hearing and to have the hearing commence de novo, that the applicant had failed to satisfy the requirements of a final interdict. In that case, the applicant, a senior public official, sought to enforce her right to be heard, but, the court found, she was the author of her own misfortune by not participating in the hearing at her own instance. At para [29], the Court held:

‘To reiterate, the applicant had not established the basis of the clear right she relied on. Any injury committed upon the applicant is clearly self-inflicted, as through her obtuse conduct, she steadfastly refused, avoided and obstructed the holding of a disciplinary

hearing, and thus deprived herself of the right to be heard, and an opportunity to defend herself against the allegations of misconduct preferred against her. Further as already indicated, the applicant flowing from her dismissal has alternative remedies under the provisions of section 191 of the LRA at her disposal. It therefore follows that this application ought to be dismissed.

[21] Founding affidavit, paras 11.1. to 11.3, pp 10 to 11.

[22] Ngobeni, *supra*, at para [17].

[23] “M6”, p 151, lines 15 to 25.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2021/432.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/futshane-v-millard-no-and-others-unknown-topic-alcjhb-2021>

Prepared on 23 October 2026 · Esheria