IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: J 2501/17

In the matter between:

DESMOND KHALID GOLDING	**Applicant**
and	
REGIONAL TOURISM ORGANISATION OF SOUTHERN AFRICA	**First Respondent**
SAM SHIKONGO	**Second Respondent**
R CRUZ	**Third Respondent**
L RAKORONG	**Fourth Respondent**
R SAIBA LWANZA	**Fifth Respondent**
M TSOLO	**Sixth Respondent**
M.D. MAQUTU	**Seventh Respondent**
A MAHUMANE	**Eighth Respondent**
D NAOBEB	**Ninth Respondent**
A FORTUNE	**Tenth Respondent**
N MOOLA	**Eleventh Respondent**

H MOTSA	**Twelfth Respondent**
L MUTALE	**Thirteenth Respondent**
R FARANISI	**Fourteenth Respondent**
L TESTA	**Fifteenth Respondent**
NTSHONA	**Sixteenth Respondent**
M RAMAWELA	**Seventeenth Respondent**
R JAIRO	**Eighteenth Respondent**
F CHAILA	**Nineteenth Respondent**
B SCHNEIDER	**Twentieth Respondent**
K GASPAR	**Twenty-first Respondent**
JOEL RASEGOTSA KGARIMETSA	**Twenty-second Respondent**

Heard: **13 October 2017**

Delivered: **18 October 2017**

JUDGMENT

MAHOSI J

Introduction

[1] This is an urgent application for an interim interdict to stay the disciplinary proceedings brought against the applicant by the first respondent, pending an application to be instituted by the applicant to review and set aside a ruling of the chairperson of the hearing dated 27 September 2017 and a High Court application to declare unlawful or invalid and setting aside the resolutions purportedly taken by the Board of the first respondent on 4 September 2017, alternatively on 5 September 2017, and 6 September 2017 and setting aside the notice to attend a disciplinary hearing dated 15 September 2017.

Material facts

[2] The applicant was appointed as CEO of the first respondent on 14 March 2017. On 5 September 2017, the first respondent held an extraordinary board meeting that was also attended by the applicant. The said meeting was convened for the winding up of the outgoing board of the first respondent. At the end of the agenda, the applicant and other members of the Secretariat were requested to excuse themselves from the meeting. The Chairperson of the Board briefed the board on the allegations of misconduct and poor performance against the applicant that had come to his attention.

[3] The Board resolved that an enquiry process comprising of five States (being Angola, Lesotho, Namibia, South Africa and Zambia) must be held against the applicant. The outgoing Board, through the chairperson, was mandated to conclude the matter. On 6 September 2017, the applicant met with the chairperson and five members of the Board. In that meeting, the allegations were then formally tabled to the applicant. The Executive for Corporate Services was called to give evidence on allegations of misconduct, but the applicant denied the charges. The applicant was told to recuse himself.

[4] On 7 September 2017, the applicant received a notice of suspension. A notice to attend a disciplinary hearing, scheduled for the 27th of September 2017, was issued to the applicant on the 15th of September 2017.On the 18th of September 2017, the applicant's attorneys objected to his suspension without him being formally asked to show cause why he should not be suspended. The first respondent uplifted the applicant's suspension on the 22nd of September 2017 on the basis that the investigation had been completed. The applicant was required to return to work on the 26th of September 2017.

[5] On the 22nd of September 2017, the applicant's attorneys delivered a letter to the first respondent demanding that the disciplinary process be uplifted on the basis that it was premised on invalid resolutions of the Board. On the 26th of September 2017, the first respondent informed the applicant by e-mail that the charges against him would not be withdrawn and that the disciplinary hearing would proceed.

[6] On 27 September 2017, the applicant attended the disciplinary hearing and raised a preliminary point in terms of which he argued that the disciplinary proceedings were invalid and unlawful as it resulted from unlawful and invalid resolutions. The applicant made an application to the chairperson of the disciplinary hearing to stay the disciplinary proceedings pending an application to be instituted in the South Gauteng High Court to declare the resolutions unlawful and invalid and to set them aside. The chairperson ruled against the application. The applicant conveyed to the chairperson of the disciplinary hearing that he would institute an urgent application to this Court to stay the disciplinary proceedings pending review of his ruling.

[7] The well-known requirements for interim relief, that I shall have regard to are the existence of a *prima facie* right, the apprehension of an irreparable harm, the absence of alternative relief and balance of convenience. On urgency, the applicant submitted that the disciplinary hearing was set down to be heard from the 19 to 22 October 2017. I will assume that the application is urgent.

[8] In the notice of motion, the applicant sought an order that a *rule nisi* be issued calling upon the respondents to show cause as to why the final order to restrain and interdict the disciplinary hearing pending the finalisation in the South Gauteng High Court's matter and the review application of the chairperson's ruling to be instituted in this Court. However, in the hearing, Adv. TG Madonsela, submitted on behalf of the applicant that there was no review application against the ruling of the chairperson of the disciplinary hearing that is pending before this Court and further that the applicant has decided against filing such an application.

[9] It is common cause that there is a pending application challenging the lawfulness of the resolutions of the Board of the first respondent at the South Gauteng High Court. In effect, what the applicant seeks is an order to stay the disciplinary proceedings pending the finalisation of the application in the South Gauteng High Court. It is the applicant's case that he is entitled to the relief sought because the resolutions which led to his disciplinary proceedings were taken contrary to the Memorandum of Incorporation and/or document establishing the first respondent.

[10] The applicant noted that this Court was generally reluctant to grant relief interdicting disciplinary proceedings. The principle applicable to interdicts pending disciplinary hearing was outlined in *Booysen v Minister of Safety and Security*[1] where the LAC stated as follows:

> '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 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.' [Footnotes omitted]

Labour Court's jurisdiction to grant an interim interdict pending a matter in the High Court

[11] The applicant submitted that the Labour Court has jurisdiction to grant an interim order pending an application at the High Court. The applicant's relied on Constitutional Court judgment in the case of *National Gambling Board v Premier of KwaZulu-Natal and Others*[2] where the court stated as follows:

> 'An interim interdict is by definition
>
> "a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination".
>
> The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the *status quo* should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on

[1] [2011] 1 BLLR 83 (LAC).

[2] 2002 (2) BCLR 156; 2002 (2) SA 715 at para 49

whether it has jurisdiction to preserve or restore the *status quo*. It does not depend on whether it has the jurisdiction to decide the main dispute.'

[12] In the above-mentioned case, the applicant's legal representative argued that if a particular court does not have jurisdiction in the main dispute, it follows that it cannot have jurisdiction in an application for an interim interdict pending the resolution of the main dispute. The Constitutional Court held as follows:

> 'A court hearing an application for an interim interdict can obviously only decide the main dispute if it has jurisdiction to do so. A court that does not have jurisdiction in the main dispute will simply determine whether the applicant has a *prima facie* right to the relief which is to be sought in the court having jurisdiction to deal with it.'

[13] In view of the above judgment, this Court has jurisdiction to hear an interim order pending an application in the High Court.

Prima facie right

[14] In support of the requirement of *prima facie* right, the applicant submitted that he has a right to a fair labour practice and fair administrative action. In his oral submissions, the applicant's representative submitted that his case was exceptional and that it warranted the stay of his disciplinary hearing in that there was a pending application challenging the lawfulness of resolutions of the Board in the South Gauteng High Court. The basis of applicant's challenge to the lawfulness and the validity of the resolutions was that the resolution that was taken on the 5th of September 2017 mandating the second respondent, being the former Chairperson of the Board, to discipline the applicant was allegedly contrary to the Staff Conditions of Service of the first respondent. The applicant argued further that no provision is made in the Charter of the Regional Tourism Organisation of Southern Africa (RETOSA) and its Staff Conditions of Service for the constitution of the enquiry committee and institution of disciplinary process as envisaged in the resolution of the 5th of September 2017.

[15] The issue turns on the lawfulness and validity of the resolutions taken by the Board to mandate the outgoing Chairperson to institute and proceed with the

disciplinary proceedings against the applicant. The question of whether the first respondent has the power to institute and proceed with the disciplinary hearing depends on the interpretation of the Charter of RETOSA and its Staff Conditions of Service. This is the matter that is pending before the South Gauteng High Court.

[16] The applicant further submitted that the disciplinary proceedings against him were tainted by the second respondent's ulterior motive. The second respondent, who is a Namibian national, allegedly informed the applicant that he found South Africans to be arrogant, that he had ruined the careers of many South Africans while he was at the United Nations and that he and Ms Thembi Kunene were being watched closely. Ms Kunene is another South African in the organization who is responsible for marketing and communication. These allegations were denied by the first respondent. This is a factual dispute between the parties that is not before this Court.

Reasonable apprehension of irreparable harm and alternative relief

[17] It was the applicant's submission that should the disciplinary hearing proceedings continue and should he be dismissed, the outcome of that application would become moot and purely academic. On the issue of an alternative relief, the applicant submitted that the LRA does not make provision for applications to challenge the unlawfulness of resolutions instituting disciplinary proceedings. I do not agree with the first respondent's contention that even if dismissed, the applicant can challenge his dismissal at the CCMA and approach this Court if unsatisfied with the CCMA outcome.[3]

[18] Furthermore, the applicant submitted that should the relief be granted, the respondents will not suffer any undue prejudice as the first respondent would still have the recourse to discipline him after the hearing of his application at the South Gauteng High Court. It is apparent that the applicant is not challenging the first respondent's right to subject him to disciplinary proceedings. It may be that the applicant has remedies created by the LRA.

[3] See *Booysen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC) at paras 45-46.

However, this will not address the injustices that he would have suffered should the High Court find the Resolutions of the Board unlawful and invalid. It is my view that the Court's failure to intervene will result in an injustice that would not be addressed by any subsequent unfair dismissal remedy.

[19] As such, I find that the applicant has shown that exceptional circumstances exist for this Court to intervene and interdict the first respondent from proceeding with the disciplinary hearing pending the finalisation of the application in the South Gauteng High Court. There is no reason why the costs should not follow the results.

[20] In the premise, I make the following order:

a) The first respondent is restrained and interdicted from proceeding with the disciplinary proceedings against the applicant, pending the finalisation of the application in the South Gauteng High Court.

b) The first to the twenty-second respondents are to pay the costs of this application the one paying the other to be absolved.

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Mahosi J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:	Adv G.J Mdonsela,
	Instructed by Strauss Daly Inc. attorneys.
FOR THE THIRD RESPONDENT:	Adv. T. Tshabalala,
	Instructed by S Mahlangu Attorneys