

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

19/3/2010

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE: YES/NO. ☒ YES ☐ NO.

2) OF INTEREST TO OTHER JUDGES: YES/NO.

3) REVISED.

DATE 2010-03-19

J. Hiemstra
SIGNATURE

Case Number 5927/2008

REGISTRAR OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

2010 -03- 19

GRIFFIER VAN DIE NOORD GAUTENG
HOE HOE, PRETORIA

In the matter between:
SCHOON GOODWILL MAHUMANI

APPLICANT

and

THE MEMBER OF THE EXECUTIVE COUNCIL:
FINANCE, ECONOMIC AFFAIRS AND TOURISM,
LIMPOPO

RESPONDENT

JUDGMENT

Date delivered: 19 March 2010

Hiemstra AJ

- [1] The applicant seeks the permanent stay and/or setting aside of disciplinary proceedings instituted against him by officials of the Limpopo Department of Finance, Economic Affairs and Tourism, arising from allegations relating to the loss of rhinoceroses at the Andover Nature Reserve during February 2002. He further seeks an order reinstating him to the post of manager, which he held prior to his suspension on 4 June 2002.

- [2] The Notice of Motion has two parts, A and B. The A part is for a stay of the disciplinary proceedings mentioned above, pending the finalisation the B part. The B part is for the relief described in paragraph [1].
- [3] The applicant approached this court on 27 January 2009 as a matter of urgency for the relief sought in the A part. The relief was granted. There was a further application for amendment of the citation of the respondent, which was also granted¹.

Factual background

- [4] The applicant was the Reserve Manager at the Andover Game Park. The respondent suspended the applicant on 4 June 2002 on full pay pending an investigation into allegations of theft of five rhinoceroses. On 27 June 2002 the applicant was served with a notice to attend a disciplinary hearing, which set out four allegations of misconduct relating to the disappearance of five rhinoceroses from the Andover Nature Reserve. The hearing was scheduled for 5 July 2002.
- [5] At the commencement of the hearing the applicant applied to be legally represented. The chairperson dismissed this application on the ground that the Disciplinary Code and Procedure of the Public Service Co-ordinating Bargaining Council (PSCBC) did not provide for legal representation. The applicant, not content with this ruling, brought an application to this court for the review of the ruling. The review application succeeded and the court declared that the applicant was entitled to legal representation. The respondent appealed against this judgment to the Supreme Court of Appeal (SCA), and on 30 November 2004 the SCA referred the matter back to the chairman to exercise his discretion to allow legal representa-

¹ The citation of the respondent was amended from MEC: Finance, Economic Affairs and Tourism: Limpopo Provincial Government to Head of Department of Economic Development and Tourism: Limpopo Provincial Government. The reason for this amendment does not appear anywhere in the papers and seems to be misconceived. In terms of section 2(2) of the State Liability Act, 20 of 1957 the member of the executive council of a province may be cited as a nominal defendant or respondent. The applicant referred throughout his papers to officials of the respondent as "the respondent" and I shall for the sake of brevity use the same nomenclature.

tion.² After reconsidering the matter, the chairperson again declined to allow legal representation.

- [6] On 13 December 2005 the respondent uplifted the applicant's suspension. The respondent ordered him to report to a different workplace and allocated new responsibilities to him until further notice.
- [7] Nothing happened until 2 February 2006 when the applicant's attorney wrote to the respondent requesting an investigation into the matter as the applicant had allegedly been suffering severe prejudice because of the pending disciplinary proceedings. It was alleged that the applicant had not received bonuses or pay increases; remained on the same salary scale since 2002 and had not been considered for promotion or performance bonuses. The respondent alleged that he had in fact received salary increases.
- [8] Subsequently, on a date that does not appear from the papers, the applicant was arrested and charged in the Regional Court of Phalaborwa with the theft of the rhinoceroses. He was acquitted on 26 October 2006 at the close of the State's case in terms of s 174 of the Criminal Procedure Act³.
- [9] On 7 February 2007, despite the applicant's acquittal, the respondent issued a further notice to the applicant to attend a disciplinary hearing on the same charges. The hearing was scheduled for 21 and 23 February 2007. The hearing did not take place, according to the applicant, because of correspondence between the applicant's attorney and the respondent.
- [10] On 26 April 2007 the respondent issued a third notice to the applicant to attend a disciplinary hearing, which was scheduled for 10 and 11 May 2007. Prior to the hearing the parties agreed to reschedule the hearing for 16 – 19 July 2007. It was,

² MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani (2004) 25 ILJ 2311 (SCA)

³ 51 of 1977.

however, postponed to 8 August 2007. On that date the hearing again did not proceed because the parties had entered into negotiations.

- [11] The hearing commenced on 31 March 2008. The applicant, through his attorney, requested the chairman to dismiss the charges due to the delay in finalising the matter. By that time more than six years had elapsed since the applicant had first been charged. The chairman declined the application and the hearing was again postponed.
- [12] The parties again engaged in settlement negotiations for several months, but could not resolve the issues.
- [13] On 8 December 2008 the respondent issued a fourth notice to the applicant to attend a disciplinary hearing, this time scheduled for 27 – 30 January 2009.
- [14] The applicant then launched this application.

Jurisdiction of this court

- [15] This matter has a distinct labour law flavour, and based on several judgments of the Constitutional Court, the SCA and the Labour Court, the respondent challenged the jurisdiction of this court to hear the matter.⁴
- [16] The point of departure in determining whether this court has jurisdiction is s 169 of the Constitution, which provides as follows:
 - *A High Court may decide -
 - (a) any constitutional matter except a matter that -
 - (i) only the Constitutional Court may decide; or
 - (ii) is assigned by an Act of Parliament to another Court of a status similar to a High Court; and

⁴ *Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC); *Fredericks & others v MEC for Education & Training, Eastern Cape & others* 2002 (2) SA 693 (CC); (2002) 23 ILJ 81 (CC); *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA); *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA); *Booyesen v SAPS & another* (2009) 30 ILJ (LC); *Mohlaka v Minister of Finance & others* (2009) 30 ILJ 622 (LC) and others.

(b) any other matter not assigned to another court by an Act of Parliament.”

[17] Despite the controversy around various judgments of the Constitutional Court⁵, the SCA⁶ and Labour Court⁷, there is consensus that the jurisdiction of a court must be determined according to the designation of the dispute as appears from the pleadings or affidavits, as the case may be. Langa CJ said in para [169] of his opinion in *Chirwa* the following:

“I must stress again that this finding does not depend on the dismissal qualifying as ‘administrative action’ in terms of PAJA. The determination of whether the dismissal does constitute administrative action is part of the merits of the claim, not a jurisdictional requirement. The finding, however, rests on the case as pleaded by Ms Chirwa. She formulated her case on the basis of PAJA, and a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.”

[18] Skweyiya J adopted the same approach, but reached a different conclusion to that of the Chief Justice as to the nature of the right which Ms Chirwa sought to enforce. He found that Ms Chirwa’s claim was that her dismissal had not been effected in accordance with a fair procedure, and that it was therefore a dispute envisaged by s 192 of the Labour Relations Act (LRA) for which special procedures are prescribed.⁸

The applicant’s case

[19] In deciding this case, I shall adopt this approach and determine exactly what the complaint of the applicant is. He said that the respondent has infringed the following of his rights:

(a) The right to be tried within a reasonable time;

⁵ *Chirwa*, supra; *Gcaba*, supra; *Fredericks v MEC for Education and Training, Eastern Cape and others* supra

⁶ *Makhanya v University of Zululand* supra; *Boxer Superstores Mthatha and Another v Mbenya* supra

⁷ *Booyesen v SAPS & another* (2009) 30 ILJ (LC); *Mohlaka v Minister of Finance & others* supra

⁸ At 387 para [63]

- (b) His right to fair labour practices;
- (c) His right to just administrative action.

The question is whether this court has jurisdiction to decide whether one or more of these rights have been infringed.

- [20] Before dealing with the applicant's contention that he had been deprived of the right to be tried within a reasonable period, I can immediately dispose of the questions whether his claims that his right to fair labour practices⁹ and his right to administrative action that is lawful, reasonable and procedurally fair¹⁰ have been infringed, can be sustained.

Fair labour practices

- [21] This court has no jurisdiction to decide unfair labour practices. The Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils have jurisdiction to determine certain unfair labour practice disputes and the Labour Court has jurisdiction to determine certain other unfair labour practice disputes.¹¹

- [22] Whichever forum has jurisdiction, the claim of the applicant can in any event not be sustained in any court. In seeking to enforce his right to fair labour practices by way of an interdict, the applicant is seeking to bypass the dispute procedures of the LRA. O'Regan J said in *SANDU v Minister of Defence & others*¹²:

"Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."

- [23] The LRA prescribes extensive procedures to enforce rights in terms of that Act. The applicant has not followed those procedures. In any event, s 186(2) of the LRA contains a closed list of unfair labour practices and the applicant has made no allegations that the employer had committed one or more of the unfair labour practices listed in that section.

⁹ S 23 of the Constitution

¹⁰ S 33 of the Constitution

¹¹ S 191 of the LRA

¹² 2007 (5) SA 400 (CC) at para 51

[24] The applicant's claim based on this ground therefore cannot succeed.

Administrative action

[25] The applicant's reliance on a violation of his right to administrative action that is lawful, reasonable and procedurally fair can also not be sustained. Although this court has jurisdiction to review any administrative action, action taken by the State as employer does not constitute administrative action as defined in s 1 of the Promotion of Administrative Justice Act (PAJA).¹³ It has no external legal effect. See in this regard *Chirwa*, *Gcaba*, *Makhanya* and several judgments referred to.

Right to be tried within a reasonable time

[26] Cameron JA said in *Boxer Superstores Mthatha and another v Mbenya*¹⁴, referring to *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹⁵:

"that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing. This means that every employee now has a common-law contractual claim - not merely a statutory unfair labour practice right - to a pre-dismissal hearing. Contractual claims are cognisable in the High Court. The fact that they may also be cognisable in the Labour Court through that court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction."

[27] If an employee has a common law right to pre-dismissal hearing, as is manifestly the case, then he is entitled to a proper one. That may well include the right to be tried within a reasonable time.

[28] Apart from the common law right to be tried timeously, the applicant also relied on the provisions of the Disciplinary Code and Procedure of the Public Service Coordinating Bargaining Council (PSCBC), which provides time periods within which disciplinary action has to be taken. The code and procedures form part of a collec-

¹³ 3 of 2000

¹⁴ 2007 (5) SA 450 (SCA)

¹⁵ 2007] SCA 52 (RSA) in paras [5] - [8], per Jafta JA

tive agreement.¹⁶ S 24 of the LRA provides procedures for the enforcement of collective agreements by the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. The fact that the CCMA and bargaining councils have been given jurisdiction to resolve disputes arising from the interpretation and application of collective agreements, however, does not oust the jurisdiction of this court. The CCMA and bargaining councils are not courts with status similar to a High Court, as envisaged by s 169(a)(ii) of the Constitution¹⁷. They are not even courts at all.

[29] This court therefore had jurisdiction to decide whether the applicant's right to be tried within a reasonable time has been infringed.

[30] I therefore find that this court has jurisdiction to decide the applicant's case insofar as he relies on an infringement of his right to a fair pre-dismissal procedure.

The merits

[31] I now turn to the merits of the application.

[32] Although this court has jurisdiction to intervene in uncompleted disciplinary proceedings, the court will do so only in extraordinary circumstances, such as where the refusal will result in a grave injustice. In *Van Wyk v Director of Education and another*¹⁸, and *Van Wyk v Midrand Town Council and others*¹⁹ the court found on the facts that they were of the rare cases where intervention was justified. In other cases the courts declined to intervene²⁰. In all cases where the court intervened, the employer was bound by statutory prescripts to follow certain procedures. Landman J declined to intervene in a private sector disciplinary enquiry in *Moro-*

¹⁶ PSCBC Resolution 1 of 2003

¹⁷ *Fredericks v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC) paragraph [35] at 711E/F - F

¹⁸ 1974 (1) SA 396 (N)

¹⁹ 1991 (4) SA 185 (W)

²⁰ *Wahinhaus & Others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (A); *Ismail & Others v Additional Magistrate, Wynberg & Another* 1963 (1) SA 1 (A)

*pane v Gilbeys Distillers & Vintners (Pty) Ltd & another*²¹. The PSCBC Disciplinary Code and Procedure are quasi statutory prescripts.

- [33] The applicant's main complaint is the delay in finalising the disciplinary proceedings. This, however, disregards the fact that the applicant and his legal representatives are responsible for most of the delay. When legal representation was not allowed, they took the matter all the way to the SCA. Thereafter the proceedings were delayed by settlement negotiations. It is, however, true that there were also periods of inactivity on the part of the respondent that have not been satisfactorily explained. The respondent, for instance, claimed that it could not proceed with the disciplinary hearing pending the outcome of the criminal proceedings. According to the answering affidavit, that was because all the documentation had been in possession of the SAPS. This is not entirely convincing. No reason has been proffered why at least copies could not have been obtained from the SAPS. There is also the delay between the outcome of the criminal proceedings on 26 October 2006 and the reconvening of the disciplinary hearing on 7 February 2007, which has not been explained.
- [34] My view about the delays is, however, that both parties are to be blamed for it, not only the respondent.
- [35] The applicant seeks a permanent stay of the disciplinary proceedings so that he can return to his old position and continue his employment. Mr J. de Beer, appearing for the applicant, argued that if the applicant is dismissed by the disciplinary chairperson after an unfair hearing, neither the Bargaining Council nor the Labour Court will have jurisdiction to reinstate him. He bases this submission on s 193(2)(d) according to which reinstatement is not competent if the dismissal is found to be unfair only because a fair procedure had not been followed.
- [36] This submission is sheer casuistry. The question whether he should be reinstated depends on whether or not he is guilty of the charges, and not whether the dismissal had been procedurally unfair. If it is found that he is guilty of the charges,

²¹ Supra footnote 17

but that the hearing had been procedurally unfair, he would in any event not be entitled to reinstatement. He could in that case be compensated within the limits prescribed by s 193 of the LRA.

- [37] Mr de Beer further submitted that the applicant had no confidence in the Bargaining Council to give him a fair hearing, should he wish to challenge the findings of the disciplinary chairman. He said that this court was far more competent to decide the matter. It goes without saying that this submission cannot be entertained. Litigants cannot select whichever forum they perceive to be the most competent. They may not bypass procedures provided for by legislation, in this case the LRA.

The requirements of a permanent interdict

- [38] The applicant seeks a final interdict. The requirements of a final interdict are: a clear right; an injury actually committed or reasonably apprehended; and the absence of similar or adequate protection by any other ordinary remedy. This application must fail on all these requirements:

Clear right

- [39] An employer has a right to charge an employee in a disciplinary hearing. The delay in finalising the proceedings does not in itself create a clear right to the relief the applicant seeks. It all depends on the reasons for the delay. There are disputes of fact as far as this is concerned, and this court is not in a position to resolve those issues.

An injury actually committed or reasonably apprehended

- [40] The applicant has not been dismissed. He was suspended on full pay. Therefore, no injury has actually been committed. If it turns out that he has suffered some financial loss, he can sue the respondent for the recovery thereof.

[41] There is also no reasonable apprehension of harm. It is simply not reasonable to presume that the applicant would be found guilty or that he would get no redress if he is wrongly dismissed.

[42] There is no reason to apprehend injury. The applicant has the procedures of the LRA at his disposal. Labour issues are to be dealt with in the specialised fora and pursued through the purpose-built mechanisms established by the LRA.²²

The absence of similar or adequate protection by any other ordinary remedy

[43] The LRA provides adequate remedies in the event of an unfair outcome of the disciplinary hearing.

[44] Had the applicant allowed the process to follow its course, it would have been finalised years ago. Instead, he needlessly challenged the refusal to grant him legal representation, and attempted to interdict these proceedings. He cannot use his own delaying tactics as a ground for interdicting the process.

Order

[45] The application is dismissed with costs.


J. Hiemstra AJ

²² *Gcaba* at 251 para [29]