

SOUTH AFRICA / JUDGMENT

O'Hara v Parliament of South Africa and Another (C 2024-125867) [2024] ZALCCT 71 (2 December 2024) [2024] ZALCCT 71

COURT

Labour Court Cape Town

BEFORE

Whitcher

CASE / FILE NUMBER

C 2024-125867

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FLYNOTES:

LABOUR – Disciplinary hearing – Review
in media res
– Applicant
alleging bias on part of chairperson – Chairperson
previously acted for Parliament in disciplinary matters
and as
presiding officer – Chairperson dismissing recusal
application – Outcome of disciplinary proceedings may
be
subject to judicial scrutiny if necessary – Recusal point
remains good for challenge in subsequent proceedings –
Applicant not showing that he will suffer grave injustice if court
does not intervene – Application dismissed –
Labour
Relations Act 66 of 1995, s 158(1)(h).
IN
THE LABOUR COURT OF SOUTH AFRICA
(HELD
IN CAPE TOWN)
Case Number: C
2024-125867
Not Reportable
In

the matter between: JASON
O'HARA
Applicant
and
PARLIAMENT
OF SOUTH AFRICA
First Respondent
DEON
VISAGIE N.O.
Second Respondent

Heard: 22 November 2024
Judgment
delivered (Electronically): 2 December 2024

JUDGMENT

WHITCHER J

Introduction

- [1] The second respondent has been appointed by Parliament as the chairperson of the disciplinary hearing between Parliament and the applicant.
- [2] The applicant is currently employed as Parliament's Chief Financial Officer, and as of 21 October 2024, is on precautionary suspension with full pay.
- [3] The applicant was due to appear before the disciplinary hearing on 28 October 2024. The hearing did not commence because on the day the applicant brought an application for the recusal of the second respondent.
- [4] The basis of the recusal application was essentially confined to the single issue that the second respondent is conflicted or biased because he has acted for Parliament in the past as its attorney and presided over other disciplinary hearings between Parliament and its employees.
- [5] On 29 October 2024, in a written ruling, the second respondent dismissed the recusal application.
- [6] The disciplinary hearing was due to recommence on 30 October 2024. Again, it did not proceed, this time because the applicant submitted a sick note and on 1 November 2024 filed this application with the Labour Court.
- [7] In terms of the notice of motion, the applicant seeks on an urgent basis to have the decision of the second respondent of 29 October 2024 not to recuse himself as chairperson of the disciplinary hearing reviewed and set aside.

- [8] Moreover, he seeks that Parliament be directed, if it wishes to reinstate disciplinary proceedings against him, to do so under the chairpersonship of an external chairperson who has not had any professional relationship with Parliament.
- [9] In essence, the applicant seeks an urgent review of a ruling made by the chairperson in medias res the disciplinary hearing.
- [10] The main objection raised by the first respondent is that on the facts the court is precluded from determining the review application in medias res. In any event, they contend, the applicant has failed to demonstrate that the decision of second respondent is unlawful, irrational and/or breached the constitutional rights listed by the applicant.

The law

- [11] In terms of section 158(1)(h) of the Labour Relations Act, 1995 the Labour Court may:

'... review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

- [12] Even if this court puts aside case law to the effect that section 158(1)(h) is not open to an employee[1], the law is clear: this Court will determine review applications in medias res and exercise judicial oversight of disciplinary hearings only where it is just and equitable to do so, the threshold essentially being the applicant will suffer a grave injustice if the Court does not intervene in medias res the hearing and the applicant will suffer irrevocable harm.

- [13] Section 158 (1B) of the Labour Relations Act, 1995 provides that:

The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices

of the [CCMA] or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the [CCMA] or bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.

- [14] This provision is equally applicable (if not more so) to incomplete disciplinary hearings.

- [15] In *Jiba v Minister: Department of Justice & Constitutional Development & others*,[2] 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. A court having jurisdiction in review will determine the application in medias res only in exceptional circumstances.

[16] The Labour Appeal Court in *Booyesen v Minister of Safety & Security & others*[3] explained the principle thus at para [54]:

...the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases only. 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. Amongst the factors to be considered would...be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.

[17] And in *Wahlhaus*,[4] the Appellate Division explained the principle as follows:

‘While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise upon untruncated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to intervene, especially having regard to the effect of such procedure upon the continuity of the proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.’

[18] In *SACCAWU v Irvin & Johnson Limited Seafoods Division Fish Processing*[5] (‘SACCAWU’) the Constitutional Court, in summary, held that:

The dismissal of a recusal application does not, as of right, entitle the unsuccessful challenger to appeal against the recusal decision immediately. The challenger ought to wait the outcome of the main proceedings and may rely on the recusal point as a ground of appeal against the final decision.

The rationale is one of convenience. It would be inconvenient to the administration of justice to permit piecemeal appeals.

Ultimately, the decision to allow an appeal against the dismissal of a recusal application is a discretionary matter for the court granting leave. The relevant factors include the nature of the matter, the nature of the objection to the court’s composition, the prospects of success in the recusal, and the length of the record before an appellate court.

The recusal point, unless clearly abandoned in the proceedings in issue, remains good for a challenge in subsequent proceedings.

[19] The principles in *SACCAWU* plainly apply to these proceedings.

[20] In a more recent decision, where the previous Public Protector sought to review the non-recusal of the chairperson of the section 194 Constitutional proceedings established to consider her removal, a Full Bench of the Western Cape High reiterated the principles listed above and concluded that:

- [49] The applicant retains effective remedies which remain available to her once the Committee has completed its work. She has not shown the existence of grave injustice or that any harm which may have been suffered by her will be material and irrevocable if the Committee is permitted to proceed with its task.
- [50] We thus find...that it would not be appropriate for this Court to permit a piecemeal review of proceedings. With no exceptional circumstances demonstrated, the balance of convenience favours a decision to dismiss the application brought by the applicant.”

Bias and the nature of disciplinary hearings

- [21] SACCAWU pointed out that absolute neutrality on the part of presiding officers is not possible, but they are required to be impartial which requires, in short, a mind open to persuasion by the evidence and the submissions of counsel.
- [22] In relation to internal disciplinary proceedings, this Court in Ngobeni,[6] explained the relationship as follows:
- [11] ...The LRA grants an employee accused of misconduct the right to state his or her case before any decision is made as to whether the employee committed the misconduct and if necessary, what the appropriate sanction should be. A disciplinary hearing is not a criminal trial, and ordinarily this court will hold an employer to no more than the statutory Code of Good Practice or, if they are more generous, the terms of the employer’s disciplinary code and procedure (see *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* (2006) 27 ILJ 1644 (LC)). The standards by which any contention of bias in a workplace disciplinary hearing is measured must necessarily be viewed in that context. In other words, the test for bias is not that which applies in a civil or criminal court. The applicant was afforded a right to a hearing before an independent legal practitioner, a senior counsel. There can be no doubt that this appointment more than satisfies any requirement of an independent minded enquiry.
- [23] More importantly, the Labour Appeal Court in *Anglo American Farms t/a Boschendal Restaurant v Komjwao*[7] held that disciplinary enquiries are similar in nature to tribunals with an institutional bias whose decisions will be interfered with by the courts only if it appears that there is, or is feared to be, a real likelihood, that is to say, a probability, of (actual) bias on the part of the decision-maker.
- [24] The LAC quoted with approval Cameron in an article entitled “The Right to a Hearing before Dismissal Part 1” (1986) 7 ILJ 183 at 2132 where the learned author said:
- “In the employment context the full rigour of the law as it has developed in relation to statutory or domestic tribunals is not applied.”*

The person or person's deciding on guilt or innocence and on the appropriate penalty will in many cases know the accused employee (including past history, employment record, previous warning) and may have even termed some initial impression as to the event in issue. In a sense the employer is necessarily a judge in its own cause".

The recusal application

- [25] The recusal application that served before the second respondent was premised on the fact that in the period 2015 to present, the second respondent had acted for Parliament in six disciplinary matters and in two as a presiding officer.[8] The applicant contended for a senior manager of Parliament to preside over his case or an external chairperson with no prior professional relationship with Parliament.
- [26] In opposing the application, the first respondent, amongst other things, pointed out that given the large number of people Parliament employs and its location, it would be near impossible in every instance to secure a different external chairperson with the relevant expertise and with no prior professional relationship with Parliament. They also highlighted the fact that an employee chairperson also has no true independent relationship with Parliament given the intricacies of the relationship between an employee and his employer.
- [27] In dismissing the application, the second respondent provided a detailed written ruling.
- [28] In part, the second respondent referred to various judgments, including the Ngobeni judgment which dealt with similar allegations against the chairperson. He opined that what Ngobeni was saying is that the procedural obligation on an employer for instituting a disciplinary hearing is that the employer must institute an independent-minded enquiry. This is the minimum requirement as per the Code of Conduct and the test for bias is not one that applies in the civil or criminal courts. He stated that in his view, by appointing a chairperson, who is a senior attorney and specialises in labour law, Parliament has complied with the minimum requirements in the Code.
- [29] The second respondent further stated:

I raised the point with Mr Field [the applicant's representative] that our law accepts that some institutional bias is inevitable where an employer institutes disciplinary proceedings against employees. Mr Field's view was that as far as institutional bias is concerned, when it is an internal disciplinary chairperson then some form of institutional bias must be allowed. However, according to his argument, when it is an external chairperson, then no institutional bias can be allowed...Mr Field could not provide any authority for this proposition.

The mere fact that an external chairperson is paid by Parliament for the services rendered must mean that some form of institutional bias is present. Similarly, a senior manager who is an employee of Parliament and who gets paid by Parliament for his services (albeit as a worker) sits as a disciplinary chairperson also means that there is some institutional bias present. I do not believe the acceptance of institutional bias is restricted to internal persons only.

- [30] The second respondent ended his ruling by saying that if an accused employee is dissatisfied and challenges the employer's obligation for an independent minded enquiry, the employee has sufficient protection in the LRA and the right to have the employer's hearing tested at the CCMA at the conclusion of the disciplinary hearing.
- [31] Basically, the second respondent explained the immaterial difference between an employee chairing the applicant's disciplinary hearing and the second respondent chairing the hearing. He further explained the safeguards in the process: his professional ethics and expertise in labour law and the role of the ultimate arbiter, being a commissioner or arbitrator appointed to determine the fairness of any disciplinary action taken against the applicant.

Analysis

and findings

- [32] In my view, the applicant has not shown that he will suffer grave injustice if this Court does not intervene in medias res the disciplinary hearing and grant the relief sought in the notice of motion. I say this because:

32.1 The second respondent is a senior attorney, specialising in labour law, a director of a reputable law firm, has acted as a judge of the Labour Court, and is obliged to justify whatever rulings and award he makes. There is further not one (substantiated) averment that in previous disciplinary hearings he acted in an unethical and biased manner owing to his professional relationship with Parliament. On these facts, a reasonable and informed person could not have reasonably thought that the risk of an unfair hearing and determination was high and that the second respondent will jettison his professional status as an officer of this court to favour Parliament.

32.2 The outcome of the disciplinary proceedings, which may go favourably for the applicant (we simply cannot know at this stage) may be subject to judicial scrutiny if necessary. Essentially, the applicant's recusal point, unless clearly abandoned during the hearing, remains good for a challenge in subsequent proceedings.

32.3 The second respondent in his ruling drew to the applicant's attention these safeguards.

32.4 According to the applicant, he has a clear-cut case that he is not guilty as charged and is merely being prosecuted because he made protected disclosures. Accordingly, on his version he faces no complicated evidential obstacles.

32.5 The applicant remains on suspension with full pay pending the outcome of the disciplinary hearing.

32.6 Despite bringing a review application, the applicant failed in this application to list actual grounds of review relevant to a s158(1)(h) review and engage with the actual reasoning of the second respondent in refusing to recuse himself. Basically, he failed to demonstrate

why the decision was unlawful, arbitrary and/or irrational. This was telling.

[33] In the premises, it would not be appropriate for this Court to permit a piecemeal review of proceedings. With no exceptional circumstances demonstrated, the balance of convenience favours a decision to dismiss the application brought by the applicant.

Costs

[34] On the face of things, the applicant's conduct warrants an order for costs given the clear law on these types of applications and the fact that the second respondent drew to the applicant's attention the safeguards in the process and that none of his rights of redress would be forfeited if the process went against him. The applicant failed to heed this advice and persisted with this application in the face of them. However, I deem it inappropriate to make an award for costs given the relationship between the parties.

Order

[35] The application is dismissed.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: R Stelzner SC, instructed by Bernadt Vukic Potash & Getz
For the First Respondent: A Nacerodien, instructed by Tapiwe Gandidze Attorneys Incorporated

[1] Because that issue has not been categorically settled by the Labour Appeal Court.

[2]

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

[3] (2011) 32 ILJ 112 (LAC).

[4] Wahlhaus and others v Additional Magistrate, Johannesburg and Association and Another 1959

(3) SA 113 (A).

[5] 2022

(3) SA 705 (CC).

[6] Ngobeni v PRASA Cres and others [2016] 8 BLLR 799 (LC).

[7]

(1992) 13 ILJ 573 (LAC).

[8] I say fact because the factual allegations were not disputed by the second respondent.

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