

SOUTH AFRICA / JUDGMENT

Ndlovu v Chaane NO and Another (J119/21) [2021] ZALCJHB 20 (1 March 2021) [2021] ZALCJHB 20

COURT

Labour Court Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

J119/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J119/21

In

the matter between

LESLINA

OLGA NDLOVU

Applicant

and

HM

CHAANE N.O.

First

Respondent

BOJANALA

PLATINUM DISTRICT

Second

Respondent

MUNICIPALITY

Heard:

11 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 01 March 2021.

JUDGMENT

BALOYI, AJ

- [1] This application was brought in the middle of the disciplinary hearing proceedings to this Court on urgent basis. It was brought on reason that the first respondent (the Chairperson) who was presiding over the hearing between the second respondent and the applicant has displayed bias. The essence of this application is that the rulings made by first respondent refusing an application for his recusal and the postponement of the proceedings be set aside on account of bias. This Court is called upon to rule that bias existed on the part of the chairperson. The second respondent opposed the application and is seeking an order dismissing the application with costs.

Background

- [2] The applicant is the second respondent's Chief Financial Officer. He has been charged for various acts of misconduct relating to maladministration of the second respondent's finances and procurement malpractices. The applicant was summoned to appear before

the disciplinary hearing jointly with the Municipal Manager Mr Pogiso Shikwane. The proceedings were first convened on 19 January 2020 and were on many occasions postponed at the instances of the applicant or her fellow charged employee, Mr Shikwane or both of them for various

reasons.

- [3] The Court was at some point called upon to interdict the disciplinary hearing pending the determination of a review application which its cause of action arose out of the second respondent's decision to take disciplinary steps against the two. The application was dismissed with punitive costs under the judgment handed down by Tlhotlhemaje J on 29 August 2020.
- [4] This application was filed just after the completion of evidence of the second respondent's last witness and the closing of the second

Introduction

- [1] This application was brought in the middle of the disciplinary hearing proceedings to this Court on urgent basis. It was brought on reason that the first respondent (the Chairperson) who was presiding over the hearing between the second respondent and the applicant has displayed bias. The essence of this application is that the rulings made by first respondent refusing an application for his recusal and the postponement of the proceedings be set aside on account of bias. This Court is called upon to rule that bias existed on the part of the chairperson. The second respondent opposed the application and is seeking an order dismissing the application with costs.
- [2] The applicant is the second respondent's Chief Financial Officer. He has been charged for various acts of misconduct relating to maladministration of the second respondent's finances and procurement malpractices. The applicant was summoned to appear before the disciplinary hearing jointly with the Municipal Manager Mr Pogiso Shikwane. The proceedings were first convened on 19 January 2020 and were on many occasions postponed at the instances of the applicant or her fellow charged employee, Mr Shikwane or both of them for various reasons.
- [3] The Court was at some point called upon to interdict the disciplinary hearing pending the determination of a review application which its cause of action arose out of the second respondent's decision to take disciplinary steps against the two. The application was dismissed with punitive costs under the judgment handed down by Tlhotlhaemaje J on 29 August 2020.
- [4] This application was filed just after the completion of evidence of the second respondent's last witness and the closing of the second respondent's case. What precipitated the filing of this application occurred when the last witness, Ms Tolo was still under cross examination during which the applicant's Counsel, Adv Sasson requested a brief adjournment. The purpose of the adjournment was to obtain final instructions from the applicant as he was about to conclude cross examination on Ms Tolo.
- [5] The Chairperson allowed the adjournment and the applicant together with her Counsel left the room. The Counsel for the second respondent also left the room. The attorneys for both parties remained behind together with the Chairperson and the witness throughout the period of adjournment. On resumption of the proceedings Ms Tolo was only asked two questions and the cross examination was concluded. The matter was then adjourned for lunch with idea that the applicant would commence with her testimony.

[6] Instead of proceeding with the applicant's testimony as arranged prior to the lunch adjournment, her Counsel addressed the Chairperson posting an application for his recusal on reason that he displayed bias in two respects. Firstly, during the brief adjournment of the proceedings prior to the conclusion of cross examination on Ms Tolo, the Chairperson according to the applicant's attorney had informed Ms Tolo that the document she earlier searched for was located in either page 83 or 84 of a certain bundle of documents.

Secondly, that the Chairperson asked Ms Tolo certain questions about issues that did not form part of her evidence in chief or cross examination. The conduct of the Chairperson was according to the applicant intended to resuscitate the collapsed case of the second respondent.

[7] The Chairperson made a ruling dismissing the application for his recusal. He found nothing sinister in assisting a witness to locate the document which a witness was struggling to find. Furthermore, that he was entitled to ask clarity seeking questions. Immediately upon the Chairperson's handing down of the ruling, the applicant posted another application, this time, for a postponement to enable her to file an urgent application in this Court in challenge of the recusal ruling. The application for postponement failed. The refusal of the application for a postponement was followed by a walk-out staged by the applicant and her legal team. Prior to this date the disciplinary proceedings encountered various episodes which resulted into postponements and the handing down of multiple rulings by Chairperson in resolution of the technical points raised by the applicant and Mr Shikwane. A detailed background on this is laid down below.

[8] The first sitting of the hearing was scheduled on 29 January

2020. A day before the sitting the applicant and Mr Shikwane requested further particulars. The matter was as a result postponed to 9 to 11 March 2020. On 09 March 2020 the second respondent reached

an agreement with the applicant and Mr Shikwane to have the matter postponed as it was not ready to proceed. The matter was then

postponed to 8 to 10 July 2020.

[9] On 8 July 2020 the hearing did not proceed due to Mr Shikwane's ill health and was postponed by agreement to 27 and 28 July 2020. Once again the matter did not proceed on 27 July 2020 as Mr Shikwane was still reported to be indisposed. The hearing was as a result postponed by agreement to 11 to 21 August 2020.

[10] On 11 August 2020 Mr Shikwane applied for postponement of the matter pending finalization of the review application in challenge of the resolutions passed by the second respondent's Council. The postponement was refused. Adv Molapo, the Counsel for both the

applicant and Mr Shikwane immediately withdrew as their representative on reason that he had no instructions to represent them. This came as a surprise to the second respondent as the very date of the hearing was arranged with him. Mr Maake, the attorney for

the applicant and Mr Shikwane was present and informed the Chairperson that he had no knowledge as to why Adv Molapo withdrew from the matter. He nevertheless followed suit by withdrawing as attorney for the applicant and Mr Shikwane.

[11] The applicant and Mr Shikwane addressed the Chairperson in person and requested an opportunity to secure the services of a new legal representative. The Chairperson afforded them indulgence and adjourned the hearing to 13 August 2020. Instead of appearing with a new representative on 13 August 2020, they came back with Mr Maake who applied for a postponement on their behalf pending the determination of the urgent application filed under case number

J774/20 in which a stay of the hearing was sought pending the review application. The postponement application was refused and Mr Maake withdrew again from the matter.

[12] After Mr Maake's departure the applicant and Mr Shikwane requested a postponement of the hearing which the Chairperson refused. The matter proceeded to a point of recording their plea of not guilty and thereafter the applicant and Mr Shikwane requested another postponement to enable them to prepare' on the merits of the matter, the postponement was once again refused. They then raised the issue of not been in possession of the bundles of documents. On completion of the process of making copies for them, there was no more time left for the day and the Chairperson rolled the matter to 19, 20 and 21 August 2020.

[13] On 19 August 2020 the hearing did not proceed as the urgent application was set down on the same date. The urgent application was later postponed at the instances of the applicant and Mr Shikwane to enable them to file a replying affidavit. The urgent application was ultimately dismissed with costs on 29 August 2020 and the hearing was rescheduled to proceed on 7, 8, 9, 16 & 17 September 2020.

[14] On 07 September 2020 the applicant and Mr Shikwane appeared with a new attorney, Mr Mokoena who immediately launched an application for the recusal of the Chairperson. The matter was postponed to 21 September 2020 as the Chairperson reserved his ruling which he handed down the ruling on 12 September 2020 in terms of which the recusal application was refused.

[15] On 21 September 2020 Mr Mokwena sought a postponement on reason that the applicant and Mr Shikwane need to engage an expert witness to review the respondent's investigation report. The said review process would take a month. The hearing was as a result postponed to 17, 18, 19 and 20 November 2020.

[16] On 17 November 2020 the applicant did not attend the hearing and Mr Mokoena applied for a postponement on reason that she was ill. The Chairperson refused a postponement as no medical certificate was produced. Mr Mokoena left the hearing immediately after the handing down of the ruling.

[17] The matter proceeded with the evidence in chief of the second respondent's first witness, Mr Thale. Mr Shikwane requested an opportunity to prepare for cross examination and the request was granted. The matter was then postponed to 02 December 2020.

[18] On 02 December 2020 the applicant appeared with the new representative, Adv Sasson instructed by Mr Mokoena and indicated that he was there to represent the applicant only. At the same time the applicant indicated that she had Covid 19 symptoms and the Chairperson was constrained to postpone the matter to 07 December

2020. The applicant's Covid 19 test result was reported to be negative on 03 December 2020.

[19] On 07 December 2020 Mr Shikwane requested a postponement to allow him an opportunity to obtain services of a new legal representative. The postponement was granted and the matter was postponed to 27 January 2021.

[20] On 27 January 2021 Mr Thoga appeared on behalf of Mr Shikwane and signalled his arrival with a request for a postponement as he was not ready to proceed and that he had Covid 19 symptoms. The postponement

was refused and he left the hearing together with Mr Shikwane. The matter proceeded in the presence of the applicant to a point of the closing of the second respondent's case. The accusation leading to the application for recusal of the Chairperson were raised and the recusal application was refused. It is the outcome of this recusal application that is subject matter of this application together with the subsequent ruling refusing a postponement.

The matter before the court

[21] As pointed above, the applicant is seeking a final relief which in effect extinguishes the second respondent's right to proceed with the disciplinary hearing or to discipline her at all. This cannot only be seen in this application but also in the other application that was dismissed. This Court in the earlier application had in essence found

the conduct of the applicant and Mr Shikwane to be disruptive and calculated to frustrate the disciplinary process by filing a

meritless application. Now in this application, this Court is once again called upon to intervene in the very disciplinary hearing that was subject to a foiled attempt to get the Court's intervention to halt it.

Urgency

[22] The first respondent has posted a challenge to urgency. The applicant merely states that the matter on its own is sufficiently urgent. The Chairperson's refusal of the recusal application creates exceptional circumstances requiring the Court to intervene by setting aside the proceedings for being irregular. Since the applicant is seeking a final order, evidence to demonstrate the existence of a clear right to the relief sought must appear in her papers. The applicant has not even attempted to plead the absence of an alternative remedy or the

reason why it will be impossible to attain any redress if the application was to be heard in the normal course.

[23] The exceptional circumstances calling for the Court's intervention must be found in the applicant's pleaded case and not based on arguments of a mere suspicion that she will not receive a fair hearing. The presence of exceptional circumstances may prompt the Court to apply its discretion towards finding that the matter may be heard as one of urgency. The conduct of the applicant in collaboration with .Mr Shikwane has in no doubt been so provocative and bent to turn the hearing into a mockery. This Court cannot find urgency out of the applicant's self- made efforts to derail the proceedings.

[24] There is no doubt that a total of 15 applications for postponements (some granted and some refused) together with two recusal applications were set as a trap to find an opportunity to trigger urgency. The applicant is raising procedural issues that are determinable at arbitration level should the outcome of the hearing be challenged through the available labour dispute resolution mechanisms in terms of the Labour Relations Act. It remains difficult to understand why the applicant elected to walk out of the disciplinary hearing which she believed that the case presented by the second respondent was so weak and had in fact collapsed, most particularly at the time she was about to put her side of the story. As observed above the applications were

made to induce rulings to find a stepping stone for urgency, which I find to be self-created.

[25] Since the matter was argued in it's entirety, I have a discretion to consider disposing of the application inspite of poor demonstration of urgency. I am however not tempted to determine this matter beyond the point of urgency. This is likely to create a wrong impression, particularly on the applicant, that this court is forever amenable to the disposing of the matters even where a case for urgency is not made with a view of eliminating the clogging of the roll. The

interests of justice should in the context of this matter come first. The default position that lack of urgency attracts the striking of the matter from the roll has to be the way to go in this matter.

Costs

[26] There is abundance of evidence to the effect that the urgency claimed

by the applicant is self-created and sadly at the expense of the tax payers. A cost order will be the only measure that will enable the first respondent to salvage the expenses incurred in opposition of this application. I find no reason to deprive the second respondent an award of costs.

[27] The following order is therefore made:

Order:

1.

The application is struck from the roll due to lack of urgency.

2.

The applicant is ordered to pay the second respondent's costs.

Baloyi M

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv J L Basson

Instructed by: MB Mokwena Attorneys

For the Second respondent: Mr T Majang of Majang Attorneys

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Prepared on 11 October 2026 · Esheria