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Interdicting an in-house disciplinary enquiry with reference to *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78

Summary

Rabie v Department of Trade and Industry **2018 ZALCJHB 78 (5 March 2018) provides a prism through which arguably core aspects of the purpose-built labour dispute resolution processes can be examined. The issues underlying this case can be condensed into one question: Under what circumstances will the Labour Court intervene in a pending disciplinary hearing? As such, four stages of enquiry will be explored in this article. Since applications for interim relief entail deviation from the ordinary court rules, the first stage of this inquiry revolves around the reasons for urgency, and why urgent relief is necessary. The second stage of inquiry delves into exceptional circumstances warranting interdicting incomplete disciplinary proceedings. In this instance, the investigation arises against the backdrop of the intersection between sec. 188A process (as per the *Labour Relations Act* 66 of 1995) and in-house disciplinary hearings. The third stage of investigation – into the doctrine of election – addresses the difficulties arising when the employer makes an about-turn on the pre-dismissal arbitration process and convenes a parallel workplace disciplinary hearing. The last stage of inquiry considers the delicate questions concerning double jeopardy and the exercise of management's powers of review over the outcome of disciplinary enquiries. *Rabie* demonstrates that, where the employer abuses the disciplinary process, the detrimental consequences on the employee would constitute compelling circumstances justifying interdicting disciplinary proceedings.**

1. Introduction

The shoals of the Labour Court's urgent roll are littered with wrecks from unsuccessful applications, in which intervention is sought in one way or another in

incomplete disciplinary proceedings.[1] Given that the Labour Court is not generally disposed to intervene in incomplete disciplinary proceedings, unless there are "exceptional circumstances",[2] *Rabie v Department of Trade and Industry*[3] (hereafter, "*Rabie*") is one of the rare cases bucking the trend. In the case under consideration, Nkutha-Nkontwana J held that, pending the finalisation of the pre-dismissal arbitration pursuant to sec. 188A of the *Labour Relations Act* 66 of 1995 (hereafter, the "*LRA*"), the Department of Trade and Industry (DTI) is divested of its power and prerogative to institute any in-house disciplinary enquiry against the applicant.

Rabie raises four distinct, yet interrelated issues that require appraisal. The first relates to the general approach of the courts in intervening in disciplinary proceedings, including intervention on an urgent basis. The second concerns the intersection between sec. 188A and in-house disciplinary hearings. Thirdly, the issue of double jeopardy comes to the fore. Lastly, the case deals with the right of higher management to interfere in the process and outcome of disciplinary enquiries.

These four issues relate to core aspects of the purpose-built labour dispute resolution processes. After a brief summary of the facts of the *Rabie* case, these issues will be analysed throughout the remainder of the article. The aim is to answer the following key question: Under which circumstances will the Labour Court intervene in a pending disciplinary enquiry?

2. Background facts

The facts of the case were the following. The applicant, a DTI Chief Information Officer, faced charges of misconduct relating to disclosure of confidential information, granting access to his official iPad to outside parties, breaching his suspension conditions, and failure to disclose his relationship with a service provider.[4] The parties entered into a pre-dismissal arbitration pursuant to sec. 188A of the *LRA*. The pre-dismissal arbitration was beset by postponements and delays. While the pre-dismissal arbitration was in progress, the DTI made an about-turn. It initiated an in-house disciplinary hearing against the applicant on charges of dishonesty and misrepresentation arising from his testimony at the pre-

1 Examples of recent cases include: *Mxakato-Diseko v DG: Department of International Relations & Cooperation* 2019 ZALCJHB 278 (15 October 2019); *Monareng v Minister of Arts & Culture* 2019 ZALCJHB 18 (6 February 2019); *Mkasi v Department of Health: KZN* 2019 40 ILJ 2576 (LC). See generally, Mischke 2011:41-46; Moletsane 2012:1568-1572; Cohen 2013:1706-1715.

2 *Jiba v Minister: Department of Justice & Constitutional Development* 2010 31 ILJ 112 (LC): par. 15; *Mkasi v Department of Health: KZN*: par. 21; *Poya v Railway Safety Regulator* 2018 ZALCJHB 354 (6 November 2018): paras. 48-51.

3 *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78 (5 March 2018).

4 *Rabie v Department of Trade and Industry*: par. 4.

dismissal arbitration proceedings.[5] The DTI spurned the applicant's efforts at getting the charges withdrawn prior to the internal disciplinary hearing. At the in-house disciplinary enquiry, the applicant raised a number of points *in limine*. These pertained to the fact that the pre-dismissal arbitration was in process and he could not be subjected to duplicated disciplinary enquiries.[6] The presiding officer (the second respondent) dismissed the preliminary points and ruled that the disciplinary enquiry would proceed.[7] This prompted the applicant to approach the Labour Court for urgent relief.

As mentioned in the introduction to this article, the four key (and interrelated) issues raised by the *Rabie* case regarding the labour dispute resolution process will now be considered.

3. The question of urgency

It is no exaggeration to state that applications for urgent interim relief often fail for lack of urgency. Urgency is invariably linked to personal circumstances. It cannot be disputed that a loss of employment is usually a devastating blow for an employee.[8] The hardship to the employee, to his/her immediate dependents, and, in other cases, to his/her extended dependents is all readily foreseeable. Securing alternative employment in the face of evident structural unemployment[9] and endemic poverty[10] in the current constrained economic climate and labour market may not be easy. The vulnerability of employees is underscored by the level of importance which society attaches to employment. Work is a wellspring of human dignity.[11] In short, work and employment matter beyond measure.

It is, therefore, not surprising that courts are routinely urged to regard a matter as urgent on the basis of financial exigencies.[12] The general principle is that financial hardship or loss of income is not, by itself, sufficient basis for urgent relief.[13] In order to succeed when reliance is based on financial

5 *Rabie v Department of Trade and Industry*: par. 6.
6 *Rabie v Department of Trade and Industry*: par. 7.
7 *Rabie v Department of Trade and Industry*: par. 7.
8 See, for example, *Kylie v CCMA* 2008 29 ILJ 1918 (LC): par. 68; *Netherburn Engineering Ceramic v Mudau* 2003 24 ILJ 1712 (LC):1725E.
9 Quarterly Labour Force Survey – QLFS Q1-2019 – Statistics South Africa http://www.statssa.gov.za>publications>Presentation (accessed on 19 November 2019). See also Assign Services (Pty) Ltd v NUMSA 2018 39 ILJ 1911 (CC): par. 2.
10 See, for example, *University of Stellenbosch Legal Aid Clinic v Minister of Justices & Correctional Services* 2016 37 ILJ 2730 (CC): paras. 41-48.
11 *SA Informal Traders Forum v City of Johannesburg* 2014 6 BCLR 726 (CC): par. 31; *Affordable Medicines Trust v Minister of Health* 2009 3 SA 247 (CC): par. 59. See also Cooper 2009:578-579.
12 See, for example, *Teffo v Small Enterprise Development Agency* 2018 ZALCJHB 123 (22 March 2018); *AMCU v Northam Platinum Ltd* 2016 37 ILJ 2840 (LC); *Mthembu v Mpumalanga Economic Growth Agency* 2015 ZALCJHB 184 (17 June 2015); *Zono v Minister of Police* 2013 ZAECELLC 4 (2 May 2013).
13 *Dziruni v SAMSA* 2017 ZALCJHB 311 (31 August 2017): par. 16; *PSA v Minister of Home Affairs* 2016 ZALCJHB 439 (22 November 2016): par. 11; *Hultzer v Standard of SA (Pty) Ltd* 1999 8 BLLR 809 (LC): par. 13.

hardship, exceptional circumstances must be shown before urgent interim relief can be granted.[14] To hold otherwise would mean that, every case of a dismissal or withholding of a salary resulting in financial hardship, will end up in the urgent roll.[15] The principle was stated in *Harley v Bacarac Trading 39 (Pty) Ltd*,[16] *Jonker v Wireless Payment Systems CC*,[17] and reaffirmed in *Gomba v MEC: Gauteng Department of Human Settlement*.[18] *Mbatha v Dube Trade Port*[19] helps complete the picture. In this case, the applicant occupied a senior position in a public entity. She relied on the lack of financial means to pursue her dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA) as the basis of urgency. Yet, litigants at the CCMA need not be legally represented. Tlhotlhalemaje J was not persuaded that financial pressure constituted sufficient ground for granting urgent relief:

> Cruel and insensitive as it may sound, the financial hardship that the applicant complains of are the ordinary consequences of a dismissal, which are experienced by multitudes of employees on a daily basis upon a loss of a job. The circumstances are thus hardly exceptional, and there is no basis for a conclusion to be reached that any such harm is incapable of being fully addressed in the normal course, and to the extent that the applicant may be vindicated.[20]

A troubling feature of applications for urgent relief from well-heeled employees is that they generally form part of a stratagem to delay disciplinary proceedings. *Golding v HCI Managerial Services (Pty) Ltd*[21] is one of countless cases illustrating this point. In this case, the applicant had approached the Labour Court seeking to halt the disciplinary hearing and requesting a declaration that his suspension was unlawful. He had been given two weeks' notice of the disciplinary enquiry. The respondent denied that the application was urgent, since the applicant had ample opportunity to draft and deliver his founding papers. He afforded HCI less than one day to deliver its answering papers. To this end, it was pointed out that urgency was entirely self-induced and the applicant's conduct amounted to an abuse of court process.[22] The applicant, for his part, contended that the relief sought in the form of a rule *nisi* would have the desired effect of preventing the hearing from commencing on the scheduled date. The

14 *DENOSA v DG: Department of Health* 2009 ZALCJHB 84 (5 January 2009): par. 9; *HOSPERSA v MEC for Health, Gauteng Provincial Government* 2008 29 ILJ 2769 (LC): par. 12.

15 *Simpson v Sisonke Budpol Construction CC* 2019 ZALCJHB 291 (18 October 2019): par. 15.

16 *Harley v Bacarac Trading 39 (Pty) Ltd* 2009 30 ILJ 2085 (LC): par. 8.

17 *Jonker v Wireless Payment Systems CC* 2010 31 ILJ 381 (LC): par. 16.

18 *Gomba v MEC: Gauteng Department of Human Settlement* 2019 40 ILJ 2355 (LC): par. 15.

19 *Mbatha v Dube Trade Port* 2019 ZALCD 10 (15 October 2019).

20 *Mbatha v Dube Trade Port*: par. 12.

21 *Golding v HCI Managerial Services (Pty) Ltd* 2015 36 ILJ 1098 (LC).

22 In this regard, counsel for HCI relied on *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 3 SA 500 (W):502D-504C.

applicant simply wanted to ensure that the more stringent requirements he would have to satisfy when final relief is sought were elided. In broad terms, this strategy has been described as "really asking for final relief, despite calling it interim relief".[23]

Dealing with the issue of urgency, the Labour Court in *Golding* had no qualms in finding that urgency was entirely self-created.[24] The applicant knew when the disciplinary hearing was due to commence; yet he gave the respondent less than one day before his application was to be heard to file answering papers, having expended nine days to draft his own lengthy founding papers.[25] The fact that the hearing will take place on a particular date is not on its own a factor that can persuade the court to treat the matter as urgent.[26] The only reasonable inference was that the applicant waited until the last minute before the envisaged date of the hearing, in order to use the application to effectively scupper the beginning of the enquiry. Steenkamp J held that the application had to be struck from the roll for that reason alone.[27]

As in *Golding v HCI Managerial Services (Pty) Ltd*, the applicant in *Rabie* was accorded two weeks' notice of the hearing. Nonetheless, the court found that the matter was urgent, as "the applicant correctly dealt with the objections in the in-house disciplinary enquiry internally with the DTI and later with [the presiding officer]".[28] As mentioned earlier, the applicant participated in the in-house disciplinary enquiry, albeit in the form of raising objections *in limine*. It was only after his preliminary points were dismissed that he sought the Labour Court's intervention.

4. The intersection between sec. 188A process and in-house disciplinary proceedings

Aside the usual requirements for urgent interim relief,[29] a sizeable obstacle that stands in the way of an applicant seeking the intervention of the Labour Court is proving the existence of exceptional circumstances that justify such intervention. What constitutes exceptional circumstances has

23 *Zondo v Uthukela District Municipality* 2015 36 ILJ 502 (LC): par. 2.

24 *Golding v HCI Managerial Services (Pty) Ltd*: par. 24. See also *Mahoko v Mangaung Metropolitan Municipality* 2013 ZALCJHB 63 (8 May 2013): par. 23; *Malehopo v Athletics South Africa* 2011 ZALCJHB 220 (7 June 2011): paras 5 and 9; *Jiba v Minister: Department of Justice & Constitutional Development*: par. 18.

25 *Golding v HCI Managerial Services (Pty) Ltd*: par. 22.

26 *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite* 2011 ZAGPJHC 196 (23 September 2011): par. 6.

27 *Golding v HCI Managerial Services (Pty) Ltd*: par 25.

28 *Rabie v Department of Trade and Industry*: par. 9. See also *McBride v Minister of Police* 2015 ZALCJHB 216 (24 July 2015): par. 8.

29 *Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC): par. 41; *SA Graduates Development Association* 2014 35 ILJ 2478 (LC): par. 32.

always eluded complete definition.[30] The established line of authority[31] is clear enough. The Labour Court will only intervene in uncompleted disciplinary proceedings if truly exceptional circumstances are shown to exist. A paradigmatic example is where there is likely occurrence of grave injustice. The situation where the employee's constitutional rights are being "trampled"[32] illustrates the point. Three reasons have been postulated for the Labour Court's disinclination to intervene in incomplete disciplinary enquiries:

- First, an employer has the prerogative to institute disciplinary proceedings against its employees.[33] Understood in this way, interdicting ongoing workplace disciplinary proceedings constitutes an illegitimate intrusion into the employer's disciplinary jurisdiction.
- Secondly, if the Labour Court routinely intervenes in workplace disciplinary and pre-arbitration proceedings, it would effectively undermine the statutory dispute resolution system.[34]
- Thirdly, such intervention would frustrate the expeditious resolution of labour disputes.[35] The effect of interlocutory applications is that disciplinary enquiries often limp along in "stop-start fashion" – indefinitely.[36] Equally, delay subverts the objective of the *LRA*, which is to promote the effective resolution of disputes.[37]

Returning to *Rabie*: In resisting the granting of urgent interim relief, the DTI relied on the fact that the applicant had adequate alternative remedies at his disposal mitigating any injustice that might ensue. The immediate problem that this submission holds for the applicant lies in the trite proposition that urgent interim relief is usually inappropriate where the employee has access to alternative remedies such as those available under

30 *Trencon Construction (Pty) Ltd v IDC of SA Ltd* 2015 5 SA 245 (CC): paras. 31-60; *GCB v Geach* 2013 2 SA 52 (SCA): paras. 87 and 160.

31 *Jiba v Minister: Department of Justice & Constitutional Development*: par. 17; *SAMWU obo Dlamini v Mogale City Local Municipality* 2014 ZALCJHB 360 (17 September 2014): par. 44; *SAMWU obo Members v Kopanong Local Municipality* 2014 35 ILJ 1378 (LC): par. 33. Likewise, the power to grant an interim interdict pending a constitutional challenge can only be exercised in exceptional circumstances. See, for example, *President of the RSA v UDM* 2003 1 SA 472 (CC): par. 32.

32 *Bargarette v PACOFS* 2007 ZALC 182: par. 7; *POPCRU v Minister of Correctional Services* 1999 20 ILJ 2416 (LC): paras. 53-56; *Booysen v Minister & Security* 2011 32 ILJ 112 (LAC):par. 54; *Solidarity obo Gerber v SAPS* 2017 ZALCCT 36 (11 August 2017).

33 *Nyathi v Special Investigating Unit* 2001 32 ILJ 2991 (LC). For serious treatment, see Strydom 1997:1-333.

34 *Steenkamp v Edcon Ltd* 2016 37 ILJ 564 (CC): par. 33; *CUSA v Tao Ying Metals Industries* 2008 29 ILJ 2451 (CC): par. 65. See also Van Niekerk 2015:837-869; Wallis 2014:849-862; Steenkamp & Bosch 2012:120-147.

35 *Jiba v Minister: Department of Justice & Constitutional Development*: par. 11.

36 *Zondo v Uthukela District Municipality*: par. 43.

37 *Stokwe v MEC: Department of Education, Eastern Cape* 2019 40 ILJ 773 (CC): paras. 70-75; *Ngobeni v PRASA* Cres 2016 37 ILJ 1704 (LC): paras. 12-13.

the unfair labour practice jurisdiction.[38] The applicant sidestepped the issue of an alternative remedy by pointing out that his challenge was predicated on the contractual right to a lawful disciplinary hearing. In other words, he was relying upon sec. 77(3) of the *Basic Conditions of Employment Act* 75 of 1997 (hereafter, the "*BCEA*") in enforcing his contractual rights in terms of a sec. 188A agreement with the DTI. The applicant's main argument was that the pre-dismissal arbitration agreement pursuant to sec. 188A substituted the workplace disciplinary enquiry. This has practical significance. Otherwise expressed, "the DTI's unilateral abandonment of the pre-dismissal arbitration offended against the applicant's right not to be subjected to parallel disciplinary proceedings".[39]

Granted that the applicant's case was premised on a contractual right arising from the statutory pre-arbitration agreement, the intriguing and consequential question is whether this passes the litmus test of "exceptional circumstances" to justify the court's intervention? Alive to this difficulty, the applicant invoked two venerable precedents in the form of *SATAWU v MSC Depots (Pty) Ltd*[40] and *Mchuba v PRASA*.[41] These authorities are unequivocal in that, once the employee has given written consent to a pre-dismissal arbitration, a tripartite agreement between the employee, the employer and the CCMA (or any other dispute resolution settlement agency) arises and irrevocably binds the parties to a sec. 188A process. The converse position is clearer. An employer cannot unilaterally resile from a pre-dismissal arbitration, regardless of whether it has what could be considered as genuine misgivings about the conduct of the pre-dismissal arbitration proceedings.[42] In sum, a pre-dismissal arbitration agreement has the shackles of the notorious "non-variation"[43] or "no-oral modification" clause.[44]

The main thrust of the DTI's objection to reliance being placed on *SATAWU v MSC Depots (Pty) Ltd* and *Mchuba v PRASA* was that its approach to pre-dismissal arbitration stood on a very different footing. Unlike in the mentioned cases, it did not intend to withdraw from the pre-dismissal arbitration altogether. Put simply, the in-house disciplinary hearing did not supplant the pre-dismissal arbitration proceedings. It followed that the sec. 188A process would still go ahead. With respect, this is a distinction without difference. As the court pithily observed "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

38 *Golding v HCI Managerial Services (Pty) Ltd*: par. 44; *PSA obo De Bruyn v Minister of Safety and Security* 2012 33 ILJ 1822 (LAC): par. 17.
39 *Rabie v Department of Trade and Industry*: par. 12.
40 *SATAWU v MSC Depots (Pty) Ltd* 2013 34 ILJ 706 (LC).
41 *Mchuba v PRASA* 2016 37 ILJ 1923 (LC).
42 Maloka & Peach 2016:368-377.
43 *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (ECM): paras. 42-50. See also Maloka 2017:532; Kohn 2014:74-106.
44 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* 2018 UKSC 24. See also Senu & Serewel 2018:150-162; Morgan 2017:589-615.

different from those ones before the arbitrator".[45] The sec. 188A procedure divests the employer of its disciplinary jurisdiction over the transgressing employee and vests it in the arbitrator. The import of the sec. 188A process is that there is no question of the employer backtracking, by reverting to its internal procedures. Nkutha-Nkontwana J explains:

> Strip of its verbiage [*sic*], 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 [*sic*].[46]

Two points were advanced in support of the workplace disciplinary hearings. First, the DTI argued that the amendments to the charge could not be made, since the applicant had already pleaded to the charges and the leading of evidence was already in process at the pre-dismissal arbitration hearing. The DTI's argument was largely defeated by the fact that "amendments to the charge sheet can be sought at any stage of the disciplinary enquiry or pre-dismissal arbitration before a finding is made".[47] An important aspect of the constitutional imperative of fairness in the conduct of arbitration proceedings is that a CCMA commissioner is required by sec. 138(1) of the *LRA* to determine the dispute before him/her fairly and quickly.[48] The Labour Court cited *Munnik Basson Dagama Attorneys v CCMA*,[49] where it was pointed out that "nothing prevents an employer from amending the charge-sheet before a finding is made".[50]

Secondly, an ingenious argument pursued by DTI was that it was indebted to its employees to expeditiously finalise the internal disciplinary enquiry it had started, given the gravity of the charges. In effect, this contention inverts the rationale behind pre-dismissal arbitration: "The benefit [of the sec. 188A procedure] for all is the elimination of the duplication that inevitably occurs when court-like in-house hearing[s] are inevitably followed by an arbitration hearing conducted on a *de novo* basis."[51] The jurisprudential imprints of the "clean hands doctrine"[52] are implicit, if not explicit in the Labour Court's rejection of the delay justification. Importantly, the DTI was no less blameworthy for the delay in finalising the pre-dismissal arbitration. As such, the employer could not

45 *Rabie v Department of Trade and Industry*: par. 18.
46 *Rabie v Department of Trade and Industry*: par. 24.
47 *Rabie v Department of Trade and Industry*: par. 22.
48 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 28 ILJ 2405 (CC): par. 266.
49 *Munnik Basson Dagama Attorneys v CCMA* 2011 32 ILJ 1169 (LC).
50 *Munnik Basson Dagama Attorneys v CCMA*: par. 11.
51 *SATAWU v MSC Depots (Pty) Ltd*: par.11.
52 The "clean hands doctrine" is a defence to a claim for equitable relief, which states that a party who is asking for a judgment cannot have the help of the court if s/he has done anything unethical in relation to the subject of the lawsuit. See Kahn, Lewis & Visser 1988:444, par. 205; Anenson 2018:1827-1890.

use the delay as a pretext for unilaterally bailing out from the pre-dismissal agreement.[53] Accordingly, the quandary in which the DTI found itself was self-induced, as it indolently prosecuted the pre-dismissal arbitration.

5. Doctrine of right of election

As indicated earlier, an about-turn on pre-dismissal arbitration performed by DTI triggered the dispute between the parties. This turns attention to the issue of election. The problem with a unilateral revocation of a pre-dismissal arbitration agreement is that it impermissibly undermines the doctrine of election. In *Anghem and Peil v Federal Cold Storage Co Ltd*,[54] Bristow J held that "in cases of election, he [the employer] cannot first take one road and then turn back and take another".[55] Relying on the reasoning in *Equity Aviation Services (Pty) v CCMA*[56] and *Chamber of Mines SA v NUM*,[57] the Labour Court emphasised that the law does not allow a party to blow hot and cold.[58]

Turning to the *Rabie* case, midway in the pre-dismissal arbitration enquiry, the DTI made a *volte-face* and convened an in-house disciplinary hearing. Having unambiguously opted for a sec. 188A procedure, the DTI cannot be allowed to approbate and reprobate. It is submitted that the employer must stand or fall on its election. It is quite undesirable for an employer to be given two bites at the disciplinary process. In sum, it would be wrong to permit an employer, who perceives that there are shortcomings in the sec. 188A process, to rectify those shortcomings by convening parallel in-house disciplinary proceedings. Delays in the pre-dismissal enquiry cannot be cured by permitting an employer to change horses midstream and commence a fresh workplace inquiry of slightly different charges arising from the same facts.

6. Double jeopardy and the exercise of management's powers of review over disciplinary enquiries

The DTI's submission that the applicant had no right not to be subjected to duplicated disciplinary enquiries in the absence of a plea of *res judicata,*[59] *lis pendens*,[60] or double jeopardy invites consideration of the troublesome

53 *Rabie v Department of Trade and Industry*: par. 23.
54 *Anghem and Peil v Federal Cold Storage Co Ltd* 1908 TS 761.
55 *Anghem and Peil v Federal Cold Storage Co Ltd*: 786.
56 *Equity Aviation Services (Pty) v CCMA* 2008 29 ILJ 2507 (CC): par. 54.
57 *Chamber of Mines SA v NUM* 1987 1 SA 668 (AD):690D-G.
58 *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 2 SA 537 (C):542E; Van der Merwe *et al.* 2012:345-347.
59 The claim has been disposed of by the other court. See *Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA): par. 27; *Nestlé (SA) Ltd v Mars Inc.* 2001 4 SA 542 (SCA): par. 16.
60 The claim is pending in another court. The High Court in *Keyter NO v van der Meulen* 2014 5 SA 215 (ECG): par. 10 summarised the principle of *lis alibi pendens* as follows: "The defence of *lis alibi pendens* arises when four

issue of whether and under which circumstances an employer is entitled to hold a second disciplinary enquiry. Although the court found that the applicant's failure to either plead *res judicata* or *lis pendens* as contended by DTI was inconsequential, a few words on the protracted *Kriel v Legal Aid Board*[61] litigation are apposite. The applicant in *Kriel v Legal Aid Board* was dismissed, following a disciplinary hearing in 2003. His dismissal was confirmed on appeal in 2004. He then lodged a review application in the High Court in 2005 to vindicate his right to fair administrative action under the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter, "*PAJA*").[62] But he failed in that, too. The High Court held that it lacked jurisdiction to determine the matter, since the dismissal of employees fell within the scope of the *LRA*. After this setback, the applicant appealed to the Supreme Court of Appeal.[63] The latter court held that the High Court had retained jurisdiction, but that the true issue for determination was whether the dismissal constituted administrative action as envisaged by *PAJA*.[64] In this lay the seeds of the applicant's unsuccessful attempt to persuade the Constitutional Court to grant leave to appeal.

Undeterred, the applicant referred an automatically unfair dismissal dispute – as contemplated by sec. 187(1) of the *LRA* – to the Labour Court. In turn, the Legal Aid Board raised several preliminary points, including those based on *res judicata* and *lis pendens*. The Labour Court found that *res judicata* and *lis pendens* have practical bite. The practical implication of this emerged clearly from the relief that was sought in the High Court, which was refused. That decision was confirmed on appeal to the Supreme Court of Appeal and the Constitutional Court. As Bhoola J explained, "this would justify upholding the *res judicata* point on the facts without having regard to the legal issues".[65] By parity of reasoning, the review was equally prevented by *lis pendens.*

The issue whether an employer is entitled to proceed against the employee twice over for the same misconduct or poor work performance – thereby placing the latter in double jeopardy – blends and overlaps with the tricky question as to whether management possess review powers over disciplinary hearings.[66] These questions have been extensively canvassed before the former Industrial Court. It bears mentioning that the approach to double jeopardy in the sphere of employment, as established in a line of

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requirements are met. They are that: (a) there is litigation pending (b) between the same parties (c) based on the same cause of action and (d) in respect of the same subject-matter. *Lis alibi pendens* does not, if successfully invoked, put an end to the plaintiff's or applicant's case. Rather, it allows for the staying of the later matter pending the final determination of the earlier matter. Once the earlier proceedings have been finalised, however, the later proceedings will be struck by, and terminated by the defence of *res judicata*."

61 *Kriel v Legal Aid Board* 2010 ZALC 159 (30 July 2010).

62 *Kriel v Legal Aid Board* 2009 30 ILJ 1091 (T).

63 *Kriel v Legal Aid Board* 2009 30 ILJ 1735 (SCA).

64 *Kriel v Legal Aid Board* 2009 30 ILJ 1735 (SCA): par. 2.

65 *Kriel v Legal Aid Board* 2010 ZALC 159 (30 July 2010): par. 20.

66 Okpaluba 1999:13-16; Le Roux 2016:70-79; 2003:48-50; 2001:19-20.

cases decided by the Industrial Court, remains sound. To a large extent, cases of recent vintage reflect the jurisprudential imprints of the Industrial Court. At one stage, the Industrial Court[67] considered it unfair for senior management to overturn a decision of a properly constituted disciplinary tribunal and to subject the employees concerned to a fresh enquiry two months after it had been made. Likewise, in *Bhengu v Union Co-operative Ltd*,[68] the Industrial Court held that "an employer is not entitled to hold a second enquiry if it is unhappy with the outcome of a first properly constituted enquiry. Such a second enquiry would be an unfair labour practice."[69]

In drawing an analogy with the well-established American constitutional protection against double jeopardy,[70] the Industrial Court in *Botha v Gengold Ltd*[71] reaffirmed the position that it was procedurally unfair for the employer to hold the second enquiry. In that case, the employee, a general manager of the company, was found guilty of fraudulently claiming travelling expenses and was given a final warning.[72] The company's audit committee, which had authorised the enquiry in the first instance, was unhappy with the penalty, as perpetrators of similar forms of dishonesty had been dismissed in the past. A fresh disciplinary enquiry was arranged, whereupon the employee was found guilty and dismissed. The Court found that the official, who conducted the first disciplinary enquiry, was competent to do so, and that the hearing had been fair.[73] Further, the company's disciplinary code did not provide for the audit committee or any other body to set aside a finding by a disciplinary committee at the instance of the company.[74] A second enquiry on the same facts exposed the employee to double jeopardy and was accordingly unfair.

NUMSA obo Walsh v Delta Motor Corporation (Pty) Ltd[75] concerned an assault perpetrated by the applicant on a fellow employee. The supervisor, whose duty it was to institute disciplinary charges against the employee, decided instead to confine action against the employee to counselling. As a result, it was agreed that the employee pay his fellow employee's medical expenses and lost earnings. The company's personnel department

67 *Amalgamated Engineering Union of SA v Carlton Paper of SA (Pty) Ltd* 1988 9 ILJ 588 (IC).

68 *Bhengu v Union Co-operative Ltd* 1990 11 ILJ 117 (IC). See also *Maliwa v Free State Consolidated Mines (Operations) Ltd SA (President Steyn Mine)* 1989 10 ILJ 934 (IC).

69 *Bhengu v Union Co-operative Ltd*: 121A.

70 This concept was developed by the United States Supreme Court based on the interpretation of the Fifth Amendment to the American Constitution. See, for example, *Benton v Maryland* 395 US 784 (1969); *United States v. Jenkins* 420 US 358 (1975); *United States v. Scott* 437 US 82 (1978). See also *S v Basson* 2005 1 SA 171 (CC): paras. 60-64.

71 *Botha v Gengold Ltd* 1996 4 BLLR 441 (IC):450.

72 *Botha v Gengold Ltd*: 443.

73 *Botha v Gengold Ltd*: 449.

74 *Botha v Gengold Ltd*: 450.

75 *NUMSA obo Walsh v Delta Motor Corporation (Pty) Ltd* 1998 6 BALR 710 (CCMA).

ordered the supervisor to institute formal charges and the employee was subsequently dismissed. The union argued on behalf of the employee that the agreement between the employees barred the employer from taking further disciplinary action against the employee, since he would effectively be disciplined a second time for an offence for which he had already been disciplined. The employer contended that what the supervisor did was not part of what he was authorised to do under the company's disciplinary code and, therefore, should not be regarded as a formal disciplinary action. In any case, argued the employer, the continuance of such an arrangement in respect of a serious, dismissible offence such as assault would lead to the inconsistent treatment of the employee when compared to other employees who had been dismissed for the same offence. Distinguishing *Botha* – where there were two proper enquiries in respect of the same offence – the Commissioner found that the institution of disciplinary action in respect of the incident did not amount to double jeopardy, but merely to compliance for the first time with the employer's policies.[76] The procedure was, therefore, fair.

In *Strydom v USKO Ltd*,[77] the second disciplinary enquiry was found to be *ultra vires* the employer's disciplinary code. The employee was charged before a disciplinary enquiry for theft in that he removed rusted and unused tools valued at R50.00. The chairman of the enquiry found that the unauthorised removal of the tools by the employee was an infraction of the company's disciplinary code, but that dismissal was not the only appropriate punishment and imposed a written warning as penalty. Under the employer's disciplinary code, no dismissal could be effected without the approval of the manager or the divisional manager. In exercising this power, the manager substituted the penalty of a written warning for dismissal, because he was of the view that the chairman did not attach sufficient weight to certain aggravating factors. The code did not expressly authorise the manager or divisional manager to review the findings of the enquiry or to set aside the penalty imposed. The Commissioner held that it was *ultra vires* the powers of the divisional manager under the company's disciplinary code to act as a review body to the panel findings, and that, had the code allowed such a procedure, it "would be tantamount to vesting powers of review in the hands of senior management; such empowerment would indeed be unconscionable since it would be nothing but a second enquiry against an employee".[78] Accordingly, the disciplinary enquiry was a matter of procedural fairness and any further enquiry, under the subterfuge of a review, on the same allegations or facts could not be countenanced, since it exposed the employee to double jeopardy.[79]

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76 *NUMSA obo Walsh v Delta Motor Corporation (Pty) Ltd*: 713.

77 *Strydom v USKO Ltd* 1997 3 BLLR 343 (CCMA).

78 *Strydom v USKO Ltd*: 350H. See also *Kohidh v Beier Wool (Pty) Ltd* 1997 18 ILJ 1104 (CCMA).

79 *Strydom v USKO Ltd*: 351C-D. See also *Hendricks v UCT* 1998 5 BALR 548 (CCMA).

In *BMW (SA) Ltd v Van der Walt*,[80] the court had to consider the propriety of instituting a second disciplinary enquiry against an employee. The employee was charged with certain disciplinary offences and found not guilty. After his acquittal, new information came to the attention of the employer which showed that the employee was indeed guilty of misconduct. He was subjected to a fresh disciplinary enquiry for the same offence and dismissed. Conradie JA made it clear that fairness alone is the yardstick to determine whether the second enquiry was justified. Fairness entails the balancing of competing interests not only of the employer but also of the employee.[81] The test expounded in *BMW (SA) Ltd v Van der Walt* has been approved in subsequent cases.[82]

The question as to whether the employer had punished the employee twice for the same misconduct arose in *HOSPERSA obo Lokoeng vs Provincial Department of Health – Limpopo*.[83] The employee had received several warnings for absenteeism. He was later dismissed for these same incidents of absenteeism. There was no evidence led to show that there were any incidents of absence apart from those for which the employee had been issued warnings. The arbitrator found this to be double jeopardy, rendering the dismissal unfair. The employer was, therefore, ordered to reinstate the employee with full back pay.

In *Mahlakoane v SARS*,[84] the employee was dismissed for fraudulently receiving social grants for her two children. The first disciplinary hearing cleared the employee of any wrongdoing, as she produced letters sent to SASSA revealing that she requested the payment of the grant to be stopped. The employer subjected the employee to a second disciplinary hearing when evidence surfaced that the letters produced at the first hearing were forged. The Labour Appeal Court found that the second charges leading to the dismissal levelled against the employee differed from the first charges. It held that the concept of double jeopardy relied on by the Commissioner had no application. The dismissal of the employee for forging the letters was upheld. It is clear, therefore, that a second disciplinary process may be justified as fair, if an employer can present any of the following evidence:

- New evidence that has not been presented at the first disciplinary hearing;
- Evidence that is relevant to the original charges, and
- Evidence that is of sufficient significance to merit a new hearing.

80 *BMW (SA) Ltd v Van der Walt* 2000 21 ILJ 113 (LAC): par. 12.
81 *NUMSA v Vetsak Co-operative Ltd* 1996 4 SA 577 (A):589C-D.
82 *Jorgensen v I Kat Computing (Pty) Ltd* 2018 39 ILJ 785 (LAC); *Moshoeshoe/ Neotel (Pty) Ltd* 2017 4 BALR 405 (CCMA); *Brandford v Metrorail Services (Durban)* 2003 24 ILJ 2269 (LAC).
83 *HOSPERSA obo Lokoeng vs Provincial Department of Health – Limpopo* 2006 5 BALR 474 (PHSDSBC).
84 *Mahlakoane v SARS* 2018 39 ILJ 1034 (LAC).

It is significant to note that, where the chairperson of a disciplinary hearing, after discovering that certain clerical errors appear in the charge sheet, adjourns the proceedings and convenes a second hearing, it has been held not to amount to the employee having been tried a second time. There was indeed no first and second trial; one trial does not amount to double jeopardy.[85]

Given that the pre-dismissal enquiry was underway in *Rabie,* it is unnecessary to ask oneself whether it was fair for the DTI to subject the applicant to a fresh in-house disciplinary enquiry. The parallel internal disciplinary hearing had the same origin as in *Rakgolela v Trade Centre*.[86] In this case, the employee was dismissed for misappropriation and misuse of a company cellular phone. He exercised his right of appeal in terms of the employer's appeal policy. On appeal, the dismissal was overturned and substituted with a final warning. The employer then charged the employee again for the same incident of taking the cellular phone and added a new charge of telling lies during the original hearing.

After the employee's original dismissal had been overturned on appeal, the police reported that the employee had lied about not having taken the cellular phone home. The employer used this report as ammunition to recharge the employee and dismiss him a second time. It could not be said that the information from the police constituted new evidence that was not presented at the initial disciplinary enquiry. After all, the appeal chairperson had already established the fact that the employee had lied. The Commissioner found that the employee had been a victim of double jeopardy, as he had been disciplined twice for the same misconduct. The employer was ordered to pay the employee 12 months' remuneration in compensation for the unfair dismissal.

To revert to the *Rabie* case: The record revealed that the charges placed before the internal disciplinary hearing were not dissimilar to those placed before the pre-dismissal arbitration enquiry. Neither was there a reasonable explanation by the DTI as to why the new charges were not combined with the charges before the pre-dismissal arbitration. As the learned judge observed, "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".[87]

The question as to whether there are compelling and exceptional circumstances to warrant urgent interim relief is, as the decisions below will show, not an easy one to answer. A good place to start is the controversial case of the so-called "SABC Eight".[88] The SABC Eight concerned suspension and subsequent dismissal of eight journalists (the applicants)

85 *SATAWU obo Sigasa v Spoornet* 1999 7 BALR 872 (IMSSA).
86 *Rakgolela v Trade Centre* 2005 3 BALR 353 (CCMA).
87 *Rabie v Department of Trade and Industry*: par. 19.
88 *Solidarity v SABC* 2016 37 ILJ 2888 (LC).

for contravening the broadcaster's suppressive Protest Policy.[89] The applicants had sought interim relief to uplift their suspension from work and postponement of disciplinary enquiries against them, pending the outcome of the Constitutional Court and Labour Court proceedings. The main thrust of the applicants' case was that their suspension and summary dismissal was in breach of a contractual right to disciplinary procedure as well as in breach of the right to freedom of expression. The Labour Court held that the applicants were entitled to interim relief. In arriving at a conclusion that the dismissals, including suspensions and incomplete disciplinary enquiries, were invalid, the court relied on the fact that the actions taken by the employer were premised on the enforcement of an unlawful policy.[90] Lagrange J noted in the course of his reasons that

> [t]he mere fact that the applicants have been dismissed in breach of their contracts of employment might not in and of itself warrant urgent relief. What makes the application urgent is related to a number of factors. Firstly, SABC has been unrelenting in opposing the relief sought by the applicants whose dismissal, suspensions and early disciplinary steps would never have come about but for the unlawful policy. One might have thought that the sincerity of the SABC in agreeing to accept the invalidity of the policy would have been followed up by an offer at least to allow the applicants to return to work in the interim, pending a final decision on that application. It cannot be reassuring for journalists who are currently working at the SABC to know that those who questioned an unlawful policy remain dismissed, despite the SABC supposedly agreeing not to enforce that policy in the meantime.

Secondly, it is important at a time when the role of the SABC will be in the spotlight in the course of the imminent local elections that its will and ability to fulfil its mandate as an instrument of a constitutional democracy will not be questioned on account of it adopting an inconsistent stance towards the applicants and the ICASA ruling.

Thirdly, the importance of the applicants returning to work without delay is also because of the importance of them actually being able to perform their work as journalists in light of all the considerations mentioned above. This is not a case where damages for wrongful dismissal would be an appropriate alternative remedy in due course.[91]

89 The SABC editorial Protest Policy issued on 26 May 2016 stated that the "SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS". See also *Solidarity v SABC*: par. 8.

90 *Helen Suzman Foundation v SABC Soc Ltd* 2016 ZAGPPHC 606 (20 July 2016).

91 *Solidarity v SABC*: paras. 68-70.

Solidarity v SABC epitomises a robust approach to protection of employment[92] and employees' constitutional right to freedom of expression.[93]

Where the applicant seeking an interim order staying a disciplinary hearing pending the outcome of a constitutional challenge did not intend to circumvent, avoid or bypass in-house disciplinary enquiry, the Labour Court has been inclined to intervene. Thus, in *McBride v Minister of Police*, the Labour Court held that exceptional circumstances existed and failure to intervene would have led to a grave injustice. In that case, the applicant, the executive director of the Independent Police Investigative Directorate, which is expressly required in terms of sec. 206(6) of the *Constitution* to be independent, was being subjected to a disciplinary enquiry that was in contravention of that independence. Further support to the foregoing proposition is that the High Court had already found that the applicant had a *prima facie* right to a disciplinary enquiry that is instituted by Parliament and not by the Minister.[94] Basson J was satisfied that "there is an inherent and fundamental prejudice in being subjected to a disciplinary enquiry which is *prima facie* unlawful and unconstitutional."[95]

SATAWU v MSC Depots (Pty) Ltd[96] also stands out as one of those defining cases, in which the court granted urgent declaratory relief, setting aside dismissals effected following internal disciplinary proceedings conducted in contravention of a pre-dismissal arbitration agreement. Similarly, in *Mchuba v PRASA*,[97] the court held that the termination of the applicant's contract of employment by the employer constituted a breach of the respondent's contractual obligation to deal with the misconduct allegation by way of a pre-dismissal arbitration in terms of sec. 188A. It is, therefore, plain that the unilateral abandonment of pre-dismissal arbitration and institution of fresh disciplinary enquiry infringing the employee's contractual rights constitute exceptional circumstances warranting the staying of parallel in-house disciplinary proceedings.

7. Summary and conclusions

The ruling in *Rabie v Department of Trade and Industry* is encouraging for reaffirming the proposition that delays in the pre-dismissal arbitration enquiry cannot be addressed by permitting an employer to change horses midstream and institute a fresh workplace disciplinary inquiry with slightly different charges arising from the same facts. When an employer

92 *Hoffman v South African Airways* 2001 1 SA 1 (CC): paras. 50-52. For further discussion, see Okpaluba 2002:111-117; Van Niekerk 2004:853-867.
93 *Contra: NUPSAWU v National Lotteries Board* 2014 3 SA 544 (CC): paras. 186-190.
94 *McBride v Minister of Police* Case No. 6588/15, North Gauteng High Court Pretoria.
95 *McBride v Minister of Police*: par. 30.
96 2013 34 ILJ 706 (LC).
97 2016 37 ILJ 1923 (LC).

resiles from a pre-dismissal arbitration proceeding, the employee's contractual right in terms of sec. 188A of the *LRA* and sec. 77(3) of the *BCEA* is inevitably encroached upon. There is an additional consideration of prejudice arising from the employee being subjected to duplicated disciplinary enquiries. The approach of the Labour Court is consonant with the concern that employers, unilaterally withdrawing from the pre-dismissal arbitration process, are effectively bypassing the statutory dispute resolution mechanisms and undermining their role in a carefully-crafted scheme that gives primacy to the value of self-regulation.[98] *Rabie v Department of Trade and Industry* dictates that unilaterally bailing out from a sec. 188A process cannot be countenanced.

The finding in *Rabie v Department of Trade and Industry* also serves to maintain the position that the Labour Court will only intervene in disciplinary proceedings, if truly exceptional circumstances are shown to exist. Cases that would warrant the court's intervention in incomplete disciplinary enquiries are of a conspicuously rare breed. The trampling upon the applicant's contractual rights arising from the *volte-face* contrived by the DTI in *Rabie* fall within the ambit of exceptional circumstances, warranting the granting of urgent interim relief staying the workplace disciplinary proceedings. The case at hand is an example where the employer tried to abuse the process to the real detriment of the employee. There can be no question that a grave injustice would have occurred, had the in-house disciplinary enquiry proceeded.

98 See, for example, *NUMSA v Bader Bop (Pty) Ltd* 2003 24 ILJ 305 (CC): paras. 26 and 65; *Kim-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC): paras. 17-18; *SA Breweries v CCMA* 2002 23 ILJ 1467 (LC): par. 2.

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