IN THE HIGH COURT OF SOUTH AFRICA

[EAST LONDON CIRCUIT COURT LOCAL DIVISION]

CASE NO.949/20

In the matter between:

NOLUBABALO MAYEDWA t/a

MAYEDWA ATTORNEYS Applicant

And

AMATOLA WATER BOARD First Respondent

THE MINISTER OF HUMAN SETTLEMENT

AND SANITATION Second Respondent

JUDGMENT

TOKOTA J

Introduction:

[1] The applicant is a firm of attorneys practising under the style and name Mayedwa attorneys. On 28 September 2020 it brought an application on an urgent basis seeking an order interdicting and restraining the first respondent from holding a disciplinary enquiry (sometimes referred to as DH) against its Chief Executive which

was to be held on 29 September 2020, pending a review application to be instituted by the applicant to set aside the decision of the first respondent terminating its appointment as the initiator of the DH. The first respondent opposed the application. Due to the fact that the DH was scheduled to be heard at 9h30 on 29 September 2020, at 9h00 on 29 September 2020 I granted an order in the terms set out at the end of this judgment. These are my reasons for the order.

Factual background:

[2] The factual matrix of the application can be summarised as follows:
Although there is a dispute as to the legality of the appointment of the applicant as the initiator of the DH I will accept, without deciding the regularity or otherwise thereof, that the applicant was appointed as such in the disciplinary process against Ms Zitumane, the Chief Executive of the first respondent. For this appointment the applicant relies on a letter dated 31 July 2020 signed by the Acting Chief Executive of the first respondent. The first respondent contends that this appointment was irregular and that N Gawula Inc. was appointed as the initiator of the disciplinary enquiry against Ms Zitumane.

[3] During September 2020 the applicant learnt that Gawula Inc. had been appointed as the initiator and the hearing of the disciplinary enquiry was scheduled to take place on 29 September 2020. Upon learning of the appointment of Gawula Inc. the applicant brought this application seeking an order interdicting and restraining the first respondent from proceeding with the disciplinary process as scheduled pending a review of the cancellation of its contract. It contended that the

appointment of Gawula Inc. was a breach of contract between itself and the first respondent. There was no letter cancelling the appointment of the applicant by the first respondent. The applicant therefore construed the appointment of Gawula Inc. as a conduct constituting repudiation of the contract between itself and the first respondent. The applicant contended further that such appointment was in breach of the prescripts relating to tender processes and therefore liable to be reviewed and set aside.

Preliminary points

[4] Before dealing with the merits of the application it is necessary to dispose of the preliminary points taken by the first respondent. The first respondent raised the following points *in limine*: (a) that the matter was not urgent. Should the court find that it was urgent such urgency was self-induced; (b) since the applicant was seeking an interim order against the organs of State it was therefore obliged to give notice of 72 hours before the hearing date of the matter. The papers were only served on the respondents at 16h40 on 25 September 2020 setting the matter down at 9h30 on 28 September 2020; (c) the necessary parties have not been joined in the proceedings; (d) the review on which the interim order was pegged was a non-starter as the cause of action was not reviewable under the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA). I consider these points hereunder *seriatim.*

Urgency:

[3] The applicant served the papers by email on the respondents on a Friday the 25th of September 2020 at 16h40 and set the matter down for hearing on Tuesday the 28th of September 2020. The respondents were not given an opportunity to file any notice to oppose and answering affidavits before the hearing date. They were given an opportunity to file opposing notices on 2 October 2020 and to file opposing affidavits, if so advised, on 12 October 2020. The first respondent, however, delivered its opposing affidavit together with its heads of argument shortly before the hearing on 28 September 2020.

[5] It is an acceptable practice that if an applicant believes that his/her matter is one of urgency, he/she may himself/herself decide what times to allow the affected parties for entering appearance to oppose and for delivering answering affidavits. In this Division Counsel for the applicant must sign a certificate of urgency and seek a directive from the duty judge indicating, without consulting the other parties, the date on which he desires the matter to be heard. The duty judge will give directives as to the manner of service on the affected parties and further conduct of the matter. The duty judge will not, in the ordinary course of events, deny the applicant a hearing by simply refusing the setting down of the matter on a date chosen by the applicant but may indicate that the applicant will be obliged to address the urgency at the hearing. That is what happened in this application. I allowed the date chosen by the applicant and simply gave directive as to service of the papers.

[6] I indicated in the directive that the applicant would be obliged to persuade the court that the matter was of such urgency that its non-compliance with the Rules should be dispensed with. Respondents had no option; they were compelled by applicant to adhere to the time periods chosen by it and to appear in court on the date selected by applicant, otherwise they would run a risk that an order could be taken in their absence.

[7] In matters of urgency the respondents can only object to the procedure followed by applicant at the hearing of the matter.[1] The applicant thus has to show good cause why the times should be abridged and why it cannot not be afforded substantial redress at a hearing in due course. The case for urgency must be made out in the founding affidavits.[2]

[8] The applicant contends that the matter was urgent and that there was no delay in bringing the application. The contention was that the applicant only became aware of the repudiation of the contract on Friday the 25th of September 2020. The disciplinary hearing was scheduled to take place on 29 September 2020. It was therefore entitled to bring this application on an urgent basis, so the argument ran, to protect its interests.

[9] Since the hearing date of the disciplinary hearing was on the following day I regarded the matter as deserving a hearing and that an order before that date had to be made. I therefore exercised my discretion and allowed the matter to be argued.

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[1] RepublikeinsePublikasies (Edms) Bpk v AfrikaansePersPublikasies (Edms) Bpk 1972 (1) SA 773 (A) at 782A

[2] *Luna MeubelVervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manu)* 1977 (4) SA 135 (W) at 137F

Consequently I need not delve into the urgency. Suffice it to say that a great deal of inconvenience has been caused to the respondents. The matter was brought at a short notice especially dealing with State organs. The period that was left for doing anything by the respondents was a weekend. I considered it to be in the interests of the parties that I should hear the matter.

Failure to comply with section 35 of the General Law Amendment Act No. 62 of 1955.

[10] Section 35 of the General Law Amendment Act 62 of 1955 provides as follows:

'Notwithstanding anything to the contrary contained in any law, no court shall issue any rule nisi operating as an interim interdict against the Government of the Union including the South African Railways and Harbours Administration or the Administration of any Province, or any Minister, Administrator or other officer of the said Government or Administration in his capacity as such, unless notice of the intention to apply for such a rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the said Government, Administration, Minister, Administrator or officer at least seventy-two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application.'

It has been held that s 35 is peremptory to the extent that notice of at least 72 hours, or such lesser period as the court may allow as being reasonable, must be given of an application falling within the ambit of the section.[3] The seventy two hour period was going to expire at 16h40 on 28 September 2020. By that time the matter would have been disposed of. *Mr Swartbooi* who appeared for the applicant, could not argue that the section was not applicable. The applicant also failed to apply for condonation for failure to comply therewith. An organ of State is an entity that

[3] *Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd* 1961 (2) SA 232 (N) at 235H; *Xaba v Bantu Affairs Commissioner, Newcastle* 1968 (1) SA 193 (N) at 195C-D

performs a public function in terms of national legislation. The first respondent is such an entity. I conclude therefore that this point was well taken. On this point alone the application could not succeed.

Failure to join the necessary parties.

[11] *Mr Erasmus SC,* who together with *Mr Vimbi* appeared for the first respondent, submitted that Gawula Inc. and Ms Zitumane had a direct and substantial interest in the outcome of the application. Gawula Inc. was appointed as the initiator and Ms Zitumane was the officer facing disciplinary enquiry. Failure to join them was therefore fatal. *Mr Swartbooi* for the applicant submitted that since these parties were served with the papers, that was a sufficient notice and if they wanted to intervene they should have done so. In the light of the view I take of the matter it is not necessary to detain myself on this point. However I agree that these are the necessary parties that should have been joined.

Is termination of a contract reviewable?

[12] *Mr Erasmus* submitted that the application was ill-conceived. The application is for an interim interdict '*pending a review application to be instituted by the applicant to set aside the decision by the first respondent to terminate the contract or tender which had been awarded to the applicant'. Mr Erasmus* submitted, correctly in my view, that the termination of a contract is not an administrative action and therefore not susceptible to review under the PAJA. Once a contract has been concluded the relationship between the parties is governed by the private law

principles of contract.[4] However it is not explained in the papers which tender was going to be reviewed and precisely on what basis.

[13] The basis of the application for an interim order cannot be premised on a right which is not clear. Cancellation of a contract is not necessarily an administrative action. The applicant is in any event not without a remedy. Two remedies come to mind. It may either bring a *mandamus* for specific performance or claim damages based on repudiation of the contract. *Mr Swartbooi* quite properly conceded that these remedies are available to the applicant.

[14] In **Cape Metropolitan Council[5]** the learned Judge of Appeal stated:

"[17] It follows that whether or not conduct is 'administrative action' would depend on the nature of the power being exercised (SARFU at para [141]). Other considerations which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation (SARFU at para [143]).
[18] The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution. "

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[4]See *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) ([2009] 1 All SA 349) at para. 18; *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) ([2003] 1 All SA 424); and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026). Para.18; *Steenkamp NO v Prov Tender Board, EC* 2006 (3) SA 151 (SCA); ([2006] 1 All SA 478; [2005] ZASCA 120) para.12.

[5]Footnote 4 para.17

In that case the SCA held that cancellation of the contract did not constitute an administrative action.

[15] In *casu* the first respondent insisted that there was no contract between itself and the applicant which had been cancelled. I am not called upon to decide the validity or otherwise of the appointment of the applicant as an initiator in the disciplinary enquiry. On the assumption that it was indeed regularly appointed then the appointment of Gawula Inc. as initiator evinced an intention no longer to be bound by that contract. Such conduct does not constitute an administrative action and is therefore not reviewable. A party's right to repudiate is one that can be freely exercised without the concurrence of the innocent party. An innocent party has a choice either to accept repudiation and claim damages or apply for *mandamus* to compel the guilty party to comply with the terms and conditions of the contract. I conclude therefore that the conduct of the first respondent did not constitute an administrative action and is consequently not reviewable. Consequently, in my view, there are no prospects of success on review.

Requirements for an interim interdict.

[16] The requirements for an interim interdict are trite. They are:

(a) 'A prima facie right even though open to some doubt. What is required is proof of facts that establish the existence of a right in terms of substantive law;

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) The balance of convenience favours the granting of an interim interdict;

(d) The applicant has no other satisfactory remedy[6].'

Generally speaking, one of the aims of an interim interdict is to preserve the *status quo* pending the final determination of the rights of the parties to pending litigation. In considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who will ultimately be successful will receive adequate and effective relief.[7] I deal hereunder with each requirement.

Prima facie right though open to some doubt.

[17] The applicant relies on the contract emanating from the letter of appointment dated 31 July 2020 as constituting its *prima facie* right to review its cancellation. Assuming that the applicant has a right to review the cancellation of that contract, the right to review a decision of the functionary resides in everyone in terms of the PAJA and the Constitution. It does not require protection *pendete lite.* The applicant must show that it stands to suffer irreparable harm if the interim interdict is not granted. The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. Where the right which is sought to be protected is not clear, the court will be loath to exercise its discretion in favour of granting the interim interdict. The applicant made no attempt to demonstrate that it will suffer

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[6]See*Setlogelo v Setlogelo*, 1914 AD 221 at p. 227 and *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691C - G

[7] See *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) ([2006] 3 All SA 523). In para 23 the court held that a litigant is entitled not to be forced to seek alternative relief. The judgment dealt with final relief, but the principle applies here.

irreparable harm in the event the interim order is not granted. *Mr Erasmus* submitted that the applicant has failed to establish any right worthy of protection. In this regard he referred to the case of **National Treasury v Opposition to Urban Tolling Alliance[8] .** In my view the applicant failed to demonstrate that it had a *prima facie* right worthy of protection and that it would suffer irreparable harm if the interim interdict was not granted.

Balance of convenience

[18] In this regard the court must consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the State functionary or organ of State against which the interim order is sought. In terms the Water Services Act 108 of 1997 the power to terminate employment, after following fair Labour practice, vests in the Board of the first respondent. Section 36 provides:

"(3) Subject to any existing rights of a person appointed before the commencement of this Act. a water board may terminate the services of the chief executive of the water board—
(a) for good reason; and
(b) in accordance with fair labour practices and the terms of his or her contract of employment."

In **Doctors for Life International v Speaker of the National Assembly and Others[9]** the Constitutional court cautioned against the courts usurping statutory powers and functions assigned to other branches of government and said:

that —
'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a

[8]2012 (6) SA 223 (CC) at para.50
[9]2006 (6) SA 416 (CC)

decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'[10]

The first respondent made all the arrangements for the scheduled disciplinary hearing. The balance of convenience favours the refusal of the interim interdict especially that the order had to be made a day before the hearing date. The applicant did not prepare for the hearing. *Mr Erasmus* submitted that an instruction to represent a client can be withdrawn at any stage before the hearing date as the client is entitled to be represented by a lawyer of his own choice. I agree.
Furthermore the applicant has not put up a clearest case deserving interference with the decision of the first respondent to hold disciplinary hearing against its employee.

Availability of an adequate alternative remedy:

[19] For the applicant to succeed it must show that there is no adequate alternative remedy that may afford it a similar protection. Whereas the court has a discretion to refuse the interim interdict even if the requirements have been satisfied it has no discretion to grant it if the requirements have not been met. I have already dealt with the alternative remedies available to the applicant above.

[20] Taking into consideration the following factors I was not inclined to think that the applicant should succeed. The first respondent has made all the arrangements for the presiding officer to fly from Johannesburg to carry on with the disciplinary

[10] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (ITAC) at paras 95

enquiry; the application was brought very late it being a day before the hearing; there has been a failure to comply with peremptory provisions of the law; Furthermore I was of the view that the prejudice that would be suffered by the first respondent would be severe compared to that of the applicant. I accordingly dismissed the application.

Costs:

[21] The issue of costs must follow the result. The only aspect that needs elaboration on is that of costs of two Counsel. *Mr Erasmus* submitted that the first respondent considered it a wise and reasonable precaution to employ services of two Counsel in the matter regard being had to the pressure under which the first respondent was put. The respondents were not given time to respond to the application before the hearing date. They were given dates to respond after the hearing date. With the wisdom of senior Counsel the first respondent filed opposing affidavit including heads of argument. The heads of argument were very helpful. In my view it was a wise and reasonable precaution to employ two Counsel to share the undue pressure put to the respondents which was over the week-end. I therefore exercised my discretion in favour of allowing costs of employment of two Counsel.

[22] In the result the following order was made:

"1. The application is dismissed;

2. The applicant is ordered to pay costs of the first respondent, such costs to include costs consequent upon employment of two Counsel."

B R TOKOTA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant	Mr Swartbooi
Instructed by Enzo Meyers Attorneys	
For the first respondent:	Mr Chris Erasmus SC
	Mr M Vimbi
Instructed by Gawula Incorporated.	

Date heard:	28 September 2020
Date order made:	29 September 2020.
Date reasons delivered:	03 November 2020