VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J2533/98

In the matter between:

S J VAN ZYL — Applicant

and

SFF ASSOCIATION — Respondent

J U D G M E N T

ZONDO J:

[1] In this matter the applicant one Mr S J van Zyl has brought to this court an application against SFF Association, his employer and the respondent in this matter. He seeks a rule nisi with an interim interdict in terms of which the respondent would be interdicted from proceeding with a disciplinary enquiry which is set down for hearing tomorrow at 10:00 at the premises of the respondent.

[2] Annexed to the applicant's founding affidavit are a number of documents purporting to support the application. The application was brought as one of urgency. The respondent has not been able to file any opposing affidavits because of the shortness of the notice of this application that the respondent was given. However, Mr Brassey, who appeared for the respondent, indicated that he was able to deal with the matter on the basis of certain points that he intended arguing in support of the respondent's opposition of this application.

[3] The facts are not complicated. I turn to deal with them briefly. In dealing with the facts I bear in mind that the papers before the court are only those filed by the applicant as the respondent has not filed any papers. The applicant was suspended from the respondent's employment some time last year pending some enquiry. According to Mr Bruwer, who appeared for the applicant, the papers indicate that an agreement was reached between the applicant, or those representing him, and the respondent in terms of which Dr Sariti was appointed to chair an enquiry into certain allegations against the applicant. The arrangement between the parties, according to Mr Bruwer, was that that enquiry would be the only one to deal with such allegations.

[4] The enquiry was set down. It got postponed at the request of the respondent at a certain stage and has not sat since then. It would appear that at some stage last week the respondent or its Board issued a press release by way of a document marked Annexure ZD at page 37 of the papers. In that

press release the Board indicated that it had terminated the enquiry which was being chaired by Dr Sariti. It gave certain reasons for its decision. The reasons are given as being that:-

"l. The external enquiry was being conducted at great expense to the organisation because it had undertaken to pay Mr van Zyl's legal costs for the enquiry at his insistence and in order to expedite matters.

2. The organisation has reason to believe that the enquiry was being deliberately delayed.

3. After careful consideration the organisation is of the belief that the enquiry could not be allowed to continue in that manner and therefore decided not to allow legal representation.

4. In short, we came to the conclusion that Mr van Zyl was abusing the process and benefits being accorded to him."

The concluding paragraph in the document reads:

"The organisation was obliged to take this decision to ensure that the enquiry be concluded expeditiously".

[5] Subsequent to that document the respondent addressed a letter which is dated 14 September 1998, which was yesterday, to the applicant. In that letter it advised the applicant of its decision to terminate the disciplinary enquiry which had been chaired by Dr Sariti. Paragraph 13 of the letter is to the effect that the Board then resolved that :-

"Mr C T Sangoni, a director of the EFF Group of Companies is appointed to chair the enquiry into allegations of misconduct against

yourself on Wednesday, 16 September and Thursday, 17 September 1998 at 10 a.m. at the offices of EFF Association, No. 6 Protea Place, Sandton in accordance with the following directions ..."

The directions are then given in the following page.

[6] One of the directions is that no legal representation would be allowed at the enquiry whereas in the enquiry chaired by Dr Sariti, the applicant had been allowed to be represented by lawyers. It is as a result of this letter that the applicant has approached this court for the relief that he seeks. Before the applicant approached this Court, he approached the respondent and sought an undertaking that that enquiry would not be proceeded with and indicated that, if such undertaking was not given by 10:00 this morning, he would approach this court.

[7] Mr Brassey has indicated that not only is it his instructions that there was no agreement between the parties relating to the Sariti enquiry, but that also the applicant's papers do not reveal any such agreement. I am going to assume for purposes of this judgment that there was such an agreement. There are three points which Mr Brassey raised in presenting his argument in opposing this application. The first one was that the matter was not urgent. The second one was that the court had no jurisdiction to entertain this matter. The third was that the applicant had not exhausted domestic remedies before approaching this Court.

[8] On the point of urgency, Mr Brassey referred the court to Rule 8 of

the Rules of this Court and submitted that no justification existed for applicant's failure to comply with that rule. Rule 8 reads as follows:

"Urgent relief:

8.1 A party that applies for urgent relief must file an application that complies with the requirements of Rule 7(1), 7(2), 7(3) and if applicable 7(7)."

Subrule (2) reads:

"(2)The affidavit in support of the application must also contain:-

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with if that is the case; and

(c) if a party brings an application in a shorter period than provided for in terms of section 68 (2) of the Act, the party must provide reasons why a shorter period of notice should be permitted."

[9] Because of the firm conclusion I have reached on the issue of the jurisdiction of this Court, I have assumed, without deciding, in favour of the applicant that the matter is indeed urgent. I turn to deal with the question whether this Court has jurisdiction to entertain this matter. It may be appropriate to state that Mr Brassey raised another point of jurisdiction but because of the view I take on this one (which was also dealt with in argument after I raised it) it is not necessary to consider the jurisdictional point raised by Mr Brassey.

[10] During Mr Bruwer's argument I pointed out to him my understanding

of the provisions of section 157(1) of the Act and invited him to address me on whether or not my understanding of those provisions was incorrect. Section 157(1) of the Act provides as follows:-

"Subject to the Constitution and section 173 and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

[11] In my view what those provisions mean is that, where the issue arises whether the court has jurisdiction in respect of a particular matter, the question to be asked is whether or not there are provisions, either in the Act or in any other law, which say such a matter must be determined by the Labour Court. If the answer is that there are such provisions, then this court has jurisdiction. If the answer is that there are no such provisions, then this court does not have jurisdiction. (**Monyela & Others v Bruce Jacobs t/a LV Constructions (1998) 19 ILJ 75 (LC)** at 78G - 79G).

[12] If I am correct in saying that the provisions of section 157(1) mean what I have said they mean, then the question I must ask myself in this matter is the following:- are there any provisions in this Act or any other law which say that a dispute of the kind involved in this application must be determined by this Court. With that in mind it is important to determine what the dispute is which is before this Court in this case. In my view, the dispute that is before this Court is whether or not the respondent has a right to hold the enquiry that it intends holding tomorrow against the applicant. In

these circumstances the question to be asked in order to determine whether this Court has jurisdiction is therefore this one : Are there provisions in this Act or any other law, express or necessarily implied, which say a dispute about the fairness or otherwise or the lawfulness or otherwise of an employer's decision to hold a disciplinary enquiry must be adjudicated by this Court?

[13] Mr Bruwer submitted that this Court does have jurisdiction. In presenting his argument on the submission that this Court does have jurisdiction, Mr Bruwer did not submit that the approach referred to above for determining whether or not in any particular matter, the Court has jurisdiction was, in any way, erroneous. Mr Bruwer relied on the provisions of section 185 and section 187 in support of his submission that this Court does have jurisdiction. Section 185 confers a right on an employee not to be unfairly dismissed. Section 187(1)(c) refers to a dismissal being automatically unfair if the reason for it is that the employer seeks to demand an employee or employees to accept certain demands by the employer relating to a mutual interest matter. Section 187(1)(c) relates to a lock-out as was defined under the old Act, namely the 1956 Act. There is absolutely no basis to say here I am being called upon to interdict the respondent from locking out the applicant. That is quite apart from the question whether or not a single employee can be locked out. Sec 185 does not assist the applicant because it is not the applicant's case on the papers that he fears that he will be dismissed unfairly.

[14] On this issue of jurisdiction, the question before me is one as stated at the end of par 12 above. Having found that the provisions relied upon by Mr Bruwer do not support his submission, I must consider whether the Act or any other law has any provisions which say a dispute about the holding of a disciplinary inquiry will be fair or will be unfair or unlawful must be determined by this Court. I have been unable to find any such provisions either in the Act or any other law. Accordingly I am not persuaded that this Court has jurisdiction to entertain this matter. If the applicant's case was based on a threat by the respondent to dismiss the applicant in a manner that would make his dismissal automatically unfair, that would have been a different case. I say that because the dispute between the parties would have been whether or not if the applicant was dismissed, the Court would have jurisdiction to adjudicate that dispute. In that case by virtue of sec 191(5)(i) read with sec 158(1)(a)(i) and (ii), 158(1)(b) and, perhaps, 158(1)(a)(j) of the Act, this Court would have had jurisdiction to entertain this matter. However, that is not the case before me. I am satisfied that on the facts of the case before me, this Court has no jurisdiction to interdict the respondent from holding the inquiry it plans to hold against the applicant.

[16] In the light of the conclusion I have reached on the above point, it is not necessary for me to consider any other point argued. In the circumstances the application falls to be dismissed and it is dismissed with costs.

R M M ZONDO

JUDGE : LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF APPLICANT	:	Adv E C D BRUWER
Instructed by	:	Janse van Rensburg, Strydom & Botha
ON BEHALF OF RESPONDENT	:	Adv M. S. M. BRASSEY SC
Instructed by	:	PSN Attorneys

DATE OF JUDGMENT	:	15 SEPTEMBER 1998