IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J 167/09

In the matter between:

NOMGCOBO JIBA **Applicant**

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT & 16 OTHERS **Respondent**

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in terms of which the applicant seeks relief relating to a pending disciplinary enquiry. The relief sought includes declarators to the effect that the decision to institute, commence and proceed with disciplinary proceedings against the applicant is unlawful, that the decision to suspend her is unlawful, that a ruling made by the 11th respondent (who was appointed as chairperson of a disciplinary enquiry at which the applicant has been called to account on allegations of misconduct) should be set aside, and an order reinstating the applicant with immediate effect.

[2] On 3 February 2009, the date on which the application was first set down for hearing, the matter was postponed until 16 April 2009 to permit the filing of answering and replying affidavits. It was agreed then that the pending disciplinary hearing would be suspended 'pending the hearing of the review application'. On 16 April 2009, the matter was again postponed to 24 April 2009, when it was finally argued.

[3] The papers in this matter exceed a thousand pages. I do not intend to burden this judgment with a recitation of what are largely common cause, background material and averments of an argumentative rather than a factual nature.

[4] The applicant is employed by the 16th respondent, the Department of Justice, as a senior deputy director of public prosecutions, and attached to the 17th respondent, the National Prosecuting Authority, in the unit known as the Directorate of Special Operations. In essence, the applicant claims that she is the victim of a conspiracy by the management of the NPA, and that the decisions to suspend her and to institute disciplinary action against her are manifestations of this conspiracy. In September 2007, the applicant was requested to assist the SAPS in an investigation involving senior members of the NPA, and in particular, the 10th respondent. Following her engagement with the SAPS, the applicant claims that she was requested to divulge the content of her communications with the SAPS. She refused to do so. After addressing letters recording her concerns to several of the respondents, the applicant claims that on 12 December 2007, she was handed a letter of suspension. In February 2008, the applicant was notified that she should attend a disciplinary enquiry to answer to allegations of misconduct concerning dishonesty, unprofessional conduct and conduct unbecoming and bringing the NPA into disrepute. The enquiry was postponed to 18 April 2008. When the hearing commenced, the applicant raised a point *in limine* to the effect that the NPA was precluded from proceeding with the enquiry since it had failed to hold the hearing within a period of 60 days after the applicant's

suspension, a failure that the applicant alleged was contrary to applicable procedures. The chairperson of the enquiry heard evidence given by the applicant and a number of witnesses who testified for the NPA. There was a dispute of fact as to the date of the applicant's suspension. The chairperson ruled that the applicant's suspension came into effect on 10 January 2008 and that the hearing had been timeously convened, on the 57th day, and that the proceedings should continue. The hearing was set down for 4 to 6 August 2008. The applicant had in the interim requested a copy of the record of the proceedings. When the hearing convened, the applicant applied for an indefinite postponement of the proceedings pending an application to review the ruling on the point *in limine*. The application was granted. Between August 2008 and January 2009, the applicant states that she attempted to obtain the record, in order to initiate the application for review. On 8 January 2009, the applicant received notice that the disciplinary hearing would continue on 5 and 6 February 2009. The tapes of the hearing having been made available to the applicant in October 2008, the transcribed record was made available to her on 27 January 2009. In the face of her employer's insistence to proceed with the enquiry on 5 and 6 February 2009, the applicant filed this application on 29 January 2009, seeking the relief outlined above. In these circumstances, the applicant submits that she is fully justified in bringing the application as matter of urgency.

[5] During argument, both parties made submissions regarding this court's jurisdiction to entertain the application, and on the merits of the applicant's suspension and the chairperson's ruling on the point *in limine*. Before addressing the question of urgency, I wish to make a few observations on these issues.

Disciplinary proceedings and suspension: Jurisdiction

[6] Mr Boda, who appeared for the fourth to seventeenth respondents, submitted that the court had no jurisdiction to entertain this application. In relation to the relief sought in respect of the applicant's suspension, he submitted that there was no pending lis between the parties that could legitimately form the basis for relief. In relation to the part of the relief sought that concerned the disciplinary hearing, Mr Boda submitted that s 157 of the LRA, read with ss 191 and 193, precluded the court from intervening in internal disciplinary proceedings.

[7] In relation to Mr Boda's first point, the matter was argued on the basis that the applicant seeks final relief, in circumstances where she has not referred a dispute concerning her suspension to arbitration, and the time limits applicable to the referral have lapsed. In these circumstances, in my view, this court is not deprived of the jurisdiction to make an order concerning the lawfulness or fairness of the suspension. Whether the applicant is entitled to an order is another matter. The applicant's suspension aside, whether this court is empowered to review or interdict internal disciplinary proceedings is a more controversial matter.

[8] Support for Mr Boda's submission that this court has no jurisdiction in these circumstances is to be found in the recent decision by Cheadle AJ in *Booysen v SAPS & another* [2008] 10 BLLR 928 (LC). In that case, the court observed that s 191 of the LRA requires disputes about the fairness of a dismissal to be referred to the CCMA or a bargaining council with jurisdiction, and confers on those bodies the jurisdiction to arbitrate disputes about dismissals for misconduct. The court considered at some length the purpose underlying the statutory dispute resolution system and in particular, the delicate balance struck between the competing interests of employer and employee, and concluded that a purposive interpretation of the Act leads to the conclusion that this court has no jurisdiction to intervene in disciplinary

proceedings. I might add that s 157(5) states in the clearest possible terms that this court does not have jurisdiction to adjudicate an unresolved dispute if the Act requires the dispute to be resolved through arbitration.

[9] I am not convinced that the proposition established in *Booysen* can be so broadly and unequivocally stated. While it is clear to me that the letter and purpose of the Act precludes this court from making orders, as it is from time to time requested to do (more often than not by way of urgent motion proceedings), that would have the effect of finally determining those dismissal disputes that fall within the province of the CCMA or a bargaining council, s 158 (1) (a) gives this court the power to grant urgent interim relief in respect of disputes that must ultimately be determined by arbitration. Whether or not the court *should* intervene is a separate matter, and one that I address below in relation to the merits of the present application. But provided the relief sought does not amount to a usurping of the CCMA's or a bargaining council's statutory functions, it seems to me that this court, in principle at least, has the jurisdiction to make interim orders concerning disciplinary proceedings.

The review

[10] The applicant seeks to review and set aside the chairperson's ruling that the disciplinary hearing was held within 60 days of her suspension, and that the disciplinary enquiry should therefore proceed. I do not intend to make any definitive finding on the substantive correctness or otherwise of the chairperson's ruling, save to say that it is supported by a recent judgment of this court. In *Lekabe v Minister of Justice and Constitutional Development* (unreported, 5 February 2009, J1092/08) the court held, in relation to the same SMS code, that an employer's right to discipline an employee does not fall away if the employer has failed within the permitted 60-day period of suspension to convene a disciplinary enquiry into alleged misconduct.

[11] 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 others* (unreported, C249/09, 14 April 2009), I said the following in relation to the review of interlocutory rulings made by commissioners:

> *"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 intervene 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 arbitration proceedings to run their course without intervention by this court." (at para 4).*

[12] The same considerations apply to internal disciplinary hearings, with the additional point that for this court to routinely consider applications such as that before me would entirely undermine the statutory dispute resolution system. By asking the court to rule that the disciplinary action initiated against the applicant was unauthorised and unprocedural, the applicant is effectively asking the court to by pass the bargaining council and to ignore its role in a carefully crafted scheme that acknowledges and gives effect to the value of self-regulation. This court, through its review powers, is mandated to exercise a degree of oversight over labour-related arbitrations - its

powers as a court of first instance are constrained by the LRA, and that constraint must be respected.

Authority

[13] Mr Zilwa, who appeared for the applicant urged me to deal with the application based on an overarching argument to the effect that the fourth respondent was not entitled, either in terms of the Constitution or the NPA act, to deal with employment issues affecting a senior official such as the applicant. The submission is based on the provisions of the National Prosecution Authority Act, 32 of 1998 ("the NPA Act"), which in s 15 confers the power on the Minister to appoint suitable persons as deputy directors. Mr Boda urged me to accept that the power to dismiss was implicit in the power of the National Director of Public Prosecutions, and that it would be unconstitutional for only the Minister to have the power to dismiss.

[14] I do not intend to dwell on this issue. The NPA is silent on the question of who is empowered to dismiss deputy directors. Mr Zilwa referred me to the unreported decision of *Tshavhunga v National Director of Public Prosecutions and others* (TPD, 42117/06, 19 March 2008) which deals pertinently with the issue of authority to terminate the employment of deputy directors of public prosecutions. After a review of the applicable legislation, the court concluded that since the NPA Act conferred powers on the Minister to appoint deputy directors of public prosecutions, it was axiomatic that only the Minister had the power to terminate the services of such a person if he or she was no longer suitable to hold office. The court held further that where a contested termination of services arises from the contract of employment (as opposed to an administrative act, a basis that Mr Zilwa did not rely on), an action must be brought "within labour forums and in particular the Labour Court, again without inordinate delay" (at para 46).

[15] For at least two reasons, the ratio of the *Tshavhunga* decision is distinguishable from the facts of the present case. In *Tshavhunga*, the applicant had been dismissed, and challenged the lawfulness of his dismissal *inter alia* on the basis that the executive committee that took the decision to terminate his services was not authorised to do so. In the present circumstances, there is no dismissal - the applicant has been called to account for her conduct in a disciplinary enquiry; she has not been dismissed. Secondly, there being no dismissal, the issue of authority to effect a dismissal is prematurely raised - the applicant has the right to raise as a defence at the disciplinary hearing the alleged unlawfulness of her employer's actions, or those of any of the other respondents, a defence that may be upheld. In the event that the applicant is found guilty of any of the charges against her, it remains open for her to contend that only the Minister has the right to make any decision to dismiss her. In this event, the chairperson (should she be persuaded to uphold the applicant's contentions on authority to dismiss) might elect to make only a recommendation to the Minister, based on the evidence led at the hearing. It is not for this court, in motion proceedings brought on an urgent basis, to anticipate events that might equally give substance to the applicant's contentions or not.

[16] Further, the *Tshavhunga* judgment is not authority for the proposition that the dispute resolution structures established by the LRA can be undermined by piecemeal attacks brought by way of motion proceedings in this court on interlocutory rulings and decisions made by chairpersons of disciplinary hearings, or by commissioners and arbitrators. When the court in that matter stated that a contested termination of employment should be brought before the appropriate forum without delay, it meant no doubt that this should be done subject to the procedures established by the LRA and the time frames that it provides. In short: there is no reason why the question of authority to dismiss should be determined by this court in motion proceedings, initiated on an urgent basis, in circumstances where no dismissal is apprehended, and where the chairperson of a disciplinary enquiry (and

I would add, a commissioner or arbitrator in unfair dismissal proceedings) have not been seized with the question of authority and have made no ruling on it.

[17] In summary: although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters generally best dealt with in arbitration proceedings consequent on any allegation if unfair dismissal, and if necessary, by this court in review proceedings under s 145.

Urgency

[17] This court recently referred to a "worrying trend" that has become evident in the last year or so where the court's roll is clogged with applications either to interdict disciplinary hearings from taking place, or to have dismissals declared invalid. The court observed that in most of these instances, the applicants were persons of means who could afford the cost of seeking relief on an urgent basis in circumstances where the case was unexceptional (see *Mosiane v Tlokwe City Council* (unreported, J202/09, 24 April 2009). Although this court must obviously guard against an abuse of its process, its doors are open to all employees, the wealthy and the impecunious. There is no basis to discriminate against employees of means simply on account of their ability to finance the litigation that they institute against their employers. The question in every application brought as a matter of urgency is whether the application is urgent, and whether the remaining requirements for interim or final relief (as the case may be) have been met.

[18] Rule 8 of the Rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite that there are degrees of urgency, and the degree to which the ordinarily 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.

[19] The urgency of this application rests on that part of the relief sought that concerns the review of the chairperson's ruling on the point *in limine*. The ruling was made on 17 June 2008. As early as 8 June 2008, shortly after argument was finalised (on 4 June), the applicant sought to acquire a transcript of the proceedings. Her evidence is that she required the record to consult her legal representatives on the prospect of an application to review any ruling made by the chairperson. At the time that the disciplinary hearing was postponed to permit the applicant to launch an application for review, the record had not been received. Transcription commenced in October 2008, and a transcribed record made available to the applicant in January 2009.

[20] I deal now with that part of the relief sought that seeks to set aside the applicant's suspension. There is no reason why the facts relevant to the review of the chairperson's ruling should be relevant to the urgency of the challenge to the lawfulness of the applicant's suspension – these are discrete disputes. The applicant was suspended in either December 2007 or January 2008, depending on which party's contention in relation to the date of suspension is correct (it is not necessary for me to make a finding on this issue). Either way, more than a year has elapsed since the applicant was suspended. On 9 July 2008, she referred a dispute to the General Public Service Sectoral Bargaining Council under case number PSGA 413-08/09. The dispute was conciliated on 11 August 2008, and a certificate on non-resolution of the dispute was issued on the same day. The applicant has not

referred the dispute to arbitration; indeed, any dispute regarding the applicant's suspension has been dormant for months. The applicant was entitled to approach this court for urgent relief, subject to the rules relating to urgency, pending the determination of any dispute referred to the bargaining council. The contention advanced on behalf of the applicant in these proceedings i.e. that the applicant was suspended by persons who had no authority to do so, could have been argued at that stage. The delay in obtaining a transcription of the disciplinary proceedings was entirely irrelevant to the applicant's suspension. I fail to appreciate how in these circumstances the matter of the applicant's suspension assumes any degree of urgency.

[21] In view of my findings on the other relief sought by the applicant, little purpose would be served in striking the matter from the roll. I intend therefore to dismiss the application. There is no reason why costs should not follow the result. None of the considerations relevant to the exercise of the court's discretion mentioned in *NUM v East Rand Gold And Uranium Ltd* 1992 (1) SA 700 (A) affect the application of the general rule that costs should follow the result.

I accordingly make the following order:

The application is dismissed, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of Hearing: 24 April 2009
Date of Judgment: 19 May 2009

For the applicant: Adv PHS Zilwa
Instructed by: TP Hotane

For the respondents: Adv F Boda

Instructed by: the State Attorney