THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J266/20

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION

(POPCRU) obo MATLAKENG LI **Applicant**

and

DEPARTMENT OF POLICE, ROADS AND
TRANSPORT: FREE STATE PROVINCE **First Respondent**

MEMBER OF EXECUTIVE COMMITTEE:

DEPARTMENT OF POLICE, ROADS AND
TRANSPORT: FREE STATE PROVINCE **Second Respondent**

HEAD OF DEPARTMENT: DEPARTMENT
OF POLICE, ROADS AND TRANSPORT:

FREE STATE PROVINCE **Third Respondent**

SEITSHIRO MTSHABI *N.O* **Fourth Respondent**

Heard: **4 March 2020**

Delivered: **10 March 2020**

Summary: **Urgent application – Part A seeks an interim order interdicting a disciplinary enquiry pending the final determination of the section 158(1)(h) review application in terms of Part B.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an urgent application for an order, sought under Part A, restraining and interdicting the respondents from proceeding with the disciplinary enquiry instituted against Mr Lehlohonolo Matlakeng (Mr Matlakeng), the applicant's (POPCRU) member, pending the final determination of the review application in terms of section 158(1)(h) of the Labour Relations Act[1] (LRA) under Part B of this application.

[2] The respondents are opposing the application based on various grounds which I deal with later in this judgment.

Pertinent facts

[3] Mr Matlakeng is currently employed by the first respondent as a Traffic Officer/Provincial Inspector. On 1 November 2019, he was acquitted of allegations of misconduct, consequent to the internal disciplinary enquiry on the following charges:

> 'Charge 1
>
> You contravened 'Annexure A' of the PSCBC Resolution 1 of 2003 which states that 'will be guilty of misconduct if he/she endures [his life]…or … the lives …of others by disregarding safety rules or regulations' in that:
>
> On or about 17 March 2019 you pointed and discharged a firearm in a public area at The Thoughts Lounge, Batho Location in Bloemfontein and shot a member of the public.

[1] Act 66 of 1995, as amended.

Charge 2

You contravened 'Annexure A' of the PSCBC Resolution 1 of 2003 which states that 'an employee will be guilty of misconduct if he/she, 'wrongfully uses the property of the state in that:

On or about 17 March 2017 you used your firearm-Petro Beretta Serial Number PX4389S and the Thoughts Lounge, in Bloemfontein while you were not on duty.'

[4] On 28 January 2020, the third respondent, Mr Mtakati, wrote a letter to Mr Matlakeng wherein he states the following:

'Be kindly advised that management has noted the outcome of the hearing which was held on 21st October 2019, wherein the Presiding Officer issued a verdict of not guilty.

After a diligent analysis of the Presiding Officer's report and the record of the proceedings, management decided to reject the outcome and invoke the provision of the Labour Relations Act 66 of 1995 to review the decision of the Presiding Officer.'

[5] Notwithstanding, the respondents did not review the decision of the Presiding Officer as promised. Instead, on 28 January 2020, Mr Matlakeng was served with another charge sheet with the following allegations:

'Charge 1

You contravened section 84(1) of the Firearms Control Act no 60 of 2000 which provides that, 'No person may carry a firearm in public place unless the firearm is carried -, (a) in a case of a handgun, (i) in the holster or similar holder designed, manufactures or adapted for the caring of handgun and attached to his or her person; or rucksack or similar holder' in that:

On or about 17 March 2019 you left your firearm namely Petro Beretta serial Number PX4895 unattended in the private car at Batho Location parking area next to the Thoughts Lounge. You then pulled it from the car and fatally shot the member of public namely Mr Neo Neels.

Alternative to Charge 1

> You contravened 'Annexure A' of the disciplinary Code and Procedures (PSCBC Resolution 1 of 2003) which states that 'an employee shall be guilty of misconduct if he or she acts negligently' in that:
>
> On or about 17 March 2019 you left your firearm namely Petro Beretta serial Number PX4895 unattended in the private car at Batho Location parking area next to the Thoughts Lounge. You then pulled it from the car and fatally shot the member of public namely Mr Neo Neels.'

[6] The second disciplinary enquiry sat on 6 February 2020 and presided over by the fourth respondent, Mr Seitshiro Mtshabi (Mr Mtshabi). Mr Matlakeng was represented by POPCRU. Two points *in limine* were raised; firstly, that the respondents have no power to institute the second disciplinary enquiry in the absence of any order setting aside the guilty verdict consequent to the first disciplinary enquiry; and, secondly, the second disciplinary enquiry constitutes a double jeopardy.

[7] On 17 February 2020, Mr Mtshabi issued his Ruling on the points *in limine*. It is clear *ex facia* the Ruling that the main issue that he had to pronounce on was whether the respondents have the power to interfere with the outcome of a first disciplinary enquiry. In this regard, he referred to a plethora of dicta of this Court, mostly pertaining to the private sector, and concluded that:

> 'an employer can [interfere] with the disciplinary outcome if fairness requires it. …It is for this reason that I concluded that the employer acted well upon his right to re-instate the case of LI Matlakeng and therefore pronounce that the proceedings will be held on 5th and 6th Match 2020 in Bloemfontein Perm Building 2nd Floor'. (Emphasis added)

[8] Mr Mtshabi's Ruling is the subject of the review in Part B of this application.

[9] On 20 February 2020, POPCRU addressed a letter to Mr Mtakati, requesting proof of the review application and the order setting aside the outcome of the first disciplinary enquiry that found Mr Matlakeng not guilty. It is not clear whether there was a response to this letter. On 25 February 2020, POPCRU's attorneys of record communicated their client's instruction to challenge Mr Mtshabi's Ruling in terms of section 158(1)(h) of the LRA and accordingly

sought a postponement of the disciplinary enquiry that was set down for 5 and 6 March 2010 as per the impugned Ruling. It was also made clear in that communication that, if there was no undertaking given by the next day that the set down hearing would be postponed, POPCRU would approach the Court for an urgent interdict.

Analysis

[10] The respondents raised various points in opposing this application. Firstly, that the Notice of Motion is in breach of section 33 of the General Laws Amendment Act[2] as it was not served on the second respondent, and that it does not afford the respondents the prescribed 72 hours.

[11] In my view, it should be elementary by now that the computation of time period prescribed in any statute for doing any act includes weekends unless the last day falls on a Sunday or Public Holiday in terms of section 4 of the Interpretation Act.[3] In this instance, since the Notice of Motion was delivered on 28 February 2020, it stands to reason that the 72 hours, or three days, expired on 2 March 2020, being a Monday. As such, the respondent's submission in this regard is untenable.

[12] There is also no merit in the respondents' submission that the service of this application was not effected on the second respondent. The Notice of Motion and its attachments was served on the Johannesburg office of the State Attorney in accordance with Rule 4(1)(b)(vi) of the Rules of this Court, which states that 'if the person is the State or a province, by serving a copy on a responsible employee in any office of the State Attorney,' constitutes a proper service.

[13] Secondly, the respondents submit that the matter is not urgent; alternatively, that urgency is self-created. According to the respondents, POPCRU was aware as early as 28 January 2020 that there were new charges but waited until three days before the disciplinary enquiry to approach the Court. It is strange that the respondents deliberately ducked to deal with the fact that Mr

[2] Act 62 of 1955, as amended.
[3] Act 33 of 1957, as amended.

Matlakeng did appear before the second disciplinary enquiry on 6 February 2020 wherein he raised his objections. The impugned Ruling was only rendered on 17 February 2020.

[14] Also, I find nothing sinister with POPCRU's actions between 20 and 25 February 2020 as it sought to establish the basis for Mr Makati's action in reinstituting the disciplinary enquiry against Mr Matlakeng. In the absence of any explanation, then it was open to POPCRU to challenge Mr Mtshabi's Ruling, a recourse it has since availed itself to in Part B. it is clear that, had the indulgence sought on the postponement of the disciplinary enquiry been granted, these proceedings would have been averted.

[15] I am, accordingly, satisfied that POPCRU has made out a case for this Court's intervention on urgent basis.

[16] Thirdly, the respondents submit that POPCRU failed to make out a case for the grant of the interim order. The thrust of the respondents' opposition in this regard is that POPCRU has not shown any irreparable harm should the order not be granted as it has adequate remedy in due course. That is so, they submit, because the charges levelled against Mr Matlakeng pertain to the new allegations and have nothing to do with the first charges that he was acquitted of.

[17] On the other hand, POPCRU disavows reliance on the fairness of the second disciplinary enquiry. It submits that the second disciplinary enquiry is unlawful and that the respondents' insistence that Mr Matlakeng subjects himself to that process presents a potential harm that cannot be remedied in due course. In essence, Mr Matlakeng has no adequate remedy in due course, as his claim lies in the legality of the conduct of the respondents and as such the balance of convenience favours him.

[18] It is trite that, in the public sector, a Presiding Officer of the disciplinary enquiry is acting *qua* employer.[4] It is for that reason that Mr Mtshabi's Ruling

[4] *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another* [2009] ZASCA 123; 2010 (3) SA 201 (SCA); [2010] 2 All SA 150 (SCA); [2009] 12 BLLR 1170 (SCA); (2009) 30 ILJ 2653 (SCA) at paras 13-17.

is reviewable in terms of section 158(1)(h). I do not have to deal with the respondents' assertion that the new disciplinary enquiry pertains to the new allegations or evidence as that enquiry would be undertaken in Part B.

[19] Clearly, POPCRU and Mr Matlakeng seek, as a matter of right, to avail themselves to the recourse in terms of section 158(1)(h) and, if successful, that would put an end to the second disciplinary enquiry. The submission that Mr Matlakeng has adequate remedy in due course is of small solace to him since he is faced with a possibility of being dismissed consequent to an impugned process. Moreover, the impugned Ruling remains valid and binding and would yield a legally valid outcome until it is set aside.[5]

[20] Pertinently, in *Mkasi v Department of Health: KwaZulu-Natal and Another,*[6] confronted with similar enquiry, this Court as per Cele J , referred with approval to the dictum in *Pinetown Council v President of the Industrial Court and Others*,[7] where it was stated that:

> 'Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions precedent to jurisdiction are known as "jurisdictional facts" …which must objectively exist before the tribunal has power to act; consequently, a determination on the jurisdictional facts is always reviewable by the courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it…'

[21] Similarly, in this instance, 'there is no merit in proceeding with the disciplinary hearing as the continuation of the hearing is dependent on the existence of a particular state of affairs yet to be decided upon by this Court, which has a potential to put a permanent end to the disciplinary hearing'.[8]

Conclusion

[5] *Swart v Starbuck and Others* 2017 (10) BCLR 1325 (CC); 2017 (5) SA 370 (CC) at paras 32- 33.
[6] [2019] 9 BLLR 926 (LC) at para 21.
[7] 1984 (3) SA 173 (N); [1984] 2 All SA 18 (N) at para C.
[8] *Supra* n 3 at para 22.

[22] In all the circumstances, POPCRU has made a case for the grant of the interim interdict.

Cost

[23] On the issue of costs, it would offend the principle of law and equity to grant costs against the respondents in the light of the persisting collective bargaining relationship between the parties.

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

Order

1. The respondents are interdicted and restrained from proceeding with the disciplinary enquiry against Mr Matlakeng pending the outcome of the review application in terms of section 158(1)(h) in Part B.

2. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Mr Mohale Magoshi of Majang Incorporated Attorneys
For the respondents:	Advocate Peter Masihleho
Instructed by	State Attorney, Free State