REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P240/14

In the matter between:

NTHABISENG MOLEKO **Applicant**

and

JOE GQABI ECONOMIC

DEVELOPMENT AGENCY (PTY) LTD **First Respondent**

Z MTYOBO **Second Respondent**

Heard: **29 July 2014**

Delivered: **1 August 2014**

Summary: Both the law and fairness require that a costs order be granted in favour of an applicant who would have been the successful litigant but for her dismissal.

Awarding costs in terms of section 162 of the LRA.

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LALLIE, J

[1] The applicant launched this urgent application for an order staying the disciplinary enquiry against her and interdicting the respondents and any person acting under their direction from finalising the disciplinary enquiry, pending the finalisation of the review application in part B of the application. The application is opposed by the first respondent.

[2] The brief factual background of this application is that the applicant was employed as the Chief Executive Officer (CEO) of the first respondent. Pursuant to allegations of misconduct against her, she was suspended from work and charged with a number of acts of misconduct. Her disciplinary enquiry was held on 16 and 25 April 2014, 24 May 2014, 21 June and 7 July 2014. On 7 July 2014, the parties reached an agreement that the second respondent who was the chairperson of the disciplinary enquiry should determine whether the conduct described by the captured facts constituted misconduct. They also agreed to file closing arguments. Subsequently, the second respondent issued his findings in which he found the applicant guilty of the first three charges which had been preferred against her. He required the applicant and the first respondent to submit mitigating and aggravating circumstances by 25 July 2014.

[3] The applicant's legal representatives received the findings on 22 July 2014 and launched this application on 24 July 2014. This matter was enrolled for 29 July 2014. However, on 28 July 2014, the first respondent delivered the applicant's dismissal letter at the offices of her attorney. On 29 July 2014, the applicant filed a notice in terms of Rule 13 withdrawing the application on the grounds that her dismissal had rendered the application obsolete. She, however, sought a costs order on the attorney and client scale on the basis that but for the dismissal, her urgent application would have been successful.

[4] It was argued on behalf of the applicant that her application was effectively unopposed as the chairperson of the first respondent's

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board who attested to the answering affidavit opposing her application had no authority to litigate on the first respondent's behalf. In terms of the first respondent's memorandum of incorporation (memorandum), it is the CEO who is authorised to institute or defend formal legal proceedings on the first respondent's behalf. Other than stating that she is the chairperson of the first respondent who possesses authority to depose to the answering affidavit, she did not disclose the source of her authority.

[5] The first respondent is a juristic person. Anyone defending legal proceedings on its behalf needs the necessary authority. The deponent did not disclose the basis for alleging that she had the necessary authority. In the circumstances, I accept the applicant's submission based on the memorandum that the deponent had no authority to defend these proceedings on behalf of the first respondent and attest to the answering affidavit. In the circumstances, the application would have been unopposed.

[6] Another argument that the applicant sought to rely on is that the second respondent infringed her right to be heard and exceeded the powers vested in him in the agreement in finding her guilty of the first three charges. He, therefore, acted *ultra vires* and his finding that she had waived her right to present her case was therefore invalid. The second respondent's conduct constituted a reviewable irregularity. She submitted that to be subjected to disciplinary enquiry presided over by a chairperson who misconstrued his powers resulted in frustration and hurt feelings. Her future career was entrusted in a person who demonstrated lack of appreciation for its importance.

[7] It was argued on behalf of the applicant that this court may interdict an uncompleted disciplinary enquiry pending the finalisation of an application to review and set aside the decision of the chairperson of a disciplinary enquiry. The applicant relied on section 158 (1) of the Labour Relations Act 66 of 1995 ("the LRA"), *Booysen v Minister of*

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Safety and Security and Other[1] and *Dladla v Council of Mbombela Local Municipality and Another*.[2]

[8] I have considered the provisions of the LRA which prescribe the conflict resolution procedures between employers and employees. I have also taken into account the authorities which express the view that this court should act with restraint when asked to intervene in uncompleted disciplinary enquiries and arbitrations. They are articulated as follows in *Jiba v Minister of Justice and Constitutional Development*.[3]

> 'I wish to deal with the application in so far as it relates to the chairperson's ruling on a more preliminary basis. Exceptional circumstances aside, it is undesirable for this court to entertain applications to review and set aside rulings made in uncompleted proceedings. In *The Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson and other* (unreported, C249/09,14 April 2009) [reported at [2009] 8 BLLR 833 (LC) – Ed], I said the following in relation to the review of interlocutory rulings made by commissioners:
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> > "There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason – for this court to routinely in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA

[1] [2011] 1 BLLR 83 (LAC).
[2] [2010] 6 BLLR 361.
[3] [2009] 10 BLLR 989 (LC) at para 11.

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> arbitration proceedings to run their course without intervention by this court."'

[9] In *Booysen* (*supra*), this court's jurisdiction to interdict unfair disciplinary actions in exceptional cases was confirmed. The second respondent found the reaching of the agreement by the parties strange. I wish to add that the terms of the agreement are equally strange. Their validity is, however, not affected by their nature. The second respondent did more than he was required to do in terms of the agreement and made findings on the applicant's guilt. He effectively denied the applicant of the right to state a case before a decision that she was guilty of some of the charges which had been preferred against her was taken. This is the kind of unfairness and exceptional case referred to in *Booysen* (*supra*). Even in *Jiba* (*supra*) in expressing the undesirability of the Court's intervention, the Court acknowledged its necessity in exception circumstances.

[10] The fundamental difference between the matter at hand and a number of cases where the intervention of this Court in uncompleted disciplinary enquiries including *Jiba* (*supra*) is that the applicant does not seek an interdict based on a chairperson's ruling on a preliminary issue. Her application is based on the merits of her case which involve findings that she is guilty of serious acts of misconduct.

[11] It is not fair to assume that the applicant waived her right to be heard. Waiver is not inferred easily. The agreement concluded by the applicant and the first respondent neither makes reference to nor constitute waiver.

[12] The applicant had no alternative effective remedy and she would have suffered more prejudice than the first respondent had this application been refused. Had the applicant not been dismissed after moving this application but before it was heard, her application for an interdict would have been successful. The law and fairness justify a costs order

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against the first respondent because the applicant should not be out of pocket as a result of the first respondent's unfair conduct.

[13] In the premises, the following order is made:

13.1 The First Respondent pay the applicant's costs

Lallie J

Judge of the Labour Court of South Africa

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Appearances

For the Applicant:	Advocate Nduzulwana
Instructed by:	Ntwendala Attorneys
For the First Respondent:	Mr Mama of Java Mama Attorneys

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