IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

REPORTABLE

CASE NUMBER: JR1853/07

In the matter between:

MOKOETLE, SOLLY	Applicant
and	
MUDAU N.O, ROBERT	First Respondent
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
THE SA BROADCASTING CORPORATION	Third Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application, *inter alia*, for the review, setting aside or correction of the first respondent's ruling dated 14 June 2007 in which

he refused to arbitrate a dispute referred to the second respondent for arbitration on 26 February 2007. There are other prayers sought with which I shall deal later.

[2] The basis for the first respondent's ruling was that in his view such arbitration process "would be an academic exercise" because the sanction imposed on him following an internal disciplinary hearing that he challenged as being unfair would be effective only if he were still an employee of the third respondent. Since his contract of employment terminated on 31 December 2006 (and the referral for conciliation had been made on 31 January 2007 followed by a request for arbitration on 26 February 2007) the first respondent was of the view that an arbitration process in those circumstances could serve no practical purpose.

The salient facts

[3] The facts do not require a detailed account, save for the most salient features.

[4] Five charges (four of which related to events that occurred in 2003) were preferred by the third respondent against the applicant formally by

way of a letter dated 3 October 2006 notifying him of a disciplinary hearing to be held thereanent on the morning of 6 October 2006.

[5] The disciplinary hearing was eventually held on 20 and 21 December 2006 and a ruling issued by the chairperson on 27 December 2006. In his ruling the chairperson recommended a final written warning in respect of four of the charges, and a written warning in respect of one. The third respondent had sought dismissal.

[6] In an undated letter, and following the ruling of 27 December 2006, the third respondent's Group Chief Executive Officer then conveyed to the applicant his decision to effect the chairperson's recommended sanction. The applicant's contract of employment was due to expire on 31 December 2006 and his last working day was to be 29 December 2006 (31 December 2006 fell on a Sunday), two days after the chairperson's recommended sanction.

[7] On 31 January 2007, a month after the expiry of his contract of employment, the applicant referred an unfair labour practice dispute to the second respondent for conciliation. In it he alleged "undue delay in instituting disciplinary proceedings" (the events giving rise to the charges had occurred some three years previously), "waiver", "estoppel" and "victimisation".

[8] On 26 February 2007 a commissioner (not the first respondent) that had been assigned to conciliate the dispute issued a certificate of outcome indicating that the dispute remained unresolved and referred it to arbitration. On that same date the applicant requested an arbitration and applied for the appointment of a senior commissioner to arbitrate the dispute. The matter fell on the first respondent's lap who refused to arbitrate for the reason already mentioned.

Relief Sought

[9] The applicant seeks wide ranging relief. In the main, he wants this Court

[9.1] to declare that the third respondent was precluded from instituting disciplinary proceedings against him and impose the sanctions in issue on him because it had waived its right to do so or had previously elected not to pursue such disciplinary proceedings, (prayer 2) and

[9.2] (as a concomitant result of the declaratory relief) set aside the disciplinary proceedings and direct the third respondent to expunge the sanctions issued by it against him. (prayer 3)

[10] In the alternative, he asks this Court to extend the period of 180 days allowed by the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") for the review of administrative action and to review and set aside the third respondent's disciplinary proceedings pursuant to the provisions of PAJA (prayer 4).

[11] In the further alternative, he asks for the review and setting aside of the first respondent's decision (prayer 1).

The Court's Analysis and Finding

[12] I am satisfied that a proper case has been made for what Mr Franklin for the applicant, who appeared together with Mr Bester and Mr Nalane, terms the applicant's "main relief" in prayer 2. The applicant avers in his founding papers that the third respondent "elected, with full knowledge of the relevant facts, not to pursue disciplinary charges" against him within a reasonable period of its becoming aware of those facts; that it is bound by that election and that it has thereby ipso facto waived any right it may have had to institute disciplinary proceedings against him some time in the future.

[13] To this, the third respondent's answer is essentially in two parts. First, it says the Group Chief Executive Officer under whose watch the applicant was charged is "not bound by any previous decision of his predecessor regarding the question of whether or not disciplinary action could be taken against the Applicant". This is an extraordinary submission. The applicant's submission is that the third respondent (not its erstwhile Chief Executive) as a juristic person made an election not to pursue disciplinary charges against him. Thus, it is not an answer to say the incumbent Chief Executive is not bound by the decision of his predecessor in this regard.

[14] In any event, the third respondent does not deny that it elected not to pursue disciplinary proceedings against the applicant. A Chief Executive carries out the instructions of the board to which he is accountable. Thus, in making that election, the erstwhile Chief Executive must have had the blessing of the board and would not have made such a decision on a frolic of his own. It would then not be legally competent for a successor (or even the board) simply to reverse that decision some two years later and on the eve of the expiry of the applicant's contract of employment.

[15] Such conduct has been characterised by our Courts as impermissible "blowing hot and cold". In *Chamber of Mines of South Africa v*

National Union of Mineworkers and Another 1987 (1) SA 668 (A) Hoexter JA put it thus at 690D-G:

> "One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in *Angehrn and Piel v Federal Cold Storage Co* Ltd 1908 TS 761 at 786:
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> > 'It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant . . . . He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. *Quod semel placuit in electionibus amplius displicere non potest* (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place.'"

[16] It must be pointed out that Hoexter JA did caution that Bristowe J's statement of the principle may require amplification. He did so by referring to Spencer Bower's *Estoppel by Representation* (1923) para 244 at 114 – 15 in which the following was said:

> "It is not . . . quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke's phraseology: *quod semel in electionibus placuit amplius displicere non potest*, as if mere mutability were for its own sake alone banned and penalised by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none."

[17] Well, the applicant raises an objection to the third respondent's *volte face*. So there we are.

[18] The second part of the third respondent's answer to the election argument is equally extraordinary. Mr Maserumule valiantly pronounced (this can hardly be considered a submission because nothing more than a mere statement was advanced) that the applicant "was not prejudiced by the timing of the decision to take disciplinary action against him". The applicant has been biffed by the first respondent on the sole ground that his referral of an unfair labour

practice for an arbitration arising from the institution of a disciplinary hearing against him more than two years after the events giving rise to it is academic and will serve no purpose since he is no longer an employee of the third respondent. But had the disciplinary proceedings been instituted within a reasonable time of the third respondent becoming aware of the events giving rise thereto, this clear prejudice to the applicant would not have arisen.

[19] *A fortiori*, the applicant has approached this Court (and the second respondent before that) because of the actual prejudice occasioned by the third respondent's delay in instituting disciplinary proceedings against him, assuming for a moment that it is at large to institute such proceedings after previously electing not to do so. (In my view it is not.) The prejudice against the applicant is thus manifest.

[20] The applicant has submitted that if prayer 2 (and, consequentially, prayer 3) were granted, then it would be unnecessary to consider prayer 1. Prayer 4 is an alternative to prayers 2 and 3 and so it is unnecessary to deal with it.

Order

[21] In the circumstances, I make the following order:

(a) It is declared that the third respondent was precluded, on account of its binding election or waiver, from instituting and pursuing disciplinary proceedings against the applicant on 3 October 2006, 20 December 2006 and 21 December 2006.

(b) It is further declared, for the same reason mentioned in paragraph (a) above, that the third respondent was precluded from imposing any sanction on the applicant following such disciplinary proceedings, including the sanction of written warnings that it did impose on him.

(c) The disciplinary proceedings instituted and pursued against the applicant on 3 October 2006, 20 December 2006 and 21 December 2006, are set aside.

(d) The sanctions imposed by the third respondent (through its Group Chief Executive Officer) on the applicant are hereby expunged and the third respondent is directed to give effect to this order by removing any record of such sanction against the applicant from its records.

(e) As a necessary consequence of the setting aside of the disciplinary proceedings against the applicant, the ruling of the chairperson of those proceedings is also set aside.

(f) The third respondent is ordered to pay the costs of this application including the costs occasioned by the employment of two counsel.

Ngalwana AJ

Appearances

For the applicant:	*A Franklin SC, C Bester and J Nalane*
Instructed by:	*Jurgens Bekker Attorneys*
For the respondents:	*Mr P Maserumule*
Instructed by:	*Maserumule Inc*
Date of hearing:	*14 November 2008*
Date of judgment:	*16 December 2008*