Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C387/2020

In the matter between:

WESLEY NEUMANN	**Applicant**
and	
WESTERN CAPE EDUCATION DEPARTMENT	**First Respondent**
PREMIER OF WESTERN CAPE	**Second Respondent**
MINISTER OF EDUCATION (WESTERN CAPE)	**Third Respondent**
MR. BRIAN SCHREUDER	**Fourth Respondent**
MS HELEN ZILLE	**Fifth Respondent**
PUBLIC SERVICE COMMISSION DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	**Sixth Respondent**

Date of Set Down: 27 October 2020

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 2 November 2020

Summary: (Urgent – Interim relief – setting aside appointment of HOD and declaring institution of discplinary proceedings invalid – struck off for lack of urgency -costs)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant, a school principal, has applied on an urgent interim basis under section 158 of the Labour Relations act, 66 of 1995 ('the LRA') to interdict a pending disciplinary inquiry until the outcome of an application to review the renewal of the appointment of the fourth respondent, the head of the Western Cape Education department ('Schreuder' or 'the HOD'), and to declare the institution of disciplinary proceedings against the applicant unlawful. The urgent application is set out in Part A of the notice of motion, and Part B sets out the final relief sought on review. This judgment only concerns the urgent application.

[2] The matter originally was enrolled on 6 October 2020, but owing to the respondent barely having time to file answering papers, the application and the disciplinary inquiry were respondent until 27 and 28 October 2020 respectively. At the hearing on 27 October, the respondent undertook not to proceed with the inquiry pending the outcome of the application.

[3] As expressed in paragraph 53.1.(b) of the Neumann's founding affidavit, "the basis of the Applicant's challenge to the lawfulness and validity of the proceedings relates to the question whether Fourth Respondent had the legal authority to institute disciplinary actions in 2020 against the Applicant".

The logic of his argument is that if the HOD's appointment was invalid, then is purported authorization of disciplinary proceedings against Neumann was also invalid and unlawful.

Events leading up to the application

[4] Arising from correspondence between Neumann and Schreuder over the return to school of matric learners towards the end of July 2020, it became apparent by the end of that month that the department was intending to take disciplinary action against Neumann, *inter alia,* for allegedly not readmitting matric learners and his public response to the departmental instruction that they be allowed to return to school, as part of the relaxation of Covid-19 restrictions.

[5] There was a hiatus during August in which a possible meeting between Neumann, his attorney and Schreuder was anticipated. When that did not materialize, Schreuder notified Neumann at the end of the month that disciplinary proceedings would be initiated.

[6] The notice of the disciplinary inquiry issued on 16 September contained six charges against Neumann and was scheduled to take place on 7 October 2020 was.

[7] A week later, on 23 September, Neumann asked for the charges against him to be withdrawn on the basis that he alleged that the reappointment of Schreuder in 2019 had been contrary to section 16 [7] of the public service act of 1994 and accordingly he contended that any decisions made by Schreuder including the decision to Institute disciplinary action against Neumann was unlawful. The department immediately asserted the lawfulness of Schreuder's appointment and reaffirmed that the disciplinary inquiry would proceed.

[8] The following week, on 29 September, Neumann advised that he intended reviewing the lawfulness of Schreuder's appointment and requested the suspension of the disciplinary proceedings pending the outcome of that review, on the premise that if successful, the decision to initiate disciplinary action would have been unlawful and therefore a nullity.

[9] The challenge to the appointment of Schreuder was the subject matter of a Public Service Commission ('PSC') investigation initiated by an anonymous complaint. The crux of the issue considered by the investigation was whether the approval of the provincial parliament was required for the extension of his contract for the period 1 April 2019 to 31 March 2021 after an initial extension of two years ending on 31 March 2019. In the report of the investigation concluded at the end of July 2020, the PSC rejected the view of the Western Cape premier that the extension of the contract, was of a temporary nature and therefore did not require provincial parliamentary approval under section 16 [7] of the PSA.

[10] The application was initially launched on 2 October 2020 but the papers filed after normal hours that Friday were incomplete and the respondent only received a complete set of papers the day before the application was set down, namely 5 October. The department only responded to the request for suspension of the inquiry on the same day.

Merits

[11] The applicant must establish that the application ought to be heard as one of urgency and, if so, must establish that he is entitled to interim relief. The requirements for interim relief are that:

11.1 the right which is the subject-matter of the main application and which the applicant seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

11.2 if such case is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and the applicant ultimately succeeds in establishing his or her right;

11.3 there is no other satisfactory remedy; and

11.4 the balance of convenience favours the granting of interim relief.

[12] Quite apart from considering whether the applicant can establish a *prima facie* right to set aside his disciplinary proceedings on the basis of unlawfulness, the court would also have to consider the jurisprudence which

cautions against intervening in incomplete disciplinary proceedings except in exceptional circumstances. As the labour court expressed it in *Lt-General A L Shezi v SAPS & Others*[1]:

> '[18] What warrants emphasis in *Booysen* is that, the LAC did no more than decide that this court had jurisdiction to intervene in uncompleted disciplinary proceedings. Contrary to what counsel suggested, this does not establish an unqualified right to intervention in uncompleted disciplinary proceedings – the LAC said no more than that this court was empowered to grant appropriate relief. The nature and extent of that relief, of course, is dependent on the basis on which intervention is sought. That basis must necessarily fall within this Court's jurisdictional footprint, as established by s 157(1). In other words, an applicant seeking intervention in uncompleted disciplinary proceedings must establish first that the application embodies a proper cause of action on which the intervention is sought and secondly, that the circumstances are exceptional and thus warrant intervention.'

[13] In essence, the ultimate order the applicant seeks, which directly affects his legal interest, is an order that the institution of the disciplinary proceedings against him is unlawful on account of the alleged invalidity of the HOD's appointment. Since the decision of the constitutional court in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 *ILJ* 564 (CC) there is now serious doubt whether a dismissal or other forms of employer conduct action in the challenged under the LRA on the basis of unlawfulness. As the court expressed the effect of *Edcon* in the *Shezi* case:

> 'The [constitutional] court observed that there was no provision in the LRA in terms of which an order could be sought declaring a dismissal unlawful or invalid. At paragraph 106 of the judgment, the court said the following:
>
> > [106] Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: 'Unfair dismissal and unfair labour practice'. Under the heading appears an indication of which sections fall under the chapter…

[1] J 852/2020 dated 15/09/2020 (unreported)

> Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA…

And further at paragraph [107]:

> This indication is reinforced when one has regard to the definition of "dismissal" in section 186 (1) … Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if the dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA.

[12] The effect of this judgment is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness. If a remedy is sought under the LRA, the applicant must categorise the alleged unlawfulness as unfairness (see *Singhala v Ernst & Young Inc & another* (2019) 40 *ILJ* 1083 (LC), where my colleague Moshoana J reiterated the principle that dismissals alleged to be invalid and of no force and effect fall outside of the contemplation of the LRA.) By extension, the same principle applies to other forms of employer conduct which are alleged to be unlawful.'

[14] The *dicta* above cast very serious doubt on the ability of Neumann to obtain an order in this court that the disciplinary action instituted against him is unlawful, owing to the jurisdictional obstacle identified by the constitutional court. This would be a very weighty consideration in deciding if Neumann has a prima facie the right to relief he seeks.

[15] Be that as it may, at the hearing, the respondents made it clear that they persist in opposing the application on grounds of urgency and this issue

must necessarily be determined before considering if other requirements for the interdictory the relief sought have been met.

Urgency

[16] Neumann claims that he only became aware of the PSC around 16 September 2020. It was only a week later, on 23 September, that he apprised the department of his view that his inquiry might be unlawful. His attorney also made it clear in the same letter that "Should you [the department] persist with the unlawful disciplinary proceedings, our client reserves the right to seek relief in an appropriate forum." On the very same day, the provincial department's director: Mr M Faker responded unequivocally that the department would not withdraw the disciplinary action based on what he characterized as Neumann's "misguided perception or opinion" about the status of the HOD, and summarizing the basis for the department's contrary view. The letter further pointed out that the HOD's extended appointment could only be set aside by a court. At that point in time, the disciplinary inquiry was only a fortnight away.

[17] Despite the looming inquiry, it was only nearly a week later on 29 September that Neumann's attorney wrote to the department calling upon it to suspend the inquiry pending an application to set aside the extension of the HOD's contract and consequently to also set aside the disciplinary proceedings against Neumann. Although the letter asked the department for an "urgent positive response", no deadline was set for a reply. By this stage, the inquiry was only one week away.

[18] Three days later, after hours on Friday 2 October 2020, an incomplete urgent application was launched.

[19] Based on the above sequence of events, the factual basis which Neumann relies on to challenge the validity of his disciplinary inquiry was effectively known to him and his legal representative by mid-September, when the inquiry was three weeks away, but the application was only launched over a fortnight later. There is no explanation why the letter of 23 September was

not sent the previous week. In any event, once the department had stated its unequivocal response to that letter the same day, there was no reason, with the inquiry only two weeks away, to wait nearly another whole week before only requesting the suspension of the inquiry pending the outcome of the review.

[20] Consequently, I am satisfied that having regard to this sequence of events it is apparent that the applicant could, and should, have acted with greater speed in bringing this application. Even though the inquiry was rapidly approaching, he only took further steps at weekly intervals. Even on a generous interpretation, the application could have been filed at least over a week earlier, and it would not have been necessary to postpone the first hearing of the application. In consequence of Neumann's tardiness, the timetable for filing answering and replying affidavits became impossibly compressed.

[21] It is telling that in Neumann's founding affidavit, the only reason advanced for the application being urgent, apart from the alleged irreparable harm he says he will suffer, is that the hearing was set down for 7 October 2020 and that at the time of launching the application, the department had not yet responded to his request to suspend the inquiry dated 29 September. However, firstly the date of the enquiry was known for some time. Further, as set out above, there was no justification for his last request to have been made so late. It is noteworthy, he did not stipulate a time within which a reply was expected, failing which he would approach the court on an urgent basis, which would have been the normal course of action by that stage. It was his own leisurely conduct which brought the matter to a head so late.

[22] A point made in argument, was that Neumann could also have at least given the chairperson of the inquiry and opportunity to consider whether the inquiry should be postponed pending the outcome of the application before approaching the court. He could first have canvassed his objection with the chairperson of the enquiry and he cannot presume bias on the part of the chairperson.

[23] On the question of irreparable harm, Neumann essentially sets out the possible damaging consequences to him of being dismissed. That

presumes the result of the inquiry. At this stage, the only prejudice he faces is having to answer to charges in the inquiry. Insofar as it is contended that he would not even have to face this prejudice if he is correct that the appointment of the HOD should be set aside and so should the institution of the disciplinary proceedings, two difficulties arise in this regard.

[24] Firstly, on the papers, it is the employee relations director, who actually instituted the proceedings even if the HOD was also involved. Secondly, even if Neumann is correct in believing that in truth it was the HOD who initiated the disciplinary proceedings, the prejudice of facing disciplinary proceedings cannot be entirely averted, pending the outcome of a review of the validity of the HOD's appointment and the initial institution of the disciplinary proceedings. Nothing would prevent the reinstitution of proceedings, by an official whose appointment and authority is not in question.

[25] For the reasons above, I am satisfied that the application should be struck off the roll for lack of urgency.

Costs

[26] Section 162 of the LRA states:

> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
>
> (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
>
> (b) the conduct of the parties—
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court."

[27] Thus, notwithstanding Neumann's attorney's indication that costs should follow the result, that principle is not applicable in litigation under the LRA. The respondents have asked for costs in this instance. The key question in

this regard is whether the applicant's conduct in launching these proceedings should attract a cost order. Cost orders ought not to be a factor that inhibit employees from exercising their rights under the LRA. The LRA itself provides a comprehensive framework and series of remedies for dealing with unfair dismissals and unfair labour practices. A party utilizing those procedures in good faith, would not normally expect an adverse cost award as part of the result. In this instance, Neumann chosen an alternative mechanism of dealing with disciplinary action by challenging its lawfulness., Although I have expressed above serious doubts whether this is still competent relief that the labour court can entertain, I will assume in the applicant's favour that the application was not brought in bad faith.

[28] However, for the reasons mentioned above, this application was left to the last minute and Neumann did not bother to first raise the problem at the inquiry itself, which was his first recourse even if he was sceptical whether the chairperson would agree to suspend the inquiry. I have also considered the fact that, the court would be unlikely to completely preclude the department itself from continuing to pursue, or to reinstitute, disciplinary action against the applicant even if it was willing to halt the inquiry purportedly initiated by the HOD. At best therefore, the relief Neumann might obtain in the interim would in all probability have been short-lived in effect. It did not warrant this application and did not warrant putting the respondent to the expense of defending it.

[29] Consequently, I am satisfied that the applicant should pay the respondent's costs, though the costs of two counsel is not justified.

Order

[30] The application set out in Part A of the notice of motion is struck off the roll for lack of urgency.

[31] The applicant must pay the respondents' costs, including the costs of one counsel.

Lagrange J
Judge of the Labour Court of South Africa

Representatives -

For the Applicant:	V Seymour of Lionel Cay Attorneys
For the Third Respondent:	C Kahanovitz SC assisted by JL Williams instructed by the State Attorney, Cape Town