

SOUTH AFRICA / JUDGMENT

Jacobs and Others v National Commissioner of South African Police Service and Another (J194/21) [2021] ZALCJHB 263 (17 March 2021)

[2021] ZALCJHB 263

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

J194/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: J194/21

In

the matter between:

PETER
ANTHONY
JACOBS First
Applicant
MAPEREMISA
JOSEPH LEKALAKALA Second
Applicant
LEON
ALBO
LOMBARD Third
Applicant
MANOGARAN
GOPAL Fourth
Applicant
ISAAC
WALLJEE Fifth
Applicant
and
NATIONAL
COMMISSIONER OF SOUTH
AFRICAN

POLICE
SERVICE First
Respondent
NNEKE
JIM LEDWABA
N.O Second
Respondent
Heard: 10
March 2021
Delivered: This
judgment was handed down electronically by circulation to the
parties' legal representatives by email, publication
on the Labour
Court's website and released to SAFLII. The date and time for
hand-down is deemed to be 10h00 on 17 March 2021.
Summary: Urgent
application to interdict an internal disciplinary enquiry –
request for a pre-dismissal arbitration in
terms section 188A(11) of
the LRA is divest the employer of its prerogative to proceed with
internal disciplinary enquiry.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] What serves before me is an urgent application for an order interdicting the second respondent the internal disciplinary enquiry against the applicants, including the delivering verdict, pending the outcome of the disputes referred by the applicants to the Safety and Security Sectoral Bargaining Council (SSSBC) in terms of the section 188A(11) of the Labor Relations Act[1](LRA).
- [2] The first respondent, the National Commissioner of South African Police Service, Khehla John Sitole, (National Commissioner Sitole), is opposing the application and, in limine, takes issue with urgency. He contends that urgency is self-created. On the merits, National Commissioner Sitole contends that reliance on section 188A(11) procedure is an afterthought and a ploy by the applicants to stall the second respondent from issuing his verdict on the charges levelled against them when they have alternative remedies.

Factual

background

[3] The first applicant, Peter Anthony Jacobs (Divisional Commissioner Jacobs), is a Divisional Commissioner: Crime Intelligence Division in the South African Police Service (SAPS) and his role within the SAPS is governed by the National Strategic Intelligence Act 39 of 1994 and the Secret Services Act 56 of 1978. The second applicant is Maperemisa Joseph Lekalakala (Major General Lekalakala), the Acting

Chief Financial Officer in the Crime Intelligence Division of the SAPS. The third applicant is Brigadier Leon Albo Lombard (Brigadier

Lombard), the Section Head: Intelligence Plan and Monitoring in the Crime Intelligence Division in the SAPS. The fourth applicant is Colonel Manogaran Gopal (Colonel Gopal), the Section Commander: Vehicle Fleet and Asset Management in the Crime Intelligence Division in the SAPS. The fifth applicant is Colonel Isaac Walljee (Colonel Walljee), the Acting Section Head: Supply Chain Management in the Crime Intelligence Division of the SAPS.

[4] On 27 November 2020, National Commissioner Sitole was alerted by the Inspector General of Intelligence (IGI) that there were procurement

irregularities in Crime Intelligence Division of SAPS relating to the purchase of Protective Personal Equipment (PPE) using the Secret Service Account in violation various prescripts, including the Public Finance Management Act[2] (PMFA).

[5] On 30 November 2020, National Commissioner Sitole appointed Lieutenant General Vuma to conduct an internal investigation into the allegations in terms of the SAPS Discipline Regulations of 2016 (Regulations). The applicants were subsequently served with notices of intended suspensions pending the investigation pertaining to the allegation of misconduct and breach of Regulation 5(4) and were invited to make written submissions in this regard. On 10 December 2020, following receipt and consideration of the applicants' respective representations, National Commissioner Sitole suspended the applicants.

[6] Disgruntled with their precautionary suspensions, the applicants demanded that they be reinstated. National Commissioner Sitole dug his heels in and refused to honour the request. That led to the applicants approaching the High Court on urgent basis, seeking an order setting aside their suspensions but were unsuccessful. It is common cause that the applicant did not invoke section 188A(11) in those proceedings.

[7] Upon receipt of the outcome of the internal investigation, National Commissioner Sitole decided to press charges against the applicants. The Limpopo Provincial Commissioner, Nneke Jim Ledwaba (Provincial Commissioner Ledwaba) was accordingly appointed as the chairperson of the expedited disciplinary enquiry in terms of regulation 9. On 12 and 13 February 2021, the applicants were duly notified of the expedited disciplinary enquiry which was set down for 22 to 26 February 2021.

- [8] The applicants approached the SSSBC in terms of section 188A(11) of the LRA to request a pre-dismissal arbitration in terms of section 188A of the LRA due to their belief that National Commissioner Sitole's decision to institute the disciplinary enquiry against them constitutes an occupational detriment in terms of the Protected Disclosure Act[3] (PDA).
- [9] On 17 February 2021, the applicants informed National Commissioner Sitole about the section 188A(11) referral and accordingly sought the stay of the expedited disciplinary enquiry pending the outcome of the section 188A enquiry. National Commissioner Sitole advised the applicants to address this issue with Provincial Commissioner Ledwaba at the commencement of the expedited disciplinary enquiry on 22 February 2021.
- [10] The disciplinary enquiry sat on 22 and 23 February 2021. It is common cause that the applicants raised various points in limine and they contend that one of the points in limine was their objection to the jurisdiction of Provincial Commissioner Ledwaba in the light of their section 188A(11) referral to the SSSBC. However, Provincial Commissioner Ledwaba was not willing to entertain their objection as he was hell bent on dealing with the merits.
- [11] National Commissioner Sitole, on the other hand, asserts that the applicants hinted that a formal application for the stay of the disciplinary enquiry pending the section 188A(11) would be made, but failed to do so as they mainly focused on the issue of Provincial Commissioner Ledwaba's security clearance and the classified documents.
- [12] It would seem that, even though the charges levelled against the applicants were read to them on 22 February 2021, they were not afforded an opportunity to respond to the charges as the discussion on both 22 and 23 February 2021 was centred around the points in limine. The disciplinary enquiry did not proceed beyond that stage as the applicants were adamant that a determination should be made on their points in limine. Provincial Commissioner Ledwaba held a contrary view that the applicants were refusing to participate in the proceedings as delaying tactic. As a result, he adjourned the proceedings to 25 February 2021 in order to attend to the verdict.
- [13] On 24 February 2021, the applicants launched these proceedings on extremely urgent basis. The matter served before Mahosi J on 25 February 2021 and was by agreement between the parties was postponed 3 March 2021 and subsequently to 10 March 2021.

Urgency

- [14] The crux of National Commissioner Sitole's impugn is that urgency is self-created and that he was afforded unreasonable timeframes to file the opposing papers. He asserts that the applicants knew as early as 29 November 2020, when they were given an opportunity to make representations on the proposed precautionary suspensions, that the disciplinary action would follow once the internal investigation was completed. However, they did not invoke section 188A(11). Instead they unsuccessfully challenged the precautionary suspensions on unrelated grounds. As such, the section 188A(11) is only invoked as an afterthought, so he further contends.

- [15] The applicants, on the other hand, assert that nothing turns of the fact that they never challenged their suspensions as an occupational detriment in terms of PDA because they did not know at that time what would be the outcome of the internal investigation. Nonetheless, as soon as they were served with the charge sheets, they invoked section 188A(11) and duly notified National Commissioner Sitole, who in turn directed them to Provincial Commissioner Ledwaba.
- [16] Mr Ramogale, counsel for the applicants, submitted that it highly unlikely that the applicants solely concerned themselves with the other points in limine during the disciplinary enquiry but failed to address the issue of section 188A(11) with Provincial Commissioner Ledwaba when they had raise this issue with National Commissioner Sitole. He further submitted that the reason the applicants did not hastily approach the Court is because they wanted to raise the section 188A(11) issue internally with Provincial Commissioner Ledwaba. However, as soon as it became apparent to them that Provincial Commissioner Ledwaba was not prepared to entertain the section 188A(11) issue and indicated that he would proceed to issue his verdict on the charges, they approached the Court.
- [17] While the applicants concede that they approached the Court of extremely urgent basis, they contend their action was necessitated by the conduct of Provincial Commissioner Ledwaba who obviously failed to appreciate the consequence of the section 188A(11) request and, on this point, they heavily relied on this Court's decision in *Nxele v National Commissioner: Department of Correctional Services & others*.^[4] In that matter, this Court endorsed the findings in *Jako-Wutu v Ntabankulu Local Municipality & Others*,^[5] pertinently, that is it 'correct for the applicant to first raise the issue in the forum whose authority is being challenged, thereby avoiding premature recourse to the courts'.^[6]
- [18] Even in the present instance, the applicants' approach cannot be faulted on the strength of *Jako-Wutu*,^[7] as endorsed in *Nxele*^[8]. Also, I agree with applicants that nothing turns on their failure to impugn their suspension in terms of the PDA. In my view, the matter is urgent and I have dealt with it a such.

Section 188A(11) request

- [19] Even though National Commissioner Sitole opposes the application on the merits as well, his challenge is limited to the contention that the applicants invoked section 188A(11) as an afterthought and that the alleged protected disclosure only applies to Divisional Commissioner Jacobs, if at all. Yet, as submitted by his counsel, Ms Poee, National Commissioner Sitole concedes the construction of the section 188(11) as per the *Nxele*^[9] decision.
- [20] To understand the extent of application of subsection (11) of section 188A, subsection (12) thereof is instructive. It is convenient to set out both subsection (11) and (12) of section 188A:

- ‘(11) Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.
- (12) The holding of an inquiry by an arbitrator in terms of this section and the suspension of an employee on full pay pending the outcome of such an inquiry do not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000)’.
- [21] Obviously, section 188A(11) is not necessarily a scheme to challenge the alleged occupational detriment in terms of the PDA, per se. However, it is a mechanism aimed at avoiding collateral litigation where an employee claims that, the holding of a disciplinary enquiry into allegations of misconduct or suspension pending such an enquiry, offends the provisions of the PDA. Whilst the PDA protects employees who make a protected disclosure, ‘section 188A(11) aims to strike a balance between taking no action because the person allegedly guilty of misconduct is a whistle-blower in terms of PDA or allowing a disciplinary process, with the safeguard being that the disciplinary process has to be done in a manner that is entirely independent of the employer.’[10] In Nxele, this Court pertinently held that: [11]
- [31] In my view, the only proper construction to be accorded to section 188A(11) is that, where an employee or employer requires a pre-dismissal arbitration in terms of section 188A, that request it is imperious. This construction gives effect to the purpose of the legislature which is to provide a degree of protection to employees who make protected disclosures and to avoid parallel litigation, typified in the present case.
- [32] Basically, following a section 188A(11) request by the employee, the employer is enjoined to institute a pre-dismissal arbitration in terms section 188A. The internal disciplinary enquiry that would have commenced and is pending must terminate. ...’
- [22] In the present instance, Divisional Commissioner Jacobs raised his reservation about the impartiality of National Commissioner Sitole for the first time in his representation against his precautionary suspension due to the fact that he has been embroiled in investigations against senior staff members of the SAPS, including the National Commissioner. He suggested that an independent person be appointed to decide on the issues relating the disciplinary action taken against him. In these proceedings, Divisional Commissioner Jacobs, the deponent to the applicants’ founding and supplementary affidavits, gives a detail chronicle of the protected disclosures he has been making over a period of two years, the latest being 20 September 2020, a month before the applicants’ suspensions. This evidence is not disputed.

- [23] National commissioner Sitole, however, seems to suggest that, even if the said complaints constitute protected disclosures, PDA protection would only apply to the first applicant. This contention is untenable as it is evidently based on the misconstruction of scheme provided for in terms of section 188A(11). As mentioned above, subsection (12) of section 188A clearly states that the proceedings in terms of subsection (11) do not constitute an occupational detriment in terms of PDA.
- [24] By invoking section 188A(11), the applicants do not seek to avoid being disciplined because they are whistle blowers, but seek to avail themselves to the right to a process that is conducted independently from their boss, National Commissioner Sitole, who is implicated in the protected disclosures. It is also telling that on 3 March 2021, National Commissioner Sitole served the applicants with letters of transfer in breach of the Regulations and the PDA.
- [25] In my view, to the extent that the applicants, in good faith, hold a view that the instituting the disciplinary enquiry against them offends the PDA, section 188A(11) is correctly invoked. It follows that the internal disciplinary enquiry should terminate and the disciplinary action against the applicants be undertaken in terms of section 188A, a hearing already scheduled for 24 March 2020 before the SSSBC.

Relief

- [26] This Court is duly clothed with the authority to intervene since Provincial Commissioner Ledwaba is acting qua employer in chairing the applicants' disciplinary enquiry. As such, his conduct is reviewable in terms of section 158(1)(h) of the LRA on the ground of legality.[12] This constitutional principle was emphasised by the Labour Appeal Court in *Ramonetha v Department of Roads and Transport Limpopo and Another*,[13] where it was stated that:

'[21] It is now trite that inherent in our constitutional order is the principle of legality in terms of which by virtue of the rule of law public functionaries, in their exercise of public power, are required to act within the powers granted to them by law and arrive at decisions which are lawful, not arbitrary and are rationally related to the purpose for which the power was given. There can be little doubt that the MEC's decision is capable of review under s158(1)(h) on the grounds of legality.'

- [27] I am thus satisfied that the applicants have succeeded in making a case for the grant of a final interdict in that they have demonstrated a clear right in terms of section 188A(11); that Provincial Commissioner Ledwaba unlawfully infringed or threatened to infringe

that right by insisting on proceeding with the internal disciplinary enquiry and to deliver his verdict; and that they have no adequate alternative remedy since their impugn against Provincial Commissioner Ledwaba's conduct is based on legality.[14]

Conclusion

[28] In the circumstances, the disciplinary enquiry against the applicants, the conduct of Provincial Commissioner Ledwaba, including the consequent verdict, stand to be reviewed and set aside for want of legality.

Costs

[29] There is no reason why costs should not follow the result in the light of the fact that the applicants, who are individual litigants, successfully vindicated their constitutional right consequent to their unsuccessful endeavours to avoid this litigation.

[30] I, accordingly, make the following order.

Order

1. The internal disciplinary enquiry against the applicants, the conduct of the second respondent as the chairperson of the internal disciplinary enquiry and the consequent verdict against the applicants are reviewed and set aside.
2. The first and the second respondents are interdicted from proceeding or instituting any internal disciplinary enquiry against the applicants pending the finalisation the section 188A pre-dismissal arbitration before the SSSBC in terms of section 188A(11) of the LRA .
3. The first respondent shall pay the applicants' costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate T Ramogale

Instructed by: NB

Makahanya Attorneys

For the Respondent: Advocate T Pooe

Instructed by: The

State Attorney, Pretoria

[1] Act 66 of 1995, as amended.

[2] Act 1 of 1999.

[3] Act 26 of 2000.

[4]

(2018) 39 ILJ 1799 (LC).

[5]

[2016] ZALCPE 1 (16 February 2016) at para 16.

[6] Ibid.

[7] Ibid.

[8] Supra n 4.

[9] Ibid.

[10] See: Nxele supra n 4 above at para 29.

[11] Ibid at paras 31 and 32.

[12] See: Ntshangase v MEC: Finance Kwa-Zulu Natal and Another

[2009] ZASCA 123; 2010 (3) SA 201 (SCA); [2010] 2 All SA 150 (SCA);

[2009] 12 BLLR 1170 (SCA); (2009) 30 ILJ 2653 (SCA) at paras 13-17; Hendricks v Overstrand Municipality and Another

2015) 36 ILJ 163 (LAC) at para 29; National Commissioner of the South African Police and Another v Nienaber N.O. and Another

[2017] ZALCCT 17; (2017) 38 ILJ 1859 (LC); [2017] 8 BLLR 840 (LC) at paras 6 and 8.

[13]

[2018] 1 BLLR 16 (LAC); (2018) 39 ILJ 384 (LAC).

[14] Setlogelo v Setlogelo 1914 AD 221 at 227.

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