

SOUTH AFRICA / JUDGMENT

Marhule v Minister of Home Affairs and Others (J 533/2021)

[2021] ZALCJHB 63 (30 May 2021)

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COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J 533/2021

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**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case No: J 533/2021

In the matter between:

RONNEY
MARHULE
Applicant
and
MINISTER OF HOME
AFFAIRS
First Respondent

DIRECTOR GENERAL:

DEPARTMENT
OF HOME
AFFAIRS
Second Respondent
CHRIS MUDAU
N.O.
Third
Respondent

Heard:

20 May 2021

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be 30 May 2021 at 19:00

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicant approached this Court on an urgent basis seeking certain declaratory and interdictory relief. In summary, he seeks an order declaring that the parties in accordance with the provisions of clause 2.7(3)(e) of Chapter 7 of the Senior Management Service (SMS) Handbook[1], are not entitled to legal representation in an internal disciplinary hearing instituted against him. He further alleges that the third respondent as Chairperson of the disciplinary enquiry, did not enjoy any discretion to permit legal representation, and had thus acted “ultra vires” by granting the first and second respondents legal representation in the internal disciplinary hearing.

[2] In opposing the application, the second respondent, Director-General (DG) contends that the matter does not deserve the urgent attention of the Court; that the applicant had not provided exceptional circumstances for the Court’s intervention in incomplete disciplinary proceedings; that he had not satisfied the requirements of the relief that he seeks, and that in any event, the relief that he seeks is not competent.

[3] The applicant, Mr Ronny Marhule, seeks relief against the following background;

3.1 He is currently employed by the Department of Home Affairs (DHA) in the position of Chief Director: Permits. On 22 February 2021,

he was placed on precautionary suspension, following allegations of misconduct related to gross dishonesty, gross negligence and

non-compliance with the Immigration Act,[2] Regulations and Standard of Operating Procedure of the DHA.

3.2 The allegations emanate from the events related to the recommendation and approval of the application for Permanent Residence made by the now infamous and self-proclaimed Prophet Shepherd Huxley Bushiri (Bushiri) and members of his immediate family. It is further alleged that an internal investigation had revealed that since March 2016 when Bushiri’s application for Permanent Residence was received, its approval was done without proper compliance with the standard operating procedures of the DHA, and further in contravention of Immigration laws.

3.3 It is alleged that the applicant and three other officials were enablers and facilitators who made it possible for Bushiri to obtain Permanent Residence permit, flowing from which he and his family were able to remain in the Republic, and thereafter commit criminal acts. Bushiri, and his family, are now known to be alleged fraudsters and fugitives from justice.

3.4 Further allegations of non-compliance with the Immigration Act, regulations and operating standards related to the recommendation and approval of Temporary Residence and Permanent Residence Permit applications in respect of two other individuals, Mohamed Afzal Motiwala and Fatima Ebrahim.

3.5 The disciplinary proceedings commenced 23 March 2021. The DHA's representative, who is also a legal representative and its attorneys of record in these proceedings, advised the applicant that the allegations ('charges') against him were to be amended. At that stage, the applicant's representative, who is a fellow employee, had objected to the DHA being legally represented, and had in turn requested that where the DHA sought to be legally represented in the hearing, then the matter should rather be referred to a competent forum for a pre-dismissal arbitration in accordance with the provisions of section 188A of the Labour Relations Act (LRA). [3]

3.6 After an adjournment, the applicant was on 14 April 2021, served with amended allegations, a copy of an application for legal representation by DHA, and further advised that the request for a process under section 188A of the LRA was declined.

3.7 At the reconvened hearing on 22 April 2021, the DHA's representative made submissions in regards to legal representation. The Chairperson had directed the applicant through his representative to address him on the submissions made in regards to legal representation. The applicant as assisted by his representative had done so in writing on 27 April 2021, essentially opposing legal representation on behalf of the DHA.

3.8 On 3 May 2021, the Chairperson had issued his ruling permitting legal representation by the parties. His ruling is detailed and it would not be necessary to repeat the contents thereof other than to point out that he had acknowledged that the default position in accordance with the SMS was that parties may not be legally represented, but that the overall considerations of fairness to both parties, the nature, complexity, public interest and comparable abilities of the parties may necessitate the admission of legal representative. Since in this case the allegations of misconduct were serious and involved complex legal issues which required competent legal practitioners to ensure properly ventilation thereof, legal representation ought to be allowed.

[4] This Court under the provisions of Rule 8 of its Rules may dispense with the forms and manner of service provided for in the Rules of Court where urgent relief is sought. The onus however remains on the applicant to persuade the Court in his/her papers that circumstances set-out therein render the matter urgent. Of equal importance is that the applicant must also show why he/she cannot not be afforded substantial redress at a hearing in due course. Further considerations the Court ought to take into account are whether or not the urgency claimed is not self-created, and furthermore, the interests of the respondent party, and any prejudice it may suffer if the matter is disposed of on an urgent basis[4]

[5] In this case, the basis upon which the applicant seeks urgent relief is that he has demonstrated exceptional and compelling circumstances in urging the Court to intervene in incomplete disciplinary proceedings. He contends that flowing from the DHA being allowed

to be legally represented at the internal hearing, he will suffer prejudice in that he does not have the financial means to secure legal representation. He further contended that the DHA had refused to consent to the process in terms of section 188A of the LRA, which would have been of assistance to him in that had it consented, he would only be burdened with legal expenses in respect of one and final process, from which either party could approach this Court in the event of an adverse outcome, instead of being burdened twice from being legally represented at the hearing and in future at the bargaining council should the need arise.

[6] To a large extent, I agree with the submissions made on behalf of the DHA that the urgency claimed in this case is self-created, when regard is had to the timeline of events and the relief that the applicant seeks for the following reasons;

6.1 The applicant approached this Court on 17 May 2021 following the ruling of the Chairperson on 3 May 2021. However, since the commencement of the disciplinary hearing on 23 March 2021, he was aware that the DHA was legally represented, or intended to be legally represented. He was further advised at that stage that the DHA was not amenable to a process under section 188A of the LRA.

6.2 At most, and to the extent that part of the relief he seeks is that the Chairperson had no powers to even consider the application and had thus by doing so acted ultra vires, he ought to have approached the Court for urgent relief on or immediately after 14 April 2021, when he received the application for legal representation from the DHA representative, to prevent the Chairperson from even considering the application.

6.3 The explanation in regards to the events after receipt of the Chairperson's ruling on 3 May 2021 are of little assistance to the applicant, as a decision had already been made. As already indicated, part of urgent relief is to seek to prevent harm or prejudice, and an applicant in my view cannot seek to undo that harm, if any, some two weeks after the fact.

6.4 Further following an exchange of correspondence between the parties' attorneys of record, in a response sent to the applicant's attorneys of record, the DHA's attorneys had confirmed not only what was said on 23 March 2021 in respect of the request for a section 188A of the LRA process, but had also indicated that the Chairperson's ruling on legal representation stood. It was not for the Chairperson to 'withdraw' that ruling or for the DHA to simply 'abandon' that

ruling.

6.5 It follows further that in the absence of an application to review and set aside that ruling, it is not for this Court at this stage to grant any relief in respect of the decisions of the Chairperson.

6.6 Even if it can be said that the urgency claimed is not self-created, the applicant has not demonstrated why it should be concluded that he would not be afforded substantial redress at a hearing in due course. As shall be illustrated further below in this judgment, it is not for the Court to micro-manage internal disciplinary hearings, and dictate to employers how they should

conduct their own internal processes. The general scheme of the LRA and its dispute resolution mechanisms insulates employees from unfair conduct, including unfair procedures by employers, and clearly to the extent that an adverse finding may be made following the disciplinary hearing, substantial redress remains available in due course where a finding of unfairness is to be made.

- [7] In the light of the above conclusions, it ought to follow that the matter ought to be struck off from the roll on account of lack of urgency.
- [8] Even if it might be argued that the merits of this application deserves the attention of this court, it is worth repeating that this Court has consistently held that even if it enjoys jurisdiction in respect of internal disciplinary proceedings, it is not its role to micro-manage those proceedings, and that any such intervention would occur only in exceptional circumstances. A key factor in determining whether to intervene in incomplete disciplinary proceedings is ‘whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.’[5].
- [9] The reluctance on the part of the Court to willy-nilly intervene in internal disciplinary processes or to micro-manage these processes is based on the trite principle that the prerogative to discipline remains that of the employer, and any such undue interference invariably intrudes into the employer’s powers and rights to take disciplinary action. Furthermore, any such intrusions and interventions do not at all serve the principle of expeditious resolution of disputes and finalisation of internal processes at the workplace.
- [10] The basis upon which the applicant implores the Court to intervene is that this would mitigate the possibility of grave injustice as a result of the DHA’s breach of his right not to be legally represented in the inquiry in terms of clause 7.2.3(e) of the SMS handbook. He further contends that the employer does not enjoy the right to be legally represented in the internal proceedings.
- [11] At the core of the applicant’s concerns is that by allowing legal representation at the internal hearing contrary to the provisions of clause 7.2.3 of the SMS Handbook, this would unjustifiably exacerbate his legal bill when taking into account the possibility of an adverse finding that might necessitate him to approach the bargaining council should he be required to, and the financial implications thereof given his limited means.
- [12] It has already been indicated that in the absence of an application to seek a review of the Chairperson’s ruling dated 3 May 2021, it is not for this Court to grant any relief in respect of that ruling for reasons already alluded to. It is therefore not even necessary for this Court to even examine the provisions of clause 7.2.3 of the SMS Handbook, the rationale behind the Chairperson’s ruling, and any other authorities referred to on behalf of the applicant in that regard. The Chairperson of the enquiry has already ruled on the matter and that ruling stands as neither an application to review it is before the Court, nor is there any such pending application. It would therefore be the function of another forum to revisit the issue,

to the extent that any unfairness may have to be determined arising out of the outcome of the disciplinary hearing.

- [13] Even more fatal to the applicant's application is that to the extent that he seeks declaratory order in respect of the issue surrounding legal representation and the Chairperson's ruling in that regard, it has long been stated that a declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction[6].
- [14] The alternative relief sought by the applicant to the effect that this Court must direct the parties to 'consider consenting to the option provided for in section 188A of the LRA' is equally not competent for this Court to consider let alone grant. This is so in that in the absence of consent or a collective agreement, it is not for this Court to direct the parties to such an inquiry.
- [15] In the end, the applicant has not made out a case for the relief that he seeks. Other than the requirements of urgency not having been met, or the fact that it would not be competent for this Court to grant the relief that the applicant seeks in the light of the ruling of the Chairperson, the exceptional circumstances pleaded in this case are not of such a nature it can be said that the failure to intervene at this stage would lead to a grave injustice. In a nutshell, the applicant has not met the requirements of the relief he seeks, and most importantly as already stated, alternative remedies remains available to him should he at some point deem it necessary to utilise the dispute resolution mechanism provided for in the LRA.
- [16] In regards to an order of costs, even though I am of the view that this application was ill-considered and misconceived as submitted on behalf of DHA, having however had regard to the facts and circumstances of this case, I am upon a consideration of the requirements of law and fairness, disinclined to make an order of costs.

[17] Accordingly, the following order is made;

Order:

1. The applicant's urgent application is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

S.M. Shaba SC with N. Mashabela, Instructed by T. Sikhala Attorneys Incorporated

For the 1st & 2nd Respondents: P. Maserumule of Puke Maserumule Attorneys Incorporated

[1] Clause 7.2.3 (e) of Chapter 7 of the SMS Handbook provides that; ‘In a disciplinary hearing, neither the employer nor the member may be represented by a legal practitioner, unless the member is a legal practitioner. For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practise as an advocate or an attorney in South Africa.’

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[2] Act 13 of 2002

[3] Act 66 of 1995, as amended. Section 188A provides’ ‘(1) An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee.’

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[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11.

[5] See *Booyesen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC) at para 36, where it was held; ‘To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. 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.’ See also *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC); *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 17, where it was held: ‘Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. 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 ...'

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- [6] *Mantzaris v University of Durban - Westville and Others* [2000] 10 BLLR 1203 (LC) at 1212; *MEC for Education, North West Provincial Government v Gradwell* (JA58/10) [2012] ZALAC 8; [2012] 8 BLLR 747 (LAC); (2012) 33 ILJ 2033 (LAC) at para 46

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