

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO J283/2011

BLESSING MAHLALELA

Applicant

and

**OFFICE OF THE PENSION FUNDS
ADJUDICATOR**

Respondent

JUDGMENT

LAGRANGE, J

Introduction

- 1] This is an urgent application. The applicant is an Assistant Adjudicator working for the respondent. Since late last year the applicant has been at the forefront, as he describes it, in voicing out the concerns of employees about perceived irregularities and disparities in salaries paid to Assistant Adjudicator's and Senior Assistant Adjudicator's employed by the respondent.

- 2] On 17 January 2011, a petition was sent to the Financial Services Board in which these grievances were expressed. The same day, the applicant and the acting Pension Fund Adjudicator, Ms Del la Rey, had a confrontation of sorts. Following the incident, the applicant laid a charge of assault and intimidation with the police against Del la Rey. On his return from the

police station, the applicant found a letter on his desk from the Senior Assistant Adjudicator, Mr Maharaj, advising him that his suspension was being contemplated and giving him until 15h00 hours to make representations why he should not be suspended. This he did despite the pressure of time, but approximately 30 minutes later he received a letter of suspension.

3] The next day he consulted with his lawyers who sent a letter to the respondent advising that his suspension was unlawful, the reason being that the person suspending him was not authorised to do so because only the Acting adjudicator had the necessary authority. A letter in reply from the respondent's attorneys did not engage the applicant on the question of Maharaj's authority. A further letter dated 20 January 2011 was written to the respondent's attorneys reiterating the allegation of the unauthorised nature of his suspension and mentioning other issues, including a claim that his continued suspension was in breach of the provisions of his contract of employment. The same letter called upon the respondent to revoke the suspension with immediate effect failing which he would approach the High Court or the labour court on an urgent basis for relief.

4] The respondent was unmoved by this threat. On 10 February 2011 it issued the applicant with a notice of a disciplinary enquiry in which he would be called to answer 116 charges. Of the charges, one related to an incident of alleged insubordination committed on 17 January 2011 and the other related to the publication of a newspaper article reportedly containing statements made by the applicant which were "exaggerated, in accurate

and/or untruthful" which the respondent claimed had the effect of bringing it into disrepute. Somewhat surprisingly, all the other charges related to alleged dereliction of duties or poor work performance between April and mid-October the previous year.

- 5] This application was served six days later. In essence, the relief sought is to stop the respondent from proceeding to hold the disciplinary enquiry which was initially scheduled to take place on 21 and 22 February 2011. The relief sought was on an interim basis pending the return day on which the applicant would apply to have the enquiry quashed entirely. In argument before this court, the applicant's counsel submitted that his client was entitled to have his suspension lifted, as a form of alternative relief.
- 6] The matter originally came before the honourable Justice Lallie, AJ on 17 February 2011. On that occasion, the parties agreed to postpone the matter until 22 February 2011 to allow answering and replying affidavits to be filed. The enquiry was also deferred pending the outcome of this application.

The legal basis of the applicant's claim

- 7] In his replying affidavit, the applicant expressly disavows reliance on any of his rights under the Labour Relations Act 66 of 1995 ('the LRA'). Instead, he relies on a common-law contractual obligation on an employer to act fairly in its dealings with employees. He argues that this obligation

has a substantive and procedural dimension.

- 8] Apart from relying on a supposed contractual right to fairness, the applicant also contends that, in effect, his suspension was unlawful because the person who purportedly suspended him lacked the necessary authority to do so. In court, it was submitted that if the suspension lacked authority, then the enquiry which was premised on the suspension could also not proceed.
- 9] Other ancillary arguments were advanced by the applicant's counsel, Mr Dlamini. One such argument was that the enquiry into the charges relating to poor performance could not proceed because the respondent had not complied with its Policies and Procedures Manual in that the respondent had failed to adopt prior, less punitive, measures to try and address his alleged non-performance. As I understood the argument, the applicant was suggesting that this was also in breach of his contractual right to fairness.
- 10] The respondent firstly attacks the applicant's contention that he was entitled to proceed on an urgent basis. The main thrust of the respondent's argument here is that if, as the applicant contends, his unlawful suspension is an act on which the enquiry is premised, then the applicant ought to have brought an urgent application challenging his suspension much earlier, instead of a month after it occurred. If this was the only basis on which the applicant is challenging the respondent's actions, the respondent might have a point. In fairness to the applicant it must be said that at least until about the end of January 2011, the applicant was attempting to persuade the respondent to revive his suspension. When this application was finally

brought, the applicant challenged the impending disciplinary enquiry itself which he had any length of on 10 February 2011. In the circumstances, I believe the applicant has acted with sufficient celerity in bringing this application. But there is another sense in which this application lacks urgency not because it is too late, but it is too early. This is dealt with below.

11] However, the substantive merits of the application do not establish a prima facie right to the relief sought for the reasons which follow. In the first place, the applicant relies on his contention for a contractual right to fairness on the judgement of the honourable Justice Van Niekerk, J in the *Mokgothle* case.¹ In that case, the court held that a trio of decisions by the Supreme Court of Appeal had established an employee's contractual right to fair dealing that can be enforced by the Labour court under the provisions of section 77(3) of the Basic Conditions of Employment Act 75 of 1997, which exists independently of any statutory rights to protection against unfair labour practices.²

12] However, since this decision, the SCA decisions referred to in *Mokgothle* have been revisited by SCA in its recent decision in the *McKenzie* case.³ In that case the SCA unequivocally held that, in the absence of specific provisions in a contract of employment to the contrary, an employer did not owe an employee a contractual obligation to act fairly.⁴ Wallace, JA, distinguished the authority of the previous SCA decisions referred to by

¹ *Mokgothle v Premier of the North West and others* (2009) 30 ILJ 605 (LC)

² *Mokgothle* at 615, par [30]

³ *South African Maritime Authority v McKenzie* 2010 (3) SA 601 (SCA)

⁴ *McKenzie* at 628, par [56]

Van Niekerk, finding in effect that those decisions did not establish the existence of a contractual right to fairness.⁵ It might be, that there could be sound reasons not to follow the apparently authoritative dicta in Mackenzie, but none were advanced and accordingly I must accept for present purposes that the latest pronouncement of the SCA on the nonexistence of a contractual duty of fairness must prevail. Consequently, in so far as the applicant relies on a contractual obligation of fair dealing, he cannot succeed. It remains to consider whether there are any other grounds on which he might still assert a *prima facie* right to relief, though open to doubt.

13]The applicant made much of the supposed lack of authority of Maharaj to suspend him. On the basis that the suspension lacked authority, the applicant argued that the consequent disciplinary enquiry could not be valid. I agree with Mr Van As, who appeared for the respondent, that it simply does not follow that if an employee's suspension is invalid the subsequent disciplinary enquiry will be invalid too. As mentioned above, the applicant also seeks alternative relief declaring the suspension invalid. In its answering affidavit the respondent denies that Maharaj lacked authority because the Acting Adjudicator had in fact delegated the necessary authority to him. The applicant suggests that if this had been the case, the respondent would in all probability have made this point in its earlier correspondence with him, when the applicant was challenging his suspension on this very basis. Having regard to that correspondence it is clear from the respondent's attorneys that they kept their responses to an absolute minimum and avoided engaging with the applicant on his

⁵ *McKenzie* at 622-628, pars [38] – [55]

contentions. In the answering affidavit however the respondent claims that the necessary authority was delegated.

14]The applicant argued that such authority cannot be properly delegated by the Acting Adjudicator in terms of the Pension Fund Act, 24 of 1956 ('the PFA'). In support of the applicant's argument, his counsel, Mr Dlamini, cited certain provisions of the PFA. Section 30B(2) of the PFA states: "*The functions of the Office [of the Pension Funds Adjudicator] shall be performed by the Pension Funds Adjudicator.*" The applicant argued that this provision means that only the Pension Fund Adjudicator can perform the functions of the Office and could not delegate the same to someone else. However, section 30Q dealing with the powers of the Adjudicator permits the Adjudicator, with the concurrence of the Financial Services Board, to delegate any of his or her functions to an employee save for his or her functions relating to the disposal of complaints in terms of section 30E, which is the main object of the Adjudicator's office in terms of section 30D of the same Act.

15] The respondent also argued that in order to suspend or discipline staff it was not even necessary for the Adjudicator to specifically delegate such powers to other management staff. The power to take disciplinary measures is not one of the main functions of the Adjudicator assigned to her in terms of the PFA, and accordingly the requirements of formal delegation in terms of the PFA do not apply. In effect, the respondent argued that the initiation of disciplinary steps at whatever level of management is a normal incident of the employment relationship, the authority for which is not derived from

the PFA. In any event, section 30Q(g) provides that the adjudicator, with the concurrence of the Financial Services Board, may in general do anything which is necessary or expedient for the achievement of his or her objects and the performance of his or her functions. As things stand on the papers, I must accept that Maharaj did have the necessary authority to suspend the applicant, based on the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)⁶, given that this is in truth an application for final relief.

16]The applicant also argued that because the respondent replaced the adjudicator as the initiator of the enquiry this indicated a concession by the respondent that the enquiry had not been properly convened. The applicant had objected to the adjudicator playing the role of initiator on the basis that she had an interest in the proceedings. It is certainly not desirable for one of the complainants in a disciplinary enquiry to also drive the prosecution of the employer's case, particularly as that individual may be required to give evidence, but in so far as it might have implications for the fairness of the enquiry, these could not be as serious as when where an interested party had been appointed as the chairperson of the enquiry.

17]Lastly, the applicant argues that the failure of the respondent to adopt other measures to deal with his alleged performance before convening a disciplinary enquiry which could lead to his dismissal, amounts to a breach of contract. In this regard, he relies on the respondent's code of conduct

⁶ At 634G-I

which deals amongst other things with less punitive approaches to resolving disciplinary problems. In terms of paragraph 5(b) of his letter of appointment it is stipulated that his contract of employment is subject amongst other things to the internal policies and procedures of the respondent. The prefatory section of the Staff Policies and Procedural Manuals of the respondents, in setting out the purpose of the policies and procedures states: "*The following Human Resource Policies and Procedures serves as guidelines that provide a framework for the application of fair and consistent human resource practices within the OPFA.*"

18]At best therefore for the applicant, the provisions which he cites in his founding affidavits at paragraph 18 are guidelines and not mandatory obligations. In any event, his contentions that no less punitive measures were adopted before resorting to a disciplinary enquiry is contested by the respondent, and on the principle in *Plascon-Evans* the respondent's version must be accepted.

Existence of alternative remedies

19] A pertinent point made by the respondent is that the objections raised by the applicant about the pending enquiry preceding have not even been tabled before the chairperson of the enquiry to consider. I agree that this should have been the first recourse of the applicant before considering an approach to this court. Equally significant, is the question whether it is

appropriate for the labour court to intervene in enquiries which are incomplete. In this regard the decision of the LAC in the case of ***Booyesen v The Minister of Safety and Security & other*** [2011] 1 BLLR 83 (LAC) is relevant. In this recent judgment, the LAC upheld the jurisdiction of the Labour court to interdict any unfair conduct, including disciplinary action. Nevertheless, Tlaletsi, JA, cautioned: “*However, such an intervention should be exercised in exceptional circumstances...Among the factors to be considered would be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.*”⁷

20]The applicant has not made out a basis for this court to intervene to prevent a grave injustice. I am not persuaded that the applicant has established prima facie rights though open to doubt and which deserve immediate protection. I also believe this application was premature in any event. He is also not without alternative remedies.

Costs

21]The respondent seeks costs on a punitive scale. I accept that the applicant has approached this court on a very slender substantive basis. On the other hand, it was only when the respondent filed its answering affidavit that it addressed his argument regarding the authority of Maharaj to suspend the applicant. The applicant and the respondent are also currently still in an employment relationship and a punitive cost award at this juncture is unlikely to improve matters. However, I agree that the applicant ought to

⁷ At 99, [54].

have reconsidered his position after receiving the answering affidavit of the respondent and could have avoided the necessity of the hearing yesterday. Accordingly a cost award is justified albeit not as extensive as sought by the respondent.

Order

22]The following order is made:

[22.1] the urgent application is dismissed, and

[22.2] the applicant is ordered to pay the respondents costs of preparation and representation on 22 February 2011.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 22 February 2011

Date of judgment: 23 February 2011

Appearances:

For the Applicant: M W Dlamini instructed by Chris N Billings Attorneys

For the Respondents: M Van As instructed by Bowman Gilfillan Inc.