Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

CASE: C228/2022

In the matter between:

NEHAWU obo MITCHELING TITUS	**First Applicant**
and	
DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT (WESTERN CAPE)	**First Respondent**
GIDEON MOGABA MAMABOLO (*N.O.*)	**Second Respondent**
PUBLIC SERVICE COORDINATING BARGAINING COUNCIL (PSCBC)	**Third Respondent**

Date of Hearing: 10 June 2022
Date of Judgment: 13 June 2022

Summary: (Urgent - interdict to stay disciplinary proceedings pending a) determination of an interpretation and application dispute concerning the appointment of legal representatives and b) pending the outcome of a review under s 158(1)(h) of the LRA-in the circumstances interim relief granted pending the outcome of the bargaining council referral)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed urgent application to interdict a disciplinary inquiry pending the outcome of a referral to a bargaining Council and the outcome of a review application under section 158(1)(h) of the Labour Actions Act, 66 of 1995 ('the LRA').

[2] Common to both the referral and review is a challenge to the appointment of legal representatives to represent the employer ('the department') in the disciplinary proceedings instituted in March 2022 against the applicant, Ms M Titus ('Titus'), concerning alleged improprieties in the recommendation and administration of a Land Redistribution for Agricultural Development Grant ('LRAD grant') resulting in the improper authorisation or utilization of spending amounting to approximately R 2,6 million in 2009 or 2010.

Brief chronology

[3] On 5 April 2022, when the disciplinary inquiry first convened, Titus raised a preliminary objection to the department appointing legal practitioners as the chairperson and its representatives in the inquiry. The chairperson asked for written representations after hearing argument on the point, which were received by 18 April 2022. On 2 May 2022 the second respondent, Mr G Mamabolo ('the chairperson) issued a written ruling dismissing the preliminary objection.

[4] On 13 May 2022, NEHAWU, acting on behalf of Titus, referred an interpretation and application dispute to the relevant bargaining council ('the PSCBC') complaining that the department had acted in breach of paragraph 7.3.f of PSCBC Resolution 1/2003 (' the resolution') by appointing legal practitioners to the perform the abovementioned roles in the inquiry. The clause reads:

> "f. In a disciplinary hearing, neither the employer only employee may be represented by a legal practitioner, unless-
>
> (i) the employee is a legal practitioner or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct; or

(ii) the disciplinary hearing is conducted in terms of paragraph 7.3.c[1]

For the purposes of this agreement, a legal practitioner as defined as a person who is admitted to practice as an advocate or an attorney in South Africa."

[5] The initial referral to the bargaining Council was defective and the dispute was re-referred on or about 17 May 2022.

[6] The urgent application was filed on 20 May 2022, some 18 days after the ruling of the chairperson. The applicant wanted the application enrolled on 31 May 2022 and called upon the respondents to file any answering affidavits by 25 May 2022. The department filed its answering affidavit on 27 May 2022, and Titus filed her replying affidavit by 30 May 2022. As it happened the matter was only enrolled on 10 June 2022.

The application

Urgency

[7] In terms of the chronology is summarised above, it could be argued that this application could have been launched as soon as Titus became aware that external legal representatives had been appointed by the employer. However, it would have been inappropriate not to have first raised this with the chairperson of the inquiry, which NEHAWU did. The chairperson asked for written representations after hearing oral argument on 5 April 2022 and handed down his decision on 2 May 2022. Had the application been made before 2 May 2022, it would have been undoubtedly challenged on the basis that it was premature. The question remains whether it should have been launched earlier than 20 May 2022.

[1] Paragraph 7.3.c provides that the employer and employee may agree that a disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council, but is of no relevance to this matter.

[8] When the chairperson handed down his ruling on 2 May 2022 he instructed the employer to schedule the enquiry within a month or, alternatively, on a date agreed to by the parties. On 12 May 2022 the department requested the chairperson to set the matter down either during the week commencing 30 May or the week commencing 6 June 2022. By that stage the department was aware of NEHAWU's first attempt to refer the dispute to the bargaining Council. The following day, NEHAWU asked the chairperson and the employer to agree to hold the inquiry in abeyance pending the outcome of the bargaining Council referral. It requested a reply by 17 May. The inquiry was then launched three days later, apparently in the absence of any positive response from the department or the chairperson.

[9] While it is not unknown for a party that is contemplating bringing an urgent application to give an opponent an extended time to agree to the relief which is ultimately sought, with the intention of artificially creating a sense of urgency when the opponent finally confirms that its position remains unchanged, this does not appear to be the case here. There were clearly some discussions about the reconvening of the inquiry which only failed to yield anything by 12 May. The union promptly requested a postponement pending the outcome of the referral, which it had attempted to make before then, and the few days it gave the employer to agree to a postponement was not obviously contrived to buy time. Once it was clear the employer and chairperson did not consent to a delay, the union acted reasonably promptly in launching the application.

[10] In the circumstances I am satisfied that the application was not brought unduly late nor prematurely in relation to the disciplinary enquiry it aims to stay.

The existence of a clear or prima facie right and the existence of alternative remedies

[11] In terms of her founding affidavit, Titus claims she has a clear right to enforce the terms of the resolution which is a collective agreement and that she has a right not to be unfairly prejudiced in the inquiry because the employer has legal representation, whereas she does not and cannot afford any herself. Elsewhere in her affidavit, she alleges that the department's decision to appoint legal

representatives was *ultra vires* because it was in breach of her contract of employment read with the employer's policies and resolutions governing disciplinary proceedings and was a material breach of the disciplinary regulations. In her founding affidavit she does not expressly state the basis on which she intended to apply to review the department's decision under section 158(1)(h) of the LRA. The only intimation about what the possible basis for such a review application might be is the allegation that the department had acted in breach of her employment contract.

[12] The review application under section 158(1)(h) was only filed after the pleadings had closed in the urgent application. Contrary to what was stated in the notice of motion in the urgent application, the review application seeks not only to review and set aside the decision of the department to appoint legal representatives before the inquiry commenced, but also to set aside the decision of the chairperson, acting for the department, in dismissing the *in limine* objection. The founding affidavit asserts that the chairperson and the department departed from the clear terms of the resolution and their decisions fell to be declared *ultra vires* and void *ab initio*. Insofar as any reliance is placed on Titus's contract of employment it is alleged that the wholesale departure from the disciplinary regulations is in breach of her contract of employment. It appears that the term 'regulations' simply a synonym for the provisions of the resolution, and is not a reference to statutory instruments. In passing it is also noted that the term '*ultra vires'* appears to be used somewhat broadly to describe unlawful action, rather than the more appropriate use of the term to describe a party, who acts beyond the scope of their own legal powers[2]. No basis is laid for a claim that the department acted *ultra vires* in the latter sense.

[13] Section 24 of the LRA provides that disputes over the interpretation or application of collective agreements must be referred to conciliation and, if unresolved, to arbitration. A clear right therefore exists to have the dispute over the alleged noncompliance with paragraph 7.3.f of the resolution determined by arbitration.

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[2] See *During NO v Boesak and Another* 1990 (3) SA 661 (A) at 675G - 676D

[14] On the other hand, the contention that the department or the chairperson acted *ultra vires* in allegedly not complying with the Resolution and that Titus has a *prima facie* right to reverse that decision in review proceedings, so the court should consequently stay the inquiry pending the outcome of the s 158(1)(h) review is not a compelling one. Notionally, such a review is possible, but whether it warrants staying the disciplinary proceedings has to be considered also.

Prospect of irreparable harm and absence of alternative remedy

[15] The harm Titus says she will suffer is the prejudice of having practising lawyers prosecuting her and hearing her enquiry, whose professional skills her union representatives cannot match and this would result in an unfair hearing. If true, this would be hard to remedy after the enquiry had been held, unless she is dismissed and can then claim her dismissal was procedurally unfair. The most satisfactory remedy that presents is to allow an arbitrator to resolve the question before the enquiry proceeds to deal with the merits, which will be obtained through the bargaining council dispute process that has been set in motion.

[16] The relief obtainable through the review application would effectively be the same but is unlikely to be enrolled court in less than a year, given the opposed motion roll. In truth the arbitration proceeding is a far more suitable, appropriate and expeditious way of resolving the essence of Titus's complaint.

Balance of convenience

[17] When the matter was argued it was contended that in fact the department intended to discuss the postponement of the enquiry to allow the arbitration of the dispute to conclude, whereafter the enquiry could proceed. However, this was not apparent in the affidavits and it should have been tendered after receiving the application, which would have made it unnecessary for Titus to proceed with this application.

[18] It is obvious that a delay of a month of an enquiry which is only being conducted belatedly into events going back some time, is the only prejudice the

department will suffer by awaiting the outcome of the arbitration, whereas the prejudice to Titus, if she is ultimately correct about the use of legal representatives by the department, will be hard to undo if evidence has already been led in the enquiry. At this point, the internal inquiry into the merits has not begun and no evidence has been led.

[19] However, in respect of the review application, the balance of convenience does not favour Titus. This is mainly because the pending conciliation and arbitration of the dispute at the bargaining council is a more than satisfactory form of alternative relief. Further, even if the enquiry has been a long time in coming, delaying it for another year is hard to justify and gives rise to the kind of interruption of internal proceedings which the court is admonished not to permit except in very exceptional circumstances[3]. Leaving aside the justification for staying the enquiry to allow the bargaining council process to run its course, Titus has not provided any exceptional grounds for staying the enquiry until the review is heard. More particularly, she has not shown that she would suffer a grave injustice and the interim relief ordered would not suffice to afford her justice by another means. In my view, one of the factors that the court ought to be mindful of when granting drastic interdictory relief of this nature is the yawning gap granting such relief creates between the employment rights of state employees and those in the private sector, which was discussed in *Mantzaris v University of Durban-Westville & others* (2000) 21 *ILJ* 1818 (LC) at paragraphs 5.1 to 5.3., albeit that it was dealing in that instance with a review application under s 145 of the LRA and not an interdict under s 158(1)(h).

[20] Accordingly, granting interim relief in respect of the dispute pending before the bargaining council is justified on the facts, up to the point where the dispute is either settled or an arbitration award is handed down, but no relief is warranted in respect of the review application.

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[3] *Booysen v Minister of Safety & Security & others* (2011) 32 *ILJ* 112 (LAC):

> " [54] To answer the question that was before the court a quo, the 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. The list is not exhaustive."

Costs

[21] Both parties have been partially successful and there is a continuing employment relationship. In the circumstances, there is no reason to depart from the normal approach to cost awards in this court in terms of s 165, namely that each party bear their own costs.

Order

[1] The application is heard on an urgent basis under Rule 8 of the Labour Court Rules and noncompliance with forms, service and time periods as provided for therein is condoned.

[2] The First Respondent is interdicted and restrained from proceeding with the disciplinary inquiry against Ms M Titus pending the settlement or, alternatively, the issuing of an arbitration award in respect of the dispute referred to the Third Respondent by the Applicant on 17 May 2022.

[3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	K Allen instructed by Marais Muller Hendricks Inc
For the First Respondent:	S Mahlangu assisted by B Maphosa, instructed by the State Attorney (Cape Town)