

SOUTH AFRICA / JUDGMENT

National Union of Mineworkers v Petra Diamonds t/a Cullinan Diamond Mine (Pty) Ltd (J1607/17) [2017] ZALCJHB 304 (25 August 2017)

[2017] ZALCJHB 304

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J1607/17

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: J 1607/17

NATIONAL

UNION OF MINEWORKERS

Applicant

and

PETRA

DIAMONDS t/a CULLINAN DIAMOND MINE (PTY) LTD

Respondent

Heard:

2 August
2017

Delivered:

25 August 2017

Summary:

Application to stay disciplinary hearing and to allow an employee to be represented by a union official. Applicant has no clear right to relief sought and has alternative remedies available.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant (also referred to as NUM) approached this Court on an urgent basis to stay the disciplinary proceedings of Ms Maria Mhlanga (Mhlanga) scheduled for 17 July 2017. The Applicant further seeks a number of other orders which I will fully deal with infra.
- [2] The matter was initially enrolled for hearing on 18 July 2017 and was postponed for hearing on 2 August 2017. The application is opposed and the parties have filed their founding, opposing and replying affidavits.

Background

- [3] Mhlanga is employed by the Respondent as a training instructor and since 2015 she is an elected union representative.

- [4] On 24 January 2017 the Respondent suspended Mhlanga pending an investigation into allegations of serious misconduct. A disciplinary

hearing was scheduled for Mhlanga on 5 July 2017 on which date the Applicant's Mr Bongi Zwane (Zwane) represented Mhlanga. The Respondent objected to Zwane as representative and after hearing submissions on the issue, Mr Clark (Clark) the presiding officer,

ruled that external representation is not allowed as per the Respondent's disciplinary code and procedure and Mr Zwane was

not allowed to represent Mhlanga. Mhlanga has the right to be represented by either a fellow employee or a union representative

from within the company and Zwane is not employed by the Respondent.

- [5] The disciplinary hearing was rescheduled to 17 July 2017, which triggered this urgent application.

The relief sought

- [6] Apart from seeking an order to stay Mhlanga's disciplinary proceedings scheduled for 17 July 2017, the Applicant seeks an order directing that the Respondent be interdicted and restrained from:

1. Barring representation at the disciplinary hearing of Maria Mhlanga by the Applicant's official or office bearer as the Applicant may assign;
2. Interdicting Mr Clark from presiding on Maria Mhlanga disciplinary hearing;

3. Interdicting Respondent's personnel from interfering and influencing whoever presiding person that Respondent may appoint thereafter.
- [7] The Applicant further seeks an order for the Respondent not to control and issue instructions to Mhlanga whilst she is suspended and for the Respondent to comply with the rules of natural justice and fairness and the applicable provisions of the law and the Constitution.

The Applicant's case

- [8] The Applicant's case is that Mhlanga is an elected union representative and after she was charged with misconduct a disciplinary hearing was scheduled for 5 July 2017. Zwane was assigned to represent Mhlanga and at the commencement of the disciplinary hearing the Respondent's employee relations officer, Ms Molate (Molate) objected to Zwane representing Mhlanga on the basis that the Respondent's disciplinary policy (the policy) does not permit representation by a third party. The Applicant's case is that it is not a third party.
- [9] Zwane submitted that Mhlanga was entitled to representation by an official or office bearer, whilst Molate maintained that in terms of the Respondent's policy, officials of the NUM were not allowed as representatives in internal disciplinary hearings.

The Respondent's case

- [10] The Respondent's case is that Mhlanga was invited to a suspension discussion on 24 January 2017, after which she was suspended. During the period 24 January to June 2017 Mhlanga's disciplinary hearing did not commence for a number of reasons inter alia the fact that Mhlanga was booked off sick or hospitalised and the Respondent's main witness or chairperson was unavailable on specific occasions. During the said period Mhlanga was represented by a full time shop steward.
- [11] On 5 July 2017 and at the commencement of the disciplinary hearing Clark was required to determine whether Mhlanga should be allowed to have external representation. Zwane, an official of NUM sought to represent Mhlanga.
- [12] The Respondent's policy provides that an employee representative "shall be fellow employee, union member or shop steward employed by the company in the workplace or operation where the accused employee

works."

- [13] After submissions were made by both parties, Clark ruled that external representation would not be allowed, as per the Respondent's

disciplinary policy. Clark further ruled that Mhlanga must be given an opportunity to consult with any fellow employee or union

representative to assist her in her disciplinary hearing and to prepare her case and that a new notification to attend a disciplinary

hearing should be issued to her.

- [14] On 10 July 2017 the Respondent addressed a letter to the Applicant stating that Zwane would not be allowed to represent Mhlanga and reiterated that she has the right to be represented by either a fellow employee or union representative from within the company. Mhlanga's hearing was rescheduled to 17 July 2017.
- [15] The Respondent's case is that its policy is clear in that it makes provision for representation by a co-employee or a shop steward and as Zwane is not employed by the Respondent, he cannot be allowed to represent Mhlanga as the policy does not make provision for external representation. The only occasions where the Respondent has allowed external union representation were when members of the Applicant's branch committee were affected. Mhlanga was not a member of the Applicant's branch committee.
- [16] The Respondent denied Zwane's allegations that Kenny Motau, Jacob Madiba, Thompson Msimanga and Kabelo Kuwane were ordinary members who were represented in disciplinary enquiries by union officials and explained how they were represented and in what type of proceedings. In its replying affidavit, the Applicant did not respond to the Respondent's specific denial but merely stated that the Applicant received no notice from the Respondent to notify it that the Respondent was withdrawing from the standing practice allowing representation to NUM's representatives.
- [17] The Respondent submitted that on 5 July 2017 the Applicant lodged an unfair labour practice dispute at the Commission for Conciliation,

Mediation and Arbitration (CCMA) for reasons related to the Respondent's refusal to allow Mhlanga representation.

- [18] This urgent application was served on the Respondent on 14 July 2017.

The urgent application

- [19] It is evident from the notice of motion that the Applicant effectively seeks final relief from this Court and as the parties have filed all their affidavits and as the matter was heard on its merits, there is no need to issue an interim interdict or rule nisi with a return date.
- [20] I will assume in the Applicant's favour that the application is urgent. It is incumbent on the Applicant to establish a clear right to the relief it seeks, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.

Clear right

- [21] The Applicant stated in its founding affidavit, in support of its prima facie right, which should be considered as a clear right, that the Applicant as a representative trade union is entitled to the rights conferred by section 12 – 16 of the Labour Relations Act[1] (the Act). The Applicant complains that it is inter alia unable to hold meetings with members, to hold shop steward councils, access the workplace for purposes of servicing members, recruiting etcetera.
- [22] The Applicant further stated that the interests of justice supports the stay of execution. This averment does not make any sense in view of the nature of this application.
- [23] The Respondent on the other hand stated that the policy is clear on who can represent an employee at an internal disciplinary enquiry and that it is either a co-employee or a shop steward. At no point was Mhlanga denied representation as provided for in the policy.
- [24] The Applicant has to demonstrate that it has a clear right to the relief it seeks. In casu the Applicant failed to show that it even has a prima facie right to the relief sought, let alone a clear right. The averments made by the Applicant in support of its right to the relief is disconnected from the relief sought and no averments are made to support the relief sought.
- [25] I have no intention to deal with each and every prayer of the relief sought in the notice of motion, as no averments were made to support any of the relief claimed. I will however illustrate this as follows: the Applicant seeks an order inter alia to interdict and restrain the Respondent from “barring representation at the disciplinary hearing of Maria Mhlanga by the

Applicant’s official or office bearer as the applicant may assign.”

- [26] In order to show that the Applicant is entitled to the relief it seeks, it has to show that NUM’s official or office bearer has a clear right to represent Mhlanga at an internal disciplinary enquiry. No averments are made to show that such a clear right indeed exists. Instead allegations are made relating to the rights NUM enjoys in terms of section 12 – 16 of the Act and no more than vague allegations and unsubstantiated averments are made about the Constitution and a standing practice.
- [27] The Applicant has placed reliance on Item 4(2) of Schedule 8 of the Act for its argument that a representative of a trade union is permitted to be represented at a disciplinary hearing by a union official or office bearer. This is indicative of a lack of understanding of Item 4(2) as the wording of the said provision does not support the Applicant’s argument.
- [28] The Respondent on the other hand made averments to show that no such right exists as the policy’s provisions on representation are clear and Mhlanga is allowed union representation as per the provisions of the policy and allegations about a standing practice

were disputed and rebutted.

[29] In *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and others (Ngobeni)*[2] this Court has held that:

“In any event, this court does not ordinarily intervene in incomplete disciplinary proceedings. In Booyesen v Minister of Safety and Security and others (2011) 32 ILJ 112 (LAC), the LAC made it clear that the Labour Court may only interdict unfair conduct in the course of disciplinary proceedings 'in exceptional

circumstances', such as where a grave injustice would result”.

[30] In casu the Applicant was unable to show that it has a clear right to the relief it seeks or that there are exceptional circumstances to justify this Court's

intervention in Mhlanga's incomplete disciplinary proceedings.

Irreparable harm

[31] The Applicant's case is that it would suffer serious prejudice in the volatile labour market should it not be able to enter the premises to serve Mhlanga's interest. There are other rival unions and once dissatisfied by the Applicant's poor service, members resign and join other unions.

[32] Mhlanga feels harassed and humiliated by her suspension and she is severely prejudiced taking into consideration that she is no ordinary employee, but a NUM representative and the chairperson of women in mining at the Respondent.

[33] The Respondent submitted that by refusing Zwane personally to represent Mhlanga, it has not denied the NUM its rights in terms of the recognition agreement to represent members in the workplace. Mhlanga still has the right to be represented by a NUM shop steward. The Respondent further denied that there is irreparable harm in that other unions are trying to recruit members at the Respondent's

workplace where the Applicant represents at least 75% of the Respondent's workforce.

[34] The Applicant has to show that it would suffer irreparable harm should the relief it seeks not be granted. Once again, the Applicant

dismally failed to do so as the averments made in support of the harm to be suffered are disconnected from the relief sought, alternatively

they do not support the relief sought.

[35] The facts placed before this Court shows that the Applicant is entitled to enter the Respondent's premises and to serve Mhlanga's

interest by representing her in an internal disciplinary enquiry. The fact that Zwane personally is not permitted to represent Mhlanga does not take away her right to be represented by a NUM shop steward, nor does it indicate irreparable harm. If such harm is to be suffered, this Court is not told what it is and how or why Mhlanga would suffer harm if she is represented by a NUM shop steward.

[36] The allegations made in respect of Mhlanga's feelings of being harassed and humiliated, is unsubstantiated hearsay evidence and no weight could be attached to it. Mhlanga failed to depose to any affidavit before this Court to confirm or verify these statements. In any event, should the Applicant or Mhlanga feel aggrieved by her suspension, they have an alternative remedy in respect of the said suspension.

[37] Mhlanga remains suspended on full pay and there is no irreparable harm to her consequent on an incomplete hearing and there remains the prospect that she might be acquitted of the charges levelled against her.

[38] I am not convinced that the Applicant would suffer irreparable harm should the relief sought not be granted.

No alternative remedy

[39] The Applicant's case is that it has no alternative remedy taking into consideration that the matter has since been referred to the CCMA in respect of an unfair labour practice.

[40] The absence of an alternative remedy is disputed by the Respondent. The Respondent submitted that the Applicant has remedies in terms of the provisions of section 191 of the Act should Mhlanga be dismissed or be treated unfairly. There is no basis for this Court to stay the disciplinary hearing or interdict Clark from chairing Mhlanga's disciplinary enquiry as it is premature to suggest that Clark or the Respondent will act unfairly against Mhlanga and even if they do so, the Applicant has a remedy to challenge the unfairness of her dismissal.

[41] Furthermore, on the Applicant's own version it has already referred a dispute to the CCMA, which is in itself indicative of the existence of an alternative remedy. Whether the Applicant will be successful with the unfair labour practice dispute it referred to the CCMA is an entirely different question and not one for this Court to decide or to express an opinion on its merits.

[42] The Applicant has alternative remedies and it is entitled, should Mhlanga be dismissed and should they contest the fairness of her dismissal, to refer a dispute to that effect to the relevant dispute-resolution body.

[43] In *Jiba v Minister: Department of Justice and Constitutional Development and others*[3] this court held that:

“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.”

[44] The urgent roll in this Court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings. The present application is a prime example. It is indicative of an attempt to use this Court and its processes to frustrate the workplace proceedings already underway. The abuse goes further — what the Applicant effectively seeks to do is to bypass the statutory dispute-resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of these structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this Court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute-resolution system. The Court's proper role is one of supervision over the statutory dispute-resolution bodies; it is not a Court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micromanage discipline in workplaces[4].

[45] The Applicant failed to satisfy the requirements for an interdict and the final relief it seeks and it follows that the Applicant is not entitled to relief.

Costs

[46] The last issue to be decided is the issue of costs.

[47] Mr Zwane on behalf of the Applicant submitted that the Applicant would not seek a cost order, although costs were prayed for in the Applicant's notice of motion. Mr Zwane argued that there is no reason to seek costs against the Respondent, should the Applicant be successful as there is an ongoing relationship between the Applicant and the Respondent.

[48] Mr Woodhouse for the Respondent agreed that there is an ongoing relationship between the parties but he submitted that this is a

meritless and frivolous application and that costs should be awarded on a punitive scale. The issue of costs on a punitive scale was raised in the Respondent's opposing affidavit, to which the Applicant has filed a reply and I therefore accept that the Applicant is aware of the fact that the Respondent would be seeking a punitive costs order. The Respondent persisted to seek punitive costs in its heads of argument and in argument before this Court. Mr Woodhouse argued that the application has no merit and no case has been made out as to why another shop steward would not be able to represent Mhlanga.

[49] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the Act to make orders for costs according to the requirements of the law and fairness.

[50] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*[5] it was emphasized that:

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

[51] In *Ngobeni* this Court has granted an order for costs on a punitive scale because the Court considered the application to be wholly misguided and one that served to frustrate one of the fundamental purposes of the Act, which is the expeditious resolution of workplace disputes within a defined structure. In the Court's view the applicant's conduct warranted an order for costs on a punitive scale.

[52] The Court in *Ngobeni* also issued a warning to the effect that litigants should be warned that it is not often that this Court will intervene in incomplete

workplace disciplinary hearings and that similar abuses of the right to urgent relief that this Court affords in appropriate circumstances

will be met with punitive orders for costs.

[53] In *casu* the application was wholly misguided and meritless and the Applicant dismally failed to satisfy the requirements for the interdict it was seeking and to place facts before this Court to support its case. The application was poorly drafted, the averments made disconnected from the relief sought and it had no consideration of the fact that the Applicant has alternative remedies available.

[54] The Applicant did not heed the stern warning from this Court as set out in *Ngobeni* and the fact that there is an ongoing relationship between the parties cannot save the Applicant from a cost order.

[55] In my view, the existence of a continued collective bargaining relationship and the potential prejudice a cost order might cause to that relationship, is irrelevant in this instance. The fact that the Respondent pursued an order for costs on a punitive scale against NUM is an indication that, at least as far as the employer was concerned, a future relationship with NUM would not be prejudiced by any order for costs. In my view there is no merit in the submission that the existence of a collective bargaining relationship militates against an order for costs.

[56] The Respondent had to defend a meritless urgent application and fairness dictates that it cannot be expected to endure enormous costs defending litigation that ought not to have been brought in the first place. Ultimately, the Applicant is the author of its own misfortune. NUM is a well-established trade union quite capable of considering the consequences of instituting meritless litigation and it had to put in some earnest thought and consideration into the merits of this case and the warning issued in Ngobeni before filing this urgent application. It is not open to trade unions to file meritless urgent applications and for them to escape costs simply because there is an ongoing relationship. When the collective bargaining relationship is not threatened by a cost order, there is no reason why a cost order cannot and should not be imposed.

[57] In my view this is a case where it is appropriate to award costs on a punitive scale.

[58] In the premises I make the following order:

Order:

1. The application is dismissed;
2. The Applicant is to pay the Respondent's costs on the scale as between attorney and client.

Connie Prinsloo

Judge of the Labour Court

Appearances:

Applicant: Mr B Zwane of the National Union of Mineworkers

Respondent: Mr D Woodhouse of Mervyn Taback Inc Attorneys

[1] Act 66 of 1995.

[2] (2016) 37 ILJ 1704 (LC).

[3] (2010) 31 ILJ 112 (LC) at para 17.

[4] Ngobeni paragraph 14.

[5] 2012 33 ILJ 2117 (LC).

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