REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 631 / 2014

In the matter between:

SENZO JUSTICE ZONDO **First Applicant**

SIYABONGA MAGIC MNGADI **Second Applicant**

and

UTHUKELA DISTRICT MUNICIPALITY **First Respondent**

BHEKI KUBHEKA N.O. **Second Respondent**

Heard: **30 July 2014**

Delivered: **5 August 2014**

Summary: **Interdict application – principles stated – application of principles to matter – issue of clear right and alternative remedy**

Jurisdiction – Labour Court does have jurisdiction to consider urgent applications to intervene in the case of incomplete disciplinary proceedings – exceptional and compelling reasons however required

Legal representation – right to legal representation in disciplinary proceedings – principles stated

Collective agreement – disciplinary code established by collective agreement – collective agreement regulating right to representation in disciplinary proceedings – legal representation ousted – parties bound by collective agreement

Alternative remedy – if legal representation improperly refused – could be an issue of procedural unfairness in subsequent unfair dismissal proceedings if employees dismissed – arbitration in any event a hearing de novo where as far as substantive fairness is concerned – suitable alternative remedy available

Prejudice – real prejudice must be shown to justify relief – no real prejudice shown

Interdict – no clear right and prejudice shown and existence of proper alternative remedy – application dismissed

---

JUDGMENT

SNYMAN, AJ

Introduction

[1] The two applicants in this matter brought an urgent application in which the applicants firstly applied for what they called an interim order, in terms of which the applicants sought to review and set aside a ruling by the second respondent in his capacity as chairperson of a disciplinary hearing against the applicants refusing them legal representation in such hearing. Secondly, the applicants applied for an interdict in which the applicants sought to interdict and restrain the first respondent from proceeding with the disciplinary hearing against the applicants pending the final determination of their application to review the legal representation ruling of the second respondent.

[2] The first issue to be dealt with is the nature of the relief sought. The applicants have couched the relief sought as an interim order. However, and to simply call the relief sought an interim order in the notice of motion does not make it so. To just attach a particular label to substantive relief sought in a notice of motion cannot change the true nature of what it is that is being applied for. There is of course good reason why applicants would want to have an application determined on the basis of seeking interim relief, being that the more stringent requirements the applicants would have to prove have been met, when final relief is sought, is avoided. Therefore it is always important to establish from the outset what the nature of the relief being sought by applicants actually is. For the reasons I deal with next, it is my view that what the applicants *in casu* are really asking for is final relief, despite calling it interim relief.

[3] The issue of what exactly it was that the applicants were seeking was specifically raised by me with Mr Hlatswayo, who represented the applicants. Mr Hlatswayo conceded that the applicants do not seek an urgent review of the ruling of the second respondent refusing legal representation, despite what is prayed for in the notice of motion. This concession was properly made. There was simply no case made out on the papers before me upon which any such review could be founded and there was no compliance with Rule 7A dealing with review applications in the Labour Court.

The record of the disciplinary proceedings were not even before me. Whilst I have my doubts as to whether it would even be competent to bring a review application on an urgent basis to challenge such a ruling by a disciplinary hearing chairperson, I need not concern myself with the issue any further, considering the concession made by the applicants. Therefore, and as confirmed by Mr Hlatswayo, what is to follow in the future is the prosecution of a review application in respect of the legal representation ruling of the second respondent in the normal course.

[4] As I therefore do not have to determine a review application, what do the applicants then want? Mr Hlatswayo confirmed that what the applicants were actually seeking is that the disciplinary proceedings against the applicants be interdicted from in any way proceeding until the applicants' review application in respect of the legal representation ruling has been finally determined. This is clearly not interim relief, but final relief.[1] In effect, the disciplinary proceedings would be permanently stayed until the event of the outcome of the legal representation review application. As matters stand, this is indefinitely.

[5] Accordingly, and as these are motion proceedings, in which final relief is sought, any factual disputes between the parties must be determined on the basis of the judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[2] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[3] this test was summarized as thus: 'The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules …. are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated

[1] See *Mashiya v Sirkhot NO and Others* (2012) 33 ILJ 420 (LC) para 19.
[2] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) para 26.
[3] 2009 (3) SA 187 (W) para 19.

by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[6] As this matter also concerns the granting of final relief, the applicants must satisfy three essential requirements, being: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[4] These requirements must all be shown by the applicants to applying the proper factual matrix arrived at by using the *Plascon Evans* test enunciated above. These facts arrived at using the *Plascon Evans* test I will now set out hereunder.

Background facts

[7] The respondent is a municipality established in terms of the Municipal Systems Act[5]. The two applicants were employed by the first respondent as respectively a senior salaries clerk and payroll officer. The first applicant started employment in February 2010, and the second applicant in September 2011.

[8] All issues relating to the conduct of discipline in the first respondent is regulated by a collective agreement concluded in the South African Local Government Bargaining Council between the South African Local Government Association ("SALGA") and the two representative trade unions in the sector (public service), being the South African

[4] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20 ; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) para 2; *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (2013) 34 ILJ 3314 (LC) para 7.
[5] Act 32 of 2000.

Municipal Workers Union ("SAMWU") and the Independent Municipal and Allied Trade Union ("IMATU"). The two applicants were at all relevant times both members of IMATU.

[9] The current collective agreement, called the 'Disciplinary Procedure and Code Collective Agreement', was concluded on 21 April 2010 between the aforesaid parties. This collective agreement will hereinafter be referred to as 'the agreement'. The agreement regulates all aspects of disciplinary proceedings in the first respondent, and in particular, how disciplinary hearings are constituted and conducted by parties to the disciplinary process and the respective rights and obligations of the parties. The agreement is currently still valid and binding between the parties. As the matter *in casu* specifically concerns the issue of representation of employees in such disciplinary proceedings, I will focus on the provisions of the agreement relating to representation.

[10] In clause 5.7 of the agreement, it is recorded that 'This procedure, as amended from time to time, will define the disciplinary process and the rights and obligations of management and employees.' The agreement then in fact specifically deals with the issue of representation in the disciplinary proceedings, in several respects. Firstly, it is prescribed that in the notice to attend the disciplinary hearing furnished to the employee (called a Notice of Misconduct), it is prescribed that the said notice must record that 'the Employee may appoint a representative of choice who may be a fellow employee, shop steward or trade union official'.[6] With regard to the conduct of the disciplinary hearing, it is prescribed that 'The Employee summoned before the Disciplinary Hearing shall have the right to be heard in person or through a representative, subject to clause 6.8.4 above ….'[7]. Finally, the agreement then specifically deals with representation per se, and it is recorded that 'An Employee shall be entitled to

[6] Clause 6.8.4 of the agreement.
[7] Clause 7.4 of the agreement.

representation at any enquiry by a fellow employee, a shop steward or a trade union official.'[8]

[11] In this matter, the applicants were suspended on 17 March 2014 following allegations of misconduct they were alleged to have committed. I may mention that the applicants in fact challenged these suspensions as an unfair labour practice to the bargaining council as well, but this challenge was not successful and the applicants' unfair labour practice dispute was dismissed.

[12] On 17 June 2014, the applicants were then each presented with a notice to attend a disciplinary enquiry to be held on 4 July 2014. The prosecutor appointed as prescribed by the agreement was one Linda Yingwana ("Yingwana"), a labour relations manager in the first respondent, and the chairperson was the second respondent. Six charges were proffered against the applicants, all related to allegations of dishonesty. These charges in a nutshell concerned a contention that the applicants had unlawfully and without cause paid a number of employees monies they were not entitled to, that the applicants had afforded themselves exorbitant salary increases without authority, that the applicants fraudulently altered their appointment letters, that the applicants had fraudulently made alterations to the VIP system to conceal their unlawful activities, and that the applicants had unlawfully made deductions from the salaries of certain employees. The notices to attend the disciplinary enquiry was accompanied a number of supporting documents. Also, the notices to attend the disciplinary hearing specifically recorded that 'You are hereby advised that you have the right to be represented by a fellow employee, trade union official or a shop steward, as contemplated by clause 6.8.4 ….'.

[13] The disciplinary hearing then convened on 4 July 2014 before the second respondent as chairperson. The applicants, at the commencement of the disciplinary hearing, came with pre-prepared written applications to be allowed legal representation in the

[8] Clause 13 of the agreement

disciplinary hearing, which was read into the record before the second respondent. The applicants acknowledged that they were aware of the provisions of the agreement relating to representation, but stated that as they were legally entitled to what they called a "fair hearing", fairness dictated that they should be permitted legal representation. This application for legal representation was opposed by Yingwana representing the first respondent, and he specifically contended that the agreement pertinently excluded legal representation.

[14] Significantly, and in their founding affidavit, the applicants, who were members of IMATU, never made out a case that they even approached IMATU to assist them. The applicants of course would have been entitled to be represented by any IMATU official, even of that official was not employed by the first respondent, as this is permitted by the agreement. The applicants, for the first time in their replying affidavit, make some vague statements about approaching IMATU but in effect being shunned by this union. However, these contentions of the applicants are completely vague and lacking in any particularity, and little credibility can be attached to the same.

[15] The upshot of the above events then was that the second respondent, after hearing submissions by both the parties on the issue of legal representation, then ruled on 4 July 2014 that legal representation be refused. The second respondent reasoned, even on the applicants' own version, that the provisions of the code (the agreement) did not allow for legal representation. Having so ruled, the second respondent then in fact adjourned the proceedings so as to afford the applicants the opportunity to arrange for representation by a fellow employee or a trade union official. The hearing was adjourned to 28 and 29 July 2014.

[16] The applicants then did nothing to arrange representation on the basis as determined by the second respondent, which was fully in line with the agreement. Instead, they

waited until 21 July 2014, just more than a week before the disciplinary hearing was scheduled to resume, to then bring the application now before me, to interdict the disciplinary hearing from proceeding.

Urgency and jurisdiction

[17] The first issue to consider is whether the Labour Court is entitled to, and if it is so entitled, should intervene in disciplinary proceedings that were barely out of the starting block and certainly not completed. I accept that whilst the Labour Court certainly has jurisdiction to entertain such proceedings on an urgent basis, this has to be subject to conditions and limitations. The Court in *Gcaba v Minister for Safety and Security and Others*[9] said that jurisdiction means 'the power or competence of a court to hear and determine an issue between parties'. In the case of the Labour Court, this competence and power is found in Section 158.[10] The Court in *Booysen v Minister of Safety and Security and Others*[11] specifically dealt with these powers and held that '…. 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.' In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[12] the Court confirmed the jurisdiction of the Labour Court to entertain such kind of urgent applications but said that it should only be entertained 'in extraordinary or compellingly

[9] (2010) 31 ILJ 296 (CC) at paras 74 – 75.
[10] Section 158(1) reads: '*(1) The Labour Court may (a) make any appropriate order, including (i) the grant of urgent interim relief (ii) an interdict; (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order ….*'.
[11] (2011) 32 ILJ 112 (LAC) at para 54.
[12] (2012) 33 ILJ 2033 (LAC).

urgent circumstances'.[13]

[18] Dealing with urgency, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[14] held: '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 law 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.' I have some concerns about the urgency of the matter before me. The fact is that the ruling refusing legal representation was given on 4 July 2014 and the reason provided for such refusal, on the applicants' own version, was that the agreement did not allow for it. This being the simple issue, I have difficulty in accepting that it would take some three weeks to prepare an application as suggested by the applicants. In any event, the explanation offered by the applicants in the founding affidavit is sparse, to say the least, and the amplification on rely does not fare much better. I believe that a far more plausible inference is that the applicants waited until the last minute, so to speak, before the date the disciplinary hearing was scheduled to resume, in order for the application to scupper the commencement of that hearing. What in essence saved the applicants when it came to urgency is that Mr Jafta, who represented the respondents, chose to rather deal with this matter on the merits of the case, and did not really press the issue of urgency. I further point out that both parties have had the opportunity to fully state their respective cases in the pleadings, and it is in the interest of justice that this issue now be finally determined. I thus conclude that for these reasons given, I shall proceed to determine this matter as one of urgency.[15]

---

[13] Id at para 46; see also *Food and Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2013) 34 ILJ 1171 (LC) para 15.
[14] (2010) 31 ILJ 112 (LC) at para 18.
[15] See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) ; *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (2007) 28 ILJ 2796 (LC) at para 12 ; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 – 24.

The issue of a clear right

[19] The applicants have the onus to show that they have a clear right to the relief sought. The applicants base their case in this regard squarely on two grounds. The first ground is that despite the provisions of the agreement, the second respondent as chairperson always retains the discretion to decide whether or not to allow legal representation, which discretion he did not exercise. The second ground is that the applicants are entitled to a fair hearing in terms of the Constitution, and this right to fairness compels the second respondent to exercise a proper and lawful discretion in deciding the issue of legal representation.

[20] There is a simple answer to the applicants' case on the issue of a clear right. This is found in the fact that the issue of representation in the internal disciplinary proceedings in the first respondent is actually regulated and determined by collective agreement. The disciplinary code in this instance is not just a code and procedure unilaterally implemented and applied by an employer in respect of its employees. This code has been agreed to at a central level of bargaining within a bargaining council by both the employer and employee representatives in the public service sector. As such, all the parties must be held to be bound to this agreement, and consequently, what is specifically stipulated in this disciplinary code (the agreement referred to above) about representation.

[21] The Court in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[16] dealt the primacy of products of collective bargaining under the LRA, and said:[17]

[16] (2003) 24 ILJ 305 (CC).
[17] Id at para 26.

> ' … the Act seeks to provide a framework whereby both employers and employees and their organizations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.'

The Court further referred with approval[18] to the following passage by Brassey:[19]

> 'The general intention behind the Act is that voluntarism (provided, at any rate, that it is collective) should prevail over state regulation. As a result, the rights conferred by the Act are generally residual: they are normally subordinate to arrangements that the parties collectively craft for themselves and operate only in the absence of such an agreement'

[22] The judgment in *Bader Bop* as aforesaid in essence does nothing more than reflect what is contained in Section 1 of the LRA, the relevant portion of which reads as follows:

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are — *(a)* to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; …. *(c)* to provide a framework within which employees and their trade unions, employers and employers' organisations can — (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and *(d)* to promote — …. (iii) employee participation in decision-making in the workplace ….'

[18] Id at para 65.
[19] Brassey *Commentary on the Labour Relations Act* vol 3 (Juta Cape Town 1999) A3: 26.

[23] The Court in *Kem-Lin Fashions CC v Brunton and Another*[20] specifically dealt with the mentioned provisions of Section 1 of the Act and held as follows:

> '[The purpose of the Act is stated in s 1 to be the advancement of economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act. One of the primary objects of the Act is to provide a framework within which employees and their trade unions, on the one hand, and, employers and employers' organizations, on the other, can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest (s 1(c) (i)) ….
>
> The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organizations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organizations, on the one hand, and employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail.'

[24] I have had the occasion to deal with the issue of prevalence that must be given to collective agreements in the judgment of *Police and Prisons Civil Rights Union v Ledwaba NO and Others*[21] and said: '…. a collective agreement, as the product of the collective bargaining process, has preference over all else ….'. I concluded in this judgment as follows:[22]

> 'I am, therefore, of the view that collective bargaining itself and its ultimate result, being the conclusion of a collective agreement, must always have preference, especially where it is concluded between an employer and a majority trade union.

[20] (2001) 22 ILJ 109 (LAC) at paras 17 – 18.

[21] (2014) 35 ILJ 1037 (LC) at para 27.
[22] Id at para 28 – 29.

> I am fortified in my conclusions by the priority given to collective bargaining as part of the defined primary purposes of the LRA in s 1 …. It is clear that specific reference is made to the parties to the employment environment regulating their own affairs by collective bargaining and that this collective bargaining must be orderly and the framework provided in terms of the LRA is inter alia to give effect to this. The point make is that self regulation by way of collective agreement of all employment issues in terms of the LRA, …. is consistent with the primary purposes of the LRA.'

[25] I conclude on this issue by the following reference to *SA Breweries v Commission for Conciliation, Mediation and Arbitration and Others*[23] where the Court said;

> 'In *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others* (2001) 22 ILJ 2684 (LC), this court emphasized this principle, namely that the Labour Relations Act encourages voluntarism and collective agreements which should be given primacy over the provisions of the Labour Relations Act...'

[26] Considering the above principles, the terms of the agreement as it is contained in the agreement itself, which establishes the disciplinary code *in casu*, must prevail. As I have set out above, the provisions of the agreement as to representation of an employee in disciplinary proceedings is specifically determined, and prescribed. In addition, this agreement is clearly a collective agreement, and concluded with a trade union of which the applicants themselves are members (IMATU). This actually the same as the applicants themselves agreeing to such provisions.[24] Therefore, the applicants are simply not entitled to legal representation in the disciplinary proceedings, as they are bound by the clear terms of a collective agreement only allowing for representation by a fellow employee, shop steward or trade union official. For this reason alone, the applicants must fail in establishing a

[23] (2002) 23 ILJ 1467 (LC) at para 12.
[24] See Section 23(1)(b) of the LRA which reads: 'A collective agreement binds …. (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them'.

clear right to the relief sought.

[27] The further contention of the applicants was that despite what is provided for in the disciplinary code about representation, the fundamental principle of a right to a fair hearing meant that the chairperson always had the discretion to allow legal representation. In deciding this issue, I will firstly consider the issue of the right to legal representation in fora other than Courts. There is no reason why the same considerations would not apply to legal representation in internal disciplinary proceedings. Recently, the Court in *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)*[25] dealt with the issue of the right to legal representation in the CCMA and said:

> 'The provisions of the LRA must be interpreted in compliance with the Constitution (s 3 of the LRA). Section 33(1) of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. But the contention that this requires there to be a right to legal representation in every case of a hearing before an administrative tribunal such as the CCMA, is contrary to long-standing and binding authority.
>
> The courts have consistently denied entitlement to legal representation as of right in fora other than courts of law. ….'

Accordingly, and as a matter of general legal principle, an employee is not entitled to legal representation in internal disciplinary hearings as of right.

[28] The above being the position as of right, the next question is whether the right to a fair hearing in general would nonetheless oblige the chairperson of such a

---

[25] (2013) 34 ILJ 2779 (SCA) at paras 18 – 19.

disciplinary hearing to consider whether to allow such legal representation in any event. The most often quoted authority in this regard is *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others*[26]. In *Hamata*, the Court dealt with disciplinary proceedings against a student of an academic institution, and where the relevant rule regarding representation read: 'The student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon. ….'. The Court considered whether the tribunal nonetheless retained the discretion allow legal representation. The Court, per Marais JA, said:[27]

> '…. There has always been a marked and understandable reluctance on the part of both legislators and the Courts to embrace the proposition that the right to legal representation of one's choice is always a *sine qua non* of procedurally fair administrative proceedings. However, it is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. In saying this, I use the words 'administrative proceeding' in the most general sense, ie to include, *inter alia*, quasi-judicial proceedings. Awareness of all this no doubt accounts for the cautious and restrained manner in which the framers of the Constitution and the Act have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness.'

Marais JA concluded as follows:[28]

> 'I am satisfied that an application of the principles of the common law in existence in the pre-constitutional era also lead to the same conclusion. They, too, require proceedings of a disciplinary nature to be procedurally fair, whether or not they can

[26] 2002 (5) SA 449 (SCA).
[27] Id at para 11.

> be characterised as administrative and whether or not an organ of State is involved. If, in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion. ….'

[29] The position adopted in *Hamata* was thus that there was no right to legal representation in proceedings of a disciplinary nature, but any disciplinary body must be considered to still have the power to exercise a discretion to allow legal representation. The Court in *Hamata* however accepted that the disciplinary body could be deprived of such a discretion provided that has been plainly and unambiguously done. The SCA in *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani*[29] then dealt with this same issue in the context specifically of the employment relationship and where the employee was subjected to disciplinary proceedings for misconduct. In *Mahumani*, the disciplinary code was equally concluded through collective bargaining in the Public Service Co-ordinating Bargaining Council, and was held to be a binding collective agreement that governed the disciplinary hearing of the employee.[30] The Court, per Patel AJA, said:[31]

> '…. I, furthermore agree, that clause 7.3*(e)*[32] is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation ….
>
> In terms of our common law, a person does not have an absolute right to be legally represented before tribunals other than courts of law (*Dabner v SA Railways & Harbours* 1920 AD 583 at 598; and *Hamata* at para 5). However, it does require

[28] Id at para 23.
[29] (2004) 25 ILJ 2311 (SCA).
[30] See para 3 of the judgment in *Mahumani.*
[31] Id at paras 10 and 11.
[32] The Court was referring to the clause relating to legal representation.

> disciplinary proceedings to be fair and if "in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion" (per Marais JA in *Hamata* at para 23).'

[30] The Court in *Mahumani* then dealt with the question whether the disciplinary body in that matter had been deprived of such a discretion. Of importance in that matter, the Court referred to clause 2.4 of the disciplinary code which provided for a fair hearing and also clause 2.8 of the disciplinary code which provided that 'The Code and Procedures are guidelines and may be departed from in appropriate circumstances'. Considering these provisions in the disciplinary code, Patel AJA concluded:[33]

> 'The parties, who agreed on the code, were intent on devising a fair procedure (see clause 2.4) and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended the presiding officer to have a discretion to allow legal representation in circumstances in which it would be unfair not to do so. I can find no indication in the code to the contrary. There is, therefore, no justification for interpreting "appropriate circumstances" in clause 2.8 so as not to include circumstances which would render it unfair not to allow legal representation at a disciplinary enquiry.
>
> It follows that, if, on a conspectus of all the circumstances, it would be unfair not to allow legal representation the provisions of clause 7.3*(e)* may in terms of clause 2.8 be departed from.'

Consequently, and in *Mahumani*, the Court found that in terms of the provisions of the code itself the disciplinary body had not been plainly and unambiguously been deprived of the discretion, considering the fair hearing provisions and the

'appropriate circumstances' exception provisions in the code itself.

[31] Whilst I am bound by the judgment in *Mahumani* and in any event agree with the legal principles set out therein, I must state that the judgment in *Mahumani* is distinguishable from the matter now before me, on the facts. This is firstly evident from a comparison between clause 2 of the disciplinary code as referred to in *Mahumani* and its comparable clause (being clause 5) *in casu*, and in particular the absence of any provision in the current disciplinary code that it is only a guideline and that it can be departed from in 'appropriate circumstances'. In fact and as set out above, the current disciplinary code records that the prescribed procedure 'will define the disciplinary process and the rights and obligations …. (referring to the parties to the disciplinary process)'[34]. In my view, the parties to the collective bargaining process in the South African Local Government Bargaining Council clearly took proper heed to what the Court has said in *Mahumani* and amended the collective agreement containing the disciplinary code accordingly. I therefore accept that *in casu*, the parties have in the collective agreement containing the disciplinary code clearly and unambiguously deprived the chairperson of the disciplinary hearing from being entitled to exercise a discretion to allow legal representation in the disciplinary hearing.

[32] I am fortified in my aforesaid view by the collective agreement concluded on 24 June 2009, containing the disciplinary code which immediately preceded the current collective agreement. In this former agreement, which was also attached to the applicants' founding affidavit, the comparable representation clauses[35] also prescribed representation by a fellow employee, shop steward or union official, but added the following provision: '…. Who is willing and able to represent the employee and, if this is not possible, any suitably qualified person.' Clearly 'any suitably qualified

[33] Id at paras 12 and 13.
[34] Clause 5.7
[35] Clauses 6.5.4 and 12 of the collective agreement signed on 24 June 2009

person' would also contemplate legal representation. Also, this erstwhile provision did not really entail the exercise of a discretion, as all an employee would have to show is that there is no fellow employee or trade union official willing and able to represent the employee, and legal representation would then follow. The fact is that this provision has been specifically removed from the current collective agreement *in casu*. In addition, even the employer's right to utilise legally qualified persons from any department of justice has been curtailed in the current collective agreement.[36] The only reasonable conclusion as to why all of this had been removed and what is now provided for, has to be that all the parties to the collective bargaining process were of the intention not to allow legal representation in the disciplinary proceedings.

[33] The Court in *Mahumani* based its decision upon an interpretation and application of the disciplinary code itself, and what the Court considered that very code to mean. As I have said, and in the current matter, there simply is no room in the current collective agreement for an interpretation and application thereof so as to allow for a discretion to allow legal representation. This then brings one to the final question to be considered, namely even if the disciplinary code is clear in not allowing legal representation, is there nonetheless a general principle or requirement of fairness that must be implied which then allows for such a discretion? The Court in *Hamata* and *Mahumani*, despite not specifically answering this question, seemed to accept that such a principle of fairness cannot be implied, considering the Court's acceptance that the discretion can be excluded provided it is done in a 'clear and unambiguous' fashion. The Labour Court in *Police and Prisons Civil Rights Union v Minister of Correctional Services and Others*[37] held in this regard:

'It might however be argued that after the 1994 constitutional dispensation which

[36] See clause 6.6.4.
[37] (1999) 20 ILJ 2416 (LC) at para 27.

> brought about constitutionalism and the adoption of the fundamental Bill of Rights in our country, the failure to allow legal representation in internal disciplinary enquiries violates the constitutional right of an employee to a fair trial. I do not believe that that will be the case. It will, in my view, depend on whether there is a disciplinary code or collective agreement between the union and the employer which governs the situation. If not, it might have to be considered with regard to the circumstances of each case, considering the nature, scope or circumstances of the particular disciplinary enquiry and the charges which the employee is facing.'

In my view, this ratio is certainly support for the fact that it is the collective agreement only that is decisive.

[34] I am further of the view that this question was actually answered in *SA Maritime Safety Authority v McKenzie*[38] where the Court dealt with the issue as to whether a general right to fairness can be implied into contractual employment terms. There is no reason the same reasoning adopted by the Court in *McKenzie* cannot equally apply to the collective agreement *in casu* and the issue now to be decided. The Court said the following:[39]

> ' …. If what is incorporated is simply a general right not to be subjected to unfair labour practices, without the incorporation of the accompanying statutory provisions, of which the definition is the most important, then the incorporation goes further than the statute from which it is derived. That is logically impermissible when we are dealing with incorporation by implication. If what is incorporated is limited to the statutory notion of an unfair labour practice, with all its limitations, then incorporation serves no purpose as the employee will gain no advantage from it. That is a powerful indication that no such incorporation is intended.'

[38] (2010) 31 ILJ 529 (SCA).
[39] Id at para 27.

The Court further said:[40]

> '…. I would add to it that there is the further bar in South Africa that the legislation in question has been enacted in order to give effect to a constitutionally protected right and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment. I am also fortified in that conclusion by the fact that it reflects an approach adopted in a number of other jurisdictions. In addition the Constitutional Court has already highlighted the fact that there is no need to imply such provisions into contracts of employment because the LRA already includes the protection that is necessary.'

The Court concluded:[41]

> ' …. insofar as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices. Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer.'

[35] The above reasoning in *McKenzie*, as far as I am concerned, simply means that the applicants thus cannot rely on a general constitutional right to fairness, to be implied or read into the disciplinary policy as contained in the collective agreement, in order to substantiate their right to relief in this matter. Mr Hlatswayo made direct reference to the Constitution[42] in support of his arguments, but there is a problem in doing so. I

[40] Id at para 33.
[41] Id at para 56.
[42] Act 108 0f 1996. Section 23(1) reads '*Everyone has the right to fair labour practices*'.

dealt with a similar question in *SA Municipal Workers Union on behalf of Members v Kopanong Local Municipality*[43] and said:

> 'The applicant also cannot base its right to relief directly on the general right to a fair labour practice as found in Section 23(1) of the Constitution. Direct reliance on the fundamental rights as contained in the Constitution is impermissible when the right in issue is regulated by legislation, as is actually the case with the LRA, which directly regulates the right to fair labour practices. In *SANDU v Minister of Defence and Others* the Court held that '…. where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. The applicant has sought to do exactly what the above reasoning prohibits, in that the applicant seeks to rely, in its founding affidavit, directly on the provisions of Section 23(1) of the Constitution to establish its right to relief. The applicant is prohibited in law from doing so, and thus cannot directly rely on the fundamental right to a fair labour practice in the Constitution to establish its right to relief in this case.'

[36] For all the reasons as set out above, I am simply not convinced that the applicants have established a clear right to the relief sought. In short, the applicants have no right to legal representation in the disciplinary proceedings and the second respondent has clearly and unambiguously been deprived of exercising any discretion to allow it. Also, the disciplinary code is founded in a collective agreement, and considering the primacy the Act affords to collective agreements, and the fact that fairness in the form of allowing a discretion with regard to legal representation simply cannot be implied into such an agreement, the applicants simply have no clear right to support the interdict they seek. For this reason alone, the applicants' application must fail.

[43] (2014) 35 ILJ 1378 (LC) at para 21.

The issue of prejudice and alternative remedy

[37] The next issue to consider is whether the applicants have no suitable alternative remedy to their disposal, and whether they would suffer irremediable prejudice should they not be afforded relief. In my view, and for the reasons set out hereunder, the applicants must fail in this regard as well.

[38] The first hurdle the applicants must successfully clear in this regard is to show that exceptional circumstances exist. The reason for this is that the Labour Court has been consistent in its approach that the Court will only intervene in uncompleted disciplinary proceedings if such exceptional circumstances are shown to exist, as I have dealt with above. I however wish to make further reference to the following ratio from the judgment in *Jiba*[44] where the Court said:

> ' …. By asking the court to rule that the disciplinary action initiated against the applicant was unauthorized and unprocedural, the applicant is effectively asking the court to bypass 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.'
>
> '…. 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 best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and

[44] (*supra*) footnote 14 at para 12 and 17; See also *Ngcongo v University of South Africa and Another* (2012) 33 ILJ 2100 (LC) at para 24; *Carolissen v City of Cape Town and Others* (2014) 35 ILJ 677 (LC) at para 26.

if necessary, by this court in review proceedings under s 145.'

I fully agree with this reasoning.

[39] In my view, the applicants have shown no exceptional circumstances to exist. The applicants were at all relevant times aware of the provisions of the disciplinary code. In addition, they are members of IMATU, and could have been represented by an external union official with no limitations on the competencies and qualifications of such official. There is simply no reason why the applicants could not have followed this avenue, having specifically been afforded the opportunity by the second respondent to procure such representation. Added to this, the disciplinary hearing had not yet even started, and the applicants could still fully ventilate their respective cases at the disciplinary hearing. There is simply no reason why the hearing cannot proceed to finality, especially considering that should the hearing end badly for the applicants and they are dismissed, they have the right to a complete hearing de novo before a bargaining council arbitrator where they can apply for legal representation in any event[45].

[40] One of the contentions specifically advanced by Mr Hlatswayo for the applicants was that the first respondent had access to a plethora of persons to represent it in the disciplinary proceedings, who have a wealth of qualifications, expertise and/or experience. As opposed to this, according to Mr Hlatswayo, the applicants were merely minions and faced a daunting task of properly representing themselves in the face of such overwhelming odds. I however specifically raised with Mr Hlatswayo that the applicants could be represented by any IMATU official not even employed by the first respondent and that IMATU would in fact, as a trade union, be compelled to represent the applicants as members of IMATU, to the best of the union's ability. Surely a trade union such as IMATU was must have equally

[45] See also *Mashiya v Sirkhot NO and Others* (2012) 33 ILJ 420 (LC) at para 36.

competent, skilled and qualified officials who can enter the fray for the applicants. In this regard, I refer to *Volschenk and Another v Morero NO and Others*[46] where the Court dealt with a similar issue and said:

> 'On the question of 'parity of arms' raised by the applicants, it must first be noted that in having the right to representation by a full-time union official, the applicants' rights to representation are more extensive than those provided for in the LRA, which do not go beyond the right to representation by a union shop steward. There is no restriction on the expertise that such a union official may possess. The main authorities on the question of legal representation in internal enquiries do not dictate that there must be parity between the ability and expertise of representatives, but only that the procedure should be fair. Whether that might necessitate legal representation will depend on the particular factual circumstances which demonstrate that an exception to the rule is justified. In the circumstances of this matter, I do not believe the applicants would be deprived of a fair hearing if they were only able to use a union official as their representative.'

[41] In *Carolissen v City of Cape Town and Others*[47] the Court said that 'One of the questions that the court should consider is whether the applicant can obtain justice by other means.' The Court the concluded as follows:[48]

> 'In the case before me, the employee can clearly attain justice by other means. He can raise his complaint about undue delay at the disciplinary hearing. He will in any event have the opportunity to state his case at that hearing. Should he be dissatisfied with the outcome, he can follow the prescribed dispute-resolution process as set out in the Labour Relations Act. He has not established a clear right for an interdict. Any harm that he may suffer is not irreparable and he has an alternative remedy.'

[46] (2011) 32 ILJ 983 (LC) at para 12.
[47] (2014) 35 ILJ 677 (LC) at para 26.
[48] Id at para 27.

I fully ascribe to the above reasoning, which in my view is equally apposite *in casu*.

[42] The further point that must be made is that the disciplinary hearing has already been convened before the second respondent, who is properly seized of the matter as chairperson. The only issue now standing in the way of the disciplinary hearing proceeding to finality is this application of the applicants. It is actually in the interest of expeditious dispute resolution, being one of the cornerstones of the LRA, that the disciplinary proceedings continue to finality as soon as possible. In *Mashiya v Sirkhot NO and Others*[49] the Court said:

> 'The disciplinary hearing is already under way. It is in the interests of expeditious dispute resolution that it is brought to finality. Adv Sirkhot has already heard the matter on 14 July, 8 August and 23 August, and has been retained to continue today, 30 August. The balance of convenience favours the respondents.'

[43] Another consideration is the fact that the applicants in effect want to stop all disciplinary proceedings against them from continuing until such time as their application to review and set aside the legal representation ruling of the second respondent has been determined on review. The fact of the matter is that practically speaking, no matter now one looks at it, it is highly unlikely that such a review application could even be heard in a period of less than six months, and in all probability could reasonably take up to a year. As matters actually stand, the delay is currently indefinite. In the interim, the applicants remain employed at the first respondent. They however remain on suspension and thus would continue to be paid their fully salaries by the first respondent. However, the work the applicants did would still need to be done, especially considering it relates to salary administration, and the first respondent would have to expend further resources to get this work done. The financial predicaments of most municipalities is no secret, and I simply

[49] (2012) 33 ILJ 420 (LC) at para 37.

can see no reason to further waste public funds by actually at this stage indefinitely delaying the disciplinary proceedings against the applicants. Also, the first respondent's interest in finality cannot be ignored. In *Volschenk*[50] the Court said the following, which I agree with as being apposite in the current matter now before me:

> 'The prejudice to the respondent of the enquiry being delayed, for what is likely to be a considerable period of time pending the outcome of a review, compared to the prejudice to the applicants in the event they are vindicated on review but denied interim relief, is much greater in my view, not least because it will have to continue paying the applicants' salaries while the enquiry is stalled, whereas the ramifications for the applicants if the ruling is set aside might be far-reaching. Accordingly, the balance of convenience favours the respondent ….'

[44] In the end, I am of the view that the applicants have made out no case of extraordinary circumstances or compelling considerations of prejudice. The applicants have an alternative remedy of approaching the bargaining council in the normal course, once the disciplinary hearing is completed and if they are dissatisfied with the outcome. In the bargaining council, as I have said, arbitration on the merits of the matter is conducted de novo which completely mitigates any prejudice the applicants may have accrued in presenting their cases in the disciplinary hearing. In addition, the applicants would be entitled to raise the issue of the refusal of legal representation by the second respondent as a possible ground of procedural unfairness, and should a bargaining council arbitrator find that there is merit in such a case, then the applicants would be entitled to relief as prescribed by the LRA.[51]

[45] I conclude by referring to the following remarks I made in Kopanong Municipality[52], which I consider equally apposite in these proceedings:

---

[50] (*supra*) footnote 46 at para 15.
[51] See Sections 193 and 194 of the LRA.

'I fully align myself with the following statements made by the Court in *Mosiane v Tlokwe City Council,* which statements in my view with appropriate adjustments in context, find equal application to the current matter:

> 'A worrying trend is developing in this court in the last year or so where this court's roll is clogged with urgent applications. Some applicants approach this court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this court with fanciful arguments about why this court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this court will grant them relief on an urgent basis.
>
> All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant bargaining councils and then approach this court for the necessary relief.'

My point is simply – urgent applications should not be the norm as they seem to have become. Such applications should be the exception.'

[46] In the light of the above considerations relating to alternative remedy and prejudice, the applicants' application in the current matter must fail as well.

---

[52] (*supra*) footnote 43 at para 33.

[47] This then only leaves the issue of costs. Despite the parties having an ongoing relationship, the applicants have elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. The applicants could readily have participated in the disciplinary hearing and were afforded ample opportunity to do so. Instead, they in effect waited until the last minute to prevent the disciplinary proceedings from taking place. I also consider that the applicants even challenged their suspension, which was equally not successful. There is simply no reason why costs should not follow the result in this matter.

Order

[48] I accordingly make the following order:

The applicants' application is dismissed with costs.

_____

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

APPLICANTS:	Mr J Hlatswayo of Hlatswayo Attorneys
RESPONDENTS:	Mr P Jafta of Jafta Inc Attorneys