

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

Appeal No. : 445/2005

In the matter between:

MOTLADILLE HERMAN LEBURU

Appellant

and

**THE LEJWELEPUTSWA DISTRICT
MUNICIPALITY**

1st Respondent

**MN SEABAT, acting Municipal Manager
of the LEJWELEPUTSWA DISTRICT
MUNICIPALITY**

2nd Respondent

PROF MZUNGULU MTHOMBENI

3rd Respondent

CORAM:

EBRAHIM J

JUDGMENT:

EBRAHIM J

HEARD ON:

10 MARCH 2005

DELIVERED ON:

17 MARCH 2005

[1] This is an application for the confirmation of a rule *nisi* which

was granted by this Court on Tuesday, 9 February 2005. In essence the applicant seeks to interdict the third respondent from proceeding with a disciplinary hearing pending the finalisation of a review application which has at this point been issued but not yet served.

- [2] The background to this application may be summarised as follows:

“FACTUAL BACKGROUND

2.1 The applicant is currently employed by the first respondent – Lejweleputswa District Municipality, based in Welkom and referred to in these heads as “*the Municipality*” – as its Manager : Corporate Services.

2.2 On 24 October 2002, while serving as the acting Municipal Manager of the Municipality, the applicant concluded an agreement on behalf of the Municipality

with Dikgolabolokwe Sanitation CC (*DSCC*) to complete a programme for the eradication of the bucket toilet system in the five local municipalities falling under the jurisdiction of the Municipality.

2.3 It is alleged that the applicant had authority only to award a contract to DSCC for the management of the programme but that, without authority and without complying with requisite tender procedures, he appointed DSCC also to undertake the work itself for the bucket eradication programme. The cost of the work awarded – allegedly without authority – is approximately R63 million.

2.4 The Municipality's financial regulations, adopted on 27 July 2002, require that the award of a contract for the acquisition of goods or services in excess of R120 000,00 be done in accordance with a formal tender procedure. The applicant has been charged with failing to comply with this requirement when awarding

the contract to DSCC.

2.5 The applicant was suspended with full pay pending the outcome of the disciplinary enquiry. He was served with the charge sheet on 17 November 2004.

2.6 The third respondent was appointed as the independent chairperson of the disciplinary enquiry.

The enquiry first convened on the 10th December 2004 but by consent between the parties and their respective legal representatives, it was rescheduled for hearing during the period from 7th to 11th February 2005.

2.7 At the enquiry, both parties were represented by attorneys (the applicant by Mr Peypper and the Municipality by Mr Lebea).

2.8 As part of the case for the employer, the Speaker of the Municipality, Mr Hleko, was called as the first witness to testify in relation to the charges levelled against the applicant. At the tail end of Mr Hleko's evidence in chief, the following exchange occurred:

‘Mr. Lebea: Mr Hleko, tell this hearing what is your view on the issue of [the] trust relationship between the municipality and Mr Leburu [the applicant] should Mr Leburu be found guilty of the charges against him?’

Mr Hleko: Looking from the point of view of the Municipality which relies on Mr Leburu for advice, I think it was quite a serious offence for him to conclude the agreement of R62 949 000,00 without following tender procedures before appointing the service provider. I also think that he should have disclosed his actions to Council and seek condonation of Council for his unauthorized action. Therefore, trust relationship will be lost as the Municipality will not trust him that he will not engage in similar action in the future. Dismissal in my view, will therefore in the light of what I have just stated be an appropriate penalty.’”

2.9 An objection was raised to this evidence by the representative of the applicant and after argument was addressed by both legal representatives, the third respondent gave his ruling overruling the objection and stating his reasons as follows:

“Chairperson: I have considered your submissions. My decision is that, I will allow [the] question. If [sic] do not think that Mr Leburu will suffer any prejudice which cannot be addressed sufficiently through cross-examination. The question is speculative or dependent on the findings – it does not amount to admission of evidence in aggravation. I refer the parties to clause 13.7.1.17(k) of the contract of employment. Mr Leburu has the right to have any previous [disciplinary] record considered only after his [guilt] has been proven. Mr Lebea’s question [does] not amount to [enquiring] into the previous disciplinary record of Mr Leburu. Based on this, the objection is dismissed’.”

2.10 On the following day of the hearing, that is the 8th February 2005, the applicant brought a formal written application for the recusal of the third respondent on the basis of his dismissal the previous day of the applicant’s objection. It was alleged that there was a perception on the part of the applicant that the third respondent might be biased against him.

2.11 After hearing argument the third respondent then handed down a ruling dismissing the recusal application and giving reasons. In essence he found the following:

“2.11.1 The enquiry is a two-pronged process, examining the merits of the case and making a finding and only then looking at the question of a proper sanction;

2.11.2 The evidence by Mr Hleko on the appropriate sanction for the applicant, if he were to be found guilty, was hypothetical and would not influence the third respondent in coming to a balanced finding based on the totality of the evidence.”

2.12 After the ruling was made the applicant’s legal representative sought a postponement to consider a possible review but this was dismissed and he then proceeded to cross-examine the witness, Mr. Hleko. One of the issues canvassed in cross-examination was

the issue of the breakdown of the relationship of trust. Hleko conceded that the relationship of trust could only be regarded as having broken down if the applicant were ultimately to be found guilty by the third respondent of the misconduct with which he had been charged and this is apparent from the following passage in the typed transcript.

“Mr Peypper: .. When did you lose the trust?.. (inaudible) ... testified about it yesterday, when did it happen?

Mr Hleko: I think if I said the trust is broken irreplaceably I was referring to a situation if Mr Leburu had been found that he has misled us to end up having this problem that we are having of 60 million then that would mean because we are talking – yesterday I said we were a public representation – representative and we are talking of 62 million. Now in a situation like what where somebody has misled and you enter into an argument [sic] that you were not intended to then it will mean that the trust has been broken.

Mr Peypper: Okay, now...

Mr Hleko: (inaudible)

Mr Peypper: 12h00 on 8th February 2004 [sic] the trust has not broken down irretrievably here where he sits.

Mr Hleko: Yes, until it is proven that he has misled us.

Mr Peypper: Okay, so the trust has not broken down at this stage.

Mr Hleko: Yes'''

2.13 On the 9th February 2005 the applicant brought an urgent application to this Court for a rule *nisi* with an interim order pending the return day. The effect of the interim order was to prevent the third respondent from proceeding with the disciplinary hearing. A rule *nisi* was granted and the return day fixed which was extended until today the 10th March when this matter was argued before me.

[3] The real issue to be decided in these proceedings is whether the applicant has made out a proper and substantial case in respect of the threatened review. In other words, insofar as the interlocutory application is concerned whether the applicant has shown a *prima facie* right to the relief sought. This in turn poses the following questions:

- (a) Whether the third respondent in dismissing the objection was wrong? and
- (b) Whether dismissal of the objection gave rise to a reasonable appreciation of bias; and
- (c) Even if the third respondent was manifestly biased towards applicant whether as a result of this the applicant was prejudiced; and
- (d) Whether the circumstances of the matter are so exceptional that the court should exercise its discretion

in media res, and interdict the first, second and third respondents from proceeding with the disciplinary enquiry against the applicant.

4. 4.1 The applicant has argued that the third respondent's conduct in hearing evidence relating to sanction was irregular and likened the matter to a criminal trial where there are two separate and distinct stages of the enquiry namely the stage of establishing guilt and the sentencing stage. Mr. Kennedy, who appeared on behalf of the respondents in this matter, referred me to the judgment of **EDDELS (SA) (PTY) LIMITED v SEWCHARAN AND OTHERS** 2000 (21) ILJ 1344 (LC) as well as the work by Professor John Grogan entitled "Dismissal" as authority for the proposition that as a hard and fast rule it has never been accepted in labour law that the two stages of the enquiry had to be distinctly and separately compartmentalised from each other. In fact, Mr. Kennedy argued the opposite is usually the case, that it is not unusual in labour cases

that evidence in respect of the two stages are dealt with at one and the same time. This in itself does not render the proceedings irregular. Mr. Kennedy argued that where however the presiding officer took a bold and proactive stance in order to illicit evidence in regard to sanction during the leading of evidence on the merits of the case, that might, depending on the circumstances, give rise to prejudice in the sense that it manifests bias on the part of the presiding officer towards the person charged. He argued however that this was not the case in the present matter. The third respondent dealt with the objection and application for recusal with manifest objectivity and sensitivity to the various principles of labour law and evinced a proper appreciation of the principles of natural justice.

- 4.2 A further argument advanced by the applicant's counsel was that in dealing with the question of the loss of trust by the first respondent for the applicant, the third respondent also acted in an irregular manner

as his acceptance of the evidence on the part of Hleko, that there could no longer be trust between the first respondent and the applicant created the perception of bias on his, that is the third respondent's part, towards the applicant. The applicant accepted and conceded the *bona fides* of the third respondent in holding the enquiry, but argued that the evidence relating to the breakdown of trust ought not to have been raised at all at that stage of the enquiry.

[5] I am of the view that the third respondent was justified in allowing the evidence to be led for the following reasons:

“5.1 The question was put specifically on a hypothetical basis namely in the event that the applicant might in due course be found guilty of the misconduct.

5.2 The applicant's attorney was permitted to cross-examine Mr Hleko and did so effectively, securing Mr Hleko's confirmation that his own evidence that the relationship of trust faced an irretrievable breakdown

would apply only in the event that the third respondent might in due course find the applicant guilty of misconduct.

5.3 The applicant would in due course be entitled if he were ultimately to be found guilty by the disciplinary chairperson, to lead evidence and present argument in mitigation.”

5.4 The third respondent was aware that it would be inappropriate to hear evidence of previous convictions at the first stage of the enquiry, but no such evidence had been led against the applicant. The evidence which had been led related to the opinion of the witness, Hleko, as to the consequences of a finding of guilty and that he ventured his view that if such a finding would have been handed down, this would result in a breakdown in the relationship of trust and for that reason dismissal would be appropriate.

5.5 The third respondent also repeatedly and emphatically stressed that he was alive to the fact that the stage of the enquiry then being conducted related to the question of the guilt or innocence of the applicant. The question and answer which were controversial were purely speculative and would only arise in the event of the applicant's being found guilty and that the evidence of Hleko to which objection was raised did not influence him in any way in reaching his decision on the question of guilt.

5.6 The third respondent thus showed a proper appreciation of the issues he was called upon to decide. He also emphasised that his decision would be based on the totality of the evidence.

“5.7 The relevant principles of labour law indicate what has to be considered is whether the overall process is fair. This requires a consideration of the entire process once it has run its complete course. It is inappropriate to consider the issue of fairness in isolation, at an early stage of the disciplinary enquiry.

5.8 The fact that the third respondent allowed the question and answer *per se* does not constitute unfairness which would justify this Court interfering in the midst of the disciplinary proceedings.”

[6] In my view, accordingly no substantial and proper case has been made out for the applicant’s claim that third respondent acted in an irregular manner in dismissing the objection raised and in allowing the evidence of the breakdown of trust and the possibility of dismissal to be admitted. I accordingly cannot therefore find that he did not have the ability to bring an objective and unbiased mind to the proceedings. There is no basis for such a finding. The contrary is in fact apparent and accordingly the application must fail.

[7] In the result I make the following order:

7.1 The rule *nisi* is discharged.

7.2 The application is dismissed with costs such costs to

include the costs of two counsel, the matter being a serious and complex one, the papers lengthy and the case law in the matter involved.

[8] In passing, I would like to express my indebtedness to Mr. Kennedy for his very helpful heads of argument which were of great assistance in preparing this judgment.

S. EBRAHIM, J

On behalf of applicant:

Adv. J.P. Daffue
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of 1st and 2nd respondents:

Adv. P. Kennedy SC
Instructed by:
N.W. Phalatsi & Partners
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