IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO:749/2021

In the matter between:

SIFISO MNCUBE	**First Applicant**
BISISIWE EVELYN SITHOLE	**Second Applicant**
and	
FOSKOR (Pty) Ltd	**First Respondent**
ADV. PAUL KIRSTEN N.O.	**Second Respondent**

Heard: **03 December 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand-down is deemed to be 10h00 on 8 December 2021.**

JUDGMENT

Hiralall AJ

Introduction

[1] This application was heard on Friday, 3 December 2021 at 2.30pm. An order dismissing the application was issued as follows on Monday, 6 December 2021, the date for the scheduled resumption of the disciplinary enquiry:

1. The application is dismissed.
2. Each party is to pay its own costs.
3. The reasons for judgment will be handed down by 8 December 2021.

[2] These are the reasons for judgment.

[3] This is an urgent application in which the applicants seek, in Part A, an interim order staying the disciplinary proceedings instituted against them by the first respondent pending the outcome of a review application, in Part B, against the ruling of the second respondent (the chairperson) on 16 November 2021 refusing to recuse himself as the chairperson of the disciplinary proceedings against the applicants.

Background

[4] The applicants are senior employees in the procurement division of the first respondent. On 19 October 2021 they were charged with various allegations of misconduct. The disciplinary enquiry was scheduled for 15 to 17 November 2021.

[5] They attended the disciplinary enquiry on 15 November 2021 where their legal representative, Mr Shangase, informed the chairperson that they intended to bring an application for his recusal in writing on notice to the prosecutor and requested that the matter be adjourned for this purpose. Following discussions around the point, the matter was rolled over to the next day with directions that the parties would argue the point the next day and the chairperson would issue a ruling. Mr Shangase was given the opportunity to present a written application for recusal and the prosecutor the opportunity to respond before then. Mr Shangase submitted the written application for recusal by 18h00 on 15 November 2021. He received the first respondent's response to the application on 16 November 2021 prior to the hearing of the matter. He then requested that the matter be postponed so that he could consider the first respondent's response. The prosecutor, Dr Van der Walt who is an attorney of JR Attorneys Inc, was opposed to a postponement of the matter, and so was the chairperson. Mr Shangase was granted some time to peruse the first respondent's response, and reply thereto. The chairperson then heard the arguments of both representatives and issued a ruling dismissing the application for his recusal.

[6] The applicants' version is as follows:

4.1 Following concerns with regards to the impartiality of the chairperson, the first applicant instructed his attorney, Mr Shangase, ahead of the disciplinary enquiry, to write to the first respondent proposing that they should appoint a chairperson from the CCMA's panel of part-time commissioners or from the accredited panellists from Tokiso.

4.2 The prosecutor rejected the proposal.

4.3 Again, in the request for further particulars, Mr Shangase asked whether the company had considered appointing an independent chairperson from the ranks of the CCMA's part time commissioners or Tokiso panellists.

4.4 The prosecutor responded that the chairperson was independent and that his widely respected expertise motivated his appointment. However, he did not answer the question as to who the chairperson was and how he was appointed.

4.5 On 14 November 2021, Mr Shangase telephoned the General Manager: HR, Ms Ndlovu, to ascertain whether IR had been involved in the selection and appointment of the chairperson. She replied that IR was not involved in selecting and appointing the chairperson but the name of the chairperson was brought to her for approval and she approved the appointment.

4.6 At the disciplinary enquiry on 15 November 2021, in response to the notification of their intention to apply for his recusal, the chairperson stated that he had been in practice for many years and had acted as a judge of the Labour Court and the Labour Appeal Court, that he was there to give both parties the opportunity to present their case, and that he was appointed by JR Attorneys Inc Attorneys. It turned out that the prosecutor was from JR Attorneys Inc Attorneys.

4.7 The chairperson further stated that he did not know the standard practice used for the appointment of chairpersons for disciplinary enquiries at the first respondent but he told Mr Shangase to continue with the hearing and raise the issue concerning non-compliance with the standard practice at the CCMA. Mr Shangase stated that he was instructed to apply for the recusal of the chairperson because, given the allegations surrounding the chairperson's appointment, they had reason to believe that he would be compromised and was biased.

4.8 The matter was postponed to the next day for the representatives to prepare written arguments. Mr Shangase submitted his written argument by 18h00 on

15 November 2021. The respondent's written argument was received the next day prior to the commencement of the hearing.

4.9 On 16 November 2021, Mr Shangase applied for a postponement of the hearing on account of the fact that he had not had sufficient time to consider the first respondent's response and file a reply thereto. The prosecutor objected alleging that the request was a delaying tactic. The chairperson was also opposed to a postponement of the matter to allow Mr Shangase time to consider the first respondent's response and to draft the replying papers. He granted him 30 minutes in which to peruse the first respondent's response and present a reply thereto despite Mr Shangase indicating that the time was insufficient and he had no resources there and then with which to prepare for the reply.

4.10 On resumption of the hearing, Mr Shangase requested that the matter be postponed to another date in order to give him time to prepare a reply as 30 minutes was inadequate. The chairperson upheld the prosecutor's objection and granted Mr Shangase a further hour to prepare the reply.

4.11 The hearing resumed after an hour, and Mr Shangase placed on record that he was still not ready as he did not have enough time to peruse the cases that the prosecutor had relied upon. When his request for an adjournment was refused he indicated that they would proceed under protest.

4.12 During argument of the recusal application, in relation to the question whether there existed a practice whereby IR identified and selected chairpersons of a disciplinary inquiry, it was elicited from the first respondent's IR specialist, Mr Khuzwayo, that 'as IR they would make sure that they got a chairperson who was independent'. The information from Mr Khuzwayo was generally that they would not allow the initiator to choose the chairperson for

obvious reasons of fairness; that the company, represented by IR or HR, would identify and appoint the chairperson; and that he co-ordinated and found the chairperson.

4.13 During the proceedings, although the prosecutor and the chairperson both practised as lawyers in Pretoria, the prosecutor initially distanced himself from Pretoria stating that he worked in Johannesburg. When Mr Shangase pointed out that his practice was in Centurion which was part of Pretoria, he stated that he meant that he was domiciled in Johannesburg. In light of the allegations of bias, this confirmed the applicants' belief that the chairperson was not impartial and was appointed specifically to carry out a mandate to dismiss them.

4.14 The prosecutor argued that the chairperson was appointed by the General Manager: HR, a contradiction to the chairperson's statement that he was identified and selected by the prosecutor's firm of attorneys.

4.15 On 16 November 2021 when they were leaving the hearing venue, the chairperson and the prosecutor remained behind. They (the first applicant, second applicant and Mr Shangase) saw the chairperson and the prosecutor having a discussion as they were walking down the steps. Whilst this may appear as innocent, given the cumulative effect of other factors referred to by the applicants, this conduct fortified their perception that the chairperson lacked impartiality and they would not have a fair trial.

[7] The first respondent's version is as follows:

5.1 The application for an interdict pending review was a strategem constructed by the applicants aimed at frustrating the disciplinary process and evading engagement with the allegations of misconduct against them. The applicants bore no willingness to appear at their disciplinary inquiry and their efforts were aimed at delaying the inquiry indefinitely.

5.2 There was no witch-hunt against the first respondent.

5.3 It was within the prerogative of the first respondent to appoint a suitably qualified chairperson in disciplinary enquiries and no employee had a right to be consulted in this regard, still less to propose his or her own candidate as a chairperson. The first respondent's disciplinary procedure was clear on the point that the 'chairperson must be a suitably qualified person … designated by management'. There was therefore no practice as contended by the applicants in terms of which chairpersons of disciplinary enquiries were identified and selected by IR/ ER persons. To the extent that IR/ER needed to be involved in the process of appointing the chairperson, Phuti Thaba, the IR specialist of the first respondent in Richards Bay was involved throughout the process in the appointment of the current chairperson.

5.4 Following the outcome of an investigation by an international audit firm into allegations of irregular and unethical activities communicated by an anonymous whistleblower, the first respondent was motivated to determine whether disciplinary proceedings ought to be pursued against the relevant employees. In this context, Ms Ndlovu sought professional advice as to the appointment of any competent chairperson. On 23 September 2021, she sent an email to J. Rheeder of JR Attorneys Incorporated, who had not been involved in the investigation in any manner, seeking assistance with sourcing the services of a chairperson with requisite experience in disciplinary hearings. The first respondent was at the time in the process of convening disciplinary hearings against implicated individuals following the outcome of the investigation.

5.5 The person responsible for the identification, selection and ultimate appointment of the chairperson was Ms Ndlovu who exercised her powers as the General Manager: Corporate Affairs and Human Capital, acting in

the best interests of the first respondent. The first respondent's first and only interaction with the chairperson to date was to chair the enquiry. The mere fact that the chairperson was briefed by JR Attorneys Incorporated on her instruction was neither out of the ordinary nor sinister. It was trite that practising advocates had to be briefed by attorneys.

5.6 Prior to the commencement of the disciplinary inquiry, Mr Shangase wrote to the first respondent requesting, on instructions from his clients, that the chairperson be appointed from a list of CCMA arbitrators or from a panel of accredited Tokiso arbitrators who were based in KwaZulu Natal. JR Attorneys Inc responded to the letter on 31 October 2021 advising that the first respondent could not accede to the request, that advocate Paul Kirsten, the appointed chairperson was a reputable advocate with experience in excess of 28 years, and who regularly appeared before the Labour Court and the Labour Appeal Court. The purpose of his appointment was to ensure objective independence and fairness. There followed a request for further particulars from the applicants to which the first respondent responded that the chairperson's ex officio independence and widely respected expertise motivated his appointment.

5.7 The gravamen of the applicant's argument in pursuance of the recusal application was that firstly, the chairperson was appointed outside of the established practice where IR would identify and select the chairperson, secondly that the chairperson was appointed by the prosecutor, and that these two issues when viewed conjunctively with the avowed intention to terminate the services of the first applicant, the employees had reasonably apprehended a perception of bias and that they would not have a fair hearing.

5.8 The first respondent opposed the recusal application. Essentially the first respondent submitted that the applicant's submission, as regards the

purported existence of a ‘practice’ in terms of which chairpersons of disciplinary enquiries were identified and selected by IR, was therefor not only not congruent with the trite law and expressed wording of the first respondents policy, but was also disingenuous and opportunistic.

5.9 The chairperson drew to the attention of the applicants the issues of his extensive experience, reputable name and inherent independence. He also indicated that his professional services had never been retained by the first respondent prior to the disciplinary inquiry and that he had no relation with the employer whatsoever. He also emphasized that he would never be biased and had most definitely come too far in his career to not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. The applicants failed to heed his words and persisted with the application for his recusal.

5.10 The applicants have been afforded an independent chairperson which is more than what schedule 8 to the Labour Relations Act (the LRA) - Code of Good Practice provides, and more than what is common in most workplaces where disciplinary enquiries are ordinarily chaired by a more senior member of management.

5.11 Both parties written representations in respect of the recusal application were attached to the first respondent's papers.

5.12 The applicants did not meet the requirements for urgency.

5.12.1 Had the applicants not had the intention to delay the proceedings and insist on the highly exceptional exchange of written process in an informal internal disciplinary inquiry they

would have brought the recusal application before the 15th of November. They were the architects of their own misfortune

5.12.2 Firstly, the recordings of the proceedings and the transcribed record were transmitted to the applicants on 16 November 2021 and 29 November 2021 respectively, but the applicants did not act with the necessary haste and diligence to enable the court to deal with the matter on an urgent basis;

5.12.3 They launched this application with incomplete and non-compliant papers and required this court to decide the application within 48 hours; The application should be considered as *pro non scripto* as there was no proper application before the court.

5.12.4 The applicants had not explained the delay of 15 days from the refusal of the recusal application;

5.12.5 Secondly, financial hardship or loss of income *per se* had never been a ground for urgency since exceptional circumstances had to exist for the court to find that it constituted a ground for urgency where such circumstances did not exist in this case and the applicants remained gainfully employed while being afforded the statutory LRA remedies vindicating their rights;

5.12.6 The applicants had not shown why relief at some later date or in the ordinary course would not have sufficed. They were required to show that they would suffer harm that ccould not

be cured if relief was granted in the ordinary course which included relief granted through the auspices of the CCMA.;

5.12.7 The applicants have presented no legally recognizable grounds for urgency and on this ground alone the application should be dismissed with costs

5.13 The applicants had set out no well-grounded apprehension of real harm that they would suffer if the interim interdict was not granted, and final relief was eventually granted.

5.14 The applicants had not been dismissed and were gainfully employed. If they were ultimately dismissed they had statutory dispute resolution procedures available to them that gave effect to their rights in terms of the LRA and the Constitution. It could not be open to the applicants to bypass the provisions of the Labour Relations Act simply because they subjectively held the unjustifiable belief that they were entitled to do so.

5.15 This application in proper context required the court not only to challenge the validity of the institution of disciplinary proceedings by the first respondent against its employees by interdicting and restraining it from proceeding with the disciplinary inquiry, but also to set aside a preliminary ruling made by the chairperson during the course of a disciplinary inquiry.

Evaluation

[8] The requirements for an interim interdict are well established. An applicant must establish a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted; the balance of convenience must favor the applicant; and there must be an absence of an alternative remedy.

Urgency

[9] The procedural requirements for an urgent interdict are set out in Rule 8 of the Rules of Court which requires that the applicant sets out in the founding affidavit the reasons for the urgency, and why substantive relief cannot be obtained in due course. It is axiomatic that urgent relief will not be granted where the urgency is self-created. The question in every application brought as a matter of urgency is whether the application is urgent and whether the remaining requirements for interim relief have been met[1].

[10] In the present case, the chairperson's ruling was issued on 16 November 2021. This application was launched on 1 December 2021, some 2 weeks later with the applicants stating that they were busy obtaining a transcript of the recordings and the ruling which had been issued *ex tempore*. I do not see that it was necessary to await a copy of the transcript in order to launch this application. It was not even immediately necessary for the review application, the rules for which make provision for obtaining the record. The applicants clearly did not act with the haste that is necessary for an urgent application. However, although the respondents had a matter of 1 day to file papers, they did so in time for the hearing of this matter. There was therefor no prejudice suffered by the first respondent.

[11] I will deal further with urgency later.

A *prima facie* right and a well grounded apprehension of irreparable harm

[12] The applicants state as follows with regard to the requirement of a prima facie right:

‘ In terms of section 23 of the Constitution read with section 188 of the Labour Relations Act, I have a right not to be unfairly dismissed, and that right includes a right to a fair procedure and to be fairly judged in a disciplinary enquiry. At the very least I

[1] Jiba v Minister: Department of Justice and Constitutional Development and Others (2010) 31 ILJ 112 (LC) at para 18

have a *prima facie* right not to be treated as such though it may be open to some doubt.'

[13] The applicants do have a right not to be unfairly dismissed. However, as stated in *Sesoko v The Independent Police Investigative Directorate*[2] per Molahlehi, the key question is whether the court should interdict the disciplinary proceedings instituted against the applicants where the right of the applicants have to be determined in the context of the disciplinary enquiry that has already commenced and the pending review application. The court went on to state as follows:

> '[16] The question of whether the Labour Court has the power to intervene in incomplete disciplinary proceedings was clarified by the Labour Appeal Court, per Tlaletsi DJP, in *Booysen v Minister of Safety and Security and Others*, where it was held that the Labour Court, as a general principle, has the power to intervene in incomplete disciplinary hearings to 'prevent a serious injustice.' It is, however, only in an exceptional case that the Labour Court will intervene in incomplete disciplinary proceedings. The duty rests with the applicant to show the existence of exceptional circumstances which would justify the intervention by the court. The key consideration in determining whether to intervene in incomplete disciplinary proceedings is 'whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.'

[14] In *Booysen v Minister of Safety and Security and Others*[3] *,* the court held as follows;

> '[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

[2] J1219/16; Judgment 29 June 2016
[3] [2011] 1 BLLR 83 (LAC).

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.'

[15] In *Jiba v Minister of Constitutional Affairs and Development and Others*[4] the court held as follows at paragraph 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 of unfair dismissal, and if necessary, by this court in review proceedings under s 145".

[16] It is to be noted that the emphasis is clearly on exceptional cases, and whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The *prima facie* right of the applicants is defined in terms of whether theirs is an exceptional case. The question is whether the applicants have shown that theirs is an exceptional case.

[17] The exceptional case on which the applicants rely is their apprehension of bias on the part of the chairperson, the chairperson's dismissal of their application for his recusal, and the pending review application to set aside the said ruling.

---

[4] 2010 31 ILJ 112 (LC)

[18] In determining whether the above constitute exceptional circumstances, the court has to evaluate the applicants' prospects of success in the review application[5].

[19] This evaluation is best considered firstly, from the point of view of the courts' reluctance to entertain reviews of rulings from the CCMA or the bargaining councils on a piecemeal basis. In fact, section 158(1B) of the Labour Relations Act now provides as follows:

> 'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just an equitable to review the decision or ruling made before the issue in dispute has been finally determined'.

There is no reason why the court would apply less stringent requirements when it comes to incomplete internal disciplinary enquiries where the employee has the right, if unfairly dismissed, to refer a case of unfair dismissal to the CCMA or to a bargaining council having jurisdiction in terms of the provisions of s 191 of the Labour Relations Act. In other words, where justice may be obtained by other means.

[20] Secondly, the basis of the applicants' apprehension of bias at the disciplinary enquiry was as follows:

- According to the first applicant, he was previously subjected to two disciplinary enquiries and acquitted on all charges. The respondent was engaged in a witch-hunt against him in order to get rid of him. He was

[5] *Sesoko* para 35

informed by one Andile Dube, branch chairperson of CEPPWAWU, that the new CEO Riaan Rademan had said in a meeting on operational matters that he wanted to get rid of the first applicant because he was a snake. Rademan also said that he wanted assistance to get rid of the first applicant. A confirmatory affidavit by Andile Dube was filed. The second applicant did not make these claims.

- Furthermore, he was informed by his line manager Mr Van Wyk, that a disciplinary inquiry was going to be instituted against him, that there would be a deviation from the normal procedure in appointing a chairperson, and that he wanted the general manager from the mining department to chair the inquiry.

- The first applicant was concerned about the planned deviation from the normal procedure and requested the human resources general manager, Ms Ndlovu to ensure that a fair chairperson was appointed such as a commissioner from the CCMA. She said that she would see to it but later reverted to say that she had discussed the matter with the CEO and that he had rejected the suggestion of a chairperson from the CCMA, or the general manager of the mining department who he said had a soft spot for the first applicant. Ms Ndlovu said that the CEO recommended the second respondent. The standard practice, as confirmed by the industrial relations officer, Mr Khuzwayo, was that a chairperson was identified, selected and appointed by the IR department and not by the CEO, or the initiator or prosecutor.

[21] The first respondent's response in its answering affidavit was as follows:

- The first respondent denied that there was any witch-hunt against the applicant, that if there was indeed a witch-hunt, it would not have abided the findings of the previous disciplinary enquiries. Insofar as the first applicant's

averment, that he received a report from the shopsteward, Andile Dube, is concerned, Rademan's version is that although he had confidential discussions with members of the trade unions in Richards Bay to seek their assistance in getting rid of corruption taking place at Richards Bay, he "did not expect unfair or unwarranted action against any employee, nor expect the dismissal of any employee who had not been proven to have committed a serious transgression".

- The first applicant 's version in relation to the advices from his line manager was denied.

- The first applicant 's averments in relation to Ms Ndlovu were denied in the strongest terms.

[22] There is an irreconcilable factual dispute as to whether the CEO told the shopstewards that he wanted to get rid of the first applicant.

[23] I have serious doubts that the CEO would have entered into discussions with shopstewards about getting rid of a senior employee of the company but even if I am wrong on this conclusion, the version of Ms Ndlovu is a plausible one in terms of how the chairperson was appointed as it is supported by the first respondent's written policy and procedures and her email to JR Attorneys Inc. Her response to the first applicant 's averments in her answering affidavit is categorically as follows:

'67.1. I, Ms. Nomaswazi Ndlovu ("Ms. Ndlovu"), am employed by the first respondent in the position titled "*General Manager: Corporate Affairs & Human Capital*".

67.2. The position "*General Manager: Corporate Affairs & Human Capital*" vests the incumbent with the highest decision-making authority in respect of the first respondent's Human Capital Function, which constituent parts are HR ER/IR.

67.2.1. An organogram, handed up to the Chairperson, and provided to the applicants and their representative, is annexed hereto and marked as “Annexure NN08”, which organogram clearly evidences the incontrovertible and unassailable fact that ER/IR reports into, and is subject to the authority of, Ms. Ndlovu.

67.3. Ms. Ndlovu did not inform the first applicant that she would “*... see to it ...*” that a Commissioner of the CCMA is appointed.

67.3.1. The above honourable court is referred to Annexure NN04 that unequivocally proves that Ms. Ndlovu sought professional advice as to the appointment of *any competent* chairperson.

67.3.2. It is patent then that the first applicant is knowingly attempting to mislead the above honourable court, which misrepresentation has been made under oath.’

[24] The email which Ms Ndlovu sent to JR Attorneys Inc is annexed to the answering affidavit. It records the following:

‘Good morning Johanette,

Hope this email finds you well.

Following our brief discussion yesterday, could you assist us with the services of a chairperson with some requisite experience on disciplinary hearings. One of such disciplinary hearings involves two senior managerial employees and will require an experienced chairperson to preside over it. Someone with high EQ, that would remail calm and focussed.

The Acid Division is in the process of convening disciplinary hearings against implicated individuals, following the outcome of investigation into irregular and unethical activities. We intend on handing over the charges next week.

Please check for us.'

[25] Her version is therefor not contradictory but consistent with her powers. She clearly sought assistance from JR Attorneys Inc in sourcing a chairperson and the appointment of the second respondent was not the decision of the CEO.

[26] Ms Ndlovu states further as follows at paragraph 85 of the answering affidavit:

'85. Upon receipt of profession (sic) advice and guidance that the Chairperson is a seasoned chairperson and part time commissioner, I exercised my discretion and, after having taken the advice under consideration, decided that he ought to be the selected chairperson, after which I duly and lawfully selected and appointed the Chairperson – in the capacity of "*management*" – in terms of paragraph 6.1 of the Policy.'

[27] The further facts that the applicants rely on are contradictions between the prosecutor's explanation and that of the chairperson as to how he was appointed. According to the applicant, the prosecutor stated that he was briefed by the General Manager: HR, and the second respondent stated that he was briefed by the Prosecutor's firm. It is clear from the facts presented that the second respondent must have received his brief from the prosecutor, but this is not to say that his selection was not approved by Ms Ndlovu. The point here is that it cannot be said that the second respondent was not truthful since he would have received his brief from the prosecutor's firm of attorneys. It is the second respondent's conduct that is under scrutiny.

[28] This brings me to the next issue, and that is the relationship between the prosecutor and the first respondent.

[29] The applicants would prefer a chairperson from the ranks of CCMA commissioners or Tokiso panellists. The point to be made here is that the first respondent's Disciplinary Code and Policy provides as follows:

> '6.1 The Chairperson – must be in the MML band and above, an external person or any other suitably qualified person as designated by management.'

[30] The chairpersons of the two previous disciplinary enquiries against the first applicant were chaired by advocates: Advocate Kenneth Mosimane and Advocate Mpati Qofa. Notably, the applicant had brought an application for recusal of the chairperson in one of those cases and it was refused but he was exonerated on all the charges.

[31] Indeed, the second respondent was briefed by JR Attorneys Inc and is dependant upon that firm for his brief, but so must the previous chairpersons have been briefed by a firm of attorneys. It has not been suggested that they were briefed any other way.

[32] In *Ngobeni v Prasa Cres and Others* the court per Van Niekerk J stated as follows:

> '[11] I deal first with the issue of a clear right. The LRA grants an employee accused of misconduct the right to state his or her case before any decision is made as to whether the employee committed the misconduct and if necessary, what the appropriate sanction should be. A disciplinary hearing is not a criminal trial, and ordinarily this court will hold an employer to no more than the statutory Code of Good Practice or, if they are more generous, the terms of the employer's disciplinary code and procedure (see *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* (2006) 27 *ILJ* 1644 (LC)). The standards by which any contention of bias in a workplace disciplinary hearing is measured must necessarily be viewed in that context. In other words, the test for bias is not that which applies in a civil or criminal court.

The applicant was afforded a right to a hearing before an independent legal practitioner, a senior counsel. There can be no doubt that this appointment more than satisfies any requirement of an independent-minded enquiry.'

[33] Insofar as the applicants' prospects of success in the review application is concerned, it is trite that a review application is based on the record of the proceedings and, in this case, the ruling itself.

[34] I doubt that the fact that the prosecutor remained behind and had a conversation with the chairperson *after* the ruling had been issued, and after the applicants had left, although questionable, can form part of the review proceedings.

[35] I find on the facts presented that the applicants do not have good prospects of success in the pending review application. Even if I am wrong on this score, which I do not think I am, the balance of convenience does not favour the granting of the application.

The balance of convenience

[36] The balance of convenience does not favour a position where the disciplinary proceedings would be suspended for a lengthy period of time until the finalization of the review which in my view does not have prospects of success. An employer is entitled to institute disciplinary proceedings against its employees, and it is entitled and in fact obliged to do so in an expeditious manner.

[37] If the interdict were to be granted and in the event that the applicants are not successful in the review application, the first respondent would have to resume a disciplinary enquiry that has barely commenced after the lapse of a lengthy period of possibly up to a year or even two. The applicants envisage a short time before the review application is heard but that presupposes that the court will give preference to the applicants over other litigants waiting in line for a date. In that time, many issues

could crop up. Witnesses might no longer be available and the applicants would have probably been on suspension with full pay for a lengthy period at an enormous expense to the respondent.

[38] The question to ask is who will be more inconvenienced in each instance. The LRA has speedier processes to finalise the case. If the applicants are unfairly dismissed, they can approach the CCMA for relief and find a quicker resolution of the dispute. If they are found not guilty of the allegations against them, as in previous disciplinary proceedings against the first applicant which he brought to the attention of the court, that would be the end of the matter long before the outcome of a review before this court.

[39] In the *Sesoko* case, the court stated as follows:

'[37] … In assessing the balance of convenience in a case of this nature, account should be taken that the court is invited to restrain the employer in an area where the power to discipline employees is within its exclusive terrain. The assessment has to be done also taking into account the need for speedy finalisation of disciplinary proceedings and the availability of other suitable remedies provided for in the labour legislation. The impact that the interdict would have on the speedy finalisation of the disciplinary proceedings in particular having regard to the prospects of success.'

I am in agreement with this view.

The absence of an alternative remedy

[40] The applicants have to demonstrate that they will suffer irreparable harm if the interdict is not granted. They have failed to do so. If they are dismissed unfairly, they have recourse to the CCMA in terms of the provisions of the LRA.

Conclusion

[41] This application for an interdict has been sought on the basis that it is interim in nature pending the review application. The applicants do not have good prospects of success in the review application.

[42] One final aspect needs to be addressed and that is that the prosecutor in this case stayed behind after the proceedings on 16 November 2021 and had a conversation with the chairperson.

[43] According to Ms Ndlovu, this is what transpired after the applicants' team left the venue:

> '111.3. Thereafter, Dr. van der Walt, after having informed Mr.Khuzwayo as regard the recordings and placing his documents, pens, and laptop within his bag, enquired from the Chairperson when he would be travelling back to Gauteng, considering that the Inquiry would not proceed on the 17th, and invited the Chairperson, considering the professed and serious intention of the applicants to approach the above honourable court on an urgent basis, to reduce his finding in respect of the Application for Recusal in writing, if he so prefers.'

[44] Having regard to the fact that the prosecutor is an attorney, he ought to have known better than to involve himself in issues that the IR/ HR department should have attended to.

[45] I focus on this point because of the prosecutor's further statement during the proceedings before this court that 'the applicant has an opportunity to prove his innocence' which, although corrected when it was pointed out by the court, is an attitude that seems to permeate the process.

[46] I have taken this fact into account in determining the issue of costs. Although the applicants have been unsuccessful in this application, they should not be ordered to pay costs of the respondent.

Order

[45] I accordingly make the following order:

1. The applicants' application is dismissed.
2. Each party is to pay its own costs.

_____

Hiralall AJ

Acting Judge of the Labour Court

APPEARANCES

For the Appellant:	ADV. J. NXUSANI
Instructed by:	A.P. SHANGASE AND ASSOCIATES
For the Respondent:	MR VAN DER WALT
Instructed by:	JR ATTORNEYS INC.