

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr: 3748/2004

In the matter between:

RANTSOEU SYLVESTER BENNET SESELE Applicant

And

MATJHABENG LOCAL MUNICIPALITY First Respondent

SJ LEEUW: EXECUTIVE MAYOR,

MATJHABENG LOCAL MUNICIPALITY Second Respondent

JUDGMENT: MUSI J

HEARD ON: 9 DECEMBER 2004

DELIVERED ON: 27 JANUARY 2005

- [1] The applicant is the Municipal Manager of Matjhabeng Local Municipality, which has its head office at Welkom, being the first respondent herein (the Council). The applicant was appointed to this position in terms of a written contract of employment for a five years term with effect from 5 December 2001. The contract is annexed to the applicant's

founding affidavit and marked “A” (the contract). The second respondent is the executive mayor of the Council. He acted throughout the events forming the subject of this case as representative for the Council and has been cited in these proceedings in such capacity. He is representing the Council in these proceedings as well.

[2] The dispute herein was triggered by a letter addressed by the second respondent to the applicant on 28 October 2004 wherein various, serious allegations of failure to perform his functions properly are levelled at the applicant and on the basis of which it is proposed to terminate his contract. He was given 72 hours notice within which to respond to the allegations and give reasons why his contract should not be cancelled, “failing which the said contract shall be deemed to have been cancelled”. The letter is annexed to the applicant’s founding affidavit and marked “B”.

[3] Upon receipt of this letter the applicant approached his attorneys of record who addressed a letter to the Council on

29 October 2004 wherein it is indicated that the 72 hours period given to the applicant is too short to deal with the allegations contained in the letter aforesaid, given the nature and extent of the allegations. An objection was also raised to the procedure envisaged in Annexure “B” and the Council was urged to follow the procedure for dismissal on the basis of misconduct as provided for in the Labour Relations Act 66 of 1995 (the LRA). In other words, that a disciplinary inquiry be conducted whereat the applicant would be afforded the opportunity to refute the complaints against him. A demand was also made for the Council to give an undertaking that it would not at the meeting scheduled for 2 November 2004 deal with the issue of the applicant’s dismissal, failing with an urgent court application would be launched to stop the Council from taking any decision to cancel the contract.

- [4] The Council responded to the above letter through a letter dated 1 November 2004 addressed to the applicant’s attorneys by its attorneys. Such letter is annexed to the applicant’s replying affidavit and marked “RSB4” (at page

353 of the pleadings). The respondents simply refused to accede to the request of the applicant's attorneys but indicated that the 72 hours notice could be ignored. The letter did not, however, give any extended period within which the applicant was to respond. Instead it is stated as follows:

“Council will treat and make a final determination with regard to the cancellation of that contract and the time period, if necessary, with which or after which the said contract must be cancelled.”

By a further letter dated 1 November 2004 the applicant's attorneys indicated that in view of the abandonment of the 72 hours notice period, they would not proceed with the proposed Application but again sought an undertaking that the Council would not terminate the applicant's contract at the meeting on 2 November 2004. The response of the attorneys for the Council was rather an impolite refusal to provide any undertakings and the attitude was adopted that the applicant could go to court and that the parties would meet there. The last paragraph of the relevant letter,

Annexure “G” to the respondent’s answering affidavit, is interesting and will be dealt with later in this judgment.

- [5] A deadlock having thus developed the applicant launched the instant application on the basis of urgency on 2 November 2004. The application was initially argued before Lombard J and I understood that due to the fact that it was already late in the day, the matter was stood down to the following day and the issue of costs to stand over. On 3 November 2004, various points *in limine* were raised by Mr. Edeling, who acted for the respondents, and argument proceeded on those on that day. At the end no decision was given and the matter was postponed to 9 December 2004 with directions for filing of further and full papers by the parties. An interim order was made to the effect that the respondents were to take no steps to suspend or terminate the applicant’s services pending finalization of the matter. A full exchange of papers took place and the matter was fully argued before me on 9 December 2004 as an opposed motion. I reserved judgment.

[6] The orders that the applicant seeks are set out in prayers 2.1 and 2.2 of the notice of motion as follows:

“2.1 that respondents be prohibited from terminating applicant’s employment agreement without following a fair procedure in accordance with the Labour Relations Act, 66 of 1995 read with Schedule 8 thereto, alternatively the terms and conditions of the employment agreement;

2.2 that respondents be interdicted to terminate the applicant’s employment agreement in accordance with the procedure set out in and pursuant to the letter of **28 October 2004** by second respondent;”

These prayers are in fact in the alternative, as was intimated by Mr. Daffue, Counsel for the applicant, during the hearing. In respect of prayer 2.1, Mr. Daffue moved that reference to the Labour Relations Act and schedule 8 thereto be deleted. This was prompted by the arguments advanced by Mr. Watt-Pringle, the senior Counsel who had been roped in to represent the respondents, on the issue of jurisdiction. Mr. Daffue thereby abandoned reliance on the provisions of the Labour Relations Act and shifted the focus to the applicant’s

constitutional rights to a fair hearing. I shall revert to the relevant submissions shortly.

- [7] The source of the applicant's complaint is essentially the procedure that the respondents followed in terms of the letter dated 28 October 2004 aforesaid. He states the following in paragraph 5 of his founding affidavit:

“Second respondent's intention to cancel my employment agreement in the manner as threatened, is not only procedurally unfair, but in total neglect of the terms and conditions of my employment agreement, my performance agreements as well as the applicable Labour Law Legislation.”

What the applicant seeks is not that the respondents be prohibited from cancelling his contract and thus dismissing him but rather that they be stopped from doing so in terms of a procedure that would allegedly violate his constitutional right to a fair hearing. In this context, the validity of the grounds upon which it is proposed to dismiss him are irrelevant. Nor is the right of the respondents to dismiss an issue. The applicant captured this in paragraph 2 of his

replying affidavit:

“Before dealing with second respondent’s affidavit I reiterate that I do not intend to deal with all factual allegations pertaining to the merits or demerits of respondents’ right to cancel my employment agreement. I refer in this regard to paragraph 7 of my founding affidavit when I made it clear that I should get an opportunity at the appropriate forum to defend myself pertaining to all allegations and evidence that may be put forward in support of such allegations.”

I shall revert to the merits of the applicant’s case in due course.

- [8] In opposing the application, the respondents insist that they were entitled to follow the procedure complained of and focus on the validity of their grounds for the proposed dismissal. They filed voluminous documents in this regard. Their standpoint is that they have made out an overwhelming case for dismissal and see it as inevitable. The respondents denied moreover that the applicant would suffer irreparable harm and dispute that he was entitled to bring the instant application. In this regard, it is pointed out that the 72 hours notice, which is central to the applicant’s grievances, has

been waived.

[9] In his heads of argument and in oral argument counsel for the respondents raised *in limine* the issue of jurisdiction and it is appropriate to deal with it at this juncture. By far the larger part of the submissions made on behalf of the respondents centre on this point and it occupies about 13 out of the 18 pages of the heads of argument. The essence of the argument is that the dispute herein is one within the exclusive jurisdiction of the CCMA and the Labour Court and it is contended that the LRA has ample remedies available to the applicant should he be dismissed. The following is stated at paragraph 13 of the heads of argument:

“It follows that in so far as the Applicant claims a right to be dealt with in accordance with Schedule 8 to the LRA before he may be dismissed, he is asserting a statutory right which he has without the need for an interdict. The remedy or penalty, as the case may be, for an employer’s non-compliance with the equitable requirements of a fair dismissal are to be found in the LRA and the determination as to whether the employer has complied with a fair procedure and has a good reason for terminating the employees services, is determined *ex post facto* by the CCMA or Labour Court as the case may be. Furthermore, the remedies

available to the employee are those specifically provided by the LRA and no other.”

This argument is in line with what was stated in **MOROPANE v GILBEYS DISTILLERS AND VINTNERS (PTY) LTD AND ANOTHER** (1998) 19 ILJ 635 (LC) at 641 G – H. In terms hereof an employee must wait until the dismissal process has taken its full course and then seek the remedies of compensation or re-instatement or re-employment through the arbitration process laid down in the LRA before he can approach the Labour Court.

- [10] Regarding the provisions of section 157(2) of the LRA which confers concurrent jurisdiction with the High Court in respect of certain labour related matters, Mr. Watt-Pringle submitted as follows:

“Although the right to fair Labour practices is a constitutional right, it does not follow that on each occasion that an employee asserts the right to fair labour practices as laid down in the Labour Relations Act, he is asserting a constitutional right which is justiciable by the High Court, the Supreme Court of Appeal and the Constitutional Court.”

He submitted that **FREDERICKS AND OTHERS v MEC FOR EDUCATION AND TRAINING EC 2002 (2) SA 693 (CC)** does not have the effect that the High Court would exercise concurrent jurisdiction with the Labour Court regardless of the nature of the specific issue. Counsel further submitted that the applicant was not in a different position from any other employee who claims to be threatened with unfair dismissal and cited authority for the view that the courts are generally reluctant to interfere in pending disciplinary hearings unless there are compelling and exceptional circumstances. He referred *inter alia* to **MHLAMBI v MATJHABENG MUNICIPALITY AND ANOTHER (2003) 24 ILJ 1659 (O)** at 1664 paragraph 13.

- [11] Mr Daffue argued, on the other hand, that this is a matter falling squarely within the perview of section 157(2) of the LRA. The contention was that there was a threat to the applicant's constitutional right to a fair hearing and administrative justice. He referred to the **FREDERICKS-**

case *supra* and to various unreported cases of this Division. He also dealt at some length with the doctrine of legality in terms of which the exercise of public power by a public functionary is lawful only in so far as the functionary acts within the confines of the law conferring the relevant power. This is an argument relevant to review proceedings and the less said about it the better.

- [12] The more authoritative case emanating from this Division on the point *in limine* is that of **RJ RAKGOALE AND ANOTHER v THE PREMIER OF THE FREE STATE**, Nr. 3065/2004, a judgment of Malherbe JP and Hattingh J delivered on 7 December 2004. Therein the applicants, senior employees of the provincial government, challenged the decision of the Premier to transfer them to other posts. The learned Judges cited *inter alia* **FREDERICKS**-case *supra* and at paragraph 14 and 15 the following is stated:

“[14] A literal interpretation of section 157(1) would suggest that only disputes specifically earmarked in the legislation for resolution by the Labour

Court fall within its exclusive jurisdiction. This narrow construction confirms that the legislature did not intend to confer exclusive jurisdiction on the Labour Courts over all disputes arising from the employment relationship. (See *FEDLIFE ASSURANCE LTD v WOLFAARDT* 2002 (1) SA 49 SCA at para. [25], pp. 60J-61D).

- [15] Section 157(2) of the LRA confers concurrent jurisdiction on the Labour Court and the High Courts to determine disputes arising from the alleged violation of constitutional rights. A literal interpretation of this section unequivocally provides for both the Labour Court and the High Courts to have jurisdiction over labour disputes that are not reserved for exclusive determination by the Labour Court in terms of section 157(1)."

The learned Judges further proceed as follows at para. 22 and 23:

- "[22] Applicants rely on their constitutional protection against infringement of their right to administrative justice and fair labour practice as envisaged in sections 23 and 33 of the Constitution.

- [23] Thus the dispute between the parties involves constitutional issues. We conclude, therefore, that this dispute is not excluded from the jurisdiction of the High Court as court of first instance."

- [13] In my view, the issues herein have been clouded by the

manner in which prayer 2.1 has been framed, where it is sought to hold the respondents to the provisions of the Labour Relations Act, in terms of which a normal disciplinary hearing would be the appropriate procedure. The applicant had been under a misconception that he was being accused of misconduct, when in fact the accusations relate to poor performance. Mr Watt-Pringle submitted that in cases of poor performance the normal disciplinary enquiry is not held, but that the employee is simply apprised of the complaints against him on the basis of which it is intended to dismiss and is given the opportunity to make representations in rebuttal. He cited **BRERETON v BATEMAN INDUSTRIAL CORPORATION LTD AND OTHERS** (2000) 21 ILJ 442 (IC) at 445 – 446. Mr. Daffue somewhat agreed with this submission and accordingly abandoned insistence on a disciplinary enquiry as well as reliance on the provisions of the Labour Relations Act.

- [14] The procedure followed in dismissals on account of poor performance referred to above, is provided for in section 4

read with section 9 of the Code of Good Conduct, Schedule 8 to the LRA. This does not, however, per se stigmatize the procedure as being a matter within the exclusive jurisdiction of the CCMA or the Labour Court. Such procedure applies also outside the ambit of the LRA. At the root of the procedure is the *audi alteram partem* rule, which is central to the notion of a fair hearing and fair labour practice. A procedure whereby an employee is given a proper opportunity to state his case would satisfy the requirements. On the other hand, a process that denies him that opportunity would be a threat to the constitutional right to a fair hearing. *In casu*, the essence of the applicant's grievance is that he was being denied a proper opportunity to state his case and that his right to a fair hearing was thus under threat. In my view, that raises a constitutional issue.

- [15] The point, however, is that the submissions advanced on behalf of the respondents are not supported by their papers. In fact, they are at variance with the opinion of their attorney as per Annexure "RSB3" to the replying affidavit, which

states:

“It is my view that the route of terminating this contract via the mechanism of the Labour Relations Act will be inappropriate in this case, because of the cancellation clause and the indefensible acts of non compliance by the employee.”

It is clear that the respondents acted throughout on the basis of such opinion and their papers drawn accordingly. If there was any doubt about that, it is dispelled by the 72 hours notice given to the applicant which repeats *verbatim* what is stated at paragraph D of the opinion. Quite clearly the respondents did not purport to act in terms of the Labour Relations Act. The wording of prayer 2.1 cannot change the fact that this is not a matter within the exclusive jurisdiction of the Labour Court. In this regard, it should be noted that this Court is, unlike the Labour Court, not a creature of statute and does not exercise sporadic jurisdiction. See **MOROPANE v GILBEYS DISTILLERS** *supra* at 638 F – G.

I hold therefore that this Court has jurisdiction in the matter.

[16] Having disposed of the highly contested issue of jurisdiction, I intend to get straight to the singular issue that needs to be determined, namely, whether the applicant was entitled to bring this application. Put otherwise, has he satisfied the requirements of a final interdict? I have already cited what the applicant says at paragraph 5 of his founding affidavit and he refers to clause 7.2.3 of the contract which sets out how the employer should deal with the employee in the event of poor performance. He proceeds to cite the provisions of the applicable performance agreement and then quotes from clause 8.4 thereof:

“Clause 8.4 of annexure “D” confirms the obligation of the employer to act in accordance with Labour Law Legislation and I quote the following:

If at any stage thereafter the Executive Mayor holds the view that the performance of the Municipal Manager is not satisfactory, the municipality will, subject to compliance with applicable Labour Legislation, be entitled to give a notice in writing to the Municipal Manager to terminate the Municipal Manager’s employment in accordance with the notice period set out in the Municipal Manager’s contract of employment.”

He further states the following:

“The notice period is one month as is evident from Clause 8.1 of the Employment Agreement.”

[17] Now I looked closely at the opposing affidavits filed on behalf of the respondents and found that these averments are not denied at all. Instead the following strange averment is made at page 94 of the pleadings:

“I am advised and I so verily believe that it is trite law that no Court of law has the right, let alone the authority, to compel a party that wants to cancel a contract for whatever reason, not to cancel that contract.”

The second respondent is barking at a wrong tree. It is not the right to cancel that is in issue. Then at page 95 the following is stated:

“If the notice already given to him, which is ANNEXURE “B” to the founding papers, is not adequate, then adequate notice of the cancellation of this contract will be given to him and he will be afforded an opportunity to fully put his case forward as to why the contract should not be cancelled.”

The applicant branded this as an afterthought in his replying affidavit, and I agree with him. On the applicant's undisputed version, he was entitled to one month's notice in terms of the contract but was instead given a hopelessly short notice of 72 hours. Clearly the respondents acted in breach of the contract. Nor could such short notice be justified on any ground. In a way the respondents have conceded this much by waiving the period of the notice.

[18] But then what transpired leading to the launching of the instant application? The correspondence is exchanged between the attorneys of the respective parties should settle the issue.

[19] Upon receipt of the notice of cancellation, the applicant caused his attorney to address Annexure "C" to his founding affidavit to the Council objecting to the procedure being followed, indicating that the 72 hours notice was too short for the applicant to respond to such extensive and serious allegations and demanding an assurance that the matter

would not be dealt with on 2 November 2004. In their response to the above letter, the Council's attorneys advised that the applicant could ignore the 72 hours notice period but flatly refused to give any assurances as to what would happen further and dared the applicant to go to Court. The applicant's attorneys again tried to get assurances that the meeting would not deal with the issue and indicated that if they get the assurances it would not be necessary to launch an urgent application. Again the respondents' attorneys would not budge. The last paragraph of the relevant letter, Annexure "G" to the opposing affidavit, is ominous and states:

"We reiterate that it is only a question of the time period within which or after which your client's contract will be lawfully cancelled by our client. Your client might have informed you by now of the overwhelming evidence which make his non-compliance with his contract of employment abundantly clearer than crystal itself."

[20] The clear impression is created that the respondents had already made up their mind to dismiss the applicant and that it was inevitable, whatever representations or explanations

he might give. It betrays the questionable tactics adopted in this matter and tells us that there really was no intention of giving the applicant a fair hearing. The question arises whether he was given 72 hours notice deliberately in the knowledge that he would not be able to respond timeously. The conclusion to this effect becomes inescapable when regard is had to what happened at the hearing of 2 November 2004.

- [21] The record of the relevant proceedings shows that Lombard J tried to get an assurance that the meeting then already in progress would not suspend or terminate the applicant's services pending the outcome of the application. He could get none from Mr. Edeling, the junior counsel for the respondents in this matter. The learned Judge had to send a message through to the Council via the office of the Registrar. It is therefore not far fetched to say that had the urgent application not been launched and the learned Judge intervened, the respondents would most probably have terminated the applicant's contract on the basis that he had

failed to give reasons why he should not be dismissed.

[22] In the circumstances, the applicant was justified to bring the instant application. In my view, the requirements of a final interdict are present. The applicant has a clear constitutional right to fair labour practices and a fair hearing. The threat of arbitrary and unlawful dismissal was real and entailed the risk of irreparable harm. It is no good to say that the CCMA or the Labour Court would be available to remedy the situation *ex post facto*, given that the procedures of the LRA were not being followed. In this regard I wish to refer to what

I said in **MHLAMBI v MATJHABENG MUNICIPALITY AND**

ANOTHER 2003 (5) SA 89 (O) at 94 para. [12]:

“The notion that an employee facing a disciplinary inquiry should be precluded from himself or herself taken steps to ensure that he or she gets a fair hearing and thereby avert any potential prejudice to himself or herself, is in my view, illogical and would probably violate provisions of chapter 2 of the Constitution, in particular the right to a fair labour practice, the right to access to information required for protection of rights and the right to just administrative action.”

As for the existence of an alternative remedy, there can be no doubt that this application was the only option available to the applicant.

[23] It stands to reason that the application should be granted and the normal rule as to costs applies. Regarding the costs of the hearings of 2 November 2004 and 3 November 2004 I have noted that the respondents were confident to argue the matter without first filing their opposing papers and did so purely on the basis of the points *in limine* taken by their counsel. The following was stated by Mr. Ploos van Amstel, who was then appearing for the applicant, at p. 92 line 16:

“The proceedings have been fruitless, because all the points *in limine* have now been withdrawn and with respect there can be no doubt that the respondents must be responsible for the costs occasioned by the appearances yesterday and today and that is what I ask your Lordship.”

There is no indication on such record that this statement was challenged and it is to be accepted that it reflects the correct position. At any rate, the fact that the matter had to go to the

merits for which a postponement became necessary, means that the points *in limine* did not succeed. The respondents are therefore liable for the costs of those days as well.

[24] I have to reiterate in passing that I have not commented at all on the validity of the grounds of the intended dismissal as propounded by the respondents. Nor is the right of the respondents to dismiss in issue. It appears though that there are indeed valid grounds for dismissal and it appears that the applicant has been given the opportunity to improve his work performance. Moreover it is trite that as a senior employee he is presumed to be able to assess his own performance.

See **BRERETON v BATEMAN INDUSTRIAL CORPORATION** *supra* at 450J – 451 (I should point out though that the facts of this latter case are distinguishable from those of the instant case.)

The applicant will be well advised to carefully reconsider his position. He may have won the battle, but the war is not over yet.

[25] As I have already indicated, prayers 2.1 and 2.2 are in the alternative and I shall grant only prayer 2.1 to be amended as set out hereunder. The application succeeds and the following order is made:

1. The respondents are prohibited from terminating the applicant's employment agreement without giving him a fair hearing, including a proper notice.
2. The respondents to pay the costs of suit, including the costs of the proceedings on 2 November 2004 and 3 November 2004.

H.M MUSI, J

On behalf of Applicant: Advocate JP Daffue
Instructed by
Lovius Block Attorneys
BLOEMFONTEIN

On behalf of Respondents: Advocate CE Watt-Pringle SC
Assisted by
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