



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J352/15

SOUTH AFRICAN DEMOCRATIC TEACHERS UNION

First applicant

NKADIMENG & 4 OTHERS

Second to Further Applicants

and

MOTHEO FET COLLEGE

First Respondent

THE DIRECTOR GENERAL: DEPARTMENT OF

HIGHER EDUCATION AND TRAINING

Second Respondent

Heard: 11 June 2015

Delivered: 17 June 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] About R50m a year was spent keeping about 400 suspended civil servants at home because of delays in finalising their cases¹. These figures might

¹ Sunday Independent November 9 2014 (Based on Public Service Commission report released in October 2014)

probably be the tip of the iceberg, and the application before the court typifies this endemic problem, which has the invariable consequences of rewarding suspended public servants who are content to stay at home at the expense of the hapless South African tax payer. Significantly however, with these prolonged suspensions of employees with full pay and benefits, the basic values and principles governing public administration as espoused in section 195 of the Constitution² become secondary.

- [2] The applicants approached the court on an urgent basis to seek an order declaring the pending disciplinary proceedings against them to be null and void as a result of non-compliance with the collective agreement entered into between SADTU and the respondent. The respondents oppose the application on two grounds, viz; that two of the individual applicants, Nkadimeng and Cuba are not “lecturers” as defined by Further Education and Training Act³ and thus not covered by the agreement, and secondly, that the applicants have not established a cause of action for the relief that they seek.
- [3] The respondent is a state funded Further and Education and Training Institution situated at Bloemfontein in the Free State. The individual applicants are Messrs Nkadimeng, Monnaruri, Modise, Ms. Cuba and Ms Ncanywa.

² Constitution of the Republic of South Africa, 1996

³ Act 16 of 2006 which provides that:

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to —

- (a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises.

Modise, Monnaruri and Ncanywa are employed as lecturers, and there is a dispute as to the positions of both Cuba and Nkadimeng. It is however common cause that they are members of SADTU, which is signatory to the Education Labour Relations Council Agreement 1 of 2013. (The Collective Agreement)

Background:

- [4] The matter has a protracted history dating back to October 2013 when Nkadimeng was first suspended. Modise, Cuba and Monnaruri were subsequently suspended on 14 April 2014. The individual applicants were suspended on account of a variety of allegations of misconduct, following forensic investigations by Price Water Cooper House into the administration of bursary scheme. The allegation is essentially that lecturers who were involved in the scheme were suspected of corruption in the loss of about R23 million. Flowing from these investigations, initially 11 employees were placed on suspension. Some had since had their suspensions uplifted, whilst others had been cleared at disciplinary proceedings. Another employee has since resigned, whilst two have since been dismissed.
- [5] An unfair suspension dispute was referred to the Education Labour Relations Council in July 2014 in respect of 11 employees. An award was issued in this regard on 23 October 2014, in terms of which the arbitrator had declared the suspension of the five of employees including Modise, Monnaruri and Ncanywa to be unfair and awarded them two months compensation. A review application has since been filed on 4 November 2014 under case number JR2340/14, and is still pending before this court.
- [6] On 23 February 2015, the applicants had referred a dispute to the ELRC in respect of the respondent's failure to comply with the provisions of the Collective Agreement 1 of 2013, seeking relief in the form of a declaratory that all disciplinary enquiries convened be declared null and void. On 26 February 2015, the applicant had approached this court on an urgent basis to seek an order that the disciplinary proceedings against the second to further applicants was null and void for non-compliance with the provisions of the

Collective Agreement, or in the alternative, to interdict the disciplinary hearings pending the resolution of the dispute referred to the ELRC.

- [7] An order was issued by the Honourable LaGrange J on 10 March 2015, in terms of which the matter was postponed *sine die*, and the respondents undertook not to proceed with the enquiries in respect of Modise, Monnaruri, Cuba, Nkadimeng, and Mcanyawa pending the determination of the dispute before the ELRC.
- [8] On 25 May 2015, the ELRC Arbitrator found that the Council lacked jurisdiction to issue declaratory orders rendering disciplinary hearings to be invalid and of no force and effect. In the award, the Arbitrator further held that clause 23 of Annexure B of the Collective Agreement provided for a process within which the collective agreement could be enforced, and that the applicants had not complied with that process.
- [9] The question whether the application was urgent or semi-urgent was not seriously pursued by the respondents, and as it was correctly pointed out on behalf of the applicants, no point will be served if this matter was to be heard in the normal course in the light of its protracted history and the order of this court issued on 10 March 2015.

The Collective Agreement:

- [10] The Collective Agreement 1 of 2013 provides for a generic contract of employment for post level 1 (one) lecturers that are appointed by the FET Colleges, and applies to all Public FETs represented by FETCEO. It further applies to all lecturers as defined in terms of Further Education and Training Colleges Act 16 of 2006 and is extended to non-union members. The agreement further does not apply to management staff appointed in terms of the provisions of the FETC Act⁴.
- [11] Annexures B – D of the Collective Agreement comprise of the Disciplinary Code and procedure applicable to lecturers. As per Clause 2 (Principles) of Annexure B, it is provided that discipline must be applied in prompt, fair,

⁴ Clause 2 – Scope of this Agreement

consistent and just manner⁵; and further that disciplinary proceedings must be concluded in the shortest possible time frame⁶. Where employees are suspended, it is provided that in the case of serious misconduct, the employer may suspend the employee on full pay for a maximum period of three months⁷, and in the event that an employee is suspended, the employer must do everything possible to conclude a disciplinary hearing within one month of the suspension⁸.

- [12] Where disciplinary proceedings are postponed, any further postponement must not exceed 90 days from the date of suspension⁹. Where proceedings are not concluded within 90 days, the employer must enquire from the Presiding Officer what the reasons for the delay are and give directions to the speedy conclusion of the proceedings¹⁰.

The individual applicants and disciplinary processes thus far:

Monnaruri:

- [13] Monnaruri is employed as a Labour Relations lecturer. He was suspended on 14 April 2014 on the basis of allegations pertaining to gross insubordination. He was notified to attend proceedings scheduled for 6 and 7 November 2014. These were however postponed to 28 January 2015. At those proceedings, he had raised a *point in limine*, to declare the proceedings as null and void on the basis that the respondent had failed to charge him within one month of his suspension as required by the collective agreement. The ruling in that regard is alleged to be still outstanding.

Nkadimeng:

- [14] Nkadimeng is employed as a Student Support Coordinator. He was suspended on 16 October 2013. On 11 December 2013 he was issued with a notice to attend an enquiry scheduled for 13 January 2014. The enquiry

⁵ Clause 1.2

⁶ Clause 1.7

⁷ Clause 6.1

⁸ Clause 6.3

⁹ Clause 6.4

¹⁰ Clause 6.5

scheduled for that date was nevertheless postponed *sine die*. Nine charges were originally preferred against him. At the enquiry scheduled for 2 June 2013, the charges were trimmed down to five. That enquiry did not proceed and was re-scheduled for 17 February 2015. He now faces one charge. It has been 16 months since Nkadimeng was suspended with pay, and on 17 May 2015 when the disciplinary was to commence, he also had raised a point *in limine* that the disciplinary enquiry be declared null and void for want of compliance with the provisions of the collective agreement. That point *in limine* was dismissed by the Presiding officer.

Ncanywa:

- [15] Ncanywa is employed as a Business Management lecturer. On 11 December 2013 she received a notice to attend an enquiry scheduled for 16 January 2014. That hearing was postponed. A second notice was issued informing her to attend an enquiry on 4 March 2014 which was also postponed. She was then suspended on 14 April 2014. The enquiry was scheduled for 10 March 2015, but could not proceed on account of referrals to the ELRC and to this court.

Modise:

- [16] Modise is employed as a lecturer. He received notice to attend an enquiry on 12 March 2014. That hearing was postponed, and he was subsequently suspended on 14 April 2014. In November 2014, he was notified to attend an enquiry scheduled for 24 to 26 February 2015. The enquiry has nevertheless not proceeded also in view of the on going litigation.

Cuba:

- [17] Cuba is employed in the respondent's central office and was suspended on 23 April 2011. In October 2014 she received notification to attend an enquiry on 27 and 28 November 2014. Only on 27 November 2014 was she issued with a 'charge sheet' and the hearing was also postponed to 17 March 2015. The hearing could however not proceed on account of the referral to the ELRC

The status of Nkadimeng and Cuba:

- [18] There is a dispute as to whether the provisions of the Collective Agreement are applicable to these two individuals. It is common cause that Cuba is currently, or at least at the time of the suspension, she was employed in the respondent's central office as Manager: Student Support Services. Nkadimeng is employed as Coordinator: Student Support Services in the respondent's central office.
- [19] It was submitted on their behalf that in respect of Nkadimeng, he was initially employed as a lecturer on a lecturer's salary scale. Despite being moved to the central office, his statutory appointment was not altered and he continues to earn his salary as a lecturer as evident from his pay slips. In respect of Cuba, it was submitted that she was appointed as an office based educator or Senior Education specialist in terms of the Employment of educators Act. To that end, it was contended that all such employees fall under the jurisdiction of the ELRC, and both these individuals are covered by the Collective Agreement.
- [20] The respondent's contention on the other hand is that Nkadimeng ceased to be a lecturer from 4 January 2010 when he was transferred to the Administration in the College Council, and the agreement cannot equally apply to Cuba as she is not a lecturer.
- [21] The same meaning is given to "Lecturer" in Annexure E of the Collective Agreement and the Further Education and Training Colleges Act as;
- " any person who teaches, educates, or trains other persons or who provides professional educational services at any college, and who is appointed in a post on any lecturer establishment determined in terms of the Further Education and Training Colleges Act, No 16 of 2006"*
- [22] It is trite that this Court lacks jurisdiction to interpret a collective agreement¹¹ in the light of the provisions of section 24(8) of the LRA¹², and I did not

¹¹ *South African Post office Ltd v CWU obo Permanent Part-Time Employees* (2014) 35 ILJ 455 (LAC)

¹² Which provide that;

"If there is a dispute about the interpretation of application of a settlement agreement contemplated in either section 142A or 158(1)(c), a party may refer the dispute to the council

understand the parties' case to be that they wished the Court to interpret the agreement. Be that as it may, it is permissible for the court to analyse the provisions of an agreement if the sole purpose is to determine the main dispute before the Court. In this context, an analysis or interpretation of the agreement would not be pivotal and fundamental to the resolution of the main dispute. It would be merely incidental to the resolution of the main dispute between the parties. The main dispute in this case is whether Cuba and Nkadimeng are "Lecturers" for the purposes of the application of the collective agreement to the extent that it is argued that the impending disciplinary enquiries should be declared null and void on account of alleged non-compliance with that agreement. Even if I may be incorrect in my approach by virtue of the same definition of "Lecturer" being found in the applicable legislation, the normal principles of interpretation of statutes would apply.

[23] A collective agreement binds; *"each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions are applicable to them"*¹³ Clause 2.3 of the Agreement provides that *"Management staff who are appointed in terms of the provisions as contained in the FETC Act 16 of 2006 are excluded from this agreement"*. The respondents' contention nevertheless is that these employees who are specifically excluded are not the only employees excluded, and that by virtue of clause 2.2 which specifically refers to lecturers as defined, it cannot be said that the agreement applies more broadly than to those who are not lecturers as defined. In this regard, it was contended that contrary to clause 2.2, the applicants seek the agreement to apply more widely to include Cuba.

[24] I am in agreement with the submissions made on behalf of the respondents that in order for one to be considered a lecturer as defined, one must as a matter of fact, perform duties of a lecturer as defined, i.e., being to *teach, educate, train, provide professional educational services, and appointed as such*. This can be gleaned from the purpose of the agreement itself which, which is to provide for generic contract of employment for lecturers.

or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute."

¹³ Section 23 (1) (b) of the LRA

- [25] Secondly, Annexure F to the agreement outlines the workload of lecturers. Cuba and Nkadimeng at the time of the suspensions were not performing these duties, and were more involved in administrative work which does not appear linked to the functions of a lecturer. I did not read from the founding affidavit that either Cuba or Nkadimeng that they adhered to the core functions as outlined in Annexure F. It therefore also implies that this dispute, other than requiring a factual enquiry, ought to be dispensed of in accordance with the *Plascon- Evans Paint*¹⁴ principles as correctly pointed out on behalf of the respondents.
- [26] In the answering affidavit¹⁵, it was disputed that Cuba and Nkadimeng were lecturers. Only in the replying affidavit did the applicants further elaborate on Cuba and Nkadimeng's position by attaching their letters of appointment and salary advice, and as correctly pointed out, a case cannot be made out in the replying affidavit. In the light of these disputed facts, which clearly the applicants ought to have foreseen, there is no basis to reject the respondent's contentions that indeed Cuba and Nkadimeng are currently not performing the functions of lecturers. The fact that Nkadimeng continued to draw a salary of a lecturer despite ceasing to perform any related functions is neither here nor there, as that is not determinative of his status as contemplated in the definition of "Lecturer". The scheme of the collective agreement together with its annexures is meant to apply to lecturers and not to any other support staff as contemplated in clause 2.3. To this end, it is concluded that the collective agreement is not applicable to Cuba and Nkadimeng, and accordingly, they cannot be granted any relief.
- [27] Thirdly, even if my conclusions as above may be incorrect, the spanner in the wheels for both Cuba and Nkadimeng is an award¹⁶ issued by Mr Jerome Mthembu, a panellist of the ELRC in regard to the unfair labour practice dispute referred in July 2014. The panellist had awarded compensation for five of the applicants before him and ruled that the ELRC had no jurisdiction to determine Cuba, Nkadimeng and others' dispute, having further established

¹⁴ *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E to 635C.)

¹⁵ Para 34

¹⁶ Under case Number ELRC 30-14/15 FS

that by virtue of the current positions they held, the Employment of Educators Act did not apply to them as they were not lecturers. It is therefore cynical for Cuba and Nkadimeng to have persisted with the contention that the agreement applied to them, in circumstances where the issue can be considered to be *res judicata*, and where a review application had not been launched in that regard. Cuba and Nkadimeng cannot seek a second bite at the cherry by disingenuous means.

Should the disciplinary enquiries be declared null and void?

- [28] It needs to be said at the outset that I am not impressed with the manner with which the first respondent had been dilatory in dispensing of the disciplinary enquiries since October 2013. Its approach to these disciplinary enquiries since October 2013 and after the investigations can at best be described as shocking and laissez-faire. On the version of its Chairman of the Council, Xolile Xuma, the charges against the individual applicants are of a serious nature, including falsifying student's test marks (Monnaruri), and misconduct in relation to bursary administration (Nkadimeng and Cuba).
- [29] The applicants on the other hand have painted a picture of disciplinary processes characterized by ineptitude, unnecessary postponements on account of lack of preparation in respect of charge sheets, withdrawal and reinstatement of the charges at a whim, and in my view sheer incompetence and lack of seriousness on the part of the respondent. No effort was made by Xuma in his answering affidavit to provide a tangible or reasonable excuse for the delays other than to agree that some of the enquiries were postponed on account of lack of water in the venue where they were supposed to be held. Surely an alternative venue could have been found?
- [30] In some instances, the mandates of chairpersons were terminated midstream the enquiries. The fact that some of the enquiries were postponed by agreement is not a justification to postpone them *sine die*, and some form of urgency needed to be displayed by the first respondent. It was nevertheless content to postpone these disciplinary proceedings without dates being set, and there was clearly a lack of willingness to show any urgency in dispensing

of these enquiries. It is my view that to have employees suspended with full pay and benefits for periods of between 12 and 16 months is extremely disconcerting, inexcusable, morally reprehensible and so inherently unfair to learners, communities the first respondent is meant to serve and the ordinary tax payer.

- [31] Notwithstanding the indignation at this wanton waste, the issue remains whether the impending disciplinary enquiries should be set aside as a result of the first respondent's dilatoriness and clear non-compliance with the Collective Agreement.
- [32] The arguments advanced on behalf of the applicants were that the fact that they had agreed to the postponements does not imply that they had waived their rights to raise the issue¹⁷. The respondent's contention on the other hand was that Monnaruri, Modise and Ncwanya were suspended on full pay for lengthy periods and were now complaining of breach of contract. It was submitted that they were content to receive full pay plus benefits for long periods whilst not working and now sought to avoid enquiries which were legitimate means of determining whether they were involved in misconduct. In this regard, it was submitted that in contract law, there was no concept which provides for declarations of nullity of disciplinary enquiries because those enquiries are in contravention of the terms of the contract. In this case, the applicants as innocent parties made an election to abide by any breach and accordingly waived their rights to rely on that breach.
- [33] As correctly pointed out on behalf of the applicants, the requirements of a waiver were eloquently set out by the Constitutional Court (per Kroon AJ) in *Lufuno Mphaphuli*, as follows;

"....Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear

¹⁷ With reference to *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC)

clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish"¹⁸ (Citations omitted)

- [34] Ncanywa was suspended on 14 April 2014 after her disciplinary enquiry was postponed on two occasions. Since then her enquiry was set down for 12 March 2015. A hearing previously set down for 13 to 14 January 2015 was postponed on account of her having submitted a sick note. Other than this postponement, were it not for these and other proceedings, she would effectively have been on suspension for 11 months.
- [35] Modise was scheduled to attend an enquiry on 12 March 2014 which was postponed. Following his suspension on 14 April 2014, a hearing scheduled for 24 to 26 February 2015 was also postponed. The respondents contend that the scheduling of the last postponed proceedings were by agreement between the parties.
- [36] Monnaruri was suspended on 14 April 2014. The proceedings scheduled for 6 and 7 November 2014 were postponed to 28 January 2015. At those proceedings, he had raised a *point in limine* as already indicated.
- [37] The first time that the applicants acted after their suspensions was in July 2014 when they referred an unfair suspension dispute to the Education Labour Relations Council. To add salt to the tax payer's injury, they were compensated for staying at home, it having been found that their suspensions were unfair. Thereafter, the applicants took no action to act in terms of the collective agreement until after either the points *in limine* they had raised at the disciplinary enquiries were dismissed or not considered.
- [38] Clause 7 of the Collective Agreement provides that any dispute about the interpretation or application of that agreement shall be resolved in terms of the dispute resolution procedure of the Council. The relevant provisions of the Council are to be found in Annexure B of its Constitution which *inter alia*

¹⁸ At para [80]

provides that a party to a dispute about the interpretation or application of a Collective Agreement may refer such dispute to conciliation and arbitration in terms of these procedures¹⁹. Furthermore²⁰, the General Secretary may promote, monitor and enforce compliance with any Collective Agreement of the Council, within the scope of the Council and in terms of this section 33 and section 33A of the LRA. For the purposes of enforcement, a Collective Agreement of the Council is deemed to include; any basic condition of employment which constitutes a term of a contract of employment of any employee covered by the Collective Agreement in terms of section 49(1) of the BCEA. The General Secretary may, in terms of this clause issue an order requiring any person, bound by a Collective Agreement, to comply within a specified period, or may refer any unresolved dispute concerning compliance with any provision of a Collective Agreement to arbitration by a panellist appointed by the Council or the CCMA.

- [39] Notwithstanding the fact that the applicants were prepared to rely on the provisions of the Collective Agreement in declaring the disciplinary null and void, it is my view that they had at no stage invoked the above provisions to enforce their rights to a speedy finalisation of those enquiries as contemplated in the agreement. This point was correctly made by the Arbitrator when declining jurisdiction on 25 May 2015. On the contrary, they were prepared to by-pass the provisions of the agreement when it suited them by utilising the provisions of section 186 (2) (b) of the LRA as it was more beneficial to them. Where however there was any attempt (*albeit* belated) by the respondent in instituting proceedings against them, they were not hesitant in seeking to set aside those proceedings as and when it suited them.
- [40] As correctly pointed out on behalf of the respondents, the applicants approbated and reprobated the provisions of the collective agreement whenever it suited their interests. They were content to have the enquiries postponed, and at very conceivable opportunity, including at the scheduled enquiries, were bent on frustrating any attempt at proceeding with those enquiries. It is therefore not correct as contended on their behalf, that they did

¹⁹ Clause 22. Interpretation and application of Collective Agreements

²⁰ Clause 23. Enforcement of Collective Agreements and of BCEA provisions

not have remedies available to them where there was an unreasonable delay on the part of the employer to commence disciplinary enquiries.

- [41] In my view, the applicants cannot in proverbial terms, have their cake and eat it. Furthermore, I did not understand it to be their case that they had at any stage languished under the impression that they would not be disciplined. It has always been the intention of the first respondent to subject them to discipline, *albeit* any efforts in that regard have been characterized by ineptness and dilatoriness. To the extent that the applicants were content with being on suspension with pay, and further to the extent that no attempt was made to either approach the ELRC to enforce the agreement as contemplated in Annexure B of the Council's Constitution or to claim specific performance in the light of the breach, it should be concluded that on the facts and their own conduct, they had waived their rights to rely on that breach.
- [42] Central to the debate in this issue are two judgments issued by Steenkamp J in *SAMWU obo Jacobs v City of Cape Town & others*²¹ in terms of which it was held that if the Collective Agreement has been breached in a material respect, the convening of a disciplinary enquiry contrary to the provisions of the Collective Agreement will be null and void. Rabkin-Naicker J in *Tsengwa v Knysna Municipality and Others*²² concluded that *Jacobs* was wrongly decided and declined to follow it. Significant in both cases is that the issue before both courts was a review application pertaining to whether commissioners have the power to declare disciplinary proceedings null and void with regard to Clause 6 of the (SALGBC) Disciplinary Procedure and Code Collective Agreement.
- [43] The above two cases are significantly distinguishable from the one in *casu* for the simple reason that the applicants have directly approached the court for a declaratory, and the ELRC finding of 25 May 2015 that it lacked jurisdiction to issue a declaratory order that the applicants seek is not the subject matter of this application.

²¹ [2014] 10 BLLR 1011 (LC)

²² (C457/14) [2015] ZALCCT 33 (16 April 2015)

- [44] The question whether disciplinary proceedings can be declared null and void on account of non-compliance with a Collective Agreement involves a variety of factors. The first, relating to waiver has already been dispensed with and ordinarily, in the light of a conclusion that the applicants had waived their rights, that would have been the end of the matter.
- [45] A second consideration notwithstanding the above, is that it is trite that the LRA encourages voluntarism and collective agreement, which should be given primacy²³. It is accepted that a collective agreement is not to be treated like any other contract²⁴, and as stated in *Western Cape Department of Health v MEC Van Wyk & Others*²⁵, the primary objects of the LRA are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. Be that as it may be, once an applicant seeks to rely on a term of a contract rather than the provisions of the LRA in seeking to nullify disciplinary proceedings, the principles of contract law will invariably become a factor, which the court will be remiss to ignore.
- [46] Further considerations in determining whether non-compliance with the provisions of a collective agreement can result in a nullity is that of equity and public policy. In this regard, the question that should be posed is whether it is fair for employees facing *prima facie* serious allegations to escape the consequences of a disciplinary enquiry on a technicality. It was contended on behalf of the applicants that they were not taking a technical stance by complaining about the employer's dilatoriness. I nevertheless do not agree with this contention.
- [47] As already pointed out, the applicants were content to be suspended with full pay, and had acquiesced in the delay if not having contributed to it with contrived preliminary points when it suited their cause. In my view, it would be iniquitous for the applicants to benefit from the delay in instituting disciplinary

²³ Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (2001) 22 ILJ 2684 (LC)

²⁴ Northern Cape Forests v SA Agricultural & Allied Workers & others (1997) 18 ILJ (LAC)

²⁵ CA 1/2013

proceedings, in circumstances *inter alia*, where equity and public considerations call for them to answer to the allegations against them.

- [48] Another consideration which should play a role in the enquiry is that of prejudice to the parties. In their founding affidavit under the rubric of urgency, the applicants contended that they have and are still suffering prejudice as a result of continued injustice by the first respondent. A bland statement such as this does not take up the applicants' case any further, and it is not apparent from the papers in what material ways they had been prejudiced by the delays. On the contrary, the delays appeared to have suited them.
- [49] On behalf of the respondents, reference was made to *Highveld District Council v CCMA and Other*²⁶ for the proposition that the failure to follow an agreed disciplinary procedure code and procedure contained in a collective agreement does not necessarily give rise to unfairness. In this regard, the LAC held that;

*"Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in Section 188 (1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair.....When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair."*²⁷

- [50] In line with the above principle, what is required therefore is for each case to be dealt with on its merits in line with the considerations already alluded to. It would be untenable to in each and every case invalidate disciplinary proceedings for mere non-compliance with provisions of a collective agreement. These provisions may be peremptory, but not necessarily sacrosanct to be slavishly adhered to at the expense of the employer's right to institute discipline. As already indicated, any prejudice, if proven, suffered as

²⁶ (2002) 12 BLLR 1158 (LAC)

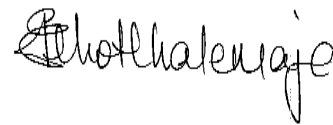
²⁷ Leonard Dingler (PTY) Ltd v Ngwenya (1999) 5 BLLR 431 (LAC),

a consequence of any delays due to non-compliance has to be examined and be compensated where it is so deemed.

- [51] To summarise then, having had regard to the circumstances of this case, I am not convinced from the provisions of the Collective Agreement that the intention of parties was to take away the right to of the employer to discipline in the event of non-compliance with its provisions. At most, the Collective Agreement in line with the quest of a speedy resolution of disputes set time frames within which disciplinary processes should be dispensed with. At most for the applicants, where they were aggrieved by the delays, they had brought a claim under section 186 (2) (b) of the LRA and were duly compensated, over and above the fact that they continued to be on suspension with full pay and benefits. In my view, these provisions, together with those of the ELRC Dispute Resolutions Procedures, and further in the absence of any other specific, provide a mechanism of enforcement in the event of non-compliance.
- [52] A conclusion has also been made that through their conduct, the applicants waived their rights to remedy the alleged breach of the provisions of the Collective Agreement, and factors such as equity and public considerations play a role in such matters. In these circumstances the non-compliance with the provisions of the collective agreement in this case cannot in itself lead to invalidity or nullity of the disciplinary proceedings.
- [53] Furthermore, notwithstanding dilatoriness on the part of the first respondent in completing these disciplinary enquiries, I did not understand the applicants' case to seriously challenge the first respondent's contention that these enquiries are ready to be finalised. In such circumstances the court should be disinclined to intervene. The applicants must have their say in those disciplinary enquiries if they are innocent of any form of misconduct.
- [54] I have also had regard to considerations of law and fairness insofar as the issue of costs is concerned. In the light of the appalling conduct of both parties as pointed out and addressed in this judgment, and further in the light of the protracted nature of this dispute, it is deemed appropriate that each party must be burdened with its own costs.

Order:

- i. The application to have the disciplinary hearing against the second to further applicants declared null and void for non-compliance with the Collective Agreement is dismissed.
- ii. Each party is to pay its own costs



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

JG Rautenbach SC

Instructed by:

Cheadle Thompson & Haysom

For the:

N Cassim SC with Adv. A Mosam

Instructed by:

Mabalane Seobe INC