IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

SIGNATURE DATE: 2 August 2021

Case No: 2021/4397

In the matter between:

VUSUMUZI MNTAMBO Applicant

and

PIOTRANS (PTY) LTD Respondent

JUDGMENT

WILSON AJ:

1 On 18 January 2021, the respondent ("Piotrans") dismissed the applicant ("Mr. Mntambo") from his position as its General Manager: Strategy and Transformation. Piotrans gave two reasons for its decision. The first reason was that Mr. Mntambo had committed various acts of misconduct that resulted in a disciplinary hearing before Nqabayethu Buthelezi, an advocate of this court briefed on Piotrans' behalf to preside over a disciplinary inquiry into Mr.

Mntambo's conduct. Mr. Buthelezi acquitted Mr. Mntambo of all the charges against him, but Piotrans nonetheless rejected Mr. Buthelezi's conclusions, and purported to substitute its own decision to dismiss Mr. Mntambo.

2 The second reason Piotrans gave was that Mr. Mntambo had, in addition to the acts of misconduct alleged before Mr. Buthelezi, made a series of what Piotrans characterised as "false statements and allegations", under oath, on behalf of group of shareholders with interests in companies that, in turn, held shares in Piotrans. The shareholders and Piotrans are presently engaged in litigation about the extent to which the shareholders are entitled to exercise influence over the appointment of directors to Piotrans' Board. That litigation has not gone particularly well for the shareholders. But it is not necessary for me to delve into the issues it raises. The only relevance of that litigation to this case is that Mr. Mntambo (himself a shareholder in an entity with shares in Piotrans) was cited as a respondent in one of the cases comprising that litigation, deposed to an answering affidavit on behalf of the shareholders, and made statements that Piotrans considered were false, and adverse to its interests.

3 In its letter dismissing Mr. Mntambo, Piotrans acknowledged that "in ordinary circumstances employees must be afforded [the] opportunity to state their side of the case". However, Piotrans said, "it is the board's view that this matter is unique and thus one which does not require a further hearing".

4 Mr. Mntambo was accordingly dismissed summarily. Piotrans ignored the findings of Mr. Buthelezi, and so disregarded the outcome of the hearing before him. It did not afford Mr. Mntambo the opportunity to be heard in relation

to his allegedly false and misleading statements made during the course of the shareholder litigation.

The urgent application

5 Aggrieved, Mr. Mntambo applied urgently to this court claiming that he had been dismissed in breach of his contract with Piotrans. He disavowed any reliance on the Labour Relations Act 66 of 1995 ("the LRA"), and pleaded his case solely in contract. Initially, his notice of motion sought only declarations that the termination of his contract was invalid and that the findings of Mr. Buthelezi were valid and binding. Mr. Mntambo later amended his notice of motion to add reference to the specific clauses of his contract that he contends Piotrans had breached, and to explicitly seek an order that he be reinstated.

6 In its answering affidavit, Piotrans advanced two defences on the merits of Mr. Mntambo's claim. The first defence was that it was entitled to disregard Mr. Buthelezi's award at the disciplinary inquiry, because that award had the status of a non-binding recommendation. The second defence was that, even if it had breached its contract with Mr. Mntambo, the court should exercise its discretion against ordering Mr. Mntambo's reinstatement, because Mr. Mntambo had committed a breach of trust in deposing to an affidavit in the proceedings against Piotrans, in making false statements in those affidavits, and in supporting the shareholders' case against it.

7 The matter came before Lamont J in urgent court on 16 February 2021. Lamont J struck the application from the roll for want of urgency. Neither party supplemented their affidavits before the matter was re-enrolled before me in opposed motion court for the week of 19 July 2021. Piotrans did, however,

seek to place the papers in the litigation between it and the shareholders before me. It also supplemented its heads of argument.

Breach of contract

8 There is now no doubt that the High Court retains a residual jurisdiction to entertain claims based on the breach of a contract of employment. Those claims must be pleaded exclusively in contract. Reliance on the LRA deprives the High Court of jurisdiction (*Baloyi v Public Protector* 2021 (2) BCLR 101 (CC)). Nor do the fairness of the parties' conduct or the fairness of the terms of the contract bear on the disposition of the case. Purely as a matter of contract law, an employee has no right to be treated fairly unless the contract itself says so (see *Old Mutual Limited v Moyo* [2020] 2 All SA 261 (GJ), para 60, relying on *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA), paras 32 to 33 and 55 to 58).

9 The question is accordingly whether, as a matter of fact, Piotrans breached its contract with Mr. Mntambo.

10 Clause 12.1 of Mr. Mntambo's contract with Piotrans states that Mr. Mntambo "will be subjected to the disciplinary procedure and rules of the Company as determined from time to time". Clause 12.2 of the contract requires Mr. Mntambo to familiarise himself with applicable company policies and procedures regularly. Clause 15.1 of the contract states that Mr. Mntambo's employment may be terminated for misconduct, incapacity, operational requirements or for any other reason that "is recognised by law as being reasonable". Gross misconduct could result in "summary" termination of the contract.

11 The disciplinary procedure and rules of the company are contained in a separate document ("the code") which Piotrans' board approved on 12 June 2012. Clause 2.6 of that document sets out a series of procedural fairness rights that accrue to an employee charged with misconduct. These include the right to a formal hearing, representation at that hearing, the right to cross-examine any witness led against the employee, and the right to call witnesses in the employee's defence.

12 Clause 2.8.2.1 (b) of the code defines a formal disciplinary enquiry as one that is "conducted by a chairperson who will decide on the appropriate penalty".

13 Clause 2.12.3 states that a formal disciplinary inquiry "must be held where the breach is one of gross misconduct or where the breach is such that dismissal may be contemplated". This sits uncomfortably with the right to summarily dismiss for gross misconduct in clause 15.1 of the contract, but that is not a tension I need to resolve in this case.

14 As must be abundantly clear from these clauses, in dismissing Mr. Mntambo, Piotrans had no regard at all to its contract with him, or the code that was incorporated into that contract by reference. In relation to the first reason it gave for dismissing Mr. Mntambo, Piotrans clearly breached clause 2.8.2.1 (b) of the code, which provides that it is the chairperson of an inquiry that decides the appropriate penalty. Into that power must be read the power to decide whether any misconduct has in fact been committed – in other words whether a penalty is warranted in the first place. A contrary interpretation would plainly be absurd. Mr. Buthelezi exercised this power when he acquitted Mr. Mntambo of the charges pressed at the inquiry he chaired. The code does not

characterise the chairperson's decision as a mere "recommendation". The language the code does use is incompatible with the attribution of that status to Mr. Buthelezi's award.

15 The second reason Piotrans gave for dismissing Mr. Mntambo abrogates the company's disciplinary procedure in its entirety. The fact and nature of Mr. Mntambo's participation in the shareholder litigation was, Piotrans asserted, enough to warrant dismissal merely on having given Mr. Mtambo the opportunity to make written representations. The problem is that this is not what the contract says, and there is nothing in the contract that justifies Piotrans' abrogation of the procedure it agreed to in that contract.

16 There can accordingly be few clearer cases of the repudiation of a contract. Mr. Tshetlo, who appeared for Piotrans, was understandably reluctant to directly submit the contrary. Mr. Tshtelo instead argued that because the brief cover Piotrans' attorneys sent to Mr. Buthelezi couched Mr. Buthelezi's role as merely to provide a "recommendation", Piotrans was free to reject Mr. Buthelezi's determination of the issues at the disciplinary hearing. That proposition is wholly unconvincing. In the first place, Piotrans' brief itself clearly adverts to Mr. Buthelezi's true role: to chair the disciplinary hearing according to Piotrans' disciplinary code. No-one could entertain any serious doubt that Piotrans intended to be bound by that code when it briefed Mr. Buthelezi. In any event, if it did not so intend, it acted outside the terms of the code, and so repudiated its contract with Mr. Mntambo.

17 It struck me during the course of argument that clause 2.8.2.1 (b) of the code had not been pleaded or relied upon in Mr. Mntambo's founding affidavit. I

invited Mr. Masombuka, who appeared for Mr. Mntambo, and Mr. Tshetlo, to tell me what, if anything, I should make of that. Mr. Masombuka stated that the failure to plead that particular clause of the code was an oversight made in the heat of urgent litigation, but that I should still have regard to the clause, and Piotrans' apparent repudiation of it. Mr. Tshetlo argued that Mr. Mntambo should be held to his pleaded case, and that I should have no regard to clause 2.8.2.1 (b), because it was not pleaded or relied upon.

18 I have some difficulty with the proposition that I must blind myself to an express clause of a written contract that is clearly relevant to the central issues in this case, just because it has not been reproduced in Mr. Mntambo's founding affidavit. As has often been said, the pleadings are made for the court, not the court for the pleadings. In the absence of prejudice to one or other party, there can be no objection to the court determining the real issues that arise from the papers, even if those issues have not been framed with the precision that is ordinarily desirable (See *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA), para 42 and *Shill v Milner* 1937 AD 101).

19 In any event, Piotrans could have been under no misapprehension about the case it had to meet, even if it only had regard to the clauses of the code Mr. Mntambo specifically referred to, and not the code as a whole. Mr. Mntambo explicitly relied upon clause 2.12 of the code, which deals with "formal disciplinary enquiries". The substance of his case is that he had been denied such an inquiry in circumstances where he was contractually entitled to one. It could not have been lost on Piotrans that a formal disciplinary inquiry entails,

in terms of clause 2.8.2.1 (b) of the code, the appointment of a chairperson with the power to decide on the outcome.

20 For these reasons, it is plain that Piotrans repudiated its contract with Mr. Mntambo. That being so, Mr. Mntambo had an election: accept the repudiation, cancel the contract and seek damages, or reject the repudiation, and press Piotrans for specific performance. Mr. Mntambo asks for specific performance. I now turn to the question of whether he is, in law, entitled to it.

Specific performance

21 Mr. Tshetlo argued that I need not enter the debate about whether specific performance is an appropriate remedy, because Mr. Mntambo had not asked for it in his initial notice of motion. Although the amendment, in which Mr. Mntambo does pray for reinstatement, was not objected to, Mr. Tshtelo argued that Mr. Mntambo had effectively altered his case in reply, which is impermissible.

22 I do not think that this submission can be sustained. In the first place, Mr. Mntambo's case does not really change between his founding and replying affidavits. Mr. Mntambo is clear in his founding affidavit that he wants to be reinstated. Piotrans devotes a great deal of space in its answering affidavit to advancing a case that reinstatement is not appropriate on the facts of this case. It also took a series of technical points about the way Mr. Mntambo had framed his case. It was said that Mr. Mntambo's notice of motion sought neither a declaration that his contract with Piotrans had been breached, nor any "other form of competent remedy for breach of contract" (see para 10 of

Piotrans' answering affidavit) The amended notice of motion sought to cure these technicalities, not to change Mr. Mntambo's case.

23 It follows that the issue of whether I should order specific performance in the form of Mr. Mntambo's reinstatement is properly before me. It is, in fact, the most difficult part of this case.

24 It has long been accepted that, although "specific performance is a primary and not a supplementary remedy" for breach of contract (*Santos PFC v Ingesund* 2003 (5) SA 73 (C) at 84I ("*Ingesund*")), a court may decline to order specific performance on the facts of a particular case. The best justification for this discretion is to protect the court from making an order which cannot practically be carried out, but courts regularly decline to order specific performance "where justice can be fully and conveniently done by an award of damages" (*Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 350).

25 Historically, our courts have also been reluctant, as Innes CJ put it, to compel "one person to employ another whom he does not trust in a position that imports a close relationship" (*Schierhout v Minister of Justice* 1926 AD 99 at 107). But that does not itself mean that there is a general rule against ordering reinstatement in the context of a contract of employment. It means only that a demonstrable breakdown in confidence or trust between the parties has long been accepted as a sound reason to refuse an order for specific performance.

26 Whether to order specific performance in the form of reinstatement is a question to be answered on the facts of each case, but that relief will only be refused where it would be "inequitable in all the circumstances" or where,

because of change of circumstances, enforcing the contract would be "unconscientious". (*National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) at 155H to 156A). "Unconscientious" is here deployed in its archaic form as a synonym for "unconscionable", not in its more modern usage to refer to someone lacking in diligence.

27 It has also been observed that not all contracts of employment are for services of such a personal nature that even a breakdown in trust or confidence between the parties necessarily precludes reinstatement (*Ingesund* at 84H to 85B). Trust and confidence can be rebuilt. The question is whether that expectation is reasonable on the facts of a particular case, and whether there are good reasons, beyond the fact of the breakdown in trust itself, to place the innocent party back into the position they would have been in but for the breach of contract, by means of an order for specific performance.

28 Finally, I do not think that an employer can expect a court to leave an assertion that it has lost trust or confidence in the employee unexamined. There must be evidence that, objectively, the employer cannot reasonably be expected to take the employee back, even though the employee has suffered a breach of contract.

29 The nub of Piotrans' case on specific performance is that Mr. Mntambo has allied himself with the claims of a group of shareholders who are seeking, unlawfully, to assert control over Piotrans' management and governance. Their attempts to do so have been restrained at least two occasions, by Malindi J in *Piotrans v Kgomo* (case no. 41248/2020) and by Mabesele J in *Piotrans v Kgomo* (case no. 263/2021). In the matter before Mabesele J, Mr.

Mntambo was cited as a respondent, deposed to the shareholders' answering affidavit and sought to defend their conduct. It is the contents of that affidavit to which Piotrans took exception, and formed the basis of the second reason it gave for dismissing Mr. Mntambo. That application concerned an unlawful attempt to amend the list of Piotrans' directors held by the Companies and Intellectual Property Commission (CPIC), which Mabesele J set aside.

30 I do not think that it is necessary for me to make a finding, one way or the other, on whether, as Piotrans asserts, Mr. Mntambo made false statements in his answering affidavit. Nor do I need to assess the extent to which Mr. Mntambo might have furthered an unlawful scheme to take control Piotrans.

31 However, I need no convincing that Piotrans must be deeply concerned about Mr. Mntambo's role in the shareholder litigation. It seems to me that, in aligning himself with a group of shareholders whose conduct appears, at least *prima facie*, to have been unlawful, and adverse to the proper administration of Piotrans as a corporate entity, Mr. Mntambo imperilled his relationship with his employer. He has not explained in the papers why he did this, or to what extent he views it as compatible with his role as a senior manager at Piotrans.

32 In the absence of such an explanation, I must accept that Piotrans has made out a case that it should not be required to tolerate Mr. Mntambo's reinstatement. Mr. Mntambo was a senior employee. He says in his founding affidavit that he had an expectation that he would one day become Piotrans' chief executive officer. If that is so, I find it difficult to imagine how such a senior employee could have allowed himself to become embroiled in the apparently unlawful conduct of a renegade group of shareholders. His

decision to depose to the answering affidavit in the second application, and to associate himself with, and defend, *prima facie* unlawful conduct adverse to his employer's interests, called for an explanation. None was forthcoming.

33 In the absence of such an explanation, there is nothing to gainsay Piotrans' case that Mr. Mntambo cannot reasonably expect to command the level of trust and confidence it is entitled to place in its senior managers. In those circumstances, I cannot conclude that Piotrans ought to be required to take Mr. Mntambo back into its fold.

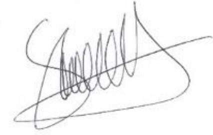
34 None of this means that Piotrans has acted lawfully. It clearly ought to have disciplined Mr. Mntambo in terms of its own disciplinary code. It is not clear to me why, other than for reasons of pure expedience, it sought to depart from the terms of the contract it had made with Mr. Mntambo and dismiss him without the hearing to which he was so clearly entitled.

35 In the circumstances, I will make an order declaring that Piotrans has acted in breach of its contract with Mr. Mntambo, and directing it to pay the costs of this application. However, I cannot, on a proper exercise of my discretion, order Piotrans to reinstate Mr. Mntambo.

36 Accordingly, I make the following order –

36.1 It is declared that the respondent's termination of the applicant's contract of employment was in breach of clauses 12 and 15 of that contract, read with the respondent's disciplinary code.

36.2 The respondent is directed to pay the costs of this application.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 2 August 2021.

HEARD ON: 21 July 2021

DECIDED ON: 2 August 2021

For the Applicant: E Masombuka

Instructed by Mathopo Moshimamne Mulangaphuma Inc

For the Respondent: R Tshetlo

L Mukome

Instructed by Ningiza Horner Inc