

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS 226-18

Not Reportable

In the matter between:

GIFT SANDILE NDWANDWE

Applicant

And

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION (SATAWU)**

Respondent

Heard: 30 October 2018

Delivered: 10 May 2019

JUDGMENT

WHITCHER J

- [1] This is an application for default judgment against the respondent. The applicant contends that the respondent unlawfully terminated his contract of employment, and, consequently, he is entitled to contractual damages.

- [2] The salient facts as presented in his statement of claim and application for a default judgment, are as follows.
- [3] The applicant commenced his employment with the respondent in 2011 as a messenger.
- [4] In 2015, at the respondent's Gauteng Provincial Congress, he was elected as the Provincial Secretary for the province of Gauteng.
- [5] He was accordingly both an employee and an elected office bearer of the respondent at the time of his dismissal.
- [6] Clause 42 of the respondent's constitution provides that any member, shopsteward, office-bearer or elected official may be disciplined by the union for acting contrary to the interests of the union and its members or for any other act of misconduct.
- [7] The clause provides for the establishment of disciplinary committees which are enjoined to follow the disciplinary procedure set out in the clause. Where the person concerned is found guilty of misconduct, the disciplinary committee has the power to remove that person from office, expel the person from the union, dismiss the person from his employment in the union or impose any other appropriate penalty.
- [8] Notably, the clause provides a right of appeal to the CEC or any other body that the CEC appoints to hear the appeal against any adverse disciplinary decision/action.
- [9] In October 2017, the applicant was briefly detained by the Department of Home Affairs, following which the Department informed the respondent that it had determined that the applicant was a Zimbabwean and had fraudulently obtained his South African identity document.
- [10] In December 2017, the applicant's attorney informed the respondent that they had in terms of section 8 of the Immigration Act lodged an appeal with the Minister against the decision of the Director-General of the Department of Home Affairs. The applicant's attorney advised the respondent that the

lodgement of an appeal automatically suspends the decision appealed against.

- [11] On 9 January 2018, the applicant was summonsed to a meeting by a Task Team established by the CEC. They asked him to explain “what was happening” in relation to his issue with the Department of Home Affairs. He told them that he was awaiting the outcome of the appeal his attorney had lodged with the Minister.
- [12] The Task Team asked the applicant for proof that he had lodged such an appeal and for a copy of the representations he had made to the Minister. He gave them a covering letter bearing a stamp as evidence that he had lodged an appeal. He refused to give them a copy of the representations made to the Minister, because, in his view, they were private and he feared they would end up on social media. In response, the Task Team took the view that he was uncooperative and withholding important information from them.
- [13] The applicant referred the Task Team to the minutes of a CEC meeting held on 17 November 2017. In his address to the CEC, the President of the union made statements to the effect that the issue between the applicant and the DHA was not an organisational matter, the applicant’s matter must be discussed in the CEC and the applicant “will” remain in his position until the next congress.
- [14] The applicant’s claim that this constituted a decision by the CEC is not borne out by the minutes.
- [15] On 10 January 2018, the applicant was again arrested at work by the DHA. He was released a few hours later after they confirmed that he was still awaiting the decision of the Minister.
- [16] On his return to work on 11 January 2018, the applicant was served with a letter of dismissal. According to the letter, the Task Team had discovered that the applicant’s appeal had been dismissed and determined he be dismissed with immediate effect.

- [17] The applicant contends that his dismissal was unlawful because, he submits, he did not misconduct in any manner contemplated by the constitution and he was not granted a pre-dismissal hearing contemplated by the constitution.
- [18] In support of the above contention, applicant's counsel, at the hearing of this matter, submitted that the *constitution* formed part of the applicant's contract of employment.
- [19] The applicant's claim falls to be dismissed on the following grounds.
- [20] If the *constitution* formed part of the applicant's employment contract, this would mean the constitution is not a separate amendable document and it would not be permissible for the respondent to amend it without the applicant's consent; which clearly cannot be the case.
- [21] The applicant failed to plead and demonstrate at the hearing of this matter that the disciplinary code and procedure in the union's constitution was incorporated into his contract of employment.
- [22] The applicant failed to plead and demonstrate that his contract of employment expressly provided for the rights set out in the disciplinary code and procedure.¹
- [23] The applicant failed to plead and demonstrate surrounding circumstances and conduct by the respondent to lead this court to infer that the disciplinary code and procedure was a tacit term of his contract.
- [24] A tacit term is a term that arises from the actual imputed intention of the parties as representing what they intended should be the contractual position or, where they did not address their minds to that situation, what it is inferred they would have intended had they applied their minds to the question. The usual test for a tacit term is that of the interfering bystander who asks what is to happen in the particular situation and receives the answer: 'Of course X will be the position. It is too obvious for us to say so.'

¹ There is no averment regarding whether his contract of employment was a verbal or written document, and to the extent that it was a written document, such document was not disclosed to the court in the supporting affidavit to the application for default judgment or at the hearing of this matter.

- [25] I have no doubt that the answer to the bystander's question as to the parties' intention, especially that of the respondent, is not one that suggests a tacit term, considering that the LRA expressly provides such rights and any breach thereof, which is the right to refer an unfair dismissal dispute to the CCMA or, where relevant, the appropriate bargaining council.
- [26] In summary, the applicant failed to plead and establish the existence of such terms in his contract, being the disciplinary code and procedure contained in the respondent's constitution. In short, the applicant established no right to fairness in terms of his contract of employment.
- [27] Even if the applicant had been able to establish the existence of such terms in his contract, the launching of this *contractual* dispute was premature. This is so because the disciplinary code provides a right of appeal to the CEC. In other words, the purported contract provided a remedy against the decision of the Task Team, which the applicant did not pursue prior to launching these proceedings. Flowing from this, it cannot be said that when the applicant launched these proceedings, the respondent had committed a breach, the nature of which entitled the applicant to invoke contractual remedies for a fundamental breach.

Order

- [28] In the premises, I make the following order:

1. The application for default judgment and the applicant's referral are dismissed.

B Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Kimani Ndung'u, Ndung'u Attorneys

LABOUR COURT