IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 12/2022

LAC/CIV/A/06/21

In the matter between –

PALESA KHABELE **APPELLANT**

and

CHAIRPERSON OF THE DISCIPLINARY

HEARING COMMITTEE **1st RESPONDENT**

DISCIPLINARY COMMITTEE **2nd RESPONDENT**

FINANCIAL INTELLIGENCE UNIT **3rd RESPONDENT**

MINISTER OF FINANCE **4th RESPONDENT**

ATTORNEY GENERAL **5th RESPONDENT**

CORAM: PT DAMASEB AJA
P MUSONDA AJA
J VAN DER WESTHUIZEN AJA

HEARD: 13 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

Unless exceptional circumstances are present, a court of law may not intervene in ongoing disciplinary proceedings involving an employer and an employee. Disciplinary proceedings fall within the managerial prerogative of the employer. The proceedings must take place fairly and lawfully. If not, the employee has the right to appeal or take the matter on review, but not to interrupt and frustrate the proceedings.

JUDGMENT

J VAN DER WESTHUIZEN AJA

Introduction

[1] Ms Palesa Khabele applies to this Court for leave to appeal against a judgment of the Labour Appeal Court (LAC), in which a judgment of the Labour Court (LC) was upheld. In this judgment, she is referred to as the appellant.

[2] The application is opposed by the third, fourth and fifth respondents, on the basis of a lack of prospects of success in the intended appeal. The respondents argue that the appellant is abusing court processes.

[3] In order to decide whether leave to appeal should be granted, the prospects of success have to be examined by this Court.

Factual and litigation history

[4] The appellant is employed as a director of the Financial Intelligence Unit (the third respondent) in the government of Lesotho. According to the respondents, she committed certain felonies. Therefore, they instituted disciplinary proceedings against her. They are of the view that although she is entitled to be treated fairly, which includes the right to a proper hearing, she does not want to be disciplined and has attempted to frustrate the disciplinary process.

[5] On 6 October 2020 the appellant was placed on suspension, with full pay and benefits, pending the investigation into her conduct. She unsuccessfully challenged the suspension before the High Court (CIV/APN//397/2020). Nevertheless, she has remained in office for about 17 months since the suspension.

[6] When the disciplinary hearing started on 14 April 2021, she raised preliminary objections. These were dismissed by the Disciplinary Panel (Panel). In its ruling the Panel stated that she was not precluded from relying on them in the proceedings. The matter was postponed to 7 May 2021.

[7] On that day the hearing proceeded in the presence of the appellant and her legal representative. Evidence was led. Around 13h00 an adjournment was taken. At the resumption about an hour later the appellant and her lawyer were absent. According to the respondents, attempts to reach them failed, because their phones were switched off.

[8] When the hearing was about to proceed, an interim order of the LC to suspend the hearing was served on the respondents. Allegedly without the knowledge of the respondents and the

Panel, the appellant had obtained an order, *ex parte*, through another advocate and attorney, presumably while the appellant and her legal representative were at the Panel hearing.

[9] The appellant raised the same issues before the LC that had been raised and dismissed by the Panel. She did not wait to review the Panel's proceedings, or appeal against its conclusion. The core of the LC's order captured two issues to be resolved at the return date, namely whether the appellant should be provided with material to prepare her defence; and whether the Panel was properly constituted.

[10] The respondents objected to the jurisdiction of the LC, because the Panel had exclusive jurisdiction to deal with the issues and had already resolved them. In the LC counsel for the appellant also orally objected from the Bar that the lawyers for the respondents were not authorized to represent them.

[11] The LC ruled that it indeed had no jurisdiction to deal with the appellant's objections to the process before the Panel. The Panel had to deal with these and had done so. With reference to case law, the LC concluded that to discipline employees is a managerial prerogative. Courts may not take over the work of disciplinary panels.

[12] Ms Khabele appealed to the LAC . The appeal was dismissed. According to the LAC, there is perhaps a distinction between declining jurisdiction to hear a matter and declining to intervene in the disciplinary process. In the view of the LAC, the LC did the latter.

[13] The LAC referred to argument presented to it and to the LC by counsel on “exceptional circumstances” that could warrant interference in disciplinary proceedings by a court, assuming that it does have jurisdiction to hear an application. It concluded that no such circumstances had been shown.

In this Court

[14] The appellant needed the leave of the LAC to appeal to this Court. This was refused. Thus, she needs this Court’s leave and applies for it. It is trite law that the prospects of success in the envisaged appeal is an important factor when leave to appeal is considered. (See, for example, *Lelimo v Letsie* C of A (CIV) 9/2013 (7/11/2018); *Ngobeni v S* (741,13) [2014] ZASCA 59; *R v Ngubane* 1945 AD 185.)

[15] According to the appellant, the LAC erred in holding that the LC declined jurisdiction to interfere in disciplinary proceedings. Counsel for the respondents argues that she “seems to deliberately misdirect herself”. There is no merit in the appellant’s contention. As clearly and sufficiently set out by both the LC and LAC, a court of law should not interfere in disciplinary proceedings before a panel created to deal with those proceedings. The institution and management of disciplinary proceedings against an employee are the employer’s prerogative. To allow the (perhaps repeated) interruption of proceedings through court applications, would result in unnecessary delays and the frustration of justice. This indeed seems to have happened in this case.

[16] Of course disciplinary proceedings must be conducted in a substantively and procedurally lawful way. An employee has the right to a fair hearing. Remedies are available to aggrieved employees. These include possibilities to appeal within the employer's system and the right to take decisions on review to an appropriate court or other forum. It is not uncommon for the chair of a disciplinary hearing to dismiss or put on hold *in limine* objections, indicating – as happened in this case – that they could be raised at a later stage. Sometimes initial concerns play no significant role in the further proceedings. What seems to be a serious objection, may during the proceedings pale into irrelevance. It is even possible that the final outcome of the proceedings may favour the person who is charged and who earlier objected. A holistic view of the process is often better than a piecemeal process.

[17] In this case the appellant's concerns were indeed addressed by the Panel. Although her objections were dismissed at the *in limine* stage, the appellant was informed that they were not dead and could be raised later. In any event, should she have been dismissed in a way that she regarded as unfair or irregular, she would have been entitled to approach a court.

[18] The appellant submits that even though the LC declined jurisdiction, it considered the questioning of the authority of the lawyers who purported to represent the respondents. Without some certainty about who was before the court and in what capacity, very little could be done though. The court had to do

so. This point seems overly formalistic and perhaps opportunistic.

[19] The appellant raises the fact that the LC interrogated the issue of “exceptional circumstances”, even though it was of the view that it had no jurisdiction. Logically, it is of course correct that if a court has no jurisdiction to hear a matter, it could not consider and adjudicate on any issue forming part of that matter.

[20] The LC stated though that counsel for the appellant (the applicant before that court) submitted “that in this case there are special or exceptional circumstances which render this Court to intervene …”. According to the LAC, “Appellant’s counsel placed … emphasis on a principle that where ‘exceptional circumstances’ exist”, a court ‘has powers to intervene”. The LAC stated that the appellant’s counsel had furnished a number of authorities in support of his argument. What exactly was the LC supposed to do? Surely, it had to consider duly all the arguments presented to it. The court dealt with the special circumstances point in order to give the appellant every opportunity to make out a case for the relief she sought, starting with the court’s power to consider the matter at all!

[20] To some extent, the above amounts to circular reasoning, like the age-old question: who was first, the chicken or the egg? Did the LC have to consider the issue of exceptional circumstances in order to determine jurisdiction, or decide on jurisdiction first in order to consider whether exceptional

circumstances existed? As mentioned above (in [12]), the LAC attempted to clarify some apparent confusion or contradiction by referring to the above-mentioned possible difference between declining jurisdiction and declining to intervene in disciplinary proceedings. It explained that the LC did the latter.

[21] For this application for leave to appeal, it matters little. The LC duly considered the arguments presented to it by the appellant. Whether it declined jurisdiction, or found that even if it had jurisdiction, it would not be legally entitled to interfere with the disciplinary proceedings, would not make a difference to the outcome of the application. The fact is that legal authority, as well as legal policy considerations, clearly prevent a court of law to intervene as the LC was asked to do. It would not assist the appellant at all to grant leave to appeal, only so that this Court can attempt to provide logical and terminological clarity after hearing an appeal, which the appellant would lose. The question now before this Court is whether the appeal desired by the appellant has prospects of success.

[22] The appellant even submit that the LAC erred in deciding on an issue that was not before it, namely … exceptional circumstances! Given what was discussed above, this is the proverbial proposition that only needs to be stated in order to be rejected.

Conclusion

[23] Despite some possibly confusion terminology, the thrust of the judgments of the LC and the LAC cannot be faulted. The

appellant was not warranted to approach the LC, on the basis of urgency, during the disciplinary proceedings in which she participated. There are no prospects of success in an appeal.

[24] It is not necessary for this Court to make a definitive finding on whether the appellant was applying delay tactics and abused the legal process, as submitted on behalf of the respondents. Counsel for the respondents asked for a punitive costs order on the scale of attorney and client against her. Given that the appellant is an individual who has litigated against the government in pursuance of her rights, a cost order is not warranted, even though her or her lawyers' decisions have caused considerable delay and frustration.

Order

[25] The application for leave to appeal is dismissed.

J VAN DER WESTHUIZEN
ACTING JUDGE OF APPEAL

I agree:

PT DAMASEB
ACTING JUDGE OF APPEAL

I agree:

P MUSONDA

ACTING JUDGE OF APPEAL

For Appellant: Adv S Phafane KC (heads of argument)

Adv RD Setlojoane (oral argument)

For fourth and fifth Respondents: K Ndebele