22/9/17

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 60723/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

22/9/17 — DATE

SIGNATURE

In the matter between:

VLOK SYMMINGTON — APPLICANT

And

SOUTH AFRICAN REVENUE SERVICES — RESPONDENT

JUDGMENT

Fabricius J,

1.

In this urgent application, the Applicant seeks the following relief:

ii) "Pending the outcome of the relief in Part B:

2.1 The Respondent is interdicted from taking any disciplinary action against the Applicant, that in any way relates to protected disclosures listed in Part B;

2.2 The Respondent is interdicted from suspending the Applicant from his employment, for reasons that in anyway relate to protected disclosures listed in Part B;

2.3 The Respondent is interdicted from engaging in any conduct towards the Applicant which would amount to an "occupational detriment" as defined in the ***Protected Disclosures Act 26 of 2000*** ('The ***PDA***").

iii) The Respondent is ordered to pay the costs of the application".

In Part B, the following relief was sought:

5. "It is declared that the following disclosures by the Applicant constitute "protective disclosures" as defined in s. 1 and 6 of ***Protected Disclosures Act 26 of 2000*** ("The ***PDA***");

5.1 The lodging of a grievance with the Respondent on or about 27 October 2016;

5.2 The participation in the subsequent investigation into the grievance, and the evidence provided to the external Attorneys tasked with investigating the grievance;

6. It is declared that the following disclosures by the Applicant constitute "protected disclosures" as defined in s. 1, 8 and 9 of the ***PDA:***

6.1 The disclosures made by the Applicant to the Independent Police Investigation Directorate ("IPID") during the period October to December 2016;

6.2 The disclosures made by the Applicant to the National Prosecuting Authority ("The NPA") during the period October to December 2016.

7. The Respondent is interdicted and restrained from subjecting the employee to any form of "occupational detriment" as defined in s. 1 (vi) of the ***PDA***, which is in anyway connected to any of the above disclosures.

8. The Applicant is declared to be excluded from all civil and criminal liability as a result of making the above disclosures, in terms of s. 9 (1) of the ***PDA***."

A cost order was also sought.

2.

The hearing served before me on 15 September 2017 and the disciplinary enquiry was to be held on 18 and 19 September. During the hearing, the Respondent however indicated that it would not proceed with any hearing before my judgment had been delivered.

3.

In the Founding Affidavit, Applicant alleged that he made several disclosures which qualify as "protected disclosures" as defined in s. 1, 5 and 9 of the ***Protected***

Disclosures Act. As a result of having made those disclosures, he said, he now faced a disciplinary hearing and probable dismissal from his employment with SARS. He added that the disclosures related to events that took place on 18 October 2016. In order to motivate this allegation, he deemed it necessary to provide an account "of the larger events" leading up to the incident on 18 October 2016. Most of those events did not involve him personally, but he alleged that the events of 18 October 2016 must be understood in the broader context of the issues of State Capture, and the attempts to oust Mr Pravin Gordhan, a former Minister of Finance from his position. He then continued to describe the events that apparently took place relating to the removal of Minister Nene and Minister Gordhan from their posts. In that particular context his involvement was that he had drafted a memorandum in March 2009, in which he expressed an opinion that the proposed retirement of Mr Ivan Pillay, a former Deputy Commissioner of SARS, was lawful, and in compliance with applicable laws and regulations.

Respondent sought an order striking out these allegations as being irrelevant amongst others, but at the hearing of this application I was not invited to do so

inasmuch as the argument pertaining thereto would be presented to the Court in later proceedings dealing with Part B of the Notice of Motion.

Respondent's view in the Answering Affidavit was that the particular paragraphs were in the form of a political treatise based on unconfirmed hearsay and media reports. They could well be interesting to read as part of a wider dissemination of information about political events which are playing themselves out in this country at the moment, but it was said that they were irrelevant and speculative in the context of the present application. They had no bearing as to how the Applicant conducted himself at a particular meeting on 18 October 2016. It was also said that by referring to these speculative and irrelevant events and Applicant's conduct in general after the incident on 18 October, demonstrated his tendency for melodrama and the exaggeration of his self-importance.

4.

The broad purpose of the ***Protected Disclosures Act*** is to encourage whistle blowers in the interests of accountable and transparent governance in both the

public and private sector. That engages an important constitutional value and such values must therefore be given full weight in interpreting the particular legislation. A general protected disclosure must be made under the circumstances it described in s. 9 of the ***Act***. A "disclosure" is also defined in s. 1, and so is the "occupational detriment" which is prohibited by the provisions s. 3 which reads as follows: "**Employee or worker making protected disclosure not to be subjected to occupational detriment.** – No employee or worker may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure". Any employee who has been subjected, is subjected or may be subjected to an occupational detriment in breach of s. 3 has certain remedies set out in s. 4 of the ***Act***, which would include an approach to this Court and the Labour Court for appropriate relief.

5.

Before dealing any further with questions arising from this ***Act*** in the present context, it is necessary to revert to the facts.

On 18 October 2016, Applicant met with certain officers of the HAWKS in a boardroom. He was asked to provide further details regarding his 2009 memorandum. He returned to his office to work on the required affidavit and was later confronted by a Mr Thabo Titi, who demanded that he hand over a certain document to him. He objected to that and Mr Titi allegedly then locked the door to the boardroom, refused to allow him to leave or phone for assistance. He called his secretary and SARS security for such assistance however, but they were refused access to the boardroom. He then called 10111 to report that he was being held against his will. At some point he then began a video and audio recording of the events using his cell phone. At some stage, also his superior Mr Louw joined the meeting and other SARS colleagues, and he described how an altercation occurred, which included him being grabbed, his arm being twisted and certain documents being wrestled from his hand. He alleged that he was extremely upset and traumatized by what had transpired and thereafter made disclosures which are now alleged to be protected disclosures in terms of the ***Act***.

In the Founding Affidavit he says that the first protected disclosure was an email that he sent to Mr Robert McBride, Head of IPID on 21 October 2016, setting out a summary of the events on 18 October and enquiring as to whether IPID could assist him. IPID was presented with a full statement together with access to the audio and video recordings on his cell phone.

The second protected disclosure was a Supplementary Affidavit made 14 December 2016, which he submitted to IPID.

The third protected disclosure was a formal complaint raised against Mr Titi on 27 October 2016.

6.

After some time he was informed that an independent firm of Attorneys would investigate his grievance and it is clear that the firm Mothle Jooma Sabdia then provided two memoranda recommending ultimately that he be charged with misconduct. It is for present purposes not necessary to deal with the contents these

reports and on which basis they were produced. Applicant has certain complaints in respect thereof which were fully dealt with in his Founding Affidavit.

7.

On 25 July 2017, the senior manager of workplace relations at SARS, sent the following email to him and Mr Titi: "I had indicated in my emails to you that the Thipe Mothle of Mothle Jooma Sabdia was requested to provide a conclusive report on all findings related to the incident that gave rise to the grievance.

He has now concluded that exercise and has provided his addendum report with recommendations to the organization. A copy of this addendum report is attached. The report has been considered by the organization which has elected to accept the findings and recommendations made.

Key amongst the recommendations made was that charges be brought against both of you for possible misconducts highlighted in the report. Due to the dynamics involved in this matter it has been decided that a disciplinary process be run by external parties. An external chairperson as well as external initiator be appointed to

conduct the process. Details of the proceedings will be shared with you by your HRBP once the parties are appointed".

8.

On 29 August 2017, a notice of a disciplinary hearing was presented to the Applicant and it is necessary that I quote it:

"You are hereby given notice to attend a disciplinary hearing in terms of Clause 10 of the Disciplinary Code and Procedure.

The alleged misconducts are (a detailed description of the misconducts is attached):

INTRODUCTION

You are employed by SARS as senior legal advisor, with an obligation to, inter alia,

- Obey all lawful and reasonable instructions issued to you;
- Act in the best interests of SARS at all times;
- Respect your fellow employees;
- Treat all your fellow employees with dignity; and
- Not bring the image and name of SARS into disrepute.

It is alleged that you have committed gross misconduct by breaching all of the above duties as set out hereunder:

CHARGE 1:

- GROSS INSUBORDINATION, ALTERNATIVELY,
- INSUBORDINATION, FURTHER ALTERNATIVELY,
- REFUSAL TO OBEY LAWFUL AND REASONABLE INSTRUCTIONS

1. It is alleged that you are guilty of misconduct as set out above in that on 18 October 2016 and at Lehae la SARS, Brooklyn, Pretoria, you repeatedly, unreasonably and obstinately refused to comply with repeated lawful and reasonable instructions given to you separately by Mr Thabo Titi, acting on behalf of the Commissioner of SARS, Mr Kosie Louw, your line manager, and Brigadier Xaba, acting on behalf of the HAWKS, to surrender and hand over to them, separately and/or jointly, documents which were in your possession and under your control at the time consisting of a letter from the National Prosecuting Authority ("NPA") and email attachments, the latter having been erroneously been attached to the letter from the NPA.

CHARGE 2: CONDUCT UNBECOMING OF AN EMPLOYEE OF SARS

2. It is alleged that on 18 October 2016 and inside Boardroom 1A, at Lehae la SARS, Brooklyn, Pretoria, you conducted yourself in an unbecoming, belligerent and disgraceful manner by becoming visibly agitated, argumentative, obstinate and disrespectful while interacting with members of the Hawks, including Brigadier Xaba and Colonel Maluleke, and SARS employees, including Messrs. Louw, Titi, Clifford Smith and Mark Kingon.

CHARGE 3: USE OF ABUSIVE AND INSULTING LANGUAGE AND AGGRESSIVE CONDUCT

3. It is alleged that on 18 October 2016 and inside Boardroom 1A at Lehae la SARS, Brooklyn, Pretoria, you verbally insulted, abused and undermined the dignity of Mr Thabo Titi by uttering and directing the following words towards him *"...your own bloody phone you f...ng phone yourself"* or words to that effect, and by aggressively pointing and shoving a cell phone towards his face.

CHARGE 4: BRINGING THE NAME AND IMAGE OF SARS INTO DISREPUTE

4. It is alleged that on 18 October 2016 and inside Boardroom 1A, at Lehae la SARS, Brooklyn, Pretoria, you recorded interactions between yourself, members of the HAWKS and employees of SARS on your cell phone. You thereafter, shared the recorded footage with unknown third parties, which resulted in the footage being broadcast on public media, which had the result of bringing the name and image of SARS into disrepute.

The hearing will take place on:

DATE:	TIME:	VENUE:
18 & 19 September 2017	09:00	LEHAE LA SARS BOARDROOM 4

If you do not attend and cannot give reasonable grounds for failing to attend, the hearing will be held in your absence.

You have the following rights:

- To be represented by a fellow employee or a union representative of a recognized trade union;

- To have reasonable access to documents and/or information to prepare for the hearing;
- To be allowed reasonable time to full pay and benefits away from the workplace to prepare for the hearing;
- To have an interpreter if so desired;
- To present evidence on your behalf in the form of documents or through witnesses;
- To cross-examine witnesses of the employer;
- If found guilty, present any relevant circumstances in mitigation in determining the disciplinary sanction, and
- To apply for an Appeal against the outcome of the disciplinary hearing".

9.

It is clear from the charges that they all relate to the events that occurred on 18 October 2016.

10.

In this context the following was said in the Respondent's Answering Affidavit having regard to the relief sought and the relevant allegations made by the Applicant in Founding Affidavit:

1. The relief sought was incompetent in that Applicant was not under any eminent threat of suspension. Also, nowhere in his Founding Affidavit did he claim that he had been threatened with suspension pending the outcome of the disciplinary hearing. The notice of the disciplinary hearing also makes no reference to any pending or contemplated suspension. Applicant himself also does not allege that any such intention was ever communicated with him by Respondent. Accordingly, any claim for an interdict relating to such suspension of the Applicant was baseless and without any factual support;
2. A proper consideration of the notice of disciplinary hearing made it patently clear that the charges which form the subject matter of the proposed hearing related to events of 18 October 2016. The charges of misconduct relate to the manner in which the Applicant conducted himself during the events which

led to the investigation that was conducted by Mothle and reported on it in the report submitted by him and the addendum thereto;

3. The alleged "protected disclosures" referred to in Part B of the Notice of Motion and elucidated upon in the Founding Affidavit make it clear that they relate to reports made by the Applicant after 18 October 2016. Properly construed, the alleged protected disclosures bear no relation to the charges as formulated in the notice of disciplinary hearing. It is beyond dispute that the investigative report prepared by Mothle was as a result of a grievance lodged by the Applicant himself;

4. In the report it was said that having regard to the various versions presented as to what occurred on 18 October 2016, these conflicting versions ought to be tested in the hearing;

5. Respondent was entitled to exercise its powers and responsibilities as set out in s. 9 (2) (c) of the ***South African Revenue Act 34 of 1997*** as amended, which provided that the Commissioner of the Respondent had the

responsibility in particular for the maintenance of discipline of the employees of Respondent;

6. There was also no allegation by the Applicant that the respondent was not entitled to discipline its employees in respect of allegations of misconduct. At the hearing Mr Unterhalter SC, on behalf of Applicant, also submitted that he did not seek to attack the fairness or otherwise of the envisaged disciplinary hearing;

7. Applicant had also not suggested or offered any basis in terms of which it could be concluded that an independent chairperson who would preside over the disciplinary hearing would not conduct such in a fair manner as contemplated in labour legislation and Respondent's disciplinary code and procedure. An independent Advocate was appointed to preside over the hearing as well as an independent initiator.

8. Accordingly, there was no reasonable prospect of the Applicant succeeding in the relief sought in Part B of the Notice of Motion which would warrant the granting of the interim relief sought in Part A.

The crux was that the Applicant was not charged in respect of any of the disclosures that he made subsequent to 18 October 2016.

11.

In any event, Applicant had all the statutory remedies at his disposal were he to be found guilty and if he was dismissed because of any protected disclosures contemplated by the ***Act***, he would be entitled to full retrospective reinstatement by the Labour Court in terms of s. 187 (h), read with s. 193 (1) (a) of the ***Labour Relations Act of 1995*** as amended. It was also submitted in the Answering Affidavit and argued by Ms K. Pillay SC, on behalf of the Respondent, that Applicant had not shown a prima facie right open to some doubt, would not suffer any irreparable harm, and was not entitled to an interim interdict on the basis of the balance of convenience being in his favour either, inasmuch as the Respondent is entitled to exercise its prerogative to discipline its employees who have engaged in conduct that is prohibited by Respondent's disciplinary code.

12.

It is clear that s. 3 of the ***Protected Disclosures*** Act makes it clear that an employee may not be subjected to any occupational detriment "on account, or partly on account" of having made a protected disclosure. There must therefore be a discernible link between a disclosure made and "any occupational detriment". In the present instance, such would include being subjected to any disciplinary action, having regard to the definition of "occupational detriment" in s. 1 of the ***Act***. Mr Unterhalter submitted in this context that this link meant something lesser than legal causation, having regard to the fact that interpretation issues pertaining to this Act should be done in a manner that would result in the broadest possible protection given to a whistle blower. In this context reference was made to ***City of Tshwane Municipality v Engineering Council of South Africa 2010 (2) SA 333 SCA at par. 42***. I have no difficulty with this interpretation which seems to be enforced by specific reference to "partly on account". In both instances however an analysis of the factual situation remains important.

13.

The charges must therefore be analysed *vis-à-vis* the relief sought in respect thereof.

Applicant, in the Founding Affidavit referred to the disclosures made by him and I have mentioned them. Ms Pillay argued that none of the disclosures relied upon by Applicant were disclosures as defined by the Act. Also, she argued that Applicant's Founding Affidavit failed to set out the factual basis on which it was contended that the three disclosures relied upon by him constituted protected disclosures. I prefer to leave these topics for the Court hearing Part B of the application. At present I am concerned about the three disclosures that Applicant has pleaded in the Founding Affidavit, which forms the basis of this application. The question now is whether the charges were brought "on account or partly on account of, of having made a protected disclosure?"

14.

In the Replying Affidavit, Applicant purports to make out a new and/or additional case concerning "constitutional issues raised in this application". I do not know exactly which issues he has in mind, but he puts this new case as follows:

13.1 "This application raises serious constitutional matters of significant public importance, relating to the Rule of Law and principle of legality generally, and in particular the spectre of a State Capture and the obstruction of justice and the use of selective prosecutions by public institutions tasked with law enforcement.

13.2 Furthermore, the application raises novel and constitutionally important questions regarding the application of the ***PDA***, and the admission of hearsay evidence on grounds of public interest, in matters of this nature".

None of these issues has been pleaded as they ought to have been, and Applicant's urgent application is certainly not based thereon, as it appears from the Founding Affidavit. It is impermissible to plead a particular case and then to seek to establish

a different case, either in reply or at a hearing. It is equally impermissible for a Court to have recourse to issues falling outside the pleadings.

See: ***Molusi and Others v Voges N.O. 2016 (3) SA 370 (CC) at paras. 27 to 28.***

He continued to say that for the purposes of adjudicating Part A of this application, the Court should take cognisance of the broader background information, and should accept, at least on the prima facie level, that it constitutes a fair summary of events that are largely within public knowledge, and which are of critical importance to the country.

15.

I have briefly referred to the "broader background", but in my view it must be emphasized that this broader background, which may indeed one day become of critical importance to the country, has at present nothing to do with the question whether or not I should grant Part A of the application on an urgent basis, and the question whether or not the disclosures that he made after the altercations in the

office on 18 October 2016, are now the subject matter of the charges as they have been framed.

16.

In the Replying Affidavit, Applicant furthermore attacks the integrity and the credibility of Mr T. Moyane, the Commissioner of SARS in the context of whether or not he had been the complainant in the criminal case against Mr Gordhan, the previous Minister of Finance. I must emphasize that this question is not the subject matter to be decided herein, and it is unfair to the Respondent as well that that debate was raised in some detail in a Replying Affidavit to which the Respondent could not ordinarily answer to. That particular debate is for present purposes irrelevant. Other issues, also irrelevant, are raised in Replying Affidavit in the context of the fairness or otherwise of Respondent's instructions to the firm of Attorneys which produced the two reports. That is also not the subject matter of the present proceedings. Other irrelevant issues are whether or not SARS has on previous occasions ignored the findings of independent chairpersons and dismissed

employees regardless of the fact that the chairperson imposed a lesser sanction, whether or not SARS fails to comply with the provisions of its own disciplinary code and whether or not members of the National Prosecuting Authority and the HAWKS acted *mala fide* in certain instances. Those issues may or may not become relevant during disciplinary proceedings against the Applicant, but for present purposes they are not.

17.

Applicant also, together with the Replying Affidavit, filed a notice in terms of ***Rule 16A*** which purported to raise certain constitutional issues which, as I have said, are not the subject matter of the present proceedings and have not been pleaded. In any event, the notice is so broad and vague that it for practical purposes becomes meaningless, certainly in these proceedings, if not in general.

18.

In the Replying Affidavit, Applicant also says the following:

34.3 "In broad strokes, my defence is that I acted in the manner that I did, because I was subjected to unlawful kidnaping, intimidation and assault by the HAWKS, assisted by Titi, and that in the circumstances, my conduct was reasonable, and I am not guilty of misconduct".

That defence is one that ought to be put before the envisaged disciplinary enquiry. Applicant's own version of the events in the office on 18 October 2016, and the findings of Attorney Mothle, certainly show conflicting facts as to who did what and when and why during the particular altercation, or scuffle. In my view, those events ought to have been settled with a handshake and a discussion over a beer. Mr Titi was prepared to accept an apology, whilst Applicant demanded his dismissal. Respondent's comment that Applicant is inclined to melodrama is borne out by his assertion that he was "subjected to unlawful kidnapping". The persons on that day in the boardroom conducted themselves in a less than dignified manner and that is about it. The disciplinary enquiry will have to determine whether or not the charges raised against the Applicant have any merit and whether they are serious. In my view the charges are not brought "on account, or partly on account, of ... ", having

20.

As a result of all of the above considerations I am of the view that the Applicant has not made out a case for an interim interdict, and accordingly the application is dismissed with costs, including costs of two Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA