

SOUTH AFRICA / JUDGMENT

Pedlar v Performing Arts Council of Free State (J157/21) [2021] ZALCJHB 45 (24 March 2021) [2021] ZALCJHB 45

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

J157/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J157/21

In

the matter between:

ARTHUR
PETER
PEDLAR
Applicant
and
PERFORMING
ARTS COUNCIL OF FREE STATE
First Respondent
CINDY
DICKENS
N.O.
Second Respondent

Heard:

24 February 2021 (Virtual Hearing)

Delivered: In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 24 March 2021

JUDGMENT

MAHOSI. J

Introduction

[1] This is an urgent application in terms of which the applicant seeks an order to set aside the jurisdictional ruling of the second respondent dated 17 February 2021, to interdict the first respondent from convening and proceeding with an internal disciplinary enquiry and to direct the first respondent to comply with the provisions of section 188A(11) of the Labour Relations Act[1] (LRA).

[2] The matter initially served before Tlhotlhamaje J on 18 February 2021, on which date it was postponed to 23 February 2021 to enable the parties to file further pleadings. The first respondent filed an answering affidavit, and the applicant filed the replying affidavit. Subsequent to the hearing on 23 February 2021 and after the judgment

was reserved, the applicant filed an application for leave to file a supplementary affidavit. This is an irregular step and it flies in the face of the audi alterem partem rule. As such, I am of the view that I should exercise my discretion against granting it.

Background

[3] The applicant is employed by the first respondent as its Chief Executive Officer (CFO). On 3 November 2020, the applicant was placed on a precautionary suspension. On 17 December 2020, he was then served with a notice of a disciplinary hearing containing the charges setting out the nature and extent of his alleged misconduct. The enquiry was scheduled for 18 December 2020.

[4] On 18 December 2020, the applicant's attorneys transmitted a letter to the first and second respondents, amongst others, making a request for postponement of the disciplinary hearing to afford the applicant enough time to prepare for the enquiry. As a result, the disciplinary hearing was postponed.

[5] On 8 January 2021, the applicant's attorneys addressed a further letter to the first respondent in terms of which it, inter alia, sought permission to represent the applicant and requested the reports upon which the applicant's suspension and disciplinary

charges were based.

[6] Furthermore, on 20 January 2021 and on 3 February 2020, the applicant's attorneys addressed a letter to the first respondent confirming, inter alia, whether their request to represent the applicant in the disciplinary hearing has been approved. In the same letter, the applicant's attorney stated that he would not be available on 18 February 2021 as he would have had an appeal to argue before the Labour Appeal Court, which appeal would conclude by 13h00. As it would happen remotely, the applicant's attorneys would be available to attend the disciplinary hearing on 18 February 2021 from 13h00 to 17h00. It was further confirmed that the applicant and his attorneys were available to travel to Bloemfontein on 16 February 2021 in order to proceed with the hearing on 17, 18 and 19 February 2021.

[7] On 12 February 2021, the applicant made a referral in terms of section 188A (11) of the LRA read together with section 4(1)(b) of the Protected Disclosure Act[2] for the Commission for Conciliation, Mediation and Arbitration (CCMA) to convene an enquiry into his alleged misconduct as a stage to substitute for the enquiry that the first respondent had initiated on the basis that he was a bona fide whistleblower.

[8] On 15 February 2021, the first respondents' attorneys addressed a correspondence to the applicant's attorneys recording, inter alia, that the referral was defective owing to the fact that the applicant had lay supine from when the first respondent placed him on

precautionary suspension; that the applicant had never in the past before 12 February 2021 raised that his disciplinary action

constituted an occupational detriment; that the applicant had confirmed attendance of the disciplinary hearing and acquiesced this

action; that the CCMA referral should have complied with CCMA rule 34 requiring that both parties consent to the section 188A referral and that the first respondent's consent as appears from the referral form was defective; and further that the disciplinary

hearing will commence and continue as scheduled on 18 February 2021.

[9] On 16 February 2021, the applicant's attorney attended the hearing and argued that the jurisdiction of the first and second respondents to convene the applicant's disciplinary enquiry was ousted by virtue of section 188A(11). It was the applicant's case that his suspension on 2 November 2020 was as a consequence of the letter

dated 10 October 2020 that he addressed to the Minister of Sports, Arts and Culture in terms of which he made a protected disclosure

against the council. The first respondent opposed the point on the basis that the applicant failed to approach the Court in terms of section 4 of the Protected Disclosure Act. Further that the CCMA referral was defective as it had been amended by the employee.

- [10] Having had regard to the submissions, the chairperson issued his ruling on 17 February 2021, in terms of which he dismissed the applicant's jurisdictional point. The basis of his decision was that a referral in terms of section 188A did not stay the disciplinary proceedings and further that in the absence of a court order declaring the applicant as a whistleblower and the disciplinary enquiry to be an occupational detriment, he had jurisdiction to convene and to proceed with the disciplinary proceeding. As a result, he ruled that the disciplinary hearing was due to proceed on 18 February 2021. It is this ruling that is the subject of this application.
- [11] The question to be answered herein is crisp, that is, whether or not an internal disciplinary proceeding is permitted to proceed in the face of a section 188A(11) referral. The first issue, though, is whether the application is urgent.

Urgency

- [12] The requirements for urgency are trite.[3] Rule 8(2) of the Rules for the Conduct of Proceedings in the Labour Court (the Rules), which governs urgent applications, provides as follows:

‘(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

(2) The affidavit in support of the application must also contain-

- (a) the reasons for urgency and why urgent relief is necessary;
- (b) the reasons why the requirements of the rules were not complied with, if that is the case; and
- (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.’

- [13] In *Jiba v Minister of Justice and Constitutional Development and Others*[4], this Court considered rule 8 and stated as follows:

‘Rule 8 of the rules of this Court require a party seeking urgent relief to set out the reasons for urgency and why urgent relief is necessary. It is trite law that there are degrees of urgency. And the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules.’

- [14] In *Baloyi and Others v Passenger Rail Agency of South Africa*[5], this Court stated that:

‘It is trite that urgency must not be self-created by an applicant as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the action by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. However, the longer it takes for the applicant from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately or risk failing on urgency.’

[15] In the current matter, it is apparent from the background facts that the applicant’s disciplinary proceedings commenced on 3 November 2020 when he was placed on precautionary suspension. Subsequent to that, he was served with the notice to attend a disciplinary hearing on 17 December 2020. Having been so notified, the applicant, on several occasions cooperated with the respondent and confirmed his intention to attend the disciplinary hearing that was eventually scheduled for 18 February 2021. Despite his confirmation to attend, the applicant referred the dispute to the CCMA on 12 February 2021. In this regard, I agree with the first respondent that little, if any explanation, has been placed by the applicant before the Court for lying supine and doing nothing until the eve of the disciplinary hearing.

[16] The referral in terms of section 188A(13) and the chairperson’s ruling could not be the trigger for urgency. Had the applicant genuinely believed that the first respondent had caused him occupational detriment as envisaged in the Protected Disclosure Act, he could have sought relief when he was placed on precautionary suspension. This Court has on numerous occasions held that a party that approaches this Court on an urgent basis for an interdict “at his leisure” must be denied relief.[6] This is such a case as the urgency was clearly self created. For this reason alone, this application ought to be struck off the roll for lack of urgency.

Costs

[17] I have had regard to the issue of costs. In terms of section 162 of the LRA, the Court has a wide discretion in awarding costs. Both parties have sought costs against each other. There is no reason why the general rule that costs must follow the result should not apply.

[18] Accordingly, the following order is made:

Order

1. The application is struck off the roll for want of urgency
2. The applicant shall pay the respondent’s costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Yusuf Peer

Instructed by: Crawford and Associates Attorneys

For the first respondent: Advocate Peter Masihleho

Instructed by:

Motaung Attorneys

[1] Act 66 of 1995, as amended.

[2] Act 26 of 2000, as amended.

[3] See: Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977

(4) SA 135 (W).

[4] (2010) 31 ILJ 112 (LC) at para 18.

[5] [2021] ZALCJHB 26 (3 March 2021).

[6] See: Ecolab (Pty) Ltd v Thoabala and Another (2017) 38 ILJ 2741 (LC).

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