IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO.: C611/07

In the matter between :

SAMWU (OBO M. ABRAHAMS & 106 OTHERS) Applicant

and

CITY OF CAPE TOWN Respondent

JUDGMENT

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[1] This is an application for an interdict relating to pending disciplinary proceedings against a large number of the Applicant's members.

[2] The proceedings were initially launched as an urgent application for a rule *nisi*. Subsequently the matter was fully canvassed in various sets of affidavits exchanged between the parties as well as extensive written and oral argument at two sittings of this Court. Under these circumstances Applicant is presently seeking a final order in the following terms :

> *"2.1 Declaring the disciplinary proceedings embarked upon by the Respondent in respect of Applicant's members (per Annexure "A" hereto) to be in breach of the collective agreement between Applicant and Respondent dated 3 February 2004;*
>
> *2.2 Interdicting and restraining the Respondent from in anyway persisting with the aforesaid disciplinary proceedings in respect of Applicant's members other than in compliance with the aforesaid collective agreement;*

…

2.4 Ordering that the costs of this application be paid by Respondent."

[3] The matter arose from an incident on 15 August 2007 when a group of Respondent's Metro police officers caused a blockade of the N2 freeway into Cape Town. Pursuant to this incident the Applicant's members in question were charged with misconduct. The alleged misconduct is of a potentially serious nature and is set out as follows in the relevant charge sheet :

"CHARGES OF COLLECTIVE MISCONDUCT

1. Following your suspension with regard to the events of 15 August 2007, you are hereby charged with the following misconduct :

CHARGES

It is alleged that you collectively, and with common purpose, alternatively by association or making common cause with the collective, on 15 August 2007 :

1.1 Participated in an illegal and unlawful strike, whilst being an essential service employee and in breach of the collective agreement and your contract of employment;

1.2 Deliberately and intentionally blockaded the N2 freeway into Cape Town during peak traffic hour, causing extensive disruption to thousands of commuters utilising

such freeway, causing such commuters to be late for work and other appointments, and occasioning consequential disruption to the businesses employing such commuters, and necessitating the City to incur additional financial expenses, through payment of additional overtime in the amount of R115 000;

1.3 Committed further unlawful acts by removing vehicle registration plates from Metro Police vehicles, and carrying firearms while not engaged in your duties as a police officer, without authorisation, and by taking part in an illegal gathering in contravention of the Gatherings Act.

1.4 Your and the collectives' aforesaid conduct brought the City, your employer into disrepute, disrupted the lives and activities of a great many members of the public, and businesses, and undermined law enforcement in the City."

[4] A dispute arose between the parties concerning the procedure to be followed at the proposed disciplinary proceedings. This in effect resulted in the present application. In summary Applicant contended that the procedure set out in the National Collective Agreement concluded under the auspices of the South Africa Local Government Bargaining Council concerning disciplinary procedure ("the collective agreement") should apply, while Respondent is

desirous of following an abridged procedure in what has been referred to as a *"collective hearing"*.

[5] The collective agreement was concluded on 3 February 2004 by the South African Local Government Association, the Independent Municipal and Allied Trade Union ("IMATU") and Applicant. Although the agreement provides that it shall terminate on 31 January 2007 it was subsequently extended to 31 December 2007 and was accordingly operative at the time when the relevant dispute arose between the parties. The agreement is binding on all Municipalities as well as all employees within the local government sphere.

[6] The purpose of the agreement is set out as follows in clause 4 thereof :

> *"4.* ***INTENT***
>
> *4.*1 *The purpose of this Code is to establish a common and uniform procedure for the management of employee discipline and to replace all existing procedures and regulations.*
>
> *4.2 The Code is a product of collective bargaining and the application thereof is peremptory and is deemed to be a condition of service."*

[7] The agreement provides as follows with regard to the procedure applicable to disciplinary proceedings :

> *7.* ***CONDUCT OF THE ENQUIRY***
>
> *7.1 The hearing shall be conducted by the Presiding Officer who may determine the procedure to be followed subject to the following:*
>
> *7.1.1 the rules of natural justice must be observed in the*

conduct of the proceedings;

7.1.2 unless otherwise agreed to by the parties, the hearing must be adversarial in nature and character; and

7.1.3 the Presiding Officer in discharging this obligation is to exercise care, proceed diligently and act impartially.

7.2 The Prosecutor shall bear the duty to commence and the burden to prove each and every allegation(s) on a balance of probabilities set out in the Notice of Misconduct.

7.3 In discharging these duties, the Prosecutor shall be entitled to call before the Disciplinary Tribunal any witnesses and produce any books, documents or things and :

7.3.1 subject to legal objection cross-examine any witness called to testify on behalf of the employee and inspect any books, documents or things produced; and

7.3.2 present argument based on the evidence in support of any submission.

7.4 The Employee summoned before the Disciplinary Tribunal shall have the right to be heard in person or through a representative and to call before the

Disciplinary Tribunal any witness and produce any books, documents or things; and

7.4.1 cross-examine any witness subject to legal objection called to testify on behalf of the employer and to inspect any books, documents or things produced; and

7.4.2 present argument based on the evidence in support of any submission.

7.5 The Presiding Officer shall have the power to :

7.5.1 determine the procedure to be followed for the conduct of the enquiry that he deems appropriate with a minimum of legal formalities, provided that the rules of natural justice shall be observed;"

[8] It is largely the above procedure that Applicant contends should be followed in the disciplinary proceedings against its members.

[9] In terms of clause 16 of the collective agreement any party may refer a dispute about the interpretation or application of the agreement to the Central Council of the Bargaining Council. Applicant has referred the dispute between the parties for determination to the Bargaining Council. The referral is presently pending.

[10] The agreement provides as follows with regard to exemptions from its provisions :

17. ***EXEMPTIONS***

17.1 Any person or Party bound by this Agreement shall be entitled to apply for exemption from this Agreement.

17.2 All applications for exemption from any provisions of this Agreement shall be in writing and lodged with the General Secretary. Such applications shall contain :

17.2.1 all material details of the Applicant;

17.2.2 the exact collective agreement or provisions of a collective agreement from which the Applicant seeks exemption;

17.2.3 detailed grounds on which such exemption is sought.

…"

[11] The abridged procedure contended for by Respondent is in conflict with the abovementioned provisions of the collective agreement. The abridged procedure has been agreed to and recorded in a written agreement concluded between Respondent and IMATU and effectively provides for the disciplinary charges to be decided on documentary and real evidence as opposed to oral testimony and cross-examination.

[12] In the absence of any agreement between the parties, the disciplinary matter proceeded before a private arbitrator appointed in terms of the agreement between Respondent and IMATU. At the commencement of the proceedings before the private arbitrator, Applicant raised its objections to the procedure agreed upon between Respondent and IMATU and insisted that the procedure set out in the collective agreement should be followed. The arbitrator overruled Applicant's objections and held that the proceedings would continue in accordance with the abridged procedure agreed upon between Respondent and IMATU, provided that the proceedings will be conducted as a pre-dismissal arbitration in respect of IMATU and its members and as a disciplinary hearing in respect of Applicant and its members. An order was granted by this Court by agreement between the parties that the disciplinary proceedings would be stayed in respect of Applicant and its members pending finalisation of the present application.

[13] Respondent has raised two points in *limine* relating to the Court's power to

interfere in uncompleted disciplinary proceedings and urgency respectively. Insofar as the latter issue is concerned, the matter has been fully canvassed in the sets of affidavits exchanged between the parties as well as in extensive written and oral argument. The matter is accordingly ripe for a decision and there has been no complaint from Respondent that it had been deprived of an opportunity to put its case fully before the Court. In any event, the matter is clearly urgent in my view in that Respondent was in the course of proceeding with the disciplinary proceedings against Applicant's members (despite the dispute between the parties) on potentially serious allegations of misconduct. There is accordingly in my view no merit in Respondent's argument concerning urgency. The latter issue has in any event become academic.

[14] Insofar as the remaining point in *limine* is concerned, it was submitted on Applicant's behalf that the weight of authority in the Labour Court and the High Court has established the principle that Courts will not ordinarily interfere in partially completed disciplinary proceedings and that the legal position was properly summed up as follows in **Mantzaris v University of Durban-Westville and Others (2000) 21 ILJ 1818 (LC) at 1827 A**, namely that :

> *"… The attitude of our Courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until it has run its course, except in exceptional circumstances."*
>
> **(cf. Laggar v Shell Autocare (Pty) Ltd & Another (2001) 22 ILJ 1317 (C) at 1324 J; Olivier v MTN Management Services & Another (2006) 27 ILJ 547 (W) at 554 J – 555 A; Van Wyk v Midrand Town Council & Others 1991(4) SA 183 (W); University of the Western Cape Academic Staff Union & Others v University of the Western Cape (1999) 20 ILJ 1300 (LC))**

[15] I am prepared to accept for present purposes that this is a correct statement of the legal position. Having considered the matter, I am persuaded that the facts of this matter constitute exceptional circumstances justifying interference in the pending disciplinary proceedings. In this matter a large number of Metro police officers are facing potentially serious allegations of misconduct which could very well result in dismissals. Respondent's decision to proceed with disciplinary proceedings in accordance with an abridged procedure which is in conflict with the express terms of

the national collective agreement and in *prima facie* violation of the fundamental right to fair labour practices is a matter which patently requires the attention of this Court.

[16] It follows in my view that this is a matter where it is justified for the Court to intervene in the pending disciplinary proceedings. I should add in passing that I do not share the doubt expressed in **Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & Another (1998) 19 ILJ 635 (LC)** whether this Court has jurisdiction to deal with issues relating to the procedural fairness of a disciplinary enquiry. Section 23(1) of the Constitution in my view, introduces into the employment relationship a reciprocal duty to act fairly **(Denel (Pty) Ltd v Vorster (2004) 25 ILJ 659 (SCA) at 665 D)**. Where this reciprocal duty is breached, section 38 of the Constitution enjoins the Court to grant appropriate relief which, in my view, would include an interdict in respect of pending disciplinary proceedings. This issue has not been fully canvassed in these proceedings and there is no need for me finally to decide the issue. I proceed to consider the merits of the matter.

[17] Applicant's case is summarised as follows in the supplementary written submissions made on its behalf :

> "*4. The Applicant contends that the Respondent is bound by a collective agreement regulating discipline. This agreement applies to all forms of disciplinary action initiated by the Respondent and its terms and provisions are described as peremptory. The agreement does not distinguish between collective and individual misconduct hearings.*
>
> *5. In terms of the SCA decision of Denel (Pty) Ltd v Vorster the Respondent is bound to the terms of the agreement and the Applicant may insist on compliance with that agreement irrespective of the fairness or otherwise of the alternative procedure.*
>
> *6. In essence, the Applicant is entitled to demand specific*

performance. At best, the Court may interpret the provisions of the agreement, but only to the extent that these are ambiguous or unclear.

7. We submit that Denel is binding on this Court and should be applied. We submit that this is conclusive of the matter and establishes the right relied upon by the Applicant, it being common cause that the alternative procedure employed by Respondent derogates from the provisions of the collective agreement.

8. Furthermore, if the agreement is binding then it must bind the Respondent in respect of all of its provisions, and not just those which the Respondent finds convenient to apply.

9. In the alternative, and only in the event of the Court finding that the agreement is not binding upon the Respondent, we submit that the disciplinary procedure employed by the Respondent is so at odds with the requirements of fairness that a breach of the right has taken place."

[18] Respondent's case can be summarised as follows :

18.1 The Courts recognise the rights of an employer to institute collective disciplinary hearings in instances where a number of employees associate themselves with a course of conduct which amounts to a disciplinary transgression;

18.2 The national collective agreement does not provide for collective disciplinary hearings. This cannot mean that Respondent is precluded from holding such collective hearings. This would only be the case where Respondent waived its rights in respect of matters not covered by the collective agreement and in particular the holding of collective disciplinary hearings. A waiver is not readily assumed and there is no indication of any intention by Respondent to abandon its right to hold collective disciplinary hearings;

18.3 Many of Respondent's employees like Applicant's members, are engaged in essential services. It makes no sense that collective misconduct by such employees cannot be addressed collectively but that the employees must be disciplined individually with inevitable substantial disruptions to the essential service which the employees in question are obliged to provide;

18.4 In any event the fact that an employer departs from the requirements of an agreed disciplinary code does not *per se* render the procedure unfair. The employer may not, however, arbitrarily or for no valid reason depart from the

provisions of the disciplinary code. An employer may depart from a disciplinary code, even if embodied in a collective agreement provided there are valid and cogent reasons for doing so particularly where the departure is substantial or fundamentally impacts on the hearing;

18.5 The procedure set out in the national collective agreement is wholly impracticable in the instant matter and a departure from such procedure is justified. In matters of group misconduct the employer need not specifically identify the role played by each individual employee. An individualised process would result in substantial delay to the prejudice of Respondent who has to pay the substantial monthly salary bill in respect of the suspended employees. In any event fairness requires no more than that each employee is afforded a full and fair opportunity of putting forward reasons showing that he or she did not participate in the group misconduct or to show cause why any collective sanction decided upon should not be applied to them;

18.6 The envisaged procedure affords each employee a full and adequate opportunity of stating their case;

18.7 Common law contractual principles do not support the unconditional application of the national collective agreement in that the Court has a discretion to grant or refuse an order for specific performance. The exercise of the discretion depends on the facts of the particular case. One of the factors which may be taken into account is that specific performance would operate unreasonably harshly on the employer. The issue of hardship is frequently considered together with another factor, namely whether the claimant has another adequate remedy. In the instant case, if any employees are unfairly dismissed they have a right of appeal, can refer an unfair dismissal dispute to the Bargaining Council and have at their disposal the full spectrum of remedies provided by sections 193 and 194 of the Labour Relations Act 66 of 1995;

18.8 The Applicant erroneously contends that disciplinary proceedings are governed and judged by the norms and standards applicable to criminal procedures. All that is required in disciplinary proceedings is that the employee is appraised of the charge, is allowed to state his case, and that the matter is considered in a *bona fide* manner. The principles of natural justice do not require, invariably or even of necessity, the incorporation of the criminal justice evidentiary and procedural rules. The right to appear personally before a tribunal, and to call and cross-examine witnesses, is not a necessary component of the principles of natural justice. The criminal law requirement that evidence may only be given *viva voce* is thus not automatically and invariably applied to disciplinary proceedings. This does not mean the collective disciplinary enquiry involves a reverse onus. All of Applicant's members appear to rely, in *vacuo* on a criminal law right to remain silent and to require that the case against them be proved. No such right exists in disciplinary proceedings. This Court therefore cannot interfere in the uncompleted proceedings and issue the blanket ban which the order sought by the Applicant would entail;

18.9 The Court must consider the practical consequences of the order which the Applicant seeks. If the individual hearings which Applicants contends for are allowed, this will result in inordinate delays in finalising the matter.

[19] In evaluating the matter, it should be pointed out that it is common cause that Respondent is bound by the national collective agreement. The latter is part of its employees' conditions of service and its application is peremptory. It is furthermore not seriously in contention that the abridged disciplinary procedure to be applied by Respondent is in conflict with the terms of the collective agreement.

[20] The legal position that obtains in this regard has been stated as follows in **Denel (Pty) Ltd v Vorster *supra* at 664 H-I :**

> *"It might be that the construction advanced by the Appellant would create a disciplinary regime that was equally acceptable (whether that is so is by no means certain) but that is not the test : through its disciplinary code, as incorporated in the conditions of employment, the Appellant undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the Appellant unilaterally to substitute something else."*

[21] The following dictum at 665 E of the judgment is equally apposite :

"The procedure provided for in the disciplinary code was clearly a fair one – it would hardly be open to the Appellant to suggest that it was not – and the Respondent was entitled to insist that the Appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the Appellant was just as good."

(emphasis supplied)

[22] The decision in **Leonard Dingler (Pty) Ltd v Ngwenya (1999) 20 ILJ 1171 (LAC)** does not constitute contrary authority as contended by Respondent. In that matter, the Court had to decide whether a relatively minor deviation from the terms of the disciplinary code would render the disciplinary proceedings in question, invalid. The Court held that disciplinary codes are guidelines which can be applied in a flexible manner. It concluded that having regard to all the circumstances the proceedings in issue, while not conducted strictly in accordance with the disciplinary code, were substantially fair, reasonable and equitable. The judgment patently does not deal with the right of an employee to require strict compliance with the terms of a peremptory disciplinary code. This distinction is crisply set out as follows in **Riekert v Commission for Conciliation, Mediation and Arbitration & Others (2006) 27 ILJ 1706 (LC) at para [14] :**

> *"I am of the view that the Applicant herein is entitled to insist that the Third Respondent abide by its contractual undertaking, namely to comply with the disciplinary code and procedure. I believe the Third Respondent failed to do so. However, that is not the issue herein. Rather, the question is whether the Commissioner was justified in his conclusion that the Third Respondent's conduct was procedurally fair notwithstanding the fact that he did not comply with all the terms of its own disciplinary code and procedure. (The Third Respondent conceded both at the arbitration and before me that it had not complied in every respect with its own disciplinary code.)"*

[23] It follows in my view that in the circumstances of the instant case, Applicant is entitled to insist that Respondent comply with the national collective agreement and the stipulated procedure for disciplinary proceedings. Applicant accordingly has established a clear right to the relief being sought in these proceedings. In my view the remaining requirements for a final interdict, namely an injury actually committed or reasonably apprehended as

well as the absence of a satisfactory alternative remedy have equally been satisfied in the circumstances of this case. It is readily apparent that Respondent is intent on proceeding in accordance with the abridged procedure. Moreover, continuing with the referral of the dispute to the Bargaining Council or the eventual referral of dismissal disputes in the ordinary course to the Bargaining Council with the concomitant delays, clearly does not constitute a realistic or satisfactory alternative remedy.

[24] There is no merit in my view in Respondent's argument concerning the scope of the collective agreement. The collective agreement patently covers all disciplinary proceedings and its application is expressly made peremptory. Where the provisions of the collective agreement might be inappropriate in a given case, any party is expressly authorised to apply for an exemption from some or all of its terms. This is obviously the course of action that Respondent must follow, if it contends that the applicable procedure is inappropriate in the case of the pending disciplinary proceedings against Applicant's members. It was not entitled to unilaterally opt for an abridged procedure which it considers to be more appropriate or even equally good.

[25] The above conclusion is in effect dispositive of the matter. For the sake of completeness it should be pointed out that I have considered the remaining contentions of Respondent as summarised above. In my view, there is no merit in any of these contentions and none of them militate against the granting of the relief being sought herein. There is specifically no merit in the contention that Applicant is misguidedly seeking to incorporate the rules applicable to criminal proceedings into the pending disciplinary hearing. It is obvious that Applicant requires nothing more than that the disciplinary procedure expressly provided for in the collective agreement should be adhered to by Respondent. The alleged impracticality of the collective agreement or the potential hardship which might result to Respondent pursuant to a disciplinary hearing conducted in accordance with the provisions of the collective agreement do not warrant a unilateral deviation from the terms of such agreement. These might be factors which are relevant to an application for an exemption in terms of the collective agreement but they certainly do not constitute a bar to the relief being sought herein.

[26] In the circumstances I make the following order :

(a) It is declared that the disciplinary proceedings embarked upon by the

Respondent in respect of Applicant's members (per annexure "A" to the Notice of Motion) are in breach of the collective agreement between Applicant and Respondent dated 3 February 2004;

(b) Respondent is interdicted and restrained from in any way persisting with the aforesaid disciplinary proceedings in respect of Applicant's members other than in accordance with the aforesaid collective agreement;

(c) Respondent is ordered to pay the costs of this application.

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DENZIL POTGIETER, A.J.