NOT REPORTABLE
OF INTEREST TO OTHER JUDGES

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 18243/2008

In the matter between:

NIMROD LLEWELLYN MORTIMER APPLICANT

versus

MUNICIPALITY OF STELLENBOSCH 1ST RESPONDENT

JAN THERON, NO 2ND RESPONDENT

JUDGMENT

26, 27 NOVEMBER 2008

Jurisdiction of High Court and Labour Court – when concurrent in respect of interdicts and declaratory orders – interpretation of section 157 of Labour Relations Act and application of decisions in ***Fredericks*** *and* **Chirwa** *– when court will intervene in incomplete proceedings of subordinate tribunal.*

GAUNTLETT, A J:

The issues

Two fundamental matters are raised by this application, argued yesterday. The first involves, again, the respective jurisdictions of

the High Court and the Labour Court, in the light in particular of recent Constitutional Court and Supreme Court of Appeal rulings in that respect. The second relates to the circumstances in which a court will intervene, by way of interdict or declaratory order, in the unterminated proceedings of another body, in this case, a disciplinary inquiry.

The applicant is the Director: Corporate Services of the first respondent, a municipal council. The second respondent is an independent attorney specialising in labour matters, engaged as the chairman of a disciplinary inquiry ("the inquiry") into the conduct of the applicant as an employee of the first respondent.

In the early evening of Monday, 3 November 2008, the applicant procured an urgent interim order from this court suspending the inquiry, pending the return day of an application for final relief. The initial order appears thereafter to have been adjusted and expanded, evidently following discussion between the parties and agreement between them relating to a timeframe. The ultimate order was made in these terms:

1. Dat die dissiplinêre verhoor van die applikant voor die tweede respondent opgeskort word hangende die keerdag van die bevel nisi in die volgende paragraaf.

2. Dat 'n bevel nisi uitgereik word met keerdag op Woensdag 26 November 2008, wat eerste respondent aansê om redes, indien enige, in hierdie Hof aan te voer waarom die volgende bevel nie gemaak sal word nie:-

2.1 dat die dissiplinêre verhoor van die applikant voor die tweede respondent onbepaald uitgestel word; in die alternatief tot 1.1 [sic] hierbo.

2.2 dat gemelde dissiplinêre verhoor uitgestel word tot 'n datum wat gereël word tussen die regsverteenwoordigers van die partye, maar nie minder as agt weke vanaf datum hiervan nie, op die volgende voorwaardes:-

2.2.1 dat die eerste respondent die volledige lys van inligting en dokumente waarna verwys word in Aanhangsel NLM4 blootlê en beskikbaar stel binne 14 dae hiervan;

2.2.2 dat die applikant binne 14 dae na sodanige blootlegging 'n versoek om nadere besonderhede tot die klagstaat mag rig;

2.2.3 dat die eerste respondent binne 14 dae op sodanige versoek reageer; en

2.2.4 dat die applikant se skorsing uit diens van die eerste respondent, met volle betaling, verleng word tot en met afhandeling van die dissiplinêre verhoor.

.... ."

Four notices of intended amendments to this relief have followed, the last - handed up at the commencement of oral argument - seeking an order declaring the inquiry null and void *ab initio*, and setting aside certain procedural rulings by the second respondent to

date, and in the alternative, a postponement as before, but now on the following conditions:

> *"2.1 dat eerste respondent die volledige lys van inligting en dokumente aangevra... blootlê en beskikbaar stel...*
>
> *2.2 dat die applikant geregtig sal wees om binne 14 dae na sodanige blootlegging 'n versoek tot nadere besonderhede tot eerste respondent se klagstaat aan eerste respondent te mag rig;*
>
> *2.3 dat eerste respondent binne 14 dae nadat hy sodanige versoek tot nadere besonderhede ontvang het, volledige daarop moet antwoord;*
>
> *2.4 dat die dissiplinêre verhoor van applikant voor tweede respondent, of enige ander voorsittende beampte wat eerste respondent mag aanwys, heropen word...*
>
> *2.5 dat applikant se skorsing uit die diens van eerste respondent, met volle betaling, verleng word tot en met die finale afhandeling van die dissiplinêre verhoor;*
> *...".*

Thus in short, the applicant seeks final relief in the form of a declaratory order of invalidity in relation to the disciplinary inquiry conducted to date, alternatively a final mandatory interdict in the respects specified.

The latest amendment, it was explained in argument, has been occasioned by two developments: firstly that the inquiry continued, the second respondent completing the hearing of evidence by the first respondent on the evening of 3 November, while the High

Court interim order was being sought; and secondly, that the applicant only ascertained on 20 November that the South African Local Government Bargaining Council: Disciplinary Procedure Collective Agreement ("the SALGA Code"), central to the disciplinary inquiry and to the appointment of the second respondent, had lapsed.

It seems to me that the logical sequence of the issues between the parties is as follows:

1. Is the application to be dismissed at the outset, as first respondent has propounded, on the basis that any urgency in the matter has been self-induced?

2. If not, does this court have jurisdiction to grant the relief sought?

3. If this court does have jurisdiction, does a case exist to intervene, by way of interdict or declarator resting on what are essentially review grounds (as to which, see **University of Cape Town v Ministers of Education**, **1988(3) SA 203 (C) at 211E-G**) in the unterminated proceedings of the inquiry?

Urgency

As regards urgency, two misconceptions underlie first respondent's contention that the application should be dismissed at the outset without further consideration. The first is that it was the court entertaining the urgent application on 3 November which had the discretionary power to determine either that the matter was not urgent (for reasons related to the third main issue), or that any urgency had been self-induced (because the applicant knew by 22 October that first respondent would not agree to the postponement he had sought, yet waited for the inquiry to convene and proceedings to commence before lodging an application to postpone). That court decided, implicitly, that the matter was sufficiently urgent for it to deal with it as it did. Now the matter is before me, relating not to urgent interim but to final relief, with full sets of papers filed and final relief being sought. Moreover, the parties appear to have agreed in relation to the timeframe adopted as regards the filing of papers and the heads of argument. Simply on the facts the complaint regarding urgency lacks logic.

The second reason is yet more fundamental. Citing **Schweizer-Reneke Vleismaatskappy (Eiendoms) Beperk v Minister van Landbou**, 1971(1) PHF11 (T), first respondent contends that dismissal is an apt remedy when a case is brought on unfounded

grounds of urgency. That decision (by Trengove J, as he then was), however, is no authority at all for that proposition. This was underscored most recently by the Supreme Court of Appeal ruling in **Commissioner, SARS v Hawker as Services ((Pty) Limited, 2006(4) SA 292 (SCA) at 299G-300A.**

It lies within the power of a judge in such a situation to decline to hear a matter on the grounds of lack of urgency, or to strike it from the roll. In circumstances which do not amount to an abuse of proceedings - and that is not contended in this matter - there is no basis on which a court, even at a preliminary stage, is entitled merely to dismiss an application in the manner first respondent has suggested.

Jurisdiction: High Court of Labour Court

I turn now to the second issue, that of jurisdiction. Jurisdiction means the power vested in a court by law to adjudicate upon, determine and dispose of a matter (**Ewing McDonald and Co Ltd v M and M Products, 1991(1) SA 252 (A) at 256G**).

Is first respondent correct that this court lacks jurisdiction to grant the declaratory order and mandatory interdict the applicant seeks?

The power of the High Court to grant both interdicts and declaratory orders to curb illegalities and unlawful conduct is rooted in the very function of the High Court itself. This is clear from the earliest South African case law (see for instance **Central Road Board v McIntyre, (1855) to Searle, 165 at 170-171**, per Wylde, C J, and in particular **Johannesburg Consolidated Investment Company v Johannesburg Municipality, 1903 TS111 at 115**, per Innes, C J).

That power has been recognised as part of the inherent jurisdiction of the High Court, now explicitly protected in section 172 of the Constitution, 1996. That inherent jurisdiction, it must always be borne in mind, is essentially procedural in nature and probably does not extend to the power to create substantive law (**Universal City Studios Inc v Network Video (Pty) Limited, 1986(2) SA 734 (A) at 754H**).

Has the inherent power of the High Court to grant relief of the kind in issue been lost? That is the next logical inquiry. The departure point is that legislative interference with the jurisdiction of the High Court is not readily accepted (see for instance, **Lenz Township Co (Pty) Limited v Lorentz NO, 1961(2) SA 450 (A)** and **Minister of Law and Order v Hurley, 1986(3) SA 568 (A)**). Whether or not such an attenuation of jurisdiction has been effected in the present case must be approached on that basis, and thus with

a careful regard to the terms of the provisions contended to have that effect.

In **Paper, Printing, Wood and Allied Workers Union v Pienaar NO, 1993(4) SA 621 (A)**, just such an exercise was conducted. The case concerned the Labour Appeal Court (LAC) as it was initially constituted. The question was whether its establishment in 1988 had the effect of ousting the review jurisdiction of the then Supreme Court (now High Court). Harms, J (as he then was) had held *a quo* that it had.

On appeal, Botha, JA noted for the court (**at 636J-637D**) as follows:

> "*The concept of specialist courts dealing with specialised matters is a familiar one in our judicial system. We know Water Courts, the Court of the Commissioner of Patents, Special Income Tax Courts, and so forth. In those instances there is no doubt that the jurisdiction of the ordinary divisions of the Supreme Court has been ousted. I do not pause to consider the particular statutory provisions by which that result has been achieved (in most instances the jurisdiction conferred on the specialist court was expressly declared to be exclusive). The point to be made is a different one. The existence of such specialist courts points to a legislative policy which recognises and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary courts (see F Mathope and Others v Soweto Council, 1983(4) SA 287W, 291H, 292A). The present case seems to me that the legislature probably intended to establish the Labour Appeal Court in conformity that that policy. The structure of the court is certainly closely akin to that of the known specialist courts. Consequently there is, in my view, substantially less reason in the present case (compared with cases such as Lentz .... Leteno and Robinson supra) for closely scrutinising the provisions in question, or for jealously guarding against interference with the jurisdiction of the ordinary courts.*"

Turning, however, to the review grounds accorded to the Labour Appeal Court, in comparison with those exercised by the then Supreme Court at common law, the Appellate Division held that establishing whether these were wider was "*a matter of great difficulty*"(at 638F). Ultimately it concluded that the LAC had been accorded lesser review powers than the Supreme Court. The Appellate Division then considered the court *a quo's* conclusion that it would be anomalous for the selfsame acts to give rise to review in two courts, and it held as follows in this regard:

> "*There is obviously much force in this reasoning. It is indeed difficult to think of a sensible reason why the legislature would have wished to bestow upon the newly created court, which ranks equal in status with the Supreme Court, the power to review the proceedings in the Industrial Court, while at the same time retaining the parallel existing procedure in the Supreme Court... However, it seems to me that there are two further considerations which tend to detract from the force of the learned judge's reasoning. The first is that the anomalies adhering to a system of concurrent jurisdiction (to the extent in which there is an overlapping of the grounds of review) are notional in character rather than of practical effect No reason suggests itself why it would be difficult or inconvenient in practice to cope with a dual system of review in relation to proceedings in Industrial Court. In argument before this court reference was made to the possibility of what was called `forum shopping', but I am satisfied that the prospect of that kind of malpractice arising is too remote to be of any real consequence.*"

The court then concluded that the factors supporting concurrent jurisdiction "*must, by a narrow margin, carry the day*"(at 641A).

The statutory provisions under consideration in that matter are of course now the *detritus* of history, and the decision itself no

authority *per se* in relation to the present matter. I would not be thought to suggest the contrary. I have cited it at some length, however, because in my respectful view it is rooted in principle, and correctly describes the general jurisprudential approach to be adopted when a problem such as that in the present case arises.

In law, Lord Steyn has observed, "***context is everything***" (**R v Secretary of State, *ex parte* Daly [2001] (1) or ER 443 (HL) at 447a**, cited with approval in **Aktiebolaget Hàsslev Triomed (Ptv) Limited 2003(1) SA 155 (SCA) at 157G**). It is necessary to consider more closely the current legislative context here.

Even at the time the interim Constitution was concluded, the enactment of a new primary statute governing labour relations in conformity with the new constitutional dispensation was contemplated. Indeed, the anticipated legislation is one of the few pieces of legislation to be referred to specifically in the schedules to the interim Constitution. After an arduous process this legislation was duly enacted as the Labour Relations Act, 66 of 1995 ("the LRA"). Its long title declares its central intention: the very first words are "***to change the law***". This the LRA does in many respects, often radically, even if here and there it draws, in the nature of things, on the long prior legislative history relating to labour relations in South Africa.

One of the controversies which had existed under the pre-existing legislation was, as has been noted, the very issue of concurrency of jurisdiction as between the High Court and the Labour Court in the key respect of review. Another was a similar debate which had raged over a period of years in the various Labour Courts regarding interdicts. The latter gave rise to significant controversy and to differing decisions (**see generally Cameron *et al*, The New Labour Relations Act (1989) 89-90 and 189-90**). Both the uncertainty and the anomalous consequences of what may or may not have been a dual jurisdiction in relation to interdicts (as to which, see the critical analysis by Harms, J quoted by Botha, JA in **PPAWU v Pienaar N.O. *supra***) were not only unsatisfactory. These are matters which, by canon of construction, we must take to have been present to the minds of the lawmakers in 1995 when the LRA was framed.

It was in this setting, then, that section 157 of the LRA, on which the debate in the present matter focused, was enacted. It provides:

"157 Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173 and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa,

1996, and arising from -

(a) employment from Labour Relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive of administrative act or conduct, by the State in its capacity as an employer;

(c) the application of any law for the administration of which the minister is responsible."

Section 157(1) is the dominant provision: section 157(2) provides for concurrence of jurisdiction between the two courts - but only in the circumstances it specifies. The difficulty, however, which has arisen is a consequence of the apparent width and inexactitude of language in section 157(2). The result has been a burgeoning body of recent case law. Argued before me was the meaning and effect of *inter alia* the decisions in **Chirwa v Transnet, 2008(4) SA 367 (CC); Fredericks v MEC for Education and Training, Eastern Cape, 2002(2) SA 693 (CC); Makambi v Member of the Executive Council, the Department of Education, Eastern Cape Province, 2008(5) SA 449 (SCA); De Villiers v The Minister of Education; Western Cape (unreported case 18733/2007); Boovsen v Minister of Police (unreported case 3499/08; and Oliver v Universiteit van Stellenbosch (unreported case 2181/04).**

The plurality of voices in the Supreme Court of Appeal and the Constitutional Court on this issue has compounded an inherently difficult inquiry. The problem is that it is evident that the

intention of the LRA itself is not to encompass in an exclusive dealing every potential aspect of the relations which arise between employer and employee, and hence, what is loosely termed employment law. On the other hand, it is evident that, mindful of the difficulties which had emerged in the past, the framers of the LRA had the clear aim of creating an exclusive legal regime for matters which properly fall within the purview of the Act, and hence of the curial structure it creates, with a view to avoiding the worst anomalies of past legislative blurring.

Without endeavouring in the extremely short time available to me to embark upon an attempt at a detailed tour of the various authorities to which I have referred, I seek to extract for the purposes of this case what I understand to be the correct approach, in the light, in particular, of the recent Constitutional Court and SCA decisions, in these broad terms:

1. By pre-constitutional principle and authority, it is clear, the High Court has the power to grant declaratory orders and interdicts, relating to illegal and unlawful acts.

2. At the level of principle, this would apply also to the conducting of disciplinary inquiries conducted as between employer and employee, whether statutory or otherwise.

3. The LRA, however, has sought (in section 157(1)) to create an exclusive jurisdiction for the Labour Court in relation to matters within the purview of that Act, other than claims to constitutional rights made in terms of section 157(2). The former provision is both a dominant and default provision.

4. Where a court is faced with a dispute as to whether a case properly falls within section 157(1) or (2), it will in each instance have to establish firstly whether that case involves a "matter" regulated by the LRA, and secondly whether, objectively characterised, it falls within the dominant and default provision of section 157(1), or within the excision created by section 157(2).

5. In that regard, the court will have to put substance over form, bear in mind the danger of tactical contrivance in the presentation of cases, and apply, if necessary, the criterion of substantiality to matters where certain facts may point in one direction and others in another.

Against this background I turn to the relevant facts of the present matter in endeavouring to answer which side of the line I believe it falls.

The founding affidavit was clearly conceived in circumstances of urgency. I am mindful of that. The applicant did not however seek, in the interim order he himself proposed to the duty judge on 3 November, nor in the later adapted form of it, provision for an opportunity to supplement his founding papers. Nor did he thereafter, before the end of the relatively leisurely period of two weeks accorded for the filing of answering affidavits, seek to pre-empt the latter by supplementing the founding affidavits in any way. Only in reply - the answers by the respondents, including first respondent's jurisdictional objection, now to hand - did the applicant seek to make out the case on which he now primarily purports to rely. This is that, he contends, his constitutional rights - more particularly to administrative fairness - have been traduced by the conduct of the inquiry. It is on that basis, the applicant now contends, that the doors of the High Court stand wide to him, and a concurrence of jurisdiction with the Labour Court exists.

Counsel for the applicant fairly conceded in oral argument that circumstances such as these - where the applicant, had he wished, could have sought to supplement his case, and had ample opportunity to do so; where the parties themselves agreed on a timeframe for the conduct of these proceedings; where three sets of papers have now been filed before me; where I have been asked to determine the matter on the papers as they stand; and with the

replying affidavit filed just one court day before the hearing - militate against a new case made out on the papers in reply being permitted.

This is especially so when the founding affidavit is itself mindful of the jurisdictional problem. Paragraph 3 indeed asserts that the High Court has inherent jurisdiction, and:

"Dat ek geen ander forum het wat ek op 'n basis vir [sic] dringendheid kan nader vir die regshulp hierin versoek nie."

The founding affidavit goes on to sketch the applicant's employment history, and asserts that in his employment he has been victimised:

"om van my ontslae te raak sodat my pos gevul kan word"

by another with other political affiliations.

The case which is thus made out in the founding affidavit is one of alleged gross irregularities in a disciplinary inquiry (to which I revert later) conducted pursuant to the employment relationship. The applicant invokes, by implication, the right to be treated fairly in the inquiry and asserts that if the inquiry is completed, as matters currently stand he faces the prospect of being dismissed

from his employment.

Nowhere does the applicant disavow (as the applicants did in **Fredericks v MEC for Education *supra* at 711D**) reliance on section 23(1) of the Constitution. Conversely, nowhere does he invoke rights other than those arising naturally from and relating to the proper conduct of a disciplinary inquiry, a matter governed - he is himself at pains to point out - by the SALGA Code (if applicable), and pursuant to the LRA.

It has been said, often enough, that parties invoking statutory provisions are required to cite these, or at least by recognisable paraphrase to invoke them (**Yannakou v Apollo Club 1974(1) SA 614 (A) at 623G**). The principle is not confined to the citation of statutory provisions. In the context of constitutional litigation in particular - that which the applicant, in his attempts to invoke section 157(2) over section 157(1) necessarily contends this to be - the need for a reasonably recognisable invocation of particular rights has been stressed, time and again (see for instance, **Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs 2004(4) SA 490 (CC) at 507C-D**). It is also a factor that the applicant is not unrepresented; he was assisted (at least from the appearance on 3 November on) by an attorney, before the disciplinary inquiry, and has been represented throughout these proceedings by counsel, including senior and junior counsel.

Given the pertinent allegations it was thought clearly important to make in the founding affidavit relating to jurisdiction, and the current difficulties posed by the **Fredericks/Chirwa** debate of which his counsel are to be taken to be aware, there is in this instance in my view no credible consideration as to why the founding affidavit did not, as in **Fredericks**, nail its colours squarely to the mast of a non Labour Relations claim, if that was truly its nature and it was so truly contended. The present case in fact exemplifies the dangers of forum shopping and simulation, through perceived tactical need when the shoe is belatedly found to pinch.

I thus conclude that in the present case, the applicant's case, properly analysed, is clearly one of a contended invalidity and unfairness in the conduct of an inquiry relating to the disciplining of an employee. This is a "matter" regulated by the Labour Court, and by it alone. It falls within the purview of section 157(1), and not within the specific excision created by sub-section (2). I follow in particular in this regard the emphasis placed by Nugent, JA in **Public Officers Association v Kigomono (unrep SCA 441/05, 2 September 2005)** at paragraph 5, on "***the applicant's claim as formulated***" (emphasis supplied).

I believe that this approach is also in accordance with that adopted last month by a Full Bench of this court (Davis *et* Allie, J J) in **De Villiers v Minister of Education, Western Cape (unreported)**. Obviously the formulation must, on an objective conspectus, be genuine.

Notwithstanding this conclusion, it is necessary to address applicant's further contention, in reliance on an unreported decision by Cheadle, AJ in **Booysen v South African Police Services (C), 60/8, unreported Labour Court, 14 February 2008)** (currently, I was told by counsel, on appeal) that the Labour Court in any event lacks power under section 157(1) read with section 185, to intervene in incomplete disciplinary proceedings. If the answer I have given to the second issue in this matter - namely that there is no concurrence of jurisdiction as between the High Court and the Labour Court is correct - this further conclusion by Cheadle, AJ would have the effect that no court at all has jurisdiction to intervene in such circumstances. Clearly that would be both a surprising and unpalatable consequence. It is necessary to determine whether it is correct.

In his reasons, Cheadle, AJ stresses the lack of an inherent jurisdiction in the Labour Court, a creature of statute (in contradistinction to the High Court). Following **Moropane v**

Gilbevs Distillers and Vintners (Pty) Limited [1997] 10 BLLR 1320 (LC), per Landman, AJ (as he then was), he holds that the Labour Court "*does not have an all-embracing jurisdiction over the employer-employee relationship*".

As already indicated, that has to be accepted as a truism (see for instance **Fedlife Assurance v Wolfaardt 2002(1) SA4 49 (SACA); Fredericks v MEC** *supra;* **United National Public Servants Association v Digmore unrep SCA 2 September 2005; Schoon v MEC, Department of Finance, Northern Province (2004) 25 ILJ 2311 (SCA);Old Mutual Life Assurance v Gumbi (2007) 28 ILJ 1499 (SCA); Oscar Mtatha v Makonya (2007) 28 ILJ 2209 (SCA)**). But with respect, that is not the point. It does not address the fact that unfairness in the dismissal process is a "matter" which the LRA clearly regulates.

Section 158 against that background is then in these terms:

> *"158 Powers of Labour Court*
>
> *(1) The Labour Court may -*
>
> *(a) make any appropriate order, including -*
>
> *(i) the granting of urgent interim relief;*
>
> *(ii) the interdict;*
>
> *(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;*

(iv) a declaratory order.

...

(b) order compliance with any provision of this Act;

...

(j) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law."

Where a person in truly extraordinary circumstances - a matter to which I revert in considering the third issue - approaches the Labour Court on the basis that a disciplinary inquiry was, for instance, about to commence or was being conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in law the inquiry, I have little doubt that the Labour Court would in law exercise these powers to stop it. In cases such as **Mantzaris v University of Durban Westville [2000] 10 BLLR 1203 (LC)** and **Ndlovu v Transnet Limited [1997] 7 BLLR 887 (LC)**, the Labour Court indeed considered interdicting proceedings. It did not adopt the stance that it lacked the power to do so. In fact, in **SAMWU v City of Cape Town [2008] 29 ILJ 1978 (LC)**, the Labour Court interdicted, on the particular facts of that matter, even an unterminated proceeding.

The suggestion in argument that the Labour Court is not as generally amenable to, or as available for, urgent proceedings at the

High Court is no answer to the question whether in law it has the requisite power. I hold that it does.

I accordingly hold that in the present case, on the application as it has been framed, this court does not have jurisdiction in relation to the relief sought, and that the Labour Court has jurisdiction, and the requisite power to grant interdicts and declaratory orders relating to disciplinary inquiries.

That in law disposes of the matter, but it seems to me desirable, as it was canvassed in argument, and in my view leads to the same result, to record as briefly as I can my views in relation to the third issue. By virtue of my conclusion as regards the second issue, and regard being had to the circumstances in which it is necessary to give this judgment, I do so in outline.

A basis to intervene in the inquiries ?

Counsel for the parties are agreed that the applicable test to apply in relation to an application for declaratory and interdictory relief pertaining to incomplete proceedings remains that laid down in **Wahlhaus v Additional Magistrate, Johannesburg, 1959(3) SA 113 (A) at 119-120.**

As that judgment suggests, several important postulates of legal policy compete in a situation such as the present. First there is the principle that matters should not be determined by higher courts on a piecemeal basis (see **F Lawrance v Additional Regional Magistrate of Johannesburg, 1908 TS 525 at 526**). Then there is the principle that courts do not deal with matters that may be academic, or become academic: a litigant arguably treated unfairly in a particular respect may yet ultimately succeed, or the point of unfairness which seem to loom so large at the time may ultimately have no bearing at all on the outcome of the case. Thirdly, there is the concern for the administration of justice itself, articulated most recently by the Chief Justice in **Zuma v National Director of Public Prosecutions (unreported)**: a strained system, seeking to serve a large population, cannot afford multiple interlocutory challenges of an inappropriate kind. But as against these, lastly there is also the concern expressed in **Wahlhaus *supra* at 120B** that a court may, notwithstanding the considerations just enumerated, yet consider itself obliged to intervene

> ***"in rare cases where injustice might otherwise result or where justice might not by other means be attained."***

The applicant's case, it may be noted, seems to have been significantly inspired by the unreported judgment of Goodman, AJ

in **Oliver v Universiteit van Stellenbosch** (case 2181/04, undated) – so much so that it was attached, unnecessarily, as an annexure to the founding affidavit. In that matter the court intervened in an incomplete disciplinary inquiry. It is unnecessary to consider whether on the facts it was right to do so. But what does matter is that, after accepting **Wahlhaus** as laying down the binding test for intervention (in the terms just quoted), the learned acting judge saw fit to paraphrase it thus:

> "*....die vraag wat beantwoord moet word, is: is daar in al die omstandighede billik teenoor die applicant opgetree ?*" (p 16, para [21]).

That, with respect, is not the threshold set by **Wahlhaus** for intervention in an incomplete proceeding of another body. That unfairness has occurred is not the issue. The issue is that an irregularity has occurred (unfairness is just one manifestation) which, it is already apparent, is of a kind and a degree calculated to give rise to injustice. And in that regard, the court must consider whether the injustice is such that the affected party might not otherwise by other means attain justice. It may be noted that this is not the only area of law which seeks to differentiate between the potentially fatal or irremediable and that which is irregular, but is not to be treated as vitiating. This is evident in criminal law, as regards irregularities in proceedings of lower courts (**S v Moodie** 1962 (4) SA 587 (A) at 597, and **S v Naidoo** 1962 (4) SA 348 (A) at

354), and in administrative law, as regards the willingness of courts to permit collateral challenge only where the irregularity clearly vitiates (Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC 1990 (4) SA 349 (C) at 355E-356B).

Applicant's argument in my view fails in this respect, because his complaints do not establish that injustice stands to result, in the sense contemplated, nor that justice might not by other means be attained, also in the sense contemplated I say this for the following reasons.

(a) Second respondent not appointed ?.

It is necessary to deal firstly in outline with three contentions which stand on a slightly different basis to general allegations of unfairness in the conduct of proceedings. Each of these contentions in essence goes to jurisdiction. The first is that the second respondent was never validly appointed: it was suggested in argument that the full council of second respondent by statute must appoint a disciplinary inquiry in respect of a senior manager such as the applicant. The point is wholly without merit. Section 55(1)(b)(f)(g) and (h) each afford a basis for the municipal manager of a municipal council to make such an appointment. The argument that section 56(a), in providing for the appointment of such managers by a municipal council, implicitly requires matters

applying to the constituting of disciplinary inquiries equally to be conducted by councils, is patently flawed. An appointment - or a *e contrariis*, a removal - is not currently in issue. To the extent that the argument seeks to imply provisions into either section 55 or 56, it stumbles on the high hurdles set by Corbett, J A in the leading decision in **Rennie v Gordon NO 1988(1) SA 1 (A) at 22D – G** for the implication of statutory provisions.

(b) Lapse of SALGA Code ?

The second point of a potential defect of a jurisdictional nature is the contended lapse of the SALGA Code. Counsel for first respondent pointed to a provision in the contract of employment between the applicant and first respondent which itself adopts the Code as an answer. This, he said, gave the code a self-standing *vires*.

It is not necessary to determine the correctness of that submission (see **S v Prefabricated Housing (Pty) Limited, 1974(1) SA 535(A)**), nor whether a statutory employer such as first respondent would be disabled from in any event continuing to apply an *ex hypothesi* lapsed code of this kind, for the purposes of a particular inquiry, so long as it is fair. A simpler and compelling factor in the present case is that the founding affidavit expressly asserts the continued existence and binding nature of the Code. First

respondent admitted this in answer. It was only on the court day before the hearing that the applicant sought to reverse its position and contend that the case on which it had relied had lapsed. As Nienaber, JA noted in **Government of the Province of Kwa-Zulu Natal v Ngubane 1996(4) SA 943 (A) at 949B-C**:

> ***"Had the point been spelt out in the application papers the respondents, duly alerted, could have responded on fact and on law."*** (original emphasis).

First respondent unsurprisingly has objected to the *volte face*, and the inadequate opportunity it has had to address the matter in law and in fact. I agree. The applicant has known since September of his impending inquiry, which in the nature of things might be expected to be conducted under the SALGA Code. He thereafter has had adequate opportunity - from 3 November to the filing of the answering affidavits a fortnight later - to discover what he now alleges is the incorrectness of the central factual and legal premise in his founding affidavit in this respect, and timeously to plead this. I accordingly decline to hold that the inquiry is vitiated by either attack.

The two matters I have just addressed would, I have suggested, go fundamentally to jurisdiction as regards the conduct of the inquiry. Lack of jurisdiction creates nullity *ex tunc* (**cf. Moch v Nedtravel, 1996(1) SA 1, (A)**), and falls potentially into a different class in a

Wahlhaus, *supra* challenge. So does bias, for the reasons analysed by Corbett CJ in **Council of Review, SADF v Mönnig, 1992(3) SA 482 (A) at 495)**, and to that I now turn.

(c) **Bias** ?

In this regard, applicant's counsel argued that the conduct of second respondent in continuing to sit, having been notified of the applicant's intention on 3 November to seek an immediate order from the High Court interdicting the inquiry - and thereafter, sitting until the completion of the evidence then available into the evening - gives rise to a basis for bias. I disagree. While the replying affidavit refers to the second respondent continuing to sit after he was so notified, no pertinent allegation is made that in so acting, he was activated by bias, or even that that conduct gives rise to a reasonable perception of bias. It is, again, elementary, one would think, that what is essentially a review ground must be identifiably stated. Otherwise in prolix and not always orderly papers, such as those filed on behalf of the applicant in this matter, what is narrative and what is conceived as constituting part of a cause of action, is not readily apparent. Discursive material which may be of a narrative kind and per se, not to take the pleaded legal issues anywhere, may be considered to have been included for atmospheric or other purposes, and left untraversed. The essential point is, as I have stressed, that it is incumbent upon the applicant to make his

points, at least with some specificity. It is significant, in the present case, that even the heads of argument failed to alert the opposing parties - and for that matter the court - to the new contended ground of attack.

This notwithstanding, I was invited nonetheless to infer the allegation of bias. I cannot do so from the factual allegations made: that the second respondent continued to sit, despite being notified of the impending application to be made to the High Court. It is entirely open in law to persons in the position of second respondent to adopt the attitude that they are currently entitled to continue to sit, and will continue to do so until they are otherwise directed by a court of competent jurisdiction. The transcript of the proceedings shows that this stance was appropriately and clearly conveyed to the applicant's representative. This unfortunately elicited the less courteous and even less considered reply that this was exactly what the applicant was hoping for. That answer speaks volumes for the tactical and misguidedly assumptive approach adopted by the applicant – or on his behalf – in this matter.

I accordingly consider that no case has been made out relating to a fatal defect in the conduct of the proceedings which might nullify the proceedings *ex tunc*.

Cumulative unfairness ?

But that again is not the end of the matter. The applicant also alleges that he was treated "unfairly" in a number of respects.

The first is that the refusal of a postponement sought on the first day of the inquiry (31 October) was irregular. I disagree. The application was duly considered by the second respondent and rejected for reasons he gives. The suggestion that the applicant was entitled to the same period to prepare to answer the charges as the forensic inquiry had taken is specious. As already noted, he had been given some two months' notice of the inquiry, he was suspended on full benefits, and able to prepare himself, and he had had the charge sheet for two weeks. The second respondent considered the amplitude of the case tabled against the applicant. I see no unfairness of a **Wahlhaus** kind in his response.

The second is that a renewed application for materially the same relief was unfairly dismissed on Monday 3 November (he was now also permitted legal representation). The complaint is that the application was not even read by the second respondent. This is correct – but the applicant forbears todisclose that (as the transcript shows) the second respondent inquired as to its ambit. When told that it sought to revisit an application made one (hearing) day

before, the second respondent declined to entertain it – other than in relation to a claim for discovery, which he directed first be made to the first respondent and which he said he would determine if not resolved. (This latter aspect was not acknowledged either in the applicant's affidavit or the argument on his behalf: it was necessary for the court to establish the real facts from the transcript of proceedings.)

None of these various complaints, significantly, was characterised in argument as grossly unfair - indeed my attribution of that appellation was resisted in oral argument on behalf of the applicant. This being the case, the matter must be approached on the basis that not one of the particular grounds is contended to be such, but that cumulatively they are such as to give rise (as I understand the contention) to a grave injustice, or to a situation such that justice will not otherwise be obtained in due course.

I do not consider that the **Wahlhaus** test is met. If the inquiry continues, the applicant will be able to testify and to present evidence. He will be able too to apply to the second respondent for an opportunity to cross-examine those witnesses who testified when he and his attorney chose to absent themselves for the purposes of the High Court application (if, as I understand the complaint, a last portion of the transcript is not available, he may apply for the evidence in question to be given again).

But, it is said, there has already been a fatal unfairness because the application for a postponement first lodged on 31 October - when the hearing itself commenced - was granted not for the indefinite period sought, nor the two months later suggested, but only until after the intervening weekend (that is, until 3 November).

It is not apparent to me at this stage that that was unfair - the setting, as I have said, is a disciplinary inquiry of a senior manager, suspended with full benefits and thus able to devote his time fully from the time of his suspension to preparation of his defence; notified in September that the inquiry would ensue; which concerns his own conduct; and having been notified of the date of commencement by 17 October. The demands made on behalf of the applicant are redolent of a highly judicialised proceeding: a claim to parity of time in answering charges; to unlimited discovery; to access to source material held by the first respondent, on the most sweeping terms; and to detailed particulars to readily comprehensible charges, even after these charges - on the intervention, it may be noted, of the second respondent - were clarified by the first respondent.

As Corbett, JA has emphasised in **Du Preez and Van Rensburg v Truth and Reconciliation Commission** 1997(3) SA 204 (SCA), following Lord Mustill in **Doody's** case, fairness is inherently

flexible: it takes its required shape from the contours of each situation in which it must be applied. There is a spectrum from the simplest situation to the most elaborate Privy Council-type proceeding: there is no one size to fit all, least of all an abstrusely judicialised test to be applied in the context of a disciplinary inquiry. The judgment of Colman, J in **Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at 486D-G** is instructive in this respect.

It is unnecessary to essay an exercise as to whether or not each constituent aspect of the criticised conduct amounts to unfairness. I am not persuaded that any does. But that in any event is not the test. The test is that which is laid out in **Wahlhaus, supra** which requires, qualitatively and quantatively, unfairness of a kind such as would militate against all the other policy considerations I have enumerated, and warrant a court intervening now, before completion of proceedings, because otherwise serious injustice arises.

If in due course it should transpire that material unfairness has occurred, the remedies of the applicant are clear. They should have been explained to him. In terms of the Labour Relations Act he is entitled to challenge both the inquiry and any consequential decision by the first respondent (the completion of the inquiry itself has no immediate final effect in relation to his employment). He has access to the appellate and review protection of the Labour

Relations Act. If his employment rights pending the determination of those proceedings for any reason are in issue - for instance, because the first respondent, notwithstanding the institution of any arbitral or review procedure, seeks to act immediately and finally upon any decision it may make as regards sanctions - his ability to seek relief is clear.

Order

The application is dismissed with costs, including the costs of two counsel.

GAUNTLETT, AJ

Counsel for the applicant	:	TN POTGIETER, SC
		(with him, H Loots)
Counsel for the first respondent	:	DF IRISH, SC
		(with him R Steltzner)

No appearance for the second respondent.