**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Of Interest to Other Judges

Case No: P99/20

In the matter between:

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| **MARGARET MIMI MINYA** | **Applicant** |
| and | |
| **SOUTH AFRICAN POST OFFICE LTD** | **First Respondent** |
| **THE REGIONAL GENERAL MANAGER (EC)** | **Second Respondent** |
| **THE ACTING GROUP CHIEF EXECUTIVE OFFICER** | **Third Respondent** |
| **MOYISILE GODUKA** | **Fourth Respondent** |
| **SIKHUTHALI BUZO** | **Fifth Respondent** |

**Heard:** **21 September 2020 (In Chambers via Zoom)**

**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 for the hand-down is deemed to be on 22 September 2020 at 10:00**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J**

[1] There is a misconception prevailing amongst employees aggrieved with minute details of internal disciplinary enquiries, that when the Labour Appeal Court (LAC) in *Booysen v Minister of Safety and Security and Others*[1] held that this Court had jurisdiction to intervene in such internal enquiries, this

[1] [2011] 1 BLLR 83 (LAC), (2011) 32 ILJ 112 (LAC) at para 36

meant that the Court is ordinarily the first port of call to deal with such internal grievances. This is despite the fact that the LAC had specifically stated that such intervention would only be called for where exceptional circumstances are demonstrated, such as where a grave injustice would result[2].

[2] From a plethora of such cases that are routinely brought on an urgent basis, it has become increasingly apparent that this Court is more often than not, called upon to micro-manage these internal proceedings, and that every little complaint about internal disciplinary proceedings, whether real or perceived, has by default, become an 'exceptional circumstance'. It has long been stated that the powers of this Court under the Labour Relations Act (LRA)[3] do not include the micro-management of workplace discipline or every dispute arising out of the workplace. This is so in that the prerogative to maintain discipline remains that of the employer, and further since the framework of the LRA is such that it is dispute specific.

[3] Equally worrisome with these applications, is that more often than not, no legal basis is pleaded for this Court to assume jurisdiction, other than flippant and out of context references to terms such as *'unlawful'*, *invalid*', *'legality'*, *'void'* , *'unconstitutional',* and in some instances, *'unfairness'*, with the hope that relief will be granted. These phrases as thrown into the mix are often deemed to be panacea and a magic wand to every complaint arising from internal disciplinary proceedings, with the hope that those proceedings will be wished away.

[4] The facts of this case are symptomatic of the misconception mentioned above, and to say that Court has reached a point beyond exasperation with such cases on its urgent roll is truly an understatement. More often than not, in instances where the applicant parties are not legally qualified or legally



[2] See also *Jiba v Minister: Department of Justice & Constitutional Development & others* (2010) 31 ILJ 112 (LC) at para [17], where it was held;

> "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 if necessary, by this court in review proceedings under s 145"

[3] Act 66 of 1995, as amended

represented, this Court, being that of equity, tends to adopt a more lenient approach. However where the parties are legally represented, the Court has to draw a line in the sand.

[5] The applicant in this case is currently employed as an L4 Senior Manager by the first respondent (SAPO) in Port Elizabeth. With this urgent application, she initially sought a *Rule Nisi* interdicting and restraining the respondents from proceedings with an internal disciplinary enquiry instituted against her, and scheduled to commence from 21 and 22 September 2020, whilst she '*is still ill and incapacitated as per the medical certificate that is annexed as 'C' to the founding affidavit'*. At these proceedings, Counsel for the applicant abandoned any interim relief, probably after realising the lack of a legal basis for such an interim order.

[6] The disciplinary proceedings against the applicant were instituted as far back as March 2020. There have been several postponements of those proceedings, some at the behest of the applicant on account of her being ill. During 11 August 2020 to 22 August 2020, the applicant was according to a letter from Hunterscraig Hospital, in that facility under the care of Dr Reddy. The applicant alleges that on 14 September 2020 whilst at Hunterscraig Hospital, she was served with a notice to attend a disciplinary hearing scheduled for 21 – 22 September 2020. It is common cause that at no stage did she attempt to contact SAPO to advise of her inability to attend the hearing, and on 18 September 2020, she had filed and served this application with reliance on Annexure 'C' to the founding affidavit.

[7] Annexure 'C' to the founding affidavit as relied upon for the relief sought is a medical certificate issued on 21 August 2020 by Dr Nava Reddy, which indicates that the applicant was examined on that date and diagnosed with *'Major Depression'*. It is stated that the applicant is unfit for duty from 21 August 2020 to 19 September 2020.

[8] Significant with this application is that upon an answering affidavit being filed and served, the applicant had obtained another medical certificate on 18 September 2020 from a Clinical Psychologist (Hyacinth Modiehi Mochela),

which recommended sick leave from 21 September 2020 to 26 September 2020. A copy of this certificate (Page 18 of the consolidated indexed bundle), was attached to the replying affidavit.

[9] This application is opposed on various fronts, including its lack of urgency, the lack of this Court's jurisdiction, and the failure to satisfy the requirements of the relief sought. All of these grounds have merit.

[10] In accordance with Rule 8 of the Rules of this Court, the applicant is required to set out in the founding affidavit, the reasons why the matter deserves the urgent intervention of this Court, and indicate why she cannot obtain substantive relief in due course. It is further trite that urgent relief will be denied in circumstances where any urgency claimed is self-created; where it is apparent that the applicant failed to act with the necessary haste in approaching the Court, and further where the respondent would suffer prejudice should urgent relief be granted[4].

[11] To the extent that the applicant seeks final relief, she must satisfy three essential requirements, *viz*, (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy[5].

[12] Prior to dealing with the issue of whether the matter is urgent, Counsel for the applicant had complained that despite this application having been served on SAPO, the latter had nonetheless proceeded to contact the applicant in the morning of 21 September 2020 and informed her that the disciplinary hearing would proceed as scheduled. Clearly there is no merit in this complaint. As



[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 26; *Minister of Law and Order v Committee of the Church Summit*, 1994 (3) SA 89 (BGD) at 99F-G; *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32, where it was held;

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. …'

See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* [2016] ZALCJHB; [2016] BLLR 1151 (LC); (2016) 37 ILJ 2840 (LC) at para 26

[5] *Setlogelo v Setlogelo* 1914 AD 221 at 227;

already indicated, at no stage did the applicant contact SAPO about either postponing the disciplinary hearing or advising it that she intended to bring this application. The mere fact that court papers have been served on SAPO cannot on its own stop the disciplinary proceedings in the absence of a Court order.

[13] Other than the fact that this application was brought on a Friday (18 September 2020) and to be heard on a Monday (21 September 2020) when the disciplinary enquiry was to take place, there is no indication from the founding papers as to the reason why it was not brought earlier, at most immediately after the notice of the enquiry was served on 14 September 2020, or why SAPO was not even forewarned of it.

[14] The applicant alleges that this application deserves the urgent attention of this Court on the basis that she was served with a notice to appear at the disciplinary enquiry whilst she was in hospital, and that the short notice given to her is indicative of SAPO's overzealousness to get rid of her.

[15] At the time that this notice was issued, it should be borne in mind that this was merely a set-down notice as correctly pointed out on behalf of SAPO, in view of previous postponements of the disciplinary enquiry. Further at the time, the applicant had already submitted the medical certificate from Dr Reddy that she was unfit for duty between 21 August 2020 and 19 September 2020. The timing of the notice was no more than taking into account the contents of that certificate, which indicated that the applicant would have been fit from 19 September 2020 to attend the hearing. Nothing can be read into the fact that the notice was served on the applicant whilst she was in hospital, as that medical certificate did not indicate that she was in hospital at the time that it was issued by Dr Reddy. In the end, the issuing of a notice to attend a disciplinary hearing cannot by any stretch of imagination trigger urgency, particularly in circumstances where a similar notice had been issued in the past.

[16] In further alleging urgency, the applicant's principal contentions were in regards to the requirements of the relief that she seeks, which are separate

issues from establishing urgency itself. In a nutshell, the applicant hopelessly failed in setting out in the founding affidavit, the reasons that make this matter urgent.

[17] To the extent that urgency was not established, this matter ought to be struck off the roll. Striking this matter off the roll however implies that it would find itself back on this Court's ordinary roll, and it is my view that in the light of its merits, it ought to be disposed of finally.

[18] The first consideration as to the reason why the application ought to be dismissed is that no legal basis was laid out in the founding affidavit for this Court to assume jurisdiction over the matter. Only in the heads of argument did Counsel for the applicant indicate that she relied on exceptional circumstances for the relief that she seeks. On countless occasions during his submissions, Counsel referred to the '*legality*', *'defective'*, or *'unlawful'* nature of the notice to attend the disciplinary hearing, and the fact that the legality of the entire process was challenged.

[19] In determining whether the court has jurisdiction to entertain a claim for final relief where an applicant alleges unlawful conduct on the part of the employer, and without locating the claim in a cause of action justiciable by this court, Van Niekerk J recently in *Lieutenant-General Adeline Lungiswa Shezi v South African Police Service & others*[6]*,* held that;

> "[9] This court is a creature of statute. Its inherent powers, authority and standing are equal to that of a Division of the High Court, but only in relation to matters under its jurisdiction (see section 151(2) of the LRA). There is a misconception that the court has jurisdiction over all disputes that arise in the context of an employment relationship. It does not. Some 20 years ago, the Judge President bemoaned the fact that the Court did not enjoy jurisdiction over all employment-related disputes, and urged the legislature to remedy this shortcoming. Regrettably, the legislature did not respond to this call and in broad terms, the jurisdiction of this court remains to be determined in terms of the Act as it was drafted in 1996.

[6] Case Number J 852/2020 (Reportable) (Delivered on 15 September 2020)

> [10] Section 157(1) provides that subject to the Constitution and s 173, and except where the LRA provides otherwise, the court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the court. What this requires is that a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this court to adjudicate the dispute. It is thus incumbent on an applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this court to entertain the claim. Jurisdiction, of course, is to be determined strictly on the basis of the applicant's pleadings; the merits of the claim are not material at this point. What is required is a determination of the legal basis for the claim, and then an assessment of whether the court has jurisdiction over it (see *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) at par 155, *Gcaba v Minister of Safety and Security* (2010) 1 SA 238 (CC) para 75)."

[20] A claim that exceptional circumstances arose out of the defect or illegality of the notice to attend a disciplinary enquiry is clearly unsustainable, as all that it points to is complaints related to procedural fairness of that enquiry, which this Court ordinarily has no jurisdiction over in the light of the scheme of the LRA. In any event, the fact that the notice to attend a disciplinary had shortcomings such as its timing, how and where it was served, its contents or the fact that it was not signed by the employer can hardly serve as exceptional circumstances for the purposes of jurisdiction.

[21] A second consideration is that a clear right to an interdict in this case cannot arise in circumstances where the disciplinary process is regulated by SAPO's ordinary Disciplinary Code and Procedure, which can hardly be classified or equated to 'regulations' or subordinate legislation as one would find with the Local Government: Disciplinary Regulations for Senior Managers, 2010[7]. It follows that Counsel's reliance on *Nothnagel v Karoo Hoogland Municipality and Others*[8] for the proposition that a disciplinary hearing was unlawful or the initiation of the disciplinary enquiry against the applicant was legally invalid

[7] Issued in terms of s 120 of the Local Government: Municipal Systems Act, Act No 32 of 2000 ("the Systems Act") and published as Government Notice No 344 in *Government Gazette* No 34213, 21 April 2011.
[8] (C 431/12) [2012] ZALCCT 19; (2014) 35 ILJ 758 (LC)

was completely misplaced. In any event, that decision was subsequently set aside on appeal, with the LAC having found that the Court *a quo* had misconstrued the facts that led to the decision to institute a disciplinary enquiry into the conduct of employees in that case[9].

[22] A third consideration is that given the facts and the circumstances of this case, I still fail to understand the reason why this Court was approached with this application and why the applicant could not have simply attended the disciplinary hearing and raised those procedural complaints before the appointed chairperson. I further fail to appreciate what possible grave injustice could arise from those alleged procedural irregularities, in circumstances where these could have been addressed at the disciplinary enquiry itself. It is not for this Court to intervene in disciplinary proceedings that have not even started in earnest, and dictate to employers and/or chairpersons of disciplinary enquiries as to how to conduct their own internal disciplinary processes.

[23] A fourth consideration is that at the very core of the applicant's complaint is the timing of the disciplinary set-down and a need for those proceedings to be postponed. There is nothing in the founding papers to suggest that the applicant was physically unable to attend the disciplinary hearing and plead her case for a postponement. Afterall, she was able to consult and prepare Court papers with her attorneys and Counsel before 18 September 2020, and to also consult with the Clinical Psychologist on 18 September 2018.

[24] The mere production of a copy of a medical certificate as the applicant had done in support of the relief she seeks, cannot serve as proof of an individual being indisposed. That copy still has to be verified, authenticated and attested to by the person whose evidence it purports to be[10]. In this regard, I agree with the submissions made on behalf of SAPO that it is not clear from the



[9] *Karoo Hoogland Municipality v Nothnagel and Another* (CA07-14) [2015] ZALAC 57; (2015) 36 ILJ 2021 (LAC)

[10] See *Joshua v Joshua* 1961 (1) SA 455 (GWLD) at 457 A-C; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* 2006 (4) All SA 43E at 54; *Mgobhozi v Naidoo NO & Others* [2006] 3 BLLR 242 (LAC); *Old Mutual Life Asurance Co SA Ltd v Gumbi* [2007] 4 All SA 866 (SCA); [2007] 8 BLLR 699 (SCA)

founding papers as to the nature of the applicant's ailment, for any conclusion to be reached that she was unable to attend the disciplinary hearing.

[25] The applicant can further not speak of an injury actually committed, or reasonably apprehended, or grave injustice in circumstances where the disciplinary enquiry had not commenced. At that hearing, she would have been afforded an opportunity to plead her case whether for a postponement or defend herself against the countless allegations of misconduct or poor performance against her. To the extent that she may be aggrieved by the ultimate outcome of that enquiry, like other ordinary employees, she has at her disposal, other satisfactory remedies, inclusive of an internal appeal and those remedies and processes under the provisions of the LRA.

[26] In the end, the applicant has not satisfied the requirement of urgency, nor has she satisfied the requirements of the relief that she seeks, and it follows that her application ought to be dismissed.

[27] In regards to costs, it was submitted that the application should be dismissed with a punitive cost order in the light of the applicant's lack of *bona fides* in bringing this application, especially to the extent that a copy of the new medical certificate extending her alleged illness to 26 September 2020 from the Clinical Psychologist was only attached in the replying affidavit. Other than it being correctly pointed out that this Court cannot attach any significance to this copy since a case cannot be made out in a replying affidavit, I agree that this conduct was indeed *mala fide*.

[28] Counsel for SAPO had also complained about the shoddy manner which the founding papers were drafted and attempts by the applicant's Counsel to amend those papers from the bar. In this regard, it will be recalled that the applicant had initially sought a *Rule nisi* with the Notice of Motion indicating relief under 'Part A'. This was despite the fact that it was not made clear as to what the basis of seeking an interim interdict was. It was also pointed out that despite the applicant's counsel having raised issues surrounding the legality of the disciplinary enquiry, nowhere in the founding papers was this pleaded.

To this end, I agree that the overall conduct in bringing this application ought to be mulcted with a costs order.

[29] The submissions made on behalf of the applicant that a costs order should not be awarded as she was a person of straw are clearly unsustainable. This application ought never have seen its day in court in the light of its ill-conceived nature, more particularly in view of the procedural complaints raised by the applicant. The applicant's attorneys of record and Counsel ought to have foreseen the futility of bringing this application. To reiterate, this Court ought not to be seen as a first port of call for all workplace related complaints when these can be sufficiently dealt with internally. In an event that an employee is still aggrieved after the internal process, such issues can properly be addressed through the dispute resolution framework of the LRA. This is something which the applicant, being legally represented, ought to have been made aware of . In the circumstances, I therefore agree that the requirements of law and fairness dictate that a punitive cost order should follow.

Order:

[30] In the premises, the following order is made;

1. The applicant's urgent application is dismissed.

2. The applicant is ordered to pay the costs of the First Respondent, on a scale as between attorney and client.



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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

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| For the Applicant: | Adv. A Nyondo, instructed by Mbewana Attorneys |

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| For the 1st – 5th Respondents: | Adv. L Nyangwe, instructed by Madhlopa & Thenga INC |