IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case No: J 796/99

In the matter between:

Applicant

and

Respondent

REASONS FOR JUDGMENT

[1] The applicant approached this court by way of an urgent application. He seeks a final interdict to prohibit the respondent from proceeding with disciplinary proceedings against him, until such time as the dispute between the parties about this issue, which was referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") on 24 February 1999, has been resolved, or the respondent has complied with the disciplinary procedures applicable to the applicant.

[1] [2] The relevant facts are briefly, that following an interview with the applicant, broadcast by the South African Broadcasting Cooperation ("the SABC") on 12

January 1999 which was watched by the Chief Executive Officer of the respondent, the latter decided, based upon what he had seen and heard on the interview, that the applicant had acted contrary to what was expected from an employee.

[3] Subsequently, the respondent suspended the applicant on 15 January 1999. Certain charges of misconduct were leveled against the applicant and he was summoned to a disciplinary hearing in South Africa, which was to held on 20 January 1999, which was postponed to 1 March 1999. The applicant was in the Netherlands at the time.

[4] In terms of the respondent's disciplinary code which was applicable to the applicant, an investigating officer had to be appointed to investigate the charges leveled against the applicant. Such an Investigating Officer, in terms of the Code, also has to write a report to the Executive Director, requesting all the various details concerning the charges and the employee in question.

[1] [5] After consideration of the Investigating Officer's report, the Executive Director should then decide whether or not to charge the employee. If a decision is reached to charge the employee in question, then a charge with full particulars, and a request as to whether the employee admits or denies the charges must be furnished to the employee. The employee must also be given an opportunity to furnish a written explanation in response to the charges leveled against him or her

within ten working days. After consideration of the employees written representation, the Executive Director may then decide to proceed with the disciplinary enquiry before a presiding officer who should be a person who is a member of senior management with a rank not lower than Deputy Director or member of the Board. The appointment must also be in writing.

[6] Then the investigating officer, after liaising with the presiding officer, should decide on a trial date whereafter the employee must be notified of the trial, in writing, no later than twenty four hours before the hearing of the trial.

[7] The applicant contends that none of the above provisions of the code were complied with and that he was merely suspended and told of the hearing.

[8] With regard to his suspension, the applicant raised the following objections.

[9] In terms of the respondent's codes the investigating officer in question, must submit a fully motivated request, to the Executive Director, seeking the suspension of the employee on the grounds that :

(1) The presence of the employee may hamper the investigation.

(1) (2) The employee's presence may cause further embarrassment or damage to the Board (the respondent).

[10] The applicant submitted that, in terms of the code, suspension may only take place in exceptional circumstances, namely:

(1) Pending a disciplinary hearing which may lead to the employees dismissal.

(2) Where the employee's presence may give rise to the aggravation of a sensitive situation or the disruption of services.

[11] The Chief Executive Director, suspended the applicant without an investigation by an investigating officer. In this case it is common cause that the applicant was suspended pending disciplinary proceedings which may or may not lead to his dismissal. The applicant contends that he had done so with a fixed mind and that the applicant should have been entitled to put forward written representations.

[1] [12] Another complaint of the applicant was that upon a request for further particulars, the respondent failed to furnish such particulars. However after correspondence between the respondent's attorneys and the applicant's attorneys, the respondent provided further particulars to the applicant's request. Even though his request was not answered to the applicant's satisfaction I gained the impression that the request was aimed at being obstructive. The request was rather prolix and legalistic with questions that bordered on the ridiculous.

[13] When the applicant arrived in South Africa on 20 January 1999, he informed the

disciplinary panel that he was not ready to proceed with the hearing and in the circumstances the matter was postponed, in order to allow the applicant to prepare for the matter. In this regard it is significant that the code provides that the respondent may give an employee only twenty four hours notice of the disciplinary enquiry.

[14] The respondent also amplified the details of the charge given in the letter dated 15 January 1999 and informed the applicant expressly which charges related to him, namely that the charges concerned his appearance on a national television news broadcast on 12 January and issuing a statement to the press on 11 January 1999.

[15] The disciplinary hearing was then to be held on 4 February 1999. Further particulars were again sought and supplied. The video tape of the broadcast, (on which the applicant himself appeared), was made available to the applicant for inspection.

[1] [16] As the wrong disciplinary code was annexed to one of the respondent's letters, further correspondence followed and the enquiry was then postponed to 10 February 1999.

[17] On 5 February 1999 the applicant's attorneys advised the respondent that the applicant was going to return to the Netherlands and could not attend the enquiry on 10 February 1999. The applicant knew that he had to obtain the necessary

authorization first. He nevertheless went.

[18] On 23 February 1999 the applicant's attorney was notified of the respondent's intention to proceed with the disciplinary enquiry on 1 March 1999.

[19] The following day the applicant advised that he could not attend the disciplinary enquiry on 1 March 1999 and that he would lodge a dispute with the CCMA on that day if the respondent intended to proceed with the disciplinary enquiry on 1 March 1999. The parties tried to settle the matter. The applicant agreed to afford the respondent an opportunity to answer to the urgent application that it was about to bring. It was agreed that the disciplinary enquiry would not proceed on the basis that the application be heard on 8 March 1999 and that the applicant would file his replying affidavit on Thursday 4 March 1999 on or before 15h30.

[1] [20] The applicant contends that he is entitled to final, urgent relief on the basis that the respondent deprived the applicant of his right to , *inter alia,* the *audi ulteram partem* rule. The applicant further contended that there is no protection available to him by way of an ordinary remedy to prevent his fundamental and constitutional rights being violated.

[21] The applicant in this matter seeks to avoid a disciplinary hearing which is the right of every employee. A disciplinary enquiry is designed to protect the employee and should not be viewed in the same light as punishment or a violation of rights.

[22] The respondent, in my view, correctly, contended that the respondent's failure to give the applicant a hearing, or opportunity to make representations before he was suspended was in the circumstances, not unfair at all. The suspension was not meant to be punishment either. In this regard see:*Lewis v Heffer & Others [1997] 3 All ER 354 (CA) at 364 (C)to (E)* where Lord Demming held that it was not unfair to refuse a hearing before suspension.

[1] [23] The Code of Good Practice contained in Schedule 8 of the Labour Relations Act 66, of 1995 ("the Act"), does not provide for a hearing prior to suspension. Neither does the Constitution. A right to fair administrative action does not mean that a hearing before suspension is required.

[24] The respondent's disciplinary code is a guideline. It is not cast in stone. There are circumstances where the parties may deviate from their code. If the applicant is aggrieved about the manner in which the disciplinary proceedings against him has been conducted thus far, this dispute can be entertained by the CCMA. After all, the applicant has already, as he should have, in his position, referred the dispute to the CCMA for conciliation. He therefore has exercised the alternative remedy available to him and he should trust that process to dispose of his dispute fairly and expeditiously.

[25] In *Koka v Director General Provincial Administration North West Government [1997] 7 BLLR 874 (LC) at 883(g)to (h)* Landman J left the question open as to

whether there may be circumstances where the court will grant urgent relief when there are further alternatives. In the matter before me, the applicant has an alternative remedy.

[1] [26] Furthermore, the applicant was entitled to, in terms of the code upon which he relies, to at any stage, tender written representations as to whether a hearing should be instituted or not. He has not done so. It is of course another question, whether it is fair to expect of an employee to give written explanation before the hearing against him is conducted. In my view, many lawyers would advise against such a course. The applicant in this matter insists that his constitutional rights have been violated, because he has in not been granted such an opportunity. In this regard, the applicant, quite plainly, has not demonstrated any prejudice he might suffer, if the relief he seeks, is not granted.

[27] Whether or not the respondent is obliged to have an independent outsider presiding over its own internal disciplinary proceedings is not a right protected by the Constitution or the general principles of Labour Law. The applicant has also, on the papers, not demonstrated any factual basis for alleging that the Chairman who will sit on the disciplinary enquiry will be biased.

[28] The applicant has not shown that any of his rights have been impaired and he certainly has not shown that a continuation of the disciplinary process will result in him having an unfair hearing.

[1] [29] Insofar as urgency is concerned, the applicant was informed for the first time on 15 January 1999 that he was suspended pending the institution of disciplinary proceedings against him on 20 January 1999. In March, only, after being granted postponements, he approached this court on an urgent basis.

[30] What the applicant has to show in order to justify bringing this application by way of urgency successfully, is that if the interdict is not issued by the court then it likely that the violation of his rights will lead to an unfair hearing and consequently an unfair dismissal. The applicant has not done this and in any event there are other remedies for an unfair dismissal, should this occur.

[31] The applicant waited until 24 February 1998 until he approached the CCMA. It appears that the applicant is rather seeking to prevent the disciplinary enquiry from taking place, than to protect his rights in the normal course.

[32] No case has been made out on the papers, as to why this matter should be regarded as urgent.

[33] Accordingly, the application is dismissed with costs.

E Revelas

Date of hearing: 12 March 1999

Date of Judgment: 12 March 1999

Date of Reasons: 12 May 1999

For the applicant: Advocate P van der Byl

Instructed by: K Piek Attorneys

For the respondent: Advocate van de Riet

Instructed by : Cheadle Thompson & Haysom Attorneys

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