



EMERGENCY CASES ARE NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19/10/18

DATE

SIGNATURE

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J3701/18

In the matter between:

GAMA, SIYABONGA

Applicant

and

TRANSNET SOC LIMITED

AND THIRTEEN OTHERS

Respondents

Heard: 16 October 2018

Delivered: 19 October 2018

Summary: Urgent application to interdict non-compliance with an employment contract. Where the contract sought to be enforced provides for an arbitration process, the jurisdiction of the Court is not ousted but a Court would direct a party to comply with the process first before approaching a court of law. A declaratory relief seeks to declare the rights of the parties. Held: (1) The matter is heard as one of urgency. (2) It is declared that the applicant's contract of employment incorporates the first respondent's Disciplinary Code and Procedure. (3) The application is stayed pending the outcome of the arbitration process contemplated in the employment agreement. (4) Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an urgent application in terms of which the applicant is seeking a declaratory, a final interdict and other ancillary reliefs. The application is opposed by all the respondents. Before writing this judgment, I afforded the parties' representatives an opportunity to reconsider their respective positions in light of certain concessions made during argument. This opportunity came to naught. Disappointing as it may have been, this court was compelled to pen down this judgment.

Background facts

- [2] Given the view I take at the end it is unnecessary to punctiliously state the facts of this matter. Suffice to state that the applicant and the respondent entered into a contract of employment on 13 April 2016. In terms of the contract, the applicant was appointed as a Group Chief Executive of the respondent. Around August 2018, the Board of the respondent through its Chairperson, Mr Popo Molefe served the applicant with a notice of intention to suspend him from duty. The applicant, through his appointed attorneys made representations why he should not be placed on suspension. The applicant was not suspended, instead, on 1 October 2018, he was served with a notice to show cause as to why he should not be terminated as an employee of the Transnet. By 15 October 2018, and if no cause was shown, the applicant would have been terminated. Aggrieved by the threat of imminent termination, the applicant, on 12 October 2018, approached this Court in order to be heard on 16 October 2018. After hearing submissions, I reserved my judgment to be delivered on 19 October 2018.

Evaluation

- [3] Although the respondents resisted that the matter must be treated as one of urgency, citing amongst others abuse of the court process, I heard the matter. The reason being that the applicant's termination, which he viewed to be in breach of his contract of employment was to happen soon. Hearing a matter as one of urgency involves an exercise of discretion. Whether a matter should be treated as one of urgency is an issue to be decided case by case, taking into account the facts of each. I was satisfied that the applicant's matter is sufficiently urgent.
- [4] With regard to a declaratory relief, Mr Cassim SC appearing for the respondents rightly conceded that the Disciplinary Code is incorporated in the employment contract. He, however, submitted that there is a conflict between the employment contract and the code. Given the view I take at the end, I choose not to decide whether there is a conflict between the contract and the code. The forum that the parties chose may be seized with this argument if it is not abandoned.
- [5] The concession was correctly made if regard is had to clause 16 read with the provisions of the code. It has been long resolved that the interpretation of a document, contracts included, is a matter of law. It requires consideration of the document as a whole as opposed to one clause. An interpretation exercise is there for the sole purpose of establishing the intention of the parties. My interpretation of clause 16 of the employment contract suggests that the code is part of the contract. Clause 2.1 of the code makes it clear that the code forms part of an employee's terms and conditions of employment and it applies to all employees. In the preamble of the employment contract it is made clear that the agreement contains terms and conditions of employment.
- [6] This finding suggests that the provisions of clause 6.2 of the code constitute terms and conditions of the employment agreement. The process followed by the respondent in the letter of 1 October 2018 is not one contemplated in clause 6.2. The applicant contends that such amounts to a breach of the agreement. Yet again, I choose not to decide

whether there is a breach of the agreement. The respondent's answer to this allegation is that there is a conflict between the terms as set out in the policy, although incorporated in the agreement, and the employment agreement. As pointed out above, I am not to decide the issue whether given the alleged conflict, clause 6.2 does not find application.

- [7] Clause 19 of the agreement, as now incorporating clause 6.2 of the code, provides that should any dispute arise regarding the interpretation; the effect; the parties' respective rights of obligations under; a breach of; the termination of; or any matter arising out of the termination shall be decided by arbitration. In alleging that the process undertaken by the respondent through the letter of 1 October 2018 is unlawful, the applicant is effectively alleging that the respondent is in breach. In terms of clause 19 of the agreement, a dispute around a breach should be decided by arbitration. An arbitration agreement does not deprive the court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to Court for a final judgment, that is what should have happened.¹
- [8] In the interim, the duty of the Court is to give appropriate directions and to exercise due supervision. The Constitutional Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another*² said the following:
- 'The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts...'
- [9] This Court in *Mmethi v DNM Investment CC t/a Bloemfontein Celtics Football Club*³ after traversing various authorities, had the following to say:

¹ See: *Parakh v Shah Cinemas (Pty) Ltd and others* 1980 (1) 301 (d) quoted with approval in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA).

² 2009 (6) BCLR 527 (CC) at para 219.

³ [2011] 32 ILJ 659 (LC) at para 17.

'In short the principle in our law is that a clause in an agreement, as is the case in the present matter, which provides for a dispute to be referred to arbitration does not preclude a party from initiating court proceedings to have the dispute adjudicated by the court. What an arbitration clause however does is that it obliges the parties in the first instance to refer the dispute to arbitration. As stated earlier a party seeking to invoke and rely on the arbitration clause in the agreement must request a stay of such proceedings, pending the determination of the matter by an arbitrator. The court retains discretion whether or not to entertain the matter or hold the parties to their agreement and order them to resolve their dispute in terms of their agreement but retain the supervisory power over the arbitration process.'

- [10] I fully agree with the above. Only in cases where special circumstances have been pointed out would a Court entertain a matter. No such special circumstances have been brought to my attention. Instead, Mr Nalane for the applicant submitted that since the respondent is the first one to allege a breach, it ought to refer the dispute to arbitration and not the applicant. The question is not who should refer, but whether the parties agreed that once they are in dispute, as it is the case in this matter, who should decide that dispute. The parties voluntarily chose an arbitrator over the court. The parties did recognize the court's supervisory role when they inserted clause 19.8.⁴
- [11] The applicant did not refer the dispute alleging breach of the employment agreement to the arbitrator as agreed. Absent special circumstances, I am unable to determine the dispute between the parties. A final relief of an interdict is issued only in instances where a clear right has been shown. The applicant has no right not to be dismissed. The right to be dismissed after following the procedure set out in clause 6.2 of the Code has not been made clear. The parties are in dispute and their dispute in that regard can only be resolved by an arbitrator as they agreed in 2016. For those reasons, I am unable to interdict the respondent.

⁴ This clause 19.1 shall not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator. [My own underlining and emphasis]

[12] Had the applicant referred a dispute to an Arbitrator and the respondent sought to take the law into its own hands as it were, the applicant could approach this court for an interim relief pending the outcome of the arbitrator. Since it is now common cause that there is a dispute, the nature of which is to be specified by the referring party, I can only stay these proceedings pending the outcome of the arbitration process. At this stage, I can only assume that the respondent would not take the law into its own hands. It would be an unnecessary exercise for the applicant to return to this court for an interim relief pending the outcome of the arbitration process. Unless the parties arrive at an amicable solution, it seems pretty obvious to me that the dispute should be arbitrated instead. As a comment in passing, if the arbitrator resolves that there is a breach, it might be that the respondent would have to undertake the process contemplated in clause 6.2 of the code and abandon its truncated process. That being a possibility, it seems to be in the best interest of these parties to consider finding a lasting solution. Of course whether the truncated process is not in breach, it is the question to be decided by an arbitrator.

Conclusions and summary

[13] For all the above reasons, I conclude that the disciplinary code forms part of the employment agreement. I further conclude that pending a referral of the dispute to arbitration, the present application is stayed. An interdict cannot be issued since the issue whether the applicant has the right to a process contemplated in clause 6.2 of the code as opposed to the truncated process is still to be determined through arbitration. In relation to costs, I take into account the fact that the issue of the arbitration clause preventing this court to deal with the matter was only raised in argument. In their answering papers, the respondents did not deal with the requirement nor did it request a stay pending a referral. Owing to the fact that the issue of a plea in abeyance is more a point of law, I allowed Mr Cassim SC to pursue it in argument. Mr Nalane did not necessarily object to this point being raised. For those reasons an appropriate order to make is that of each party paying its own costs.

[14] In the results I make the following order:

Order

1. The application is heard as one of urgency;
2. It is declared that the applicant's contract of employment incorporates the Transnet SOC Limited's Disciplinary Code and Procedure;
3. This application is stayed pending a referral to arbitration and determination of the dispute as contemplated in clause 19.1 of the employment agreement;
4. Each party to pay its own costs.



GN Moshwana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant:	Advocate J Nalane
Instructed by:	MSMM Inc, Pretoria.
For the Respondent:	Advocate N Cassim SC
Instructed by:	MNS Attorneys, Illovo.

LABOUR COURT