IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE

CASE NO **D71/05**

DATE HEARD 2005/02/11

DATE OF JUDGMENT 2005/02/21

In the matter between

H W JONKER **APPLICANT**

and

OKHAHLAMBA MUNICIPALITY AND OTHERS

RESPONDENTS

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 21 FEBRUARY 2005

ON BEHALF OF APPLICANT: ADV P BLOMKAMP

ON BEHALF OF RESPONDENTS: ADV P SCHUMANN

JUDGMENT 21 FEBRUARY 2005

PILLAY D, J

[1] The applicant seeks to interdict the first respondent finally from proceeding with a disciplinary inquiry into the conduct of the applicant.

[2] The first respondent had suspended the applicant in May 2003. After certain exchanges between the representatives of the parties, the applicant was reinstated and he tendered his services on 1 December 2003. He was then demoted.

[3] He referred the dispute to the CCMA. An award was issued and set aside on review on 3 December 2004. The reviewing Judge ordered that the applicant be reinstated to his position of Municipal Manager with effect from 22 May 2003. He remarked, in passing, that he did not think that the

> "chances of disciplining the applicant have lapsed ... If the award is corrected the third respondent will still retain the chance of disciplining the applicant if it wants to proceed with the disciplinary proceedings against the applicant."

[4] On 10 December 2004 the first respondent advised the applicant that it intended to proceed with the disciplinary inquiry and invited the latter to collaborate about dates and other matters pertaining to the hearing. By letter dated 21 December 2004 the inquiry was set for 10 and 11 January 2005. The applicant's counsel indicated that it was not prepared

to agree those dates. On 22 December 2004 the first respondent confirmed with the applicant's attorney that, as counsel for the applicant was not available on 10 and 11 January 2005, the inquiry would be set for the dates proposed by the applicant, that is 24 to 28 January 2005.

[5] On 25 January 2005 the applicant applied for a postponement of the hearing, despite having agreed to the date. The chairperson of the inquiry refused the application for postponement. The applicant's current attorneys of record, who were also on record for the applicant at the inquiry, withdrew. The applicant renewed his application for a postponement and secured for himself a day to prepare.

[6] On 27 January 2005 a medical doctor certified that the applicant needed to be hospitalised for depression. The next day the applicant launched this application with the assistance of his attorneys who had, by then, reinstated themselves.

Jurisdiction

[7] The contract of employment relied on by the applicant requires that disputes or differences be submitted to binding negotiations and arbitration. Mr *Blomkamp* conceded that the clause had escaped the applicant's attention. He nevertheless persisted that the application was warranted and that any order could be made pending the arbitration.

[8] The applicant has also referred a dispute to the CCMA in

terms of section 136(2)(b) and (c). The principal reason for this application is that the CCMA process would not yield a quick remedy. The same cannot be said of a private arbitration. If the applicant referred the dispute to arbitration on 10 December 2004 it could have been finalised long before this hearing.

[9] The applicant has not advanced any reason why the matter should not have been referred to private arbitration. He has failed to discharge the *onus* of showing that the dispute ought not to be referred to arbitration. (*Nick's Fishmonger Holdings (Pty) Limited v Da Souza* 2003 (2) SA 278 (SE).) A Court should be slow to accept jurisdiction if the parties have agreed to arbitrate, unless there is a "strong case" with "compelling reasons". (*University of Stellenbosch v J A Louw (Pty) Limited* 1983 (4) SA 321 (A).)

[10] The court, accordingly, lacks jurisdiction to hear the matter.

Urgency

[11] The applicant was aware as early as 10 December 2004 of the first respondent's intention to proceed afresh with the disciplinary inquiry. This application was launched on 28 January 2005. During the intervening period, the applicant's conduct was dilatory and anything but honourable. In so far as the matter became urgent, it is as a result of his own doing. The explanation that the Christmas shut-down created difficulties in launching the application earlier is weak. The applicant had enough time before and

after the Christmas shut-down to bring the application if he genuinely believed that it was urgent. If it was not convenient for him or his legal representative to launch the application earlier, there is no reason why the first respondent or the court should suffer the inconvenience of an urgent application.

A clear right

[12] The applicant contends that the holding of the inquiry at this stage is, firstly, an unfair labour practice and, secondly, a material breach of clause 19 of the contract of employment. Section 186(2) of the Labour Relations Act No 66 of 1995 ("the LRA") provides:

> "(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving -
>
> .....
>
> (b) the unfair suspension of an employee or any other unfair disciplinary action, short of dismissal, in respect of an employee.
>
> (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement."

[13] The applicant relies on these provisions because the review judgment of the Labour Court reinstated the applicant to his position of Municipal Manager with effect from 22 May 2003 on the same conditions and

benefits as existed at the time of his suspension.

[14] The review judgment, which was issued on 3 December 2004, did not preclude the first respondent from holding the disciplinary inquiry. The first respondent proceeded expeditiously and resolved on 9 December 2004 to hold the inquiry.

[15] The applicant has not made out a case that he is suspended unfairly, nor is the intended disciplinary inquiry "action short of dismissal". Disciplinary action has not been taken against the applicant yet. Furthermore, he is an employee, not a former employee. No case of an unfair labour practice in terms of sub-section (b) or (c) has therefore been made out.

[16] Turning to the alleged breach of contract, clause 19 of the contract sets out the procedure and time limits for disciplinary action. The procedure involves reporting of an "accusation", a decision by the executive committee that the accusation warrants disciplinary hearing, the appointment of a disciplinary committee and prosecutor, the service of a charge sheet within ten working days and notice of the hearing, which must be within 20 days of the notice.

[17] The applicant contends, firstly, that the executive council and not the executive committee decided that disciplinary action should be instituted. This is refuted by the first respondent, who is supported by a copy of a resolution by the executive committee

dated 9 December 2004 that it took the decision to institute disciplinary action.

[18] Secondly, the applicant contends that it is an implied term of the contract that the executive committee should have heard him before deciding to institute disciplinary action. In my view, this is not a necessary or reasonable inference to be drawn from the terms of the contract. I agree with the first respondent that it is tantamount to requiring prosecutors to give accused persons a hearing before charging them.

[19] Thirdly, the applicant contends that the time limit for holding the inquiry has expired and the first respondent lost its contractual rights to discipline him. Nothing in the terms of the contract suggests that the first respondent would lose its right to discipline.

[20] As I see it, the procedure and time limits are a commitment to deal with discipline expeditiously, and they serve as a guide as to how this can be accomplished. To hold that the procedure and the time limits are written in stone and immutable must necessarily imply that the first respondent elected to abandon or waive its wide powers of discipline, which the law merely requires it to exercise in a reasonable manner. Why the first respondent would contract away such substantial rights in favour of the applicant is unfathomable. The waiver or abandonment by the first respondent of its right to discipline the applicant

cannot necessarily or reasonably be inferred from the contract. Neither the terms of the contract nor the conduct of the first respondent's respresentatives amount to an unequivocal waiver of the right to discipline the applicant. (*RAF v Mothupi* 2000 (4) SA 38 (SCA).)

[21] The unfair labour practice claim is based on an alleged breach of section 186(2)(b) and (c) of the LRA. It is not the applicant's contention that the breach of contract is *per se* an unfair labour practice. That is not an unfair labour practice as defined in section 186 of the LRA. Whether it amounts to an unfair labour practice under the constitutional right to fair labour practices, (section 23(1) of the Constitution of the Republic of South Africa Act No 106 of 1996), was not argued by the applicant. It did arise in the course of argument for the first respondent. The language of the constitutional right to fair labour practices is open textured. Regard must be had to the LRA to give context to the constitutional rights. (*NAPTOSA v The MEC for Education; 2001 (2) SA112 (C) NEHAWU v UCT (2003) 24 ILJ 95 (CC)*)

[22] The Legislature elected to define unfair labour practice in relation to very specific employer conduct (section 186 of the LRA). One of the objectives for doing so is to provide certainty and clarity about what amounts to an unfair labour practice and to avoid the *ad hoc*-ism which plagued the jurisprudence under the LRA of 1956. Another important objective is to limit the right to particular unfair labour practices to employees

only. Hence employers do not have an unfair labour practice claim under section 186 of the LRA. But in *NEHAWU* the Constitutional Court held that an unfair dismissal is an unfair labour practice. I understand that declaration to be in the context of the open-textured language of the Constitution. By extension, any violation of the LRA could amount to an unfair labour practice under the Constitution. Thus a breach of an employer's statutory rights could amount to an unfair labour practice under the Constitution even though it is not recognised as such under the LRA. Similarly, a breach of the common law contract of employment, in so far as it has not been supplanted by legislation, may also be actionable under the Constitution. Remedies for such breaches must be derived from the LRA itself, however.

[23] The interface between the Constitution, labour legislation and the common law depends on the right claimed and how it is pleaded. If a claim is pleaded as a breach of contract, the Courts are duty-bound to decide it on that basis subject to these caveats: Firstly the Courts have a duty to develop the common law to promote the spirit, purport and objects of the Bill of Rights. (section 39(2) of the Bill; *Grobler v Naspers, PLC and Others* (2004) 25 ILJ 439 (C).)

[24] Secondly, a common law breach of contract could also be a statutory violation. A court will need to enquire whether the statute supplants the common law. If it does, the statutory procedures and remedies must apply. Thus an employee who pleads retrenchment,

should not be allowed a claim under the common law breach of contract as that situation is regulated by section 189 of the LRA. In *Fedlife Assurance ltd v Wolfaardt (2001) 22 ILJ 2407 (SCA)* the court first established that the common law breach of a fixed-term contract was neither prohibited nor regulated by statute before awarding a common law remedy. The primacy of the law of contract prevailed over the employer's defence that the employee had been retrenched two years into the five-year contract. This approach, the court held, gave effect to the constitutional values promoted by the fair labour practice clause.

[25] Thirdly, a common law breach of the contract of employment remains an employment dispute. As such, sight should not be lost of the primary object of the LRA. For instance, the defence of retrenchment to a claim for breach of a fixed-term contract should be investigated for the socio-economic impact of any decision the court might make. Assuming that the need to retrench is genuine, an award of the balance of the contract period as compensation to a single white-collar worker might deplete the limited resources of a small employer to such an extent that blue-collar workers are left with little for their own severance pay.

[26] Lastly, irrespective of whether a right is claimed under the common law or legislation it must be consistent with the overarching authority of the Constitution (*Fedlife*).

[27] The observation of these and possibly other caveats, could stem the potential development of two parallel streams of labour law, one under the common law and the other under labour legislation, one through the general civil courts and the other through the specialist labour courts. Litigants will frame their cases opportunistically by weighing and contrasting the risks and costs against the benefits of High Court and Labour Court litigation. The courts are straight-jacketed into responding to disputes on the basis of how they are pleaded and presented. Practitioners should plead and present cases in ways that enable the courts to develop labour law as one system of law under the Constitution. Labour and employment law under the Constitution compels a mindshift from a linear common law approach to a polycentric socio-economic approach. After all, labour rights fall under the broad family of socio-economic rights. Not to treat them as such would defeat the aims of the Constitution.

[28] In this case, as mentioned above, the applicant has not expressly pleaded the breach of contract as an unfair labour practice. Even if it did so, it cannot succeed as the first respondent has not breached the contract. The inquiry was scheduled in less than ten days after the executive committee decided to institute disciplinary proceedings. It was at the request of the applicant that it rescheduled for later in January 2005. The first respondent complied with the agreed procedure and the time limits.

[29] Whether disciplinary action is fair must be assessed not only from the terms of a contract but also from what is actually done to enable the applicant to have a proper hearing. (*Highveld District Council v CCMA and Others* (2003) 24 ILJ 517 (LAC).) In *Denel (EDMS) BPK v Vorster (2004) 4 SA 481 (SCA*) the respondent employee pleaded a breach of a contract that imported into its terms provisions of the disciplinary code and procedure. The employer's defence that another procedure, which was also fair, was applied was rejected by the Supreme Court of Appeal. The facts in *Denel* are distinguishable from *Highveld*. The breach of the agreed procedure might arguably be more material than in *Highveld*. It is regrettable though that the SCA did not refer at all to *Highveld*. An opportunity to guide the lower courts has been sorely missed.

[30] There may be cases where the breach of the contract may be so fundamental that whatever procedure is actually followed could never render the hearing fair. If I am wrong in holding in this case that there has not been a breach of the contract, the applicant's objection to the procedure adopted is about timing and time limits. In the context of this case they are not fundamental to fair procedure. The applicant has not demonstrated that he has a clear right. On the contrary, his right to fair procedure has to be balanced with the first respondent's prerogative and, indeed, public duty to conduct an inquiry into the serious allegations of fraud in an organ of State.

[31] At no stage has the applicant taken the Court into his confidence and offered an explanation as to why, substantively, the charges against him are unfair.

Injury actually committed or reasonably apprehended

[32] In the light of *Highveld* the applicant has acted precipitately in launching this application before the inquiry is actually held. As a matter of labour law, the applicant has to show actual prejudice arising from the procedure followed. A procedural irregularity that does not result in prejudice is not actionable.

[33] For the purposes of this interdict the applicant has failed to show actual or potential prejudice. Employees may be stressed simply because an inquiry is pending. In so far as the Applicant seeks to rely on the alleged breach of the contract or any procedural irregularity in holding the inquiry as the cause of his stress, he has to do more than attach a medical certificate to his application. Besides, it seems to me that the medical certificate was a stratagem to secure a postponement of the disciplinary inquiry.

Alternative remedy

[34] Applications to interdict disciplinary proceedings are granted in the most exceptional circumstances. (*Mensaris v University of Westville and Others* (2000) 21 ILJ 1818 (LC); *Molefe v Dihlabeng Local Municipality* (2004) 25 ILJ 680 (O).)

[35] The applicant has the alternative and appropriate

remedy of private arbitration. If, at the end of the inquiry, it transpires it was procedurally unfair the Applicant will have a claim for compensation. By initiating this application, the Applicant unnecessarily assumes the *onus* of proving the unfairness and unlawfulness of the procedure, an *onus* which strictly falls on the second respondent if it decides to dismiss the applicant.

[36] The applicant has not set out any exceptional circumstances. On the contrary, it is a constitutional imperative and a matter of public interest that complaints of fraud and corruption in an organ of State be investigated.(section 195 (1) and (2) of the Constitution)

[37] In all the circumstances, the application is dismissed with costs.

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