

SOUTH AFRICA / JUDGMENT

Mashiya v Sirkhot NO and Others (J1744/11) [2011] ZALCJHB 75; [2012] 2 BLLR 183 (LC); (2012) 33 ILJ 420 (LC) (30 August 2011)

[2011] ZALCJHB 75

COURT

Labour Court Johannesburg

BEFORE

A J Steenkamp

CASE / FILE NUMBER

J1744/11

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REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO: J 1744/11

In the matter between:

NW MASHIYAApplicant

and

ADV I SIRKHOT N.O.First respondent

THE MINISTER OF

CORRECTIONAL SERVICESSecond respondent

THE NATIONAL COMMISSIONER OF

CORRECTIONAL SERVICESThird respondent

Heard: 29 August 2011

Delivered: 30 August 2011

Summary: Application to interdict disciplinary hearing – recusal of chairperson

judgment

STEENKAMP J

Introduction

This is an application to order that the chairperson of a disciplinary hearing, due to commence at 0900 today, 30 August 2011,

must recuse himself from the hearing; and interdicting the respondents from proceeding with the hearing today or on any other

date under the chairmanship of the first respondent, Adv I Sirkhot. The applicant further seeks an order that the respondents must agree to another independently appointed arbitrator from the relevant sectoral bargaining council.

The application was brought on an urgent basis and the hearing before me was concluded at 1700 on Monday 29 August 2011. At the

request of the applicant I did not give an ex tempore judgment but indicated that I would hand down judgment at 0800 the next morning, 30 August 2011. Due to the urgency of the matter and the time constraints I will provide only brief reasons for my findings.

Background

The applicant is the Area Commissioner for Leeuwkop Prison, employed by the Department of Correctional Services. The first applicant is Adv Imthiaz Sirkhot, a legal practitioner who is cited in his nominal capacity as the appointed chairperson in a disciplinary

hearing. The second and third respondents are the Minister and the National Commissioner, respectively, of Correctional Services.

The applicant has been accused of various instances of serious misconduct involving dishonesty. It is common cause that, should he be found to have committed the alleged acts, he may well be dismissed.

The applicant, as a senior employee in the public service, falls within the auspices of the Senior Management Service Handbook (SMS Handbook) and the provisions concerning discipline contained therein. In terms of clause 2.7 (3)(b) of the Handbook:

“The employer must appoint a person, from within or outside the public service, as chairperson of the disciplinary hearing.”

Adv Sirkhot, a person from outside the public service, was appointed to chair the applicant’s disciplinary hearing.

And in terms of subclause (e):

“In a disciplinary hearing, neither the employer nor the member may be represented by a legal practitioner, unless the member is a legal practitioner.”

Despite the clear wording of this clause, the applicant applied for legal representation when the disciplinary hearing was due to commence on 14 July 2011. On that day, the parties agreed that the hearing would proceed on 8, 23 and 30 August 2011. On 25 July 2011, Adv Sirkhot declined the application. I will return to that aspect later.

On 5 August 2011 the applicant brought an application to review the chairperson’s ruling on legal representation. That application was brought in the normal course and not on an expedited basis. Nevertheless, in terms of prayer 2 of that application, the applicant sought an order to halt the internal hearing.

On 8 August the applicant, represented by a union representative, sought and was granted a postponement to enable his chosen union representative to represent him at the next sitting on 23 August. Although the applicant’s counsel, Mr Ndziba, argued that the applicant’s representative also sought the chairperson to recuse himself on 8 August, no such application is clear from the transcript of the proceedings.

On 19 August, 11 days later, the applicant brought an urgent application before this Court [per Bhoola JJ] asking for the following relief:

“Declaring that there was malice and bias on the part of the first respondent in its ruling no to permit the applicant legal representation at the disciplinary hearing;

Interdicting, prohibiting and/or restraining the respondents from proceeding with the disciplinary hearing of the applicant on 23rd and 30th August 2011;

Ordering the second and third respondents to agree to an independently appointed arbitrator from the relevant sectoral bargaining council appointed by the Council in terms of the provisions of clause 2.7(5) of the SMS Disciplinary Code and Procedures (Chapter 7 of the SMS Handbook).

On the day of the hearing on 19 August, the application was removed from the roll at the applicant’s request to enable him to amend his papers. He tendered costs.

This application was launched a week later, on 26 August 2011.

Urgency

The application, comprising more than 400 pages, was delivered at 16:00 on Friday 26 August to be heard at 10:00 on Monday 29 August.

The main cause for this application is the applicant’s purported apprehension of bias on the side of the chairperson. The

applicant first attended his disciplinary hearing on 14 July 2011, a month and a half ago. He did not raise any apprehension of bias then. Mr Ndziba, for the applicant, says that is because the apprehension was only triggered by the refusal to grant legal representation on 25 July 2011. But

that is in itself more than a month ago. The reason for the delay, says Mr Ndziba, is that it is only on 19 August, when the previous urgent application was brought before Bhoola J, that he and the applicant realised from the respondents' answering affidavit in that application that the actual relief sought – ie to order Adv Sirkhot to recuse himself – was not clear and that, therefore, the applicant had to amend his papers. Yet he does not explain why it took him a week to do that, and then expected the respondents to respond to a voluminous new application over the weekend.

Even if one accepts that this application was triggered only by the ruling on 25 July, and could not have been brought in the period between 14 and 25 July, it is entirely self-created. The purported cause of action was clear from 25 July; the applicant (and his legal representatives) only have themselves to blame for couching the relief sought in the wrong terms in their first application of 19 August. And even then the delay from 25 July to 19 August is not adequately explained. The applicant says he consulted his attorneys of record on 8 August 2011 (and his counsel has been assisting him since at least the commencement of the hearing on 14 July); there is no explanation for the delay in bringing this application (and the one on 19 August) on such short notice.

Rule 8 requires that the applicant sets out in his founding affidavit the reasons for urgent relief.¹ This was not adequately done in this case. On that basis alone, the application should be dismissed or removed from the roll. I have nevertheless heard full argument on the merits and will deal with it.

Application premature?

The disciplinary hearing has commenced and some witnesses have already been called. The chairperson has ruled on legal representation (on 25 July) and on the application for his recusal (on 23 August). It would be premature for this court to order the chairperson to recuse himself where his ruling on that regard has not been taken on review and the hearing is midstream.

Prima facie right?

The applicant submits that he has a clear right to the relief sought. With regard to the recusal of the chairperson the relief

sought is final in nature, which is presumably why he doesn't rely on a prima facie right only.

The right he asserts is the right to a fair trial. He submits that, absent the relief sought, he will be denied that right as the chairperson is biased and refused to recuse himself.

In order to inquire into the question whether the applicant will be denied that right, then, the Court has to consider whether the applicant has a reasonable apprehension of bias on the part of the chairperson.

The test for recusal in judicial proceedings – and the parties are *ad idem* that the same should apply in the disciplinary hearing – is that the applicant has to show that he entertains an apprehension of bias on the part of the presiding officer; and that the apprehension is reasonable.²

The Constitutional Court recently formulated the test thus in *Bernert v ABSA Bank Ltd*³:

“The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.”

Is the applicant’s apprehension of bias on the side of Adv Sirkhot reasonable? Mr Ndziba advanced four reasons for this contention.

Firstly, he says that the refusal of legal representation was misguided; he goes so far as to say that Adv Sirkhot “lied” when he said in his ruling that the applicant did not refer in his submissions to any of the factors set out in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others*.⁴ In *Hamata*, the SCA held that there is a residual discretion to allow legal representation in internal hearings in certain circumstances. Each case would have to be considered on its own merits, including factors such as the nature of the charges, the degree of factual or legal complexity, the potential seriousness of the consequences of an adverse finding, and the fact that there may be a legally trained person presenting the case for the employer. In *casu*, Adv Sirkhot exercised his discretion and decided not to deviate from the prescripts of the SMS Handbook. The applicant, who undertook to present written submissions by 21 July 2011, did not do so. It is against that background that Adv Sirkhot said in his

ruling

that inconsistency – which the applicant’s representative argued on 14 July – was not a factor; and that the applicant did not refer to the other factors in *Hamata*. Mr Ndziba pointed out that he, representing the applicant on 14 July, did note that the charges are “dismissable offences” in terms of the SMS Handbook. But that is as far as he could take it.

It appears to me that the chairperson reasonably exercised his discretion not to deviate from the default position in the SMS

Handbook that no legal representation is allowed. It does not, reasonably, point to bias on his side.

Secondly, Mr Ndziba argues that the appointment of the chairperson was irregular. His letter of appointment was signed by one Malatsi, who had previously investigated allegations against the applicant. This issue was not raised in an application for recusal on 14 July, even though the appointment had been made long before that. In any event, there is no suggestion on the evidence before me that Malatsi had influenced Sirkhot. It appears, rather, that the Department went out of its way to appoint an independent outsider to chair the hearing – as it is empowered to do in terms of the SMS Handbook – rather than appointing a fellow employee who may be familiar with the applicant.

I can see no reason why a reasonable person would view Adv Sirkhot's acceptance of his appointment as creating a reasonable apprehension of bias.

Thirdly, Mr Ndzima referred to what is called a "fight" or an "altercation" between the applicant's union

representative and the chairperson on 23 August 2011. He referred me to the relevant passages in the record. It reflects no more than a robust debate between the chairperson and the representative. On occasion the chairperson politely asked the representative to "please proceed" – with good reason, as far as I am concerned. He pointed out that he had already made a ruling on legal representation and was, in effect, *functus officio* on that point. That is not an unreasonable stance. The verbal sparring between the two individuals, such as it was, amounted to no more than what occurs between judges and counsel in this Court on a regular basis. It evinces no reasonable indication of bias.

Fourthly, Mr Ndzima referred to the fact that the chairperson had presided over a previous hearing in which one Ms Mqobi had been found guilty of misconduct and dismissed. Mqobi had been dishonest. The applicant indicated that he wished to call her as a witness in

her own hearing. Mr Ndzima suggested that, because the chairperson had found her to have committed misconduct involving dishonesty in an unrelated hearing, he would prejudge her credibility as a witness. The chairperson responded as follows:

"As regards Adv Mqobi who yes, it is true, there was a matter at the Bargaining Council. I chaired the matter and she was dismissed. There is nothing personal between me and Adv Mqobi. If she testifies at a hearing there is no need for me to draw any adverse inference and the fact that she was dismissed, it has got nothing to do with the hearing of Mr Mashiya. If she testifies here, I have to make a decision based on the evidence that she puts before me."

There is nothing biased about that response. As Nicholson JA pointed out in *Irvin & Johnson*⁵:

"There is no rule in South Africa which lays down that a judge, in cases other than appeals from his judgment, is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case. See R v T 1953"

- (2) SA 478 (A) at 482G-483G. The court held in that case that in the case of a trained judicial officer the mere possibility of bias not based on a previous extra-judicial opinion in relation to the case he is going to try or on his hostility or relationship to or intimate

friendship with one of the parties or on an interest in the case, does not disqualify him from trying the case. In that case a

magistrate, who had convicted the female accused of contravening s 2 of Act 5 of 1927 (the Immorality Act), had thereafter refused to recuse himself from trying the case against the male accused in which the convicted female was a witness. It was held that such magistrate was not disqualified from trying the case."

In conclusion, I can see nothing unreasonable in the chairperson's refusal to recuse himself. The applicant may subjectively have formed a suspicion of bias, but it was not a reasonable apprehension. The applicant has not shown a prima facie right, much less a clear right, for the chairperson to recuse himself.

Apprehension of irreparable harm?

Mr Ndziba argues that the applicant may be found to have committed the serious and dishonest misconduct that the Department alleges; if so, he may be dismissed; and if he is dismissed, he will have to vacate the house he occupies on the Leeuwkop premises.

Not all employees have the benefit of housing provided by their employer (or the state), but all employees run the risk of being

dismissed if they are found to have committed serious misconduct. That harm is not irreparable. If the dismissal was not for a fair reason or in accordance with a fair procedure, they can claim unfair dismissal at the CCMA or the relevant bargaining council. The same goes for the applicant.

As this Court has pointed out in Jiba⁶:

"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 under s 145."

I agree. The applicant has not shown any apprehension of irreparable harm. Even if his worst fears prove to be correct, he has other remedies available to him.

Balance of convenience

The disciplinary hearing is already underway. It is in the interests of expeditious dispute resolution that it is brought to finality. Adv Sirkhot has already heard the matter on 14 July, 8 August and 23 August, and has been retained to continue today, 30 August. The balance of convenience favours the respondents.

Alternative remedy

As I have pointed out above with reference to Jiba, the applicant has an alternative remedy available to him, should it prove necessary at the conclusion of the disciplinary hearing.

The Labour Appeal Court has pointed out in *Booyesen v Minister of Safety and Security*⁷ that it is only in exceptional circumstances that this Court will interdict any unfair conduct including disciplinary action. In this case, the applicant has not shown any unfair conduct on the part of the respondents; nor are there exceptional circumstances present.

Conclusion

The application is not urgent; but even if it were, the applicant has not made out a case for the relief sought.

Costs

Both parties asked for costs to follow the result. In law and fairness, I can see no reason not to heed that request.

Order

The application is dismissed with costs, including the costs of counsel.

A J Steenkamp

Judge

APPEARANCES

APPLICANT: Adv M Ndziba

Instructed by Grosskopf attorneys.

RESPONDENTS: Adv LD Halam

Instructed by the State Attorney.

1Jiba v Minister: Dept of Justice & Constitutional Development & Others (2010) 31 ILJ 112 (LC) para [18].

2SACCAWU 7 others v Irvin & Johnson Ltd (2000) 21 ILJ 330 (LAC) para [25].

3 [2011] 4 BLLR 329 (CC) para [29].

4(2002) 23 ILJ 1531 (SCA).

5Supra para [26] at 337 A-C

6Supra para [17].

7 [2011] 1 BLLR 83 (LAC) para [54]

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Prepared on 12 October 2026 · Esheria