REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A5048/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

15 MARCH 2013 ROLAND SUTHERLAND

In the matter between

MPUTUMI DAMANE APPELLANT

and

CENTRAL ENERGY FUND RESPONDENT

JUDGMENT

SUTHERLAND J:

INTRODUCTION

1. The appellant failed to procure orders in the court *a quo* that would have prevented him from being subjected to discipline by his employer, the respondent. That court granted him leave to appeal the refusal to the full bench of this division.

2. The appeal is premised on the proposition that the decision of the board of the respondent to institute disciplinary proceedings was unlawful. The basis of invalidity relied upon was articulated on behalf of the appellant as twofold:

   2.1. first, that the rationale for instituting disciplinary proceedings was hit by s 3 of the Protected Disclosures Act 26 of 2000 (PDA); and,

   2.2. secondly, a decision taken by the chair of the board on 18 February 2011, the date the charges were presented to the appellant, was *ultra vires.*

3. Perhaps the first matter that demands attention is to eliminate confusion related to this formulation of the issues. The relief sought from the court *a quo* was to declare a *board decision* unlawful, not a decision of the chairperson, and the further relief was to interdict *the board* (axiomatically the respondent, the board being merely an organ of the respondent, not a party) from instituting disciplinary charges identical to those presented to the appellant on 18 February 2011. The appeal can only be against a refusal of that relief. To the extent that the decision of the chair is attacked, for want of authority, it is a subordinate aspect of the controversy.

IS THE APPEAL MOOT?

4. The order of the court a quo was made on 5 July 2012. A lot of water has flowed under the bridge since then. As a result, the respondent has invoked s 21A of the Supreme Court Act 59 of 1959 to contend that the appeal should not be entertained as the order can have no practical application. The application to admit the evidence, which was common cause, was granted.

5. The critical facts relevant to that issue are these:

   5.1. Charges were presented to the appellant on 18 February 2011, but never put to him to plead and no proceedings ever took place.

   5.2. The attempt to interdict the proceedings resulted in a delay, which even after the order refusing the interdict on 5 July 2011, continued.

   5.3. On 16 September 2011 the appellant resigned from the employ of the respondent.

   5.4. The appellant thereafter took a further step by referring an alleged unfair labour practice dispute to the CCMA. It was later withdrawn.

6. The controversy over the departure of the appellant from the employ of the respondent is now totally extinguished. Under these circumstances, what possible utility can a judgment on appeal serve?

7. The appellant initially advanced three grounds in support of the claimed practical effect:

   7.1. The outcome of the appeal is material to his future employment prospects;

7.2. A judgment on appeal will guide other senior executives about whether to blow the whistle on their employer's corrupt behaviour or remain mute, thereby frustrating the aim of the PDA.

7.3. A judgment on appeal will 'clarify' the 'true' roles of directors and accounting officers in the public sphere.

8. In our view, these contentions are meritless.

8.1. The notion that the appellant's career prospects are likely to be influenced by a judgment appeal is unfounded and was not seriously persisted with before us. He was not dismissed, he resigned. He was never subjected to discipline. In the court *a quo* he failed to obtain a procedural remedy in the form of an interdict, and although for other reasons, he did not later appear before any disciplinary tribunal. The upshot is that although he failed to interdict the proceedings to avoid having to appear before a disciplinary tribunal, he nevertheless has never subsequently been subjected to any disciplinary enquiry. No pronouncement has ever been made about either his conduct or affecting his reputation.

8.2. Regardless of the merits or demerits of the claim that the appellant ought to be protected by the provisions of the PDA, there are not, on the facts relevant to this dispute, prospects of a novel point of law being decided; indeed, no novel point was advanced in argument.

8.3. The notion that the law on the roles of directors and accounting officers might be developed or clarified in relation to the issues on appeal is misplaced. No room for such novelty has been shown, in the evidence or in argument.

9. Similar contentions were advanced, without success, before the SCA in *Western Cape Education Department and another v George* 1998 (3) SA 77 (SCA). In that matter the applicant, Mrs George, a teacher, was aggrieved by a discriminatory practice of the respondent Department of Education, which denied her as a married woman, access to certain benefits. She succeeded before the Industrial court (established under the LRA of 1956). The Department appealed to the Labour

Appeal Court. However by the time the matter was called, the Department had, in consequence of collective bargaining, resolved to eliminate the discriminatory regulations. When the appeal was heard, the Department persisted in an attempt to have the finding that it had committed an unfair labour practice overturned. Such a step was warranted, it was argued, because the Department should be absolved of the stigma of having committed an unfair labour practice. In other words, the department's honour was at stake. The contention was rejected for want of any foundation that the Department was affected in any deleterious fashion, such as being unable to attract staff or that the finding was likely to engender staff resentments (at 83B-I). Further, it was argued that a judgment 'could be given providing a practical guideline for the solution of similar legal questions in the future' (at 83J). The court held on the facts that there was no scope to do, and in any event, if the court were to do so, the *dictum* would be *obiter* (at 84D).

10. In argument, a further submission was advanced that in respect of the costs, an order would have a practical effect if, on the merits, the order ought not to have been granted *a quo.* It is doubtful that, in this case, such an outcome is a likelihood. In those cases where costs alone is the basis for persisting with an appeal, there needs to be exceptional circumstances as contemplated in s 21A(3) of the Supreme Court Act (see too: *Oudebaaskraal (Edms) Bpk en andere v Jansen van Vuuren en andere* 2001 (2) SA 806 (SCA) 812B-F). For the reasons already articulated, there are no such exceptional circumstances present in this case because no public interest is affected. Substantial costs having been incurred may be considered as such exceptional circumstance: in the present matter however, the costs incurred are nothing out of the ordinary.

11. Of no little importance to constantly bear in mind, is the injunction by Olivier JA in *Premier, Provinsie Mpumalanga en 'n ander v Grobersdalse Stadsraad* 1998 (2) SA 1136 (SCA) that a court should not be burdened with academic questions and that practitioners have a responsibility to be alert throughout the legal process of the need to unburden the courts (at 1143B). The notion that the avoidance of unnecessary appeals ought not to be strictly striven for was pointedly condemned by

Navsa JA in *Radio Pretoria v Chairman, ICASA and another* 2005 (1) SA 46 (SCA) 56G-J.

12. Accordingly, we regard the stance adopted by the respondent apposite to the circumstances. On such grounds alone, the appeal ought to be dismissed as having no practical effect.

THE CASE ON APPEAL

13. However for good order, the substance of appeal is also addressed

The PDA Case

Was there a disclosure as contemplated in the PDA?

14. The alleged disclosure is in a letter of 3 November 2010. The text reads:

'The Director General
Ms. N Magubane
...

Dear Nellie

SFF has in the past been involved in a number of episodes with ethical implications that resulted in bad publicity for the company, the CEF Group and the Department.
I am afraid that we have another episode now which is of the same proportion as the previous ones.
In August, the company issued an RFP for tank rentals in Saldanha, and in the period prior to the closing date the Chairperson of SFF (who is also the chairperson of CEF) issued a directive (SIC) see appendix 1, that we must stop all activities relating to storage rental until the Board had looked at the matter.
We wrote to the chairperson explaining the cost implications of her directive (appendix 2) but she went ahead and got the Board to endorse her decision in a round robin resolution (appendix 3) despite our pleas and legal advice from the company legal advisors (Appendix 4). It is noteworthy here that no contradictory legal advice was sought by the Chairperson, so she went ahead regardless of professional advice. The question is what drives this push to disregard all the rules.
A Board meeting was held on Wednesday 27th October 2010 at which the non executive directors present bulldozed the matter through the Board despite protestations of the executive directors and management. It was again pointed out that the company had lost income already (Appendix 5) and stood the los more if they proceed in the manner they

had. It was also pointed out that rental of storage tanks was a matter specifically mentioned in the PFMA as a function of the accounting officer (Appendix 6)
However, they pushed through a resolution that said that until a strategy for rental storage had been clarified with the Board (appendix 7) the matter should stand as directed by the chairperson.
Again it was pointed out to them that the rental of space is an operational issue and there is nothing strategic about it. Furthermore, the chairperson or the board cannot withdraw a mandate given to the Accounting Officer by the PFMA. But they bulldozed through the issue and effectively ruled that the board will in future be responsible for all such decisions. The recordings of the said meetings will give you an idea of the high handed manner in which this matter was dealt with by the non executive directors.
The oil industry is already awash with rumours of who phoned these directors for what gain but I do not want to go there, save to say that if we do not deal with this matter expeditiously we have another crisis on our hands.
What is even more scary is that some foreign trading companies have reported this matter to their ambassadors who have started making enquiries and are threatening to raise issue with their governments.
Fortunately for them, the department representatives on the Board were not present when this matter was ramroded [sic] through the meeting as it would have had even more serious implications.
To summarise, we believe that the directive issued by the Chairperson was irregular and illegal and she acted ultra vires. Secondly the directors who endorsed this did not act in the best interest of the company because they ignored all legal advice and note that the company stood to lose R72 million.
The PFMA enjoins me to report such matters to you when the interest of the company are under threat and I would like to urge you to intervene to stop further losses being incurred by this company.
Yours Truly
Mputumi Damane
Group Chief Executive Officer

PS: In all my life in business, I have never heard of a Board stopping managers from making money for a company.'

15. In the court *a quo,* the import of this letter was addressed. It was held that the only category of complaint into which the letter might fall in the definition of a 'disclosure' in the PDA is (d) of the definition; *ie* ' that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject'. Further, it was held that the alleged disclosure would have to qualify, if it qualified at all, only as one contemplated in s 9 of the PDA as a 'general protected disclosure'. These findings are, in our view, correct.

16. The substance of the letter was to allege that the members of the board were acting *ultra vires* their powers by interfering with appellant's alleged operational prerogatives *qua* CEO. There were apparently strong differences of opinion about a

tender for tanks at Saldanha Bay. The letter accused the board of poor judgment and failing to safeguard the best interests of the enterprise.

17. Can this complaint constitute a revelation about a failure by the board to comply with a legal obligation? Apparently, the board chose, wisely or otherwise, to adopt a particular view of a business transaction and insist that a final decision be taken within the context of a so-called strategic plan. It was argued that the letter should be read as implying a potential irregularity as contemplated in the Public Finance Management Act 1 of 1999 (PFMA) in relation to financial mismanagement. In our view the letter does not lend itself to such an interpretation. However, what is of more importance is whether the letter constitutes a disclosure as contemplated in the PDA. In this regard, the conclusion of the court *a quo* was, in our view, correct in finding that it did not because it goes no further than a criticism of the judgment of the board and contests the board's view about the respective spheres of authority of the CEO and of itself.

The absence of causality

18. In any event, in our view, there is a further reason why, on the facts, the claim based on the PDA must fail. There is no proof of a causal connection between the so-called disclosure of 3 November 2010 and the framing and presentation to the appellant of the charges on 18 February 2011, demonstrated on the evidence adduced in the affidavits.

19. The appellant, having chosen to proceed by way of an application, the matter fell to be decided upon the familiar principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). That means that the respondent's version trumps the applicant's allegations, where they cannot be rebutted (at 634E-635B).

20. The charges related to alleged irregularities about a matter extraneous to the subject matter of the letter of 3 November, namely, an improper appointment of one Pillay, and related matters. That difference *per se* is immaterial to whether or not the

charges were, in truth, initiated as a reprisal for having made a disclosure on 3 November 2010.

21. The respondent's version is twofold:

21.1. first, the inspiration for the 18 February 2011charges was an independent forensic report in which, citing s 51 of the PFMA, discipline against the appellant, and two others, was recommended as early as May 2010 and reiterated on 18 August 2011, well before the date of the alleged disclosure on 3 November 2010.

21.2. secondly, the board only learnt of the existence of the alleged disclosure on 29 March 2011, when reading the appellant's application.

22. The high point of the appellant's thesis is that, in his opinion, it is unlikely that the respondent would not have learnt of the letter he gave to the Minister on 3 November. These allegations by the appellant do not rebut the respondent's denial of knowledge. Moreover, the institution of proceedings, in line with the recommendations in the forensic reports, the first of which was to hand prior to the date of the appellant's letter, is corroborative of the respondent's version. Notably, a board of an organ of state is not at liberty to disregard such recommendations in regard to alleged financial irregularities because *inter alia*, the fiduciary responsibility of the board requires adherence to the norms prescribed by the PFMA (see esp: s 83(2)).

23. According to the respondent, late in September 2010, the appellant and the chair of the board argued over the withdrawal of the tender and their respective scopes of responsibility and final authority to make decisions for the respondent. The appellant did not respond to this allegation in reply: it therefore stands as admitted. The chair sent an email, dated 29 September 2010, to the appellant on the issue of the withdrawn tender. On 27 October 2010 a board meeting endorsed the chair's decision. This was the gravamen of the letter of 3 November 2010, which, as is evident, was sent a mere 7 days after this board meeting.

24. Thereafter, it is common cause that the chair of the board and the Minister had a conversation about the issue of how to address the tankers. There is no suggestion that the Minister or the Director-General shared the letter with the chair. Moreover, the substance of that conversation had already been ventilated at the board meeting of 27 October. The issue of adopting a strategic posture before embarking on the business decisions concerning the tankers, itself an aspect of a broader business decision, was addressed in correspondence with the Minister. Thereafter in January at an *ad hoc* strategic planning meeting a policy within which to take the operational decisions was devised. The controversy was extinguished before 18 February.

25. It was argued that the lapse of some three months between the letter of 3 November (or, perhaps, the board meeting of 27 October) and the presentation of charges on 18 February is a ground to suspect the chair and the board of *mala fides*. In our view, the passage of time has adequately been explained by reference to the invitation to the management, including the appellant, to offer a response to the forensic report, the intervening year-end holidays and the attention devoted to the strategic meeting already alluded to. The lapse of time accordingly seems to us to be a neutral factor.

26. On this body of evidence, a causal connection is not demonstrated.

27. Thus, in contrast to the decision in *Young v Coega Development Corporation (Pty) Ltd* 2009 (6) SA 118 (ECP) at esp [34] – [36], where it was shown on the facts that the discipline was instituted as a reprisal when exit negotiations with the employee failed, the appellant's reliance on an alleged protected disclosure cannot succeed.

28. The appellant's contentions should therefore be dismissed on that ground alone.

29. It is, in the circumstances, unnecessary to plumb the evidence to determine whether all the criteria in s 9 of the PDA might have been met.

THE VALIDITY OF THE BOARD DECISION

30. As regards the board decision *per se*, it is plain that the decisions taken on 24 February and 6 April 2011 are the decisions pertinent to the controversy.

31. The initial decision to charge the appellant was indeed taken by the chair of the board. It is common cause she was not authorised to do so and it is also common cause that the source of the authority to initiate discipline against the appellant vested only in the board. The real challenge to the board's decision is narrow: it is contended that it was not possible in law to ratify the initial decision of the chair. In contending this, the appellant is mistaken.

32. The principle in contention is that unauthorised decisions may be ratified with retrospective effect. There is a distinction of importance between:

    32.1. the ratification of an authorised decision that could have been validly taken if prior authority had been conferred, and ,

    32.2. the impossibility of an attempt to 'ratify' a decision which could not have been taken, even if the decision maker had been notionally authorised.

    The difference is between the concept of an 'unauthorised decision' and the concept of an 'incompetent decision'.

33. The decision in *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (1) SA 635 (O) is an illustration of the latter type of decision, *ie* an incompetent decision: an invalidly constituted board (improperly convened and without a *quorum*) cannot take a valid decision and nothing exists in law to ratify. The critical point is that the *decision maker* was incompetent to make the decision (at 638D). Similarly, the basis for the decision in *Mathipa v Vista University and others* 2000 (1) SA 396 (T) was that the initial decision by the rector to appoint a campus director was characterised by the court as *ultra vires* the statutory regime of the university and that a ratification

of an *ultra vires* act by an organ of the university, *ie* the council, that did have such power to make an appointment, was not in law possible (see at 401A-E).

34. It was acknowledged on behalf of the appellant that the board had the power to authorise the chair to issue charges to the appellant. The respondent' Articles of Association addresses the power to delegate functions of the board in article 33.2:

'The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit....'

35. The principle that is applicable to the facts adduced in the affidavits in this matter is that in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA). In that matter, an official of the Town Council, purporting to act on behalf of the Town Council, decided to institute legal proceedings. He was not authorised to do so. Later the Town Council ratified his decision. The ratification was challenged but the court upheld its efficacy. Harms JA (at [9] – [10]) addressed the issues and held that the deeds of an agent who acts without authority may be ratified with retrospective effect.

36. The Court *a quo* correctly held that no legal barrier existed to inhibit the board from authorising the chair to act as she had done and the decision was therefore capable of ratification. Moreover, the board decision of 6 April 2011, which was, ostensibly, conscious of this very controversy, authorized afresh the prosecution of the disciplinary proceedings: an ample set of braces to add to the belt of the 24 February 2011 decision, which ratified the chair's conduct and which also directed the subcommittee to pursue the disciplinary proceedings.

COSTS

37. The costs must follow the result. No relationship between the parties exists that needs to be rehabilitated and the appellant has unwisely persisted in the appeal on a moot issue.

THE ORDER

38. The appeal is dismissed with costs.

ROLAND SUTHERLAND
JUDGE OF THE HIGH COURT

I agree.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

R BEDHESI
ACTING JUDGE OF THE HIGH COURT

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