REPUBLIC OF SOUTH AFRICA

Not reportable / of interest

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 144/12

In the matter between:

G W HERMANUS **Applicant**

and

OVERBERG DISTRICT MUNICIPALITY **Respondent**

Heard: **29 February 2012**

Delivered: **1 March 2012**

Summary: Urgent application to interdict disciplinary hearing – rule 8 -- struck from roll for lack of urgency.

JUDGMENT

STEENKAMP J

Introduction

1] The applicant is employed by the respondent municipality. He has been notified to attend a disciplinary hearing tomorrow, 1 March 2012. He seeks an urgent interim interdict, preventing that hearing from proceeding, pending an application to enforce certain provisions of his employment contract.

The contract

2] The parties entered into a contract of employment on 24 April 2008. With regard to disciplinary procedures, it embodies everything that an internal disciplinary hearing is not meant to be. The informal nature of an internal hearing, as envisaged by the Labour Relations Act, was emphasised by Van Niekerk J in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*[1]. This contract, on the other hand, provides for elaborate procedures akin to a criminal trial; it purports to give the employee the right to co-determine the chairperson; and, perhaps most astonishingly, not only is the employee entitled to legal representation, but it provides that the municipality (i.e. the ratepayers of the Overberg) must foot the bill for the employee's legal representatives, including a senior attorney and senior counsel. (It goes further to ensure the same representation up to Constitutional Court level!).

3] The applicant is facing charges of misconduct relating to sexual harassment. I need not and should not decide the merits of those allegations. Suffice to say that the applicant has asserted his rights to make use of a senior attorney and senior counsel at ratepayers' expense, and plans to do so if and when the disciplinary hearing eventually gets underway. The hearing has had to be postponed numerous times, mainly due to the applicant's alleged (but unidentified) medical condition.

4] The municipality now states that many aspects of the contract of employment are unlawful, *ultra vires* and against public policy. Hence it does not intend to provide the applicant with legal representation at the

1 [2006] 9 BLLR 833 (LC).

hearing. The volte-face concerning the contract of employment – that the municipality entered into with the applicant in 2008 – may have more to do with a change in political leadership than a sudden concern for ratepayers and public policy. Be that as it may, that is for another court to decide. What I have to decide today is whether the hearing scheduled for tomorrow should be interdicted.

Urgency

5] The applicant appeared unannounced in court yesterday (28 February 2012), accompanied by his attorney and senior counsel. At the end of the motion court roll, I enquired from Mr *Potgieter SC*, representing the applicant, whether I could be of assistance, as he did not have a matter on the roll. He informed me that they wished to have this application heard on an urgent basis, even though his attorney had made no such arrangements with the registrar. Despite this, I agreed to hear the matter this morning, the applicant having the leap year benefit of an extra day in February.

6] The application was filed on 27 February 2012. In terms of rule 8, the applicant has to set out grounds for urgency.

7] The applicant complains that he is being targeted by the respondent. As part of this campaign, he is accused of misconduct. That remains to be tested. What is common cause, though, is that he was informed as far back as April 2010 – i.e. two years and ten months ago – of the allegations against him. He was represented by his attorneys of record throughout. Various postponements followed, occasioned by his medical condition and objections to the proposed chairperson, including a number of senior part-time CCMA commissioners.

8] In August 2010 the municipality's attorneys wrote to the applicant's attorneys, setting out why they believed that the employment contract was invalid and *ultra vires* the relevant statutory provisions. As far back as 19 August 2010 the applicant's attorneys, Bagraims, wrote to the municipality's attorneys and stated:

"We are instructed to inform you, as we hereby do, that should you proceed [with the disciplinary enquiry] in breach of the contractual obligation of our client's valid employment contract, that we must enrol his application for an interdict against your client at the Labour Court. We await your client's undertaking by close of business on Friday, 20 August 2010."

9] No such undertaking was given; yet, despite the earlier sabre-rattling, the applicant's attorneys did not enrol the threatened urgent application (until 18 months later, that is).

10] On 10 September 2010 Bagraims again wrote to the municipality's attorneys in these terms:

"It is clear from your client's attitude in your aforementioned letter [of 9 September 2010] that our client has no other option but to bring an application to the Labour Court for an interdict to stop it from proceeding with the disciplinary hearing, pending a declaratory regarding the validity of the employment contract, which will include an order for costs."

Again, they did not do so.

11] In November 2010 the High Court overturned the appointment of an administrator who was appointed to oversee the affairs of the municipality. The disciplinary process stalled until the Council appointed a person to investigate the allegations against the applicant afresh.

12] On 9 December 2011 the municipality wrote to the applicant informing him of two possible chairpersons to chair a reconvened disciplinary hearing. On 20 December 2011 Bagraims wrote to the municipality, stating:

"Neem kennis dat indien u nie voor of op 4 Januarie 2012 van u Raad se onderneming voorsien [*sic*] om ons kliënt se regskoste te dek ingevolge sy dienskontrak nie, ons opdrag het om die Arbeidshof op 'n dringende basis te nader en 'n interdik te verkry teen u voorneme om voort te gaan met die dissiplinêre verhoor. Ons kliënt se regte in hierdie verband word voorbehou.

Indien ons nie voor of op 4 Januarie 2012 van u in hierdie verband verneem nie, is ons opdrag om die Arbeidshof te nader vir die nodige bevel en interdik, en u en u Raad verantwoordelik te hou vir alle regskoste aangegaan."

13] The municipality responded on 23 December 2011. At the request of the applicant's attorneys, the municipality sent him the CV's of the two proposed chairpersons. It reiterated that the municipality would not bear his legal costs as it deemed his contract to be invalid.

14] A month later, on 10 January 2012, Bagraims wrote to the municipality and stated:

> "In light of your refusal to undertake to pay our client's legal costs, our client will now approach the Labour Court for a declarator and a prayer for costs.
>
> [P]lease confirm that you will not proceed with the hearing until the outcome of the Labour Court ruling on our client's proposed declaratory [*sic*] about the validity of his employment contract. Should we not receive your written undertaking by close of business on Thursday, 12 January 2012, we will approach the Court on the basis of urgency, including a prayer for costs an an attorney and own client scale."

15] On 12 January, no undertaking was forthcoming. Instead, the municipality wrote to Bagraims, stating:

> "Please ensure that any interdict papers are served on us timeously in order that we may have sufficient time to prepare our response."

16] Instead, the interdict papers were only served on the municipality on Friday 24 February 2012[2]; filed at Court on Monday 27 February; and the applicant's attorney and counsel arrived at court on Tuesday 28 February, without the date having been arranged with the registrar or the matter having been enrolled.

17] A revised "charge sheet" was sent to the applicant and his attorneys on 13 January 2012. The disciplinary hearing was scheduled to proceed on 21 February, approximately six weeks later. Again, the applicant was booked off sick for an unknown illness and the hearing was postponed to 1 March 2012. A new notification containing the identical complaints was served on the applicant by hand on 10 February 2012.

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2 An incomplete set of affidavits was faxed to the municipality's attorneys on Thursday 23 February.

18] Despite these various notices; the fact that the applicant knew, at the very latest, by 11 January 2012 exactly what the allegations against him were and that the municipality would not pay his legal costs for representation at an internal disciplinary enquiry; and despite the fact that he has been represented by his attorneys of record since at least April 2010 and they have been threatening an urgent application since August 2010, the application was eventually brought on less than 48 hours' notice.

19] Rule 8 states:

"8. Urgent relief.—(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7 (1), 7 (2), 7 (3) and, if applicable, 7 (7).

(2) The affidavit in support of the application must also contain—

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case; and

(c) if a party brings an application in a shorter period than that provided for in terms of section 68 (2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

20] In his founding affidavit, he applicant simply states, rather coyly:

"I have been served with a notice of a disciplinary hearing set down on 1 March 2012."

21] He does not play open cards by informing the court that he was initially served with a "charge sheet" on 13 January and told that the hearing would commence on 21 February; that it was postponed due to his illness; and that he was informed by 10 February that it had been rescheduled for 1 March.

22] The applicant goes on to say:

" It is vitally important for the protection of my rights that the present proceedings be finalised before then. It is clear that the respondent is not prepared to

acknowledge and honour its obligations in terms of the employment contract in the absence of appropriate relief. It is accordingly clear that this matter is urgent and that I would not be able to obtain substantial redress at a hearing in due course. I have endeavoured to bring this application as soon as circumstances permitted. I have to fund this application from my own limited resources and there was an inevitable delay in raising the necessary funds to be able to instruct my legal representatives to launch these proceedings."

23] That is the sum total of the applicant's reasons for urgency. It falls woefully short of the requirements of rule 8. It is by no means "clear that this matter is urgent". He also does not explain how he has "endeavoured to bring this application as soon as circumstances permitted", given that his attorneys have been threatening an urgent interdict for months. And his allegation that he has "limited resources" fails to mention – as the municipality does in its answering papers – that he is paid more than R1 million per year. His attorneys have not, over the past two years, hesitated to send off many lengthy letters objecting to the disciplinary hearing and threatening an urgent application; why there should now, suddenly, be "an inevitable delay in raising the necessary funds to be able to instruct my legal representatives to launch these proceedings" is not explained at all.

24] As Van Niekerk J pointed out in *National Police Services Union & others v National Negotiating Forum & others*[3]:

"The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time limits, or any time limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is cause of the harm on which they rely to seek relief in this court. For these reasons, I find that the union has failed to satisfy the requirements relating to urgency."

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3 (1999) 20 *ILJ* 1081 (LC) para [39], cited with approval in *NUM v Black Mountain* (2007) 28 *ILJ* 2796 (LC) para [13].

25] The same considerations apply to this case.

Conclusion

26] The application should be struck from the roll for lack of urgency.

27] In these circumstances, I need not deal with the merits. Suffice it to say that the applicant may have a *prima facie* right to legal representation at the municipality's cost at his disciplinary hearing, though open to some doubt, arising from his contract of employment; however, this court will only grant urgent relief interdicting disciplinary hearings in exceptional circumstances.[4]

28] These are not such circumstances. The complaints to which the applicant has to answer comprise clear instances of sexual harassment. They are not factually and legally complex, and he has been aware of them since April 2010. There is little reason why he should not, if they are without merit, be able to defend himself adequately without legal representation like other employees do every day.

29] Even if the complaints were proven; and even if they were to be considered serious enough to dismiss him, the applicant has an adequate alternative remedy. Like any other employee, and as envisaged by the dispute resolution system established by the LRA, he can then refer an unfair dismissal dispute to the relevant Bargaining Council. He would suffer no irreparable harm.

30] The balance of convenience also appears to favour the municipality. It needs to get clarity on the applicant's position as employee and it needs to finalise the process in order to justify to its ratepayers why he should either be paid for work done, or otherwise.

31] I would, therefore, in any event have been inclined to dismiss the application, based on the well-known requirements for interim relief set out

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4 *Booysen v The Minister of Safety and Security & others* [2011] 1 BLLR 83 (LAC) para [54]; *City of Cape Town v SAMWU & others* (unreported LAC judgment of 7 February 2012, CA 7/08 para [16].

in *Eriksen Motors (Welkom) Ltd v Protea Motors*[5] and other authorities.

Costs

32] Mr *Conradie*, for the municipality, argued that the applicant should pay its costs, and that he should be ordered to do so on a punitive scale. I do not agree. The parties still have a relationship, albeit a fraught one. The applicant has unnecessarily delayed the bringing of this application, but it was not entirely without merit, given the existing terms of his contract of employment, unconscionable as they may seem.

33] In law and fairness, each party should pay its own costs. I should clarify, though, that this means that the applicant – and not the municipality on his behalf – is liable for his own costs for these proceedings (including the appearance on 28 February 2012).

Ruling

34] The application is struck from the roll for lack of urgency. Each party must pay its own costs.

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Anton Steenkamp
Judge

APPEARANCES

5 1973 (3) SA 685 (A) 691 A-G.

APPLICANT:	Denzil Potgieter SC) Instructed by Bagraims Inc.
RESPONDENT:	Bradley Conradie attorney.