THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J515/18

In the matter between:

VIRGIL RABIE **Applicant**

and

DEPARTMENT OF TRADE AND INDUSTRY **First Respondent**

SIPHO ZIKODE *N.O* **Second Respondent**

Heard: **23 February 2018**

Delivered: **05 March 2018**

Summary: **Urgent application – stay of the parallel in-house disciplinary enquiry – a party to a section 188A agreement has no discretion to unilaterally abandoned the pre-dismissal arbitration – the in-house disciplinary enquiry offends the applicant's contractual rights – alternatively, the first respondent is bound by the doctrine of election.**

Practice and procedure – amendments to a charge sheet can be sought at any stage of the disciplinary proceedings, including section 188A pre-dismissal arbitration.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] This is an opposed urgent application for an order, firstly, staying the internal disciplinary enquiry instituted by the first respondent, the Department of Trade and Industry (the DTI), against the applicant, Mr Virgil Rabie (Mr Rabie), pending the finalisation and outcome of the pre-dismissal arbitration proceedings instituted by agreement between the parties and held at the General Public Service Sectoral Bargaining Council (the GPSSBC) under case number GPBC615/2017. Secondly, for an order interdicting the DTI from instituting any further disciplinary enquiries against Mr Rabie pending the finalisation and outcome of the pre-dismissal arbitration proceedings instituted by agreement between the parties and held at the GPSSBC under case number GPBC615/2017.

Factual Background

[2] Mr Rabie is the Chief Information Officer in the employ of the DTI. He is currently on suspension since August 2016 pending the outcome of the disciplinary enquiry. He was formally charged with four charges of misconduct sometime in December 2016. The parties agreed to a pre-dismissal arbitration in terms of section 188A of the Labour Relations Act[1] (LRA) under the auspices of the GPSSBC. The disciplinary enquiry was accordingly referred to the GPSSBC under case number GPBC615/2017.

[3] The pre-dismissal arbitration has been postponed on a number of occasions at the instance of the DTI. It first sat on 19 December 2016 and the opening statements were only made on 2 August 2017. The DTI led its witnesses on 11 December 2017. Mr Rabie is represented by his attorneys of record in those proceedings as well.

[4] The essence of the charges preferred against Mr Rabie is that, firstly, he forwarded three confidential emails to Mr Nazeer Ebrahim, the Chief Operating Officer of the EOH, without permission and authority of the

[1] Act 66 of 1995 as amended.

Accounting Officer; secondly, he granted access to his DTI issued official iPad to external parties; thirdly, that he breached his suspension conditions by communicating with Messrs Alistair Watts, Nazeer Ebrahim and Lionel October in an inappropriate manner; fourthly, that whilst he was a Project Manager of IEMS Project, he failed to disclose his relationship with Mr Mackay, a non-executive Director at EOH and the Executive Chairman of the TSS Capital.

[5] During the sitting of the pre-dismissal arbitration on 11 December 2017, the DTI led the evidence of Mr Abrahams of Ubuntu Business Advisory and Consulting (Pty) Ltd, the author of the investigation report into the allegations of misconduct against Mr Rabie. During his cross examination Mr Rabie, through his attorneys of record, put a version of his defence to the effect that he (Mr Rabie) had informed his subordinate, Ms Shirleen Kornizer (Ms Kornizer), that the DTI service provider (EOH) had instituted civil action against the DTI as a ploy to put pressure on her to perform as she appeared to be indifferent about her responsibilities in as far as the contract between the DTI and EOH is concerned. However, there was no litigation against the DTI at that particular time.

[6] Consequently, on 30 January 2018, Mr Rabie was served with another notice to attend an in-house disciplinary enquiry on charges of dishonesty and misrepresentation emanating from the version of defence he had put to Mr Abrahams. In essence, the charges against Mr Rabie are that he misrepresented material facts when he, firstly, informed Ms Kornizer that EOH had intended litigating against the DTI; and secondly, when he informed Ms Jodi Scholtz (Ms Scholtz), the Group Operations Officer, that EOH has appetite for litigation; thirdly, that he was insubordinate when he communicated with Mr Abrahim of EOH when the DTI had already made the decision that only the DG would communicate with EOH on all matters; fourthly, that he failed to protect the interest of the DTI in that he misrepresented facts to Misses Scholtz and Kornizer in an attempt to expedite payments to EOH despite being fully aware that such payments were in dispute.

[7] Mr Rabie attended the disciplinary enquiry on 13 February 2018 chaired by the second respondent and raised various preliminary points but, pertinently, that there is a pending pre-dismissal arbitration which pertains to the same subject matter which ought to run its course as he could not be subjected to two parallel processes. On 15 February 2018, the second respondent dismissed Mr Rabie's preliminary points and ruled that the disciplinary hearing would proceed on 19 February 2018. These proceedings were launched on 16 February 2018.

Urgency

[8] The DTI argued that the matter is not urgent as Mr Rabie received the charge sheet together with the notice to attend the disciplinary enquiry set down for 13 to 15 February 2018 as early as 31 January 2018. Instead of launching the urgent application, on 5 February 2018, Mr Rabie sought the withdrawal of the charges and when his request was declined, on 9 February 2018, he sought to have that matter referred to the GPSSBC in terms of section 188A. That request was also declined on 12 February 2018. The DTI was resolute that the in-house disciplinary enquiry would proceed as scheduled and advised Mr Rabie to raise any preliminary points with the second respondent.

[9] Clearly, Mr Rabie correctly dealt with his objections to the in-house disciplinary enquiry internally with the DTI and later with the second respondent. It was after his points *in limine* were dismissed that he approached this Court. I am, therefore, persuaded that the matter is urgent.

Interdicting incomplete disciplinary proceedings

[10] The question that arise in this regard is whether there are exceptional circumstances that would warrant the Court's intervention in an incomplete disciplinary enquiry. It is common cause that Mr Rabie has already pleaded to the charges.

[11] The DTI argued that the Court has not been favoured with the circumstances that warrant the grant of an urgent interim relief. Mr Rabie has an adequate alternative recourse which takes away any injustice that might occur and as

such grave injustice is not feasible in the circumstances, so it was argued further.

[12] Mr Rabie, on the other hand, premised his challenge on the contractual right to a lawful disciplinary hearing, *inter alia.* He argued that the pre-dismissal arbitration in terms of section 188A has replaced the in-house disciplinary enquiry as per the agreement between the DTI and himself. The DTI's unilateral abandonment of the pre-dismissal arbitration offends Mr Rabie's right not to be subjected to parallel disciplinary proceedings, so his argument went.

[13] Tritely, as correctly submitted by Mr Ramawele, counsel for the DTI, this Court does not, as a rule, intervene in incomplete disciplinary proceedings. In *Booysen v Minister of Safety and Security and Others,*[2] referred to by both parties, the Labour Appeal Court (LAC) was categorical that this Court may only interdict unfair conduct in the course of the disciplinary proceedings in 'exceptional circumstances', such as where a grave injustice would result. Also in *Jiba v Minister*: *Department of Justice and Constitutional Development and others,*[3] this Court pertinently held that:

> '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.'

[14] Mr Masigo, Mr Rabie's counsel, submitted that Mr Rabie's case presents exceptional circumstances as it is premised on the contractual right that stems from the agreement concluded in terms of section 188A. This section provides the following:

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[2] [2011] 1 BLLR 83 (LAC), (2011) 32 ILJ 112 (LAC) at para 36; *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and others* [2009] 8 BLLR 833 (LC) [2009] at para 3,

[3] [2009] 10 BLLR 989 (LC), (2010) 31 ILJ 112 (LC) at para 17.

'188A Inquiry by arbitrator.

(1) An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee.

(2) The request must be in the prescribed form.

(3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of –

(a) payment by the employer of the prescribed fee; and

(b) the employee's written consent to the inquiry.

(4) (a) An employee may only consent to an inquiry in terms of this section after the employee has been advised of the allegation referred to in subsection (1).
(b) …

(5) …

(6) Section 138, read with the changes required by the context, applies to any inquiry in terms of this section.

(7) …

(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any such ruling.

(9) An arbitrator conducting an inquiry in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, rule as to what action, if any, may be taken against the employee.'

[15] Mr Rabie accordingly referred to the two authorities which I now deal with. In *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others,*[4] the Court, as per Van Niekerk J, articulately explained the purpose of section 188A as follows:

> '[11] Section 188A (despite its unfortunate title which on the face of it, assumes the outcome of the arbitration hearing) has as its purpose a means of expediting dispute resolution by avoiding duplication between internal and external hearings. In effect, in terms of a tripartite agreement between the employee, the employer and the CCMA, an arbitrator steps into the shoes of the employer and assumes the right normally considered a sacrosanct element of the managerial prerogative - the right to exercise discipline, including the right to dismiss. The benefit for all is the elimination of the duplication that inevitably occurs when court-like in-house hearings are inevitably followed by an arbitration hearing conducted on a *de novo* basis.'

[16] The court stated further that:

> '[15] It seems to me from the wording of s 188A that once an employer and an employee consent to refer the determination of allegations of misconduct or incapacity to an arbitration hearing in terms of s 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its internal disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. <u>That being so, and since the consent of the affected employee and the CCMA is necessary to achieve that result, it is not open to the employer to abandon the process on a unilateral basis</u>.' [Emphasis added]

[17] The principle in *MSC Depots* has been endorsed in *Mchuba v Passenger Rail Agency of South Africa,*[5] where the Court stated that:

> [16] '…By referring the matter to pre-dismissal arbitration, the respondent lost the right to take decisions on the relevance of documents the

[4] [2012] ZALCD 10; (2013) 34 ILJ 706 (LC) at para 11.
[5] [2016] 6 BLLR 612 (LC) at para 16.

> applicant requested as it had handed it over to Tokiso. When the tripartite agreement was reached, the respondent had no residual power to take any step against the applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration, the applicant acted in breach of the applicant's contract of employment.' (Emphasis added)

[18] Coming back to the present case, the DTI argued that the above cases are distinguishable because it is not its intention to abandon the pre-dismissal arbitration; those proceedings would still proceed. Notwithstanding, the DTI seems to be convinced that it could still exercise its prerogative, as the employer, to institute the in-house disciplinary enquiry on charges that are different from the ones before the arbitrator. Mr Ramawele was at pains to convince me that Mr Rabie has no legal right not to be subjected to parallel disciplinary enquiries in the absence of a plea of *res judicator* or *lis pendens* or double jeopardy.

[19] The DTI is clearly disingenuous. The common thread in the charges against Mr Rabie both before the arbitrator in the pre-dismissal arbitration and the in-house disciplinary enquiry is conduct pertaining to EOH, its service provider. The fact that the second charge sheet emanates from Mr Rabie's version of defence that was put to the DTI's witness during the pre-dismissal arbitration proceedings gives credence to Mr Rabie's contention that both proceedings deal with the same matter.

[20] There is no plausible explanation by the DTI as to why the new charges were not incorporated into the charges before the pre-dismissal arbitration. Mr Ramawele submitted that the charge sheet could not have been amended because Mr Rabie has already pleaded to the charges and the leading of evidence is already underway. Clearly this submission is untenable. The arbitrator conducting the pre-dismissal arbitration is clothed with all the powers in terms of section 138 of the LRA. Section 138(1) provides that 'the commissioner may conduct the arbitration in a manner that the commissioner

considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.

[21] In *Munnik Basson Dagama Attorneys v Commission for Conciliation, Mediation and Arbitration and Others,*[6] the Court, dealing amendment of a charge sheet after the commencement of the disciplinary enquiry, had this to say:

> '[9] It is trite law that in civil proceedings, amendments to pleadings and A documents can be sought at any stage of the proceedings. An amendment may also be granted at any stage before judgment on such other terms as to costs or other matters as the court deems fit. An amendment may also be allowed on appeal where no prejudice would thereby be occasioned for instance where the issues sought to be introduced by the amendment have been fully canvassed at the trial… The granting or refusal of an application for an amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. An amendment will be allowed where this can be done without prejudice to the other party...
>
> [10] The principles referred to in para 9 above apply equally in labour matters. Nothing prevents an employer from amending the charge-sheet before a finding is made. The amendment sought and granted by the chairperson of the disciplinary hearing was to categorize the charges as gross negligence…
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> [11] I share the sentiments expressed by Van Niekerk AJ (as he then was) in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 ILJ 1644 (LC) at 1652:
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> > 'The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

[6] (2011) 32 ILJ 1169 (LC).

> "The draft Bill requires a fair, but brief, pre-dismissal procedure ... [It] I opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."
>
> On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex "charge-sheets", requests for particulars, the application of the rules of evidence, legal arguments, and the like.' (Emphasis added)

[22] Clearly, amendments to the charge sheet can be sought at any stage of the disciplinary enquiry or pre-dismissal arbitration before a finding is made.

[23] The delay in finalising the pre-dismissal arbitration cannot be used as an excuse by the DTI to unilaterally bail out from the pre-dismissal agreement when it is the architect of the delay. It is, therefore, mind boggling that the DTI has the audacity to argue that it owed it to its employees to expeditiously finalise the in-house disciplinary enquiry it has commenced given the seriousness of the charges. The predicament it finds itself in is self-created as it indolently prosecuted the pre- dismissal arbitration.

[24] Strip of its verbiage, the DTI's intention is clearly to use the in-house disciplinary enquiry to parachute from the pre-dismissal arbitration aircraft, so to speak. it stands to reason that, once parachuted, it would be impossible to go back to the pre-dismissal arbitration. In essence, the dismissal of Mr Rabie consequent the in-house disciplinary hearing would render the pre-dismissal arbitration moot.

[25] It is also evident that the DTI has misconstrued Mr Rabie's claim. Even though Mr Rabie is also claiming procedural fairness, his claim is also hinged upon section 77(3) of the Basic Conditions of Employment Act[7] (BCEA) as he

[7] Act 75 of 1997.

is seeking to enforce his contractual rights in terms of the section 188A agreement with the DTI. As such, his armoury cannot be reduced to procedural fairness as contended by the DTI. The lawfulness of the in-house disciplinary enquiry is at issue. That, in my view, Mr Rabie's failure to plead of *res judicata*, *lis pendens* or double jeopardy as contended by the DIT is inconsequential.

[26] For that reason, also nothing turns on Mr Rabie's reasons to support his request for postponement of the disciplinary enquiry on 15 February 2018. Whether he lied about his fitness to proceed with the in-house disciplinary enquire after the second respondent dismissed his preliminary points is of no consequence in these proceedings.

[27] Another reason why abandoning the pre-dismissal arbitration is unlawful is that it is impermissible in terms of the doctrine of the right of election which has since been endorsed by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*.[8] The Constitutional Court referred with approval to *Chamber of Mines of South Africa v National Union of Mineworkers and Another*[9] where it was stated that:

> 'One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 786:
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> > 'It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant… He must be allowed a reasonable time within which to make

[8] 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC); [2008] 29 ILJ 2507 (CC) at para 54.
[9] 1987 (1) SA 668 (AD) at 690 D-G.

> his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. *Quod semel placuit in electionibus amplius displicere non potes*t (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place.'

The above statement of the principle may require amplification in the following respect indicated by Spencer Bower *Estoppel by Representation* (1923) para 244 at 224 - 5:

> 'It is not... quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke's phraseology: *quod semel in electionibus placuit amplius displicere non potest*, as if mere mutability were for its own sake alone banned and penalized by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none.''

[28] Accordingly, the essence of this matter is Mr Rabie's objection to the DTI's *volte face*.

Conclusion

[29] In the circumstances, I agree with the sentiments expressed in authorities mentioned above. Pending the finalisation of the pre-dismissal arbitration, the DTI is divested of its power and prerogative to institute any in-house disciplinary enquiry against Mr Rabie, including dismissing him consequent to those proceedings, in terms of the section 188A agreement; alternatively, in terms of the doctrine of election. Likewise, in the absence of any right by the DTI to unilaterally institute the in-house disciplinary enquiry, Mr Rabie is entitled to the relief he seeks.

[30] On costs, the parties argued that costs should follow the result and I am inclined to honour the request. The DTI ought to have been better advised on the consequences of opposing the relief sought by Mr Rabie.

[31] In the circumstances, I make the following order:

Order

1. The in-house disciplinary hearing instituted by the Department of Trade and Industry against Mr Virgil Rabie is stayed pending the finalisation and outcome of the pre-dismissal arbitration proceedings held at the General Public Service Sectoral Bargaining Council under case number GPBC615/2017.

2. The Department of Trade and Industry is interdicted from instituting any further in-house disciplinary enquiries against Mr Virgil Rabie pending the finalisation and outcome of the pre-dismissal arbitration proceedings held at the General Public Service Sectoral Bargaining Council under case number GPBC615/2017.

3. The Department of Trade and Industry to pay the costs of this application.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate G Mashigo
Instructed by	Thapelo Kharametsane Attorneys
For the respondents:	Advocate RPA Ramawele SC with Advocate D Mtsweni
Instructed by	State Attorney, Pretoria