REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J82/14

In the matter between:

IMATU	**First Applicant**
ABRAHAM GERHARDUS STRYDOM	**Second Applicant**
and	
THE CITY OF MATLOSANA LOCAL MUNICIPALITY	**First Respondent**
E H LOUW (*N.O.*)	**Second Respondent**
	Third Respondent

Heard: 06 February 2014

Delivered: 26 February 2014

Summary: (Urgent application for interim relief – *in limine* issues should be canvassed with chairperson of disciplinary enquiry even if he lacks the power to make final determinations on those issues as he can still postpone proceedings).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an urgent application for interim relief. The applicants brought the application to prevent a disciplinary enquiry chaired by the second respondent from proceeding against the second applicant, appointed as a Director: Corporate Services, on 22 January 2014, pending the outcome of an application for declaratory relief invalidating a resolution of the first respondent dated 11 December 2013 initiating disciplinary proceedings against the second applicant and nullifying all steps taken pursuant to that resolution. Further, the applicant sought a stay of all the disciplinary proceedings pending the outcome of disputes referred to the South African Local Government Bargaining Council concerning alleged disclosures in terms of the Protected Disclosure Act number 26 of 2000 (' the PDA').

[2] The application was served on the local authority on 16 January 2014 for hearing on 21 January 2014. On the date of that hearing the first respondent objected to the non joinder of the second respondent, who had been appointed to chair the disciplinary enquiry. The Honourable Justice Cele, J postponed the matter to the following day in order to permit the joinder of the second respondent, preserving costs of the postponement. The following day the second respondent, who did not oppose the application, was joined and the applicants then sought a postponement in order to file replying papers. The first respondent objected to the need for such a postponement on the basis the matter could be disposed of as a matter of urgency without the filing of replying papers, but Cele J held that the matter was sufficiently urgent in relation to the protected disclosure dispute to permit the filing of papers in reply.

[3] The matter was then postponed till 6 February 2014, for hearing and the applicant was ordered to pay the wasted costs of the proceedings on 21 January 2014. By 6 February 2014, the disciplinary proceedings had been postponed to 17 February 2014. When I reserved judgement in the matter

because on the basis that the first respondent was interdicted from the reconvening the disciplinary enquiry pending my judgement.

[4] On 5 February 2014, the day before the application for urgent interim relief was to be heard, the applicant appears to have served an amended notice of motion on the respondents seeking a final order of declaratory relief on the matters for which they previously sought interim relief and in the alternative stating the disciplinary enquiry pending the outcome of the disputes referred to the bargaining council.

The application for interim relief

[5] When the disciplinary proceeding was initially postponed until 22 January 2014, the second applicant's union representative made it clear that it intended to raise preliminary issues relating to the validity of the disciplinary proceedings. In consequence of this application, those issues have not yet been canvassed before the second respondent chairing the enquiry. In consequence, the first respondent argues that the application is premature. It would perhaps be better to refer to this argument as an argument based on the existence of an alternative remedy available to the applicants which they have yet to try. I say this because talk of an application being premature in the context of an urgent application is often dealt with on that basis, even though in substance it is about the availability of an alternative remedy

[6] The crux of the matter in my view is whether or not the applicants should first have canvassed their objections with the chairperson of the enquiry including the suggestion that he should recuse himself. I accept the applicant's argument that some of the issues raised such as the lawfulness of the disciplinary proceedings or the question whether or not the proceedings might constitute an occupational detriment under the PDA and should be postponed for such a claim to be determined, are not ones that the chairperson of the enquiry would have the power to determine himself. However, if the chairman believes that such issues could seriously impugn the integrity of the proceedings, nothing prevents him from deciding to postpone the enquiry pending the resolution of those disputes. Despite it being agreed that the adjourned hearing would

reconvene to consider *in limine* objections raised by the applicants, this has not occurred yet. In ***Booysen v The Minister of Safety and Security & others*** **[2011] 1 BLLR 83 (LAC)**, the LAC made it clear that :

> *"... [T]he Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. 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. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means."*[1]

[7] In this instance the hazard facing the second applicant, which he sought to prevent as a matter of urgency, was the risk of the disciplinary proceedings continuing under circumstances where those proceedings may be unlawful, or presided over by a chairperson who might have some interest in the issues to be determined that could taint his impartiality, and the like. However, all of this could have been canvassed with the chairperson at the next sitting of the enquiry and he might well have decided on one more grounds raised by the applicant's that he ought to postpone the enquiry or recuse himself. That could have been dealt with on 22 January 2014.

[8] Had the chairperson's action on that occasion halted the proceedings, pending the resolution of one or more of the *in limine* objections,the applicant's would have achieved substantially the same relief they sought by way of an interim interdict, without incurring the same costs. If he refused to discontinue the proceedings and insisted on them resuming then the applicant's might well have considered at that point launching these proceedings at least insofar as they raise issues going to the very lawfulness of the enquiry.

[1] At 99, par [54].

[9] The absence of the chairperson's power to make a ruling on some of the issues, does not mean proceedings might not have been postponed, and the applicants should have explored that remedy before rushing to court.

The amended application for final relief

[10] In my view this application was brought on wholly insufficient notice, and accordingly must be dismissed for lack of urgency.

Order

[11] In the circumstances,

11.1 the application for interim relief is dismissed;

11.2 the amended application for final relief is dismissed for lack of urgency

11.3 The applicants must pay the first respondent's costs.

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R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: W Scholtz of Scholtz Attorneys

FIRST RESPONDENT: Adv G L Van der Westhuizen instructed by Savage, Jooste & Adams.