IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 1255/02

In the matter between:

SS MAIMELA APPLICANT

AND

UNIVERSITY OF SOUTH AFRICA RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction1

[1] The Applicant, Prof Maimela claims that his dismissal by the Respondent (UNISA) was automatically unfair in terms of section 187(1) (d) and (f) read with sections 3 and 5 of the Labour Relations Act 66 of 1995 (the LRA). The relief he seeks is that he be compensated by UNISA to the equivalent of 24 (twenty four) months remuneration in terms of section 194 (3) of the LRA.

[2] The Applicant had also brought an application to amend his statement of case. The essence of the amendment was to include the issue of procedural unfairness, which was never included in the referral to conciliation, as part of the cause of action. This Court dismissed the application to amend the statement of claim with costs.

Background facts

[3] The facts giving rise to the Applicant's claim relates to the appointment of Dr Pityane as principal and vice-chancellor of UNISA. The Applicant who previously acted as the principal of UNISA was one of the applicants for the position of principal/vice-chancellor which was advertised during April 2001.

[4] After the appointment of Dr Pityana, the Applicant was relieved of his acting responsibilities and advised that he should revert back to his position as vice-principal (tuition). The Applicant was clearly not happy with the appointment of Dr Pityana. It is also apparent that prior to the appointment of Dr Pityana, the Applicant had a conflictual relationship with the chairperson of UNISA's Council, Mr Motimele. It should be noted that at the time of the Applicant's acting appointment, the post of principal and vice-chancellor had already been advertised.

[5] The Applicant was charged with several acts of misconduct some of which arose prior to the appointment of Dr Pityana and others relating mainly to his reaction and defiance of authority of the newly appointed principal and vice-chancellor Dr Pityana. He was charged with the following offences:

> *"(1) Contravening or attempted to contravene, either intentionally, or negligently, a directive of the University;*
>
> *(2) Either intentionally or negligently refused, or failed to carry out lawful instruction issued within the University context, or contrary to such instructions;*

(3) Behaved improperly or unfittingly;

(4) Knowingly made a false or inaccurate statement which may have prejudiced or harmed the University

(5) Where at the time of the conduct in question such consequences were foreseen or were reasonably foreseeable, conducted yourself in a manner which resulted, or may reasonably have resulted in any/orall of the following consequences:

(i) harming the University's good reputation;

(ii) prejudicing or imperilling the maintenance of order, and security at the University;

(iii) prejudicing or imperilling the smooth course of administration and general activities of the University.

(6) Acted contrary to, or failed to act in the manner which may reasonably be expected of you in terms of your conditions of service."

[6] As already indicated the above charges were based on several incidences of misconduct which the Applicant had committed during the period when he was acting as the principal, prior to the appointment of Dr Pityana and the others when he was supposed to have reverted back to his position as vice- principal (tuition).

[7] The Applicant is accused of instructing the acting head of the department of building administration Mr Dalton, to change the locks of the offices of the Council of the University during November 2001. This instruction which the Applicant issued at the period he was acting as principal was confirmed in a letter addressed to the chairperson of the University, Mr Motimele. It was alleged that the purpose of changing the locks was to deny Council of the University access to those offices. This instruction was repeated during December 2001 and confirmed in a letter addressed to Mr Dalton by the Applicant.

[8] Failure to obey lawful instruction relates to failure by the Applicant to implement the resolution of the management committee that arrangements be made to locate the office of the Chairperson of Council on the 10th floor of Theo Wijk Building. The other failure to obey the instructions concerns refusal to implement the decision of the executive committee taken during February 2000 in terms of which certain individuals were to be seconded to management positions for a period of three years. The Applicant refused to implement the resolution and confirmed his refusal through an email which he distributed to all other University employees on the 26th November 2001.

[9] The incidents that occurred after the Applicant was supposed to have reverted back to his position as vice-principal (tuition) relate to undermining and challenging authority of the Council and the principal and vice-chancellor of the university, Dr Pityana. The essence of the incidences as listed in the notice

issued to the Applicant in terms of paragraph 3(6) of the Disciplinary Code for the Staff of the University relate to his:

- Refusal to obey the instruction of the Chairperson that he should meet with Dr Pityana and other management team members on the 27h November 2001 in the principal's office.

- Reneging on the undertaking that he accepted the authority of Dr Pityana.

- Claiming that he was the *defacto* and *de jure* Acting Principal and Vice – Chancellor of UNISA.

- Refusal to attend at the office of Dr Pityana on the 10th December 2001, despite lawful instruction to do so.

- Indicating in writing on 11th December 2001 that he would not recognise the authority Dr Pityana as the Principal of the University.

[10] The Applicant was also accused of having brought the good reputation of the University into disrepute. In this respect because of his conduct various articles were written in the print media about the University in particular in the Die Beeld, The Weekly Mail and Die Burger.

[11] The relationship between the Applicant and the Respondent deteriorated further when he was informed that his acting period had come to an end. The Applicant was appointed to act as principal and vice-rector after Prof Mell retired from the University. The letter which appointed him to act in that position dated 12th September 2001 reads as follows:

"It gives me great pleasure to confirm that at a recent meeting, the executive council approved your appointment as acting principal and vice-chancellor as from 6 September 2001 until the post has been filled."

[12] The Applicant was informed about the termination of his acting period by the then Chairperson of Council, Mr Motimele subsequent to confirmation of the appointment of Dr Pityana as the principal and vice-rector of the University.

[13] Initially there seem to have been a problem with the date of commencement of duties by Dr Pityana. He was in terms of his contract as head of the South African Human Rights Commission (HRC) supposed to have served three months notice. The issue of the notice period was however resolved between him and the Minister of Justice. His problem of leaving the HRC and having to start his work with the university was resolved when the Minister granted him leave of absence from the HRC during the month of December 2001.

[14] Having reached an agreement about his earlier departure from the HRC, Dr Pityana reverted back to Unisa and indicated that he could start his duties earlier than he had anticipated.

[15] In response to the notice of termination of his acting period, the Applicant addressed a letter to the chairperson of council wherein he stated the following:

"Dear Adv Motimele

I acknowledge receipt of a letter in which you purport to dismiss me from my position as acting principal and vice-chancellor.

I should not be needing to point out to a chairperson of council that, in terms of the delegation of powers of the University Council, only council itself has the power to dismiss me. In your case, however, it apparently needs pointing out that you have once again, in a manner that has marked your rule as chairperson, acted unprocedurally and autocratically and have also, once again, besmirched and sullied the reputation of this great institution.

I therefore reject your unilateral, unprocedural and undemocratic decision to dismiss me with the contempt it deserves.

I remain, acting principal and vice-chancellor of the University of South Africa.

PROFESSOR SS MAIMELA

ACTING PRINCIPAL, AND VICE-CHANCELLOR"

[16] In relation to refusal to implement the resolution to second certain staff members to certain positions as per the resolutions of both human resources committee and Exco of UNISA the Applicant respondent in an email in which he amongst others states:

"Although the university does not have fixed rules on secondment, the above secondments are not in keeping with the existing practice and they have already caused animosity in the university. More importantly, the secondments for a three year goes (sic) contrary to the Minister of

Education, Professor Kader Asmal, who has requested the university since May 2001 that any appointment which is longer than one year should be agreed to by the merger partners, namely, TSA/UNlSA/VUDEC."

The email went further to state:

"In the light of current council policy I have decided that, as long as I am chief executive officer not to implement the decision of the Executive of Council. Indeed to do otherwise will (be) a dereliction of duty oil my part as an accounting officer of this grand University. Moreover, it is my firm belief that policies and procedures that have been negotiated upon are as binding to Council itself as well as to all the employees of UNISA."

[17] The instruction to change the digital locks of the offices of Council by the Applicant was contained in a letter to Mr Dalton and reads as follows:

"Dear Mr Dalton

DIGITAL LOCKS ON THE TENTH FLOOR OF THEO VAN WIJK BUILDING ROOMS 10-01, 10-03, 10-05, 10-06

In my capacity as de facto and de jure Acting vice-chancellor and principal of the University of South Africa, until a new principal has been appointed, I hereby lawfully instruct you to install digital locks at the above-mentioned offices and provide me with entry pin code numbers with immediate effect.

Finally, ignore any contrary instruction from anyone else and if my orders are disobeyed by anyone including current temporarily seconded members of the Management Committee, leave it to me to deal with the matter regarding whether or not I should institute disciplinary hearings against the offending staff member – regardless of their purported current status which itself will be the subject of the review by the new interim council and is certainly going to be declared nul and void by the labour court in 2002.

Yours sincerely

PROFESSOR SIMON S MAIMELA

ACTING PRINCIPAL AND VICE-CHANCELLOR"

[18] The Applicant wrote another letter on 27th November 2001, in essence evicting the Chairperson from his office. The letter reads as follows:

"I am henceforth denying you access to the offices you have claimed for your use in the Theo Van Wijk Building.

It is for this purpose that the locks to said offices are being changed. You are requested to vacate the offices immediately."

[19] Dr Pityana suspended the Applicant from his duties in a letter dated 10th December 2001, with full pay pending disciplinary proceedings. The Applicant responded to the suspension in a letter dated 11th December 2001 and stated that:

"To engage in a messy war that had little to do between you and me. I want to tell you that I accept the challenge but assure you will not win the war you have started.

I do not recognize your authority as principal over me. The court will have to decide the legality of your appointment. Pending that outcome I will take no order or instruction from your or Motimele and their cohorts. This is my last communication to you and please refrains from interfering with my life."

[20] The disciplinary committee found the Applicant guilty of a number of charges and imposed the following sanction:

"1. Prof Maimela is reprimanded and cautioned, since this is a serious matter.

2. Prof Maimela is dismissed.

3. The dismissal, however, suspended for a term of two years on the following conditions:

(i) That Prof Maimela is not found guilty of the same contravention of the Disciplinary Code for Staff during the two years;

(ii) That Prof Maimela unconditionally apologizes to Council, stating that his commitment to Council; and

(iii) That Prof Maimela unconditionally apologizes to Dr Pityana and unconditionally accepts his authority and that Council has appointed him as Principal and Vice – Chancellor;

(iv) That the letter referred to in (ii) and (iii) be sent to the pro forma prosecutor before close of business on the 15th May 2002 and she would then send this through to the Principal and Council. The Committee shall determine whether the letters comply with the required conditions."

[21] In compliance with the conditions set out in the decision of the disciplinary committee, the Applicant addressed two letters of apology. The contents of both letters are essentially the same. In the letter in which the apology is addressed to Dr Pityana, the Applicant amongst others states:

"Dear Dr Pityana

Let me start this formal letter on an informal note: it was most heartening and friendly of you to have greeted me before my hearings started on 4 March 2002. During the hearings I also intimated that would be pleased to work under your principal and that your positive gesture before the hearings started, was most heartening.

In compliance with paragraph (2) above, I hereby unconditionally apologize to you and unconditionally accept your authority as Principal and Vice-Chancellor.

I am looking forward to resuming my work as Vice –Principal (Tuition) and working enthusiastically in a team with Council, yourself and management. I am ready to start work on Monday 18 March 2002 and will await our confirmation in this regard.

I note the Code provides for an appeal to Council and thereafter to the Minister. I am informed that legal recourse also lies in terms applicable labour legislation and the Constitution of the RSA. I reserve all my rights. I also note that Mr Tshehla, the chairperson of the committee, in answer to a question put by my attorneys via the pro forma prosecutor, acknowledge that these rights are reserved.

Yours Sincerely."

[22] The report of the disciplinary committee including the letters of the Applicant wherein he accepted the authority of Dr Pityana was served before the UNISA Council on 20th March 2002. An addendum explaining the condition attached to the suspended dismissal sanction was developed by one of the disciplinary committee members. The addendum explained that the suspension of the dismissal sanction was based on the unconditional apology to Dr Pityana and acceptance of his authority and appointment.

[23] The report of the disciplinary committee which served before the council on 20th March 2002, resolved that:

"Resolved that the verdict of the Staff Disciplinary Committee be respected and also that Prof SS Maimela had complied with the requirements laid down by the Staff Disciplinary Committee."

[24] On 8th May 2002 UNISA Council resolved as follows:

"(1) to reinstate its decision of 20th March 2002 to respect the decision of the Disciplinary Committee in the matter of Professor SS Maimela;

(2) that Professor Maimela is dismissed with effect from 8th May 2002 for failing to comply substantively with the conditions imposed by the Disciplinary Committee."

[25] This decision was communicated to the Applicant in a letter dated 10th May 2002. Following this letter the Applicant referred the dispute to the CCMA concerning an alleged automatically unfair dismissal.

[26] At the stage when the Applicant was informed that he was dismissed he had already filed an application challenging the appointment of Dr Pityana in the High Court under case number 4908/2002. In response to that application Unisa raised a point in *limine* based on the contention that the Applicant had irrevocably abandoned his right or cause of action by the letter dated 15th March 2002. Mojapelo J in dismissing the application and in dealing with the decision to suspend the dismissal of the Applicant had this to say:

"The applicant was clearly given a choice: he either had to accept immediate dismissal and continue his confrontation with council and questioning the appointment of the third respondent (Dr Pityana) and be free from any conditions; or he had to accept the conditions imposed, act in accordance therewith and stay off his immediate suspension."

[27] The Applicant instituted the High Court application during February 2002 soon after the charges were served on him. The parties had discussions, exchanged correspondence between them including through their attorneys regarding the possibility of withdrawing the High Court application. The Applicant had in correspondence with UNISA indicated his willingness to withdraw the case on condition he was allowed back to his job and to occupy the office he had occupied prior to the dispute.

Issues for determination

[28] The Applicant's case in as far as substantive fairness is concerned is based on discrimination in terms of section 187 (1) (d) and (f) of the LRA. At the beginning of his argument Mr Ackerman, for the Applicant indicated that although the Applicant had abandoned the issue of procedural fairness he persisted that it was still relevant. The issue of procedural fairness was relevant according to Mr Ackerman, as a *facta probanta,* showing that the dismissal was automatically unfair.

[29] Mr Ackerman further argued that the case of the Applicant was based on the provisions of both section 187(1) (d) and (f) of the LRA. In this respect the

Applicant argued that UNISA was not entitled to dismiss him for refusing to withdraw his High Court application. He argued that the Applicant was punished and discriminated for exercising his Constitutional right of access to a Court of law and this constituted automatically unfair dismissal as envisaged in section 187 of the LRA. In other words the case of the Applicant was that he was discriminated because he challenged the appointment of Dr Pityana in the High Court.

[30] In relation to the issue of whether the Applicant was pursuing labour rights in challenging the appointment of Dr Pityana and refusing to withdraw the challenge, Mr Ackerman urge the Court to give section 187 of the LRA a much broader and purposive interpretation which would take into account, the circumstances that gave rise to the exercising of the right and the manner in which the right was persuade. In this regard Mr Ackerman conceded that there was no authority available to support his argument.

[31] The Applicant argued that the discrimination and victimisation arose from the fact that there was no reason whatsoever to have dismissed him for not withdrawing the High Court case and further that he was not given a fair hearing.

Legal principles

[32] The case of the Applicant is that his dismissal was automatically unfair in that he was dismissed for having filed a Court case against his employer, UNISA. As indicated earlier his case is based on the provisions section 187(1) (d) and (f)

read with sections 3 and 5 of the LRA. It therefore means that the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the Applicant. If the Applicant succeeds in discharging his evidentiary burden then the burden to show that the reason for the dismissal did not fall within the circumstances envisaged by section 187(1) of the LRA rests with UNISA. See *Van der Velde v Business and Design Software (Pty) Ltd and Another (2006) 27 ILJ 1738 (LC).*

[33] This Court in the case of *Viney v Barnard Jacobs Mallet Securities (Pty) Ltd (2008) 29 ILJ (CC),* in dealing with the issue of automatically unfair dismissal held that:

> *"37 In order to ascertain whether a dismissal constitutes an automatically unfair dismissal in terms of s187 of the LRA, one must ascertain the true reason for such a dismissal. See Kroukam v SA Airlink (Pty) Ltd [2005] 12 ILJ 2153 (LAC) at 2162F; .NUMSA & Others v Driveline Technologies (Pty) Ltd & Another 2000 ILJ 142 (LAC) at 152J; SA Chemical Workers Union (SACWU) & Others v Afrox Ltd 1999 ILJ 1718 (LAC) at 17260; Van der Velde v Business Design Software (Pty) Ltd & Another (2) 2006 ILJ 1738 (LC) at 1745 I; Jabari v Telkom SA (Pty) Ltd 2006 ILJ 1854 (LC) at 927A-B."*

The Court went further in *Viney's case* and relying on the decision in *Kroukam v SA Airlink (Pty) Ltd 2005 ILJ 2153 (LAC)* to say:

"53 The starting point in this inquiry… is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidentiary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as provided for in terms of s192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s188 of the LRA."

[34] The approach to be adopted when dealing with the claim that the dismissal was automatically unfair was also dealt with by the Labour Appeal Court in the case *SA Chemical Workers Union & others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)* (at para 32), where Froneman DJP formulated it as follows:

"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law should not also be utilized here (compare S v Mokgethi & others 1990 (1) SA 32 (A) at 39D-41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34)."

Evaluation

[35] In dealing with the facts in the present instance there are two questions to answer in as far as section 187 (1) (d) of the LRA is concerned. It may be

convenient at this stage to quote both sub-sections (d) and (f) of section 187 (1) which read as follows:

"(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

(d) that the employee took action, or indicated an intention to take action, against the employer by –

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

[36] The questions to answer arising from the above provision of section 187 (1) (d) of the LRA are:

- Do the facts presented before this Court reveal that the Applicant was dismissed for exercising a right conferred by the LRA.
- Do the facts reveal that the Applicant was dismissed for participating in any proceedings in terms of the LRA.

[37] The answers to both questions are in the negative and it seems, as will appear later, that the Applicant does not take issue with these answers. Whilst in his pleadings the Applicant based his case on the provisions of section 187 of the LRA, he however in his argument sought to persuade the Court to look at the alleged discrimination much broader than the provisions of that section.

[38] The Applicant argued that although access to Court is not one of the listed grounds in section 187 (f) of the LRA it does relate to human dignity, in the sense that any person should be entitled to approach the Courts for protection against what he or she perceive to be unfair treatment. It was further argued for the applicant that had he not been discriminated against, he would not have been unfairly dismissed. In his answer to the request for further particulars for the purpose of the trial and specifically in relation the question as to which factors of discrimination was he specifically relying on, the Applicant stated that he was discriminated against because of the fact that he contested the appointment of Dr Pityana's appointment in Court.

[39] In the High Court application the Applicant sought to have the appointment of DR Pityana set aside including declaring *"the purported assumption"* of duties after the appointment to have been invalid. There is no evidence that the applicant brought the High Court case in terms of any provision of the LRA nor is there evidence that his cause of action in that application was based on any of the provisions of the LRA.

[40] It is also important in conducting the enquiry to consider whether or not the objective facts from the evidence presented by the Applicant do establish a case for victimisation or discrimination. In this respect it is important to note that the Applicant conceded during cross-examination that no facts were mentioned relating to the alleged victimisation or discrimination in his statement of facts. These two issues were also not mentioned in the CCMA referral. The Applicant did however mention in answering a question from his counsel that he did feel discriminated and victimised for instituting the High Court proceedings.

[41] UNISA's version as presented by Dr Pityana is that it was made clear to the Applicant that he was not to be prevented from proceeding with his High Court application but he had to make a choice of proceeding with that application and face the consequences that would arise from the suspended dismissal sanction.

[42] In my view the Applicant was not dismissed for exercising a right in terms of the LRA but for failing to comply with a condition set out by the disciplinary committee. The complaint about the manner in which the Council of UNISA went about the amplification or clarification of the decision of disciplinary committee may well be a good point that may sustain the case of the Applicant before another forum but it is not a matter that this Court can entertain. In the present instance the complaint does not take the case of the Applicant any further in particular regard being had to the fact that there is no evidence indicating that this may have been done with an ulterior motive of victimising or discriminating the Applicant. The same applies to the complaint about the manner in which Dr Pityana invoked the conditionality of the decision of

disciplinary committee. However, even if that was the case the conduct of the Applicant left much to be desired. It is clear from the conspectus of the evidence that even after being given the opportunity to mend his ways the Applicant never intended to abandon his confrontational attitude. In my view he missed the opportunity given to him by the disciplinary committee because for all intends and purposes the committee could have ordered his immediate dismissal.

[43] It would appear to me that although the Applicant had in writing apologised for his behaviour and accepted the authority of Dr Pityana, his conduct to the contrary points to some consistent form of *"guerrilla tactics."* He had resolved to use the most inappropriate strategies to deal with those who did not agree with him and rendered UNISA at the senior most level of management ungovernable. In this respect I align myself with the comment made by Mojapelo J in the High Court case when he observed that:

> *"He (Prof Maimela) clearly intended to continue to act as vice-chancellor and principal in spite of the appointment of the third respondent (Prof Pityana) and concurrently with the third respondent. An untenable situation had developed. Two persons purporting to hold the same position and purporting to wield equal powers were to operate independently and quite clearly in conflict with each other in the same institution. The conflict had not only pitched high against the third respondent, the applicant was also openly defying council of the second respondent (the University) in the face of its decision on 28 November 2001 taken in his presence. The proverbial two bulls in a China shop*

were up against each other and the subordinate staff at the institution would not know who to follow. The situation could not be left to go on as it was."

The Learned Judge went further to say:

"On 19 February 2002 the applicant attested to the founding affidavit and issued this application. In the application the applicant expressly challenges the appointment of the third respondent as principal and vice-chancellor which was made by council as well as his resumption of duties. The very confrontation which he had started on 27 November 2001 is taken to the Courts."

Conclusion

[44] In conclusion, it is clear that the only reason that the Applicant was dismissed was because of his failure to comply with the suspensive condition imposed on his disciplinary sanction by the disciplinary committee. The Applicant has failed to adduce sufficient evidence showing that he was dismissed for participating in proceedings in terms of the LRA or that he was victimised or discriminated against in terms of section 187 of the LRA by UNISA. I see no reason why costs in the circumstances of this case should not both in law and fairness follow the results.

[45] In the premises the applicant's claim is dismissed with costs.

Molahlehi J

Date of Hearing : 9th September 2008

Date of Judgment : 13th May 2009

Appearances

For the Applicant : Adv M F Ackermann

Instructed by : Len Dekker & Associates

For the Respondent: Adv H v R Woudstra SC with Adv W Mokhare

Instructed by : Werksmans Incorporated