IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

NOT REPORTABLE

CASE NO: J2608/08

2008-12-17

In the matter between

BABELEGI MOTOR VEHICLE TESTING STATION **First Applicant**

T/A TSHWANE EAST TESTING STATION

D C LUYT **Second applicant**

And

M H A LABUSCHAGNE **Respondent**

J U D G M E N T

VAN NIEKERK J

This is an urgent application in which the applicants seek an order declaring that the respondent was dismissed by the first applicant on 13 November 2008, pursuant to a disciplinary hearing into allegations of

misconduct. The applicants also seek orders interdicting the respondent from attending at the first applicant's premises and from being involved in or interfering in the business, and from intimidating employees and members of the first applicant.

The application was initially launched as an application for interim relief. When the matter was argued, a full set of affidavits had been filed and the matter was dealt with as an application for final relief. That being so, it is incumbent on the applicants to establish a clear right to the relief they seek, the absence of any alternative remedy, and that the harm they apprehend will be irreparable should relief not be granted.

The applicants explained the primary purpose of their application as being to interdict the respondent from attending at the business of the first applicant, until such time as a competent tribunal has ruled that he should be reinstated or as afforded him some other relief.

Mr Van As, who appeared for the respondent, submitted that the applicants effectively seek an eviction order, relief that falls outside of the scope of this court's jurisdiction. And on that basis he questioned the court's jurisdiction to entertain the application.

This court is of course a creature of statute and has no inherent powers beyond those conferred on it by Section 157(1) of the Labour Relations Act. While these powers do not, on the face of it, extend to certain of the

consequential relief sought by the applicants, it is competent for this court, in my view, to grant orders in relation to the existence or otherwise of a dismissal as defined by Section 188(1) of the Labour Relations Act; effectively the primary declaratory relief sought in terms of paragraph A of the Notice of Motion, I intend therefore to deal with the merits of the application on that basis.

A dismissal is a termination of an employment contract by an employer with or without notice. This requires proof of some overt act by the employer that is the proximate cause of the termination of the employment contract. It goes without saying that this is a factual enquiry and that the existence of any dismissal is to be objectively determined.

In the present instance, it is common cause that an independent chairperson, Advocate Jan Hiemstra SC, was appointed to chair a disciplinary enquiry into allegations of misconduct levelled against the respondent, who is described as the manager of the first applicant. It is also common cause that at the relevant time the respondent's son, Eugene Labuschagne, effectively owned 50 percent of the member's interest in the first applicant, and that the second applicant and his son owned 19 percent and 17 percent of that interest respectively. It is also common cause that the relationship between the Labuschagnes and the Luyts was fraught and remains so, to the extent that their business relationship was a subject of litigation in the High Court.

Advocate Hiemstra convened the disciplinary enquiry on 30 October 2008. The respondent was represented by counsel who requested a postponement of the proceedings pending the finalisation of certain matters in the High Court and challenged the first applicant's authority to institute the enquiry. Advocate Hiemstra ruled against the respondent on both issues. The respondent then withdrew from the enquiry which continued in his absence.

On 9 November 2008, Advocate Hiemstra furnished written findings in which the respondent was found guilty on all charges. Advocate Hiemstra recommended that the respondent be dismissed with immediate effect.

There was some suggestion that Advocate Hiemstra's findings constituted more than a recommendation but the terms of Advocate Hiemstra's findings are clear; he did not regard himself as having a brief to impose a disciplinary sanction himself, he was to conduct an enquiry and in the light of his factual findings to recommend an appropriate disciplinary penalty.

On 13 November 2008, a meeting of members of the first applicant was held. The second applicant tabled Advocate Hiemstra's findings and recommendation and informed the respondent that he was dismissed with immediate effect. The second applicant did so in his capacity as chairperson of the first applicant and as the member of the management committee. The second applicant holds these positions by virtue of the terms of the members' agreement.

The respondent's son, Eugene Labuschagne, then tabled 17 resolutions, one of which proposed the reappointment of the respondent as manager of the first applicant. The second applicant avers that at this point, he and his son exercised the right afforded them in terms of the member's agreement and vetoed the reappointment of the respondent. On this basis, the applicants aver that the respondent remains validly dismissed and that they are entitled to the declaratory orders that they seek.

The existence of any dismissal of the respondent is to be determined by reference to the events at the meeting held on 13 November and the validity of the actions taken by the Luyts and Labuschagnes respectively.

The relevant provisions of the membership agreement read as follows, I refer to paragraph 3:

> *"Tinus Labuschagne will be the manager in charge of all operations. D C Luyt will be chairman. The chairman and the manager will form the management committee in charge of all financial affairs and all decisions will be taken by consensus. The management committee will not hold formal meetings but any disagreement will be referred to a members' meeting for discussion and resolution. A members' meeting may overrule prescribed or limit the scope of decisions taken by the management committee."*

Paragraph 6.6 of the member's agreement provides:

> *"Resolutions at meetings. Members shall be decided on a simple majority (51% of members' interest) and all resolutions of the corporation will be properly recorded in a minute book."*

Paragraph 7 provides:

> *"A member of the corporation present in person at any meeting of the members shall, whether of show of hands or by a poll, have the number of votes that corresponds with the percentage of his member's interest."*

And finally, paragraph 6.12 which provides:

> *"The present lessor may veto any resolution that threatens his investigation. The present lessor is obliged to supply his reasons in writing if requested to do so by the members which reasons will then be included in the minute book."*

I refer further to the heads of agreement annexed to the members' agreement and in particular paragraph 16 thereof, that paragraph provides:

> *"DCL and CJL (being the second applicant and his*

son) sal nie deelneem aan die daaglikse bedryf van die besigheid nie maar sal 'n wete reg hê ten opsigte van die finansies, uitbreiding en of kapitaal aankope van die organisasie."

The reference to the "present lessor" should be read together with the definitions clause, and in particular clause 1.2.12 of the members' agreement which provides as follows:

"Lessor means the member of Branderstraat 284 BK duly authorised by its members to transact business with the corporation. "Present lessor" means the lessor who is also a member of the corporation."

While there can be doubt, as the applicants submit, that an employer is entitled to take action against an employee who has committed serious misconduct and that the employer is ultimately entitled to terminate that employee's employment, I am not persuaded that in the present instance, the applic`nts have established that the respondent has been dismissed, a fact on wiich their claim to a cldar right is predicated.

The second applicant max well be t(e chair of the firct ap0licant "ut it does not follow dHat he has the right to unilaterally terminate the respondent's employment. The same observation extends to the second applkcant's wearing thu hat of the`management committee of which he was at the relevant`time the sole member.

The respondent's version is 4hat at the meeting the second applicant simply informed the respondent that he was dismissed and that Advocate Hiemstra's recommendation was not put to the members' meeting for discussion nor for a vote. This version is supported by the minutes of the meeting annexed to the applicants' founding affidavit. On this basis alone, there must be significant doubt as to whether the respondent was validly dismissed.

I say this because the terms of the members' agreement and those paragraphs to which I have referred, clearly subordinate both the chairperson and the management committee to the members' meeting. The minutes record further that after the second applicant's announcement of the respondent's dismissal, the member with the majority interest, i.e. Eugene Labuschagne tabled and voted in favour of a resolution that effectively reappointed the respondent to the position of manager. Insofar as any right of veto is concerned, it seems to me that on a reading of the members' agreement no member enjoys any general right of veto, and that the threat to the lessor's "investment" referred to in paragraph 6.12 of the member's agreement is a reference to the lease agreement concluded between the first applicant and the landlord of the premises on which it conducts business, an entity in which the second applicant clearly has an interest.

Similarly, in paragraph 16, the heads of agreement do not equivocally

establish a right of veto in respect of the appointment of staff or the termination of their employment.

In coming to these conclusions, I do not purport to make any definitive findings in regard to the interpretation and application of the members' agreement. Like the relationship between the Montagues and the Capulets, the feud between the Labuschagnes and the Luyts that underlies this matter may well have further consequences in another forum.

I refer to these provisions only in the context of the present enquiry into the existence or otherwise of a dismissal as defined by Section 188 of the Labour Relations Act and as an integral part of an enquiry into all of the relevant facts, ultimately to determine whether, for the purposes of this application, the applicants have established a clear right in the form of the dismissal of the respondent.

In my view, for the above reasons, the applicants have failed to establish on a balance of probabilities that the respondent has been validly dismissed. Their application for a declaratory order to that effect must accordingly fail.

My conclusion on this aspect of the application has the consequence that it is unnecessary for me to consider the alternative arguments advanced by Mr Van As, as to why the application should not succeed. I have

assumed for the purposes of this judgment and without making a ruling to that effect that the applicants have the necessary authority to bring this application but given my finding on the merits of the application, it is not necessary for me to express a view on this issue and refrain from doing so.

In the result, **the application is dismissed with costs**.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 17 December 2008

Date of Judgment: 19 December 2008

Appearances:

For the applicant Adv R Venter

Instructed by Hannelie Basson Attorneys

For the Respondent Adv M Van As

Instructed by Macrobert Inc.