



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D103/2025

Not Reportable

In the matter between:

EDWARD VUSUMUZI MZOBE

Applicant

and

KWAZULU-NATAL ECONOMIC
REGULATORY AUTHORITY

First Respondent

PHUMLANI NGUBANE

Second Respondent

Heard: 13 and 25 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 15h00 on 31 March 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicant initiated an application in which he sought orders that the application be enrolled as an urgent application and further,

‘That the disciplinary enquiry initiated by the first respondent on 09 January 2025 against the Applicant which serves before the second respondent as the Presiding Officer be and is hereby declared to be unlawful and invalid.’

[2] The second respondent delivered a notice to abide, with the first respondent having opposed the application. In so doing, the first respondent raised certain technical defences in addition to having opposed the application on its merits.

[3] As a result of time constraints argument could not be completed on the first occasion on which the application was enrolled, 13 March 2025, and it was accordingly adjourned to 25 March 2025. In view of the fact that the first respondent had been afforded an extremely short period of time within which to deliver its answering affidavit, it was then given leave to deliver a supplementary answering affidavit, an opportunity to which it did not avail itself. The applicant did in the intervening period commission a replying affidavit which was provided to this court at commencement of the adjourned hearing. The first respondent agreed that the disciplinary enquiry would be held in abeyance pending the outcome of the application.

[4] The first respondent did not challenge the issue of urgency. In light of the fact that the disciplinary enquiry had been enrolled to proceed on 14 March 2025, as well as the fact that upon the conclusion of the matter the issues had been fully ventilated, no purpose would have been served by not enrolling the matter accordingly.

Background

[5] The applicant was initially employed by the first respondent's predecessor, the KwaZulu-Natal Liquor Authority, as its Regional Inspectorate Manager, South and Midlands. His appointment on 1 April 2012 was effected in terms of a written contract of employment, the terms of which were the basis upon which the present application

was founded. By the time of the initiation of his application he had been appointed to the position of Acting Executive Manager: Compliance and Enforcement.

[6] The applicant was named in a report made to the Vuvuzela Fraud and Ethics Hotline concerning certain conduct on the part of the first respondent's Chief Financial Officer, Ms Ongeziwe Cingo. In addition to it having been alleged by the whistleblower that the applicant had been involved in the approval of study leave, the value of which was subsequently being sought to be deducted from the whistleblower's leave pay, it was alleged that,

'At the beginning of 2022 EXCO undertook KZNLA District Office/s visits, one of those visits was at the Port Shepstone (Ugu District Office). Ms Ongeziwe Cingo travelled with the Acting Executive Manager: Mr Vusi Mzobe. On the following "claim period" Ms Cingo divulged to other colleagues who had been part of that Mr Mboze had included the claim for the trip mentioned above as part of his travel expenses in the S&T claim. She went further to state that she confronted him about this discredence [sic], however she continued to approve the payment of the said claim.'

[7] This report was conveyed to the first respondent by way of email, addressed to Mr Bheki Mbanjwa, the first respondent's erstwhile Chief Executive Officer, and Ms Nokobonga Magubana, whose designation was not specified. Albeit that the report itself did not evince its date of transmission, the applicant's allegation that this had been effected on 5 April 2024 was not disputed by the first respondent which simply *'dispute[d] the argumentative allegations contained in this paragraph.'* It was also not disputed by the first respondent that the applicant had been interviewed by the investigator who had been appointed to investigate the issue on 13 June 2024.

[8] On 23 July 2024 Mr Mbanjwa addressed correspondence to the applicant in which he was informed that he had been implicated in allegations of misconduct relating to the first respondent's Subsistence and Travel Policy, Fraud Prevention Policy and Response Plan, as well as its Disciplinary Code and Policy. Having identified the allegations of misconduct alleged to have been committed by the applicant, which were categorised as serious, he was requested to show cause by

way of written representations why he ought not to be placed on precautionary suspension pending the finalisation of the investigation. Having made representations as requested, Mr Mbanjwa notified him of his formal suspension on 30 July 2024.

[9] A notice calling upon the applicant to attend a disciplinary enquiry on 14 January 2025 was signed by Mr Mbanjwa on 18 December 2024, the applicant having acknowledged receipt thereof on 9 January 2025. The charges reflected that he was alleged to have perpetrated an act of fraud, insofar as it was contended that he had falsified his odometer readings in relation to his trip to the erstwhile KZN Liquor Authority District, and that he had been grossly dishonest, having provided misleading information to both the investigator on 13 June 2024 and to Mr Mbanjwa in the representations made by him on 25 July 2024.

[10] The disciplinary hearing was adjourned on 14 January 2025 to afford the parties an opportunity to exchange documents, and to afford the applicant time to prepare a substantive application. Although the application which was duly prepared by the applicant was not provided to this court, the applicant explained that he had sought therein *'to have the disciplinary enquiry quashed as being ultra vires the express provisions of the employment contract.'* His application was dealt with at the resumption of the disciplinary hearing on 24 February 2025, the result of which was the dismissal of his application by the second respondent in his written ruling issued on 7 March 2025. He concluded,

'4.1 I have accepted that there were delays in the conclusion of the disciplinary proceedings and that such delays exceed the allowable limit by clause 6.8 of the Disciplinary Code and Procedure.

4.2 I have accepted that the reasons advanced by the employer for the delays are substantive and justify to warrant deviation from clause 6.8.

4.3 Consequently, the application by the employee is dismissed.

4.4 The disciplinary hearing will continue.'

[11] Upon receipt of such ruling, the applicant initiated the present application.

Analysis

[12] It is necessary at the outset to identify the nature and ambit of the applicant's claim. To this end the essential elements of the applicant's case as were set forth in his founding affidavit will be particularised:

- The purpose of the application was to have the disciplinary proceedings declared to be unlawful and invalid by reason of a breach by the first respondent of the express, binding provisions of his contract of employment. (paragraphs 6, 7 and 10)
- The material, express terms of the contract of employment upon which he relied were summarised by him:
 - The terms and conditions set out therein constituted his contract with the first respondent;
 - His contract of employment was subject to the provisions of the Basic Conditions of Employment Act, 1997, the Labour Relations Act, 1995, the Public Finance Management Act, 1999;
 - The first respondent's Disciplinary Code, grievance procedure, standard procedures and policies governing security, health and safety, and customer care, together with any other standard policy and procedure relating to employment, would form part of the applicant's contract of employment and would apply to his employment with the first respondent;
 - He undertook to acquaint himself with the terms and conditions of the first respondent's policies, procedures and codes;
 - The first respondent's policies, procedures and codes would be amended from time to time, at the sole discretion of the first respondent, which amendments would be binding on him;
 - Any policies, procedures and codes introduced by the first respondent pursuant to the contract of employment having been entered into would be binding on him;
 - No amendment of the contract of employment or cancellation of any part thereof would be binding on the parties unless such amendment or cancellation was reduced to writing and signed by both; and
 - The agreement constituted the whole agreement between the parties and no warranties or representations, whether express or implied, had been given by the first respondent to him. (paragraph 17)

- The clause of the contract of employment said to have been breached was clause 6.8 of the Disciplinary Code. (paragraph 27)
- The first respondent became aware of the allegations of misconduct which had been levelled against him on 5 April 2024 when the incident report had been transmitted to the first respondent's Chief Executive Officer, the first respondent's accounting officer. (paragraph 31)
- The effect of clause 6.8 of the Disciplinary Code was that any disciplinary enquiry initiated against him arising out of such allegations of misconduct as had been embodied in the incident report ought to have commenced and have been concluded by not later than 5 July 2024. (paragraph 32)
- Notwithstanding the three month limitation imposed by clause 6.8, the period to finalise the disciplinary enquiry could, on good cause shown, have been extended to 5 October 2024 at the latest. (paragraph 33)
- By having initiated disciplinary proceedings against him on 9 January 2025 the first respondent acted in breach of his contract of employment and its own Disciplinary Code. (paragraph 40.1)

[13] Having expressly disavowed reliance on any of the provisions of the LRA relating to fairness, he nonetheless asserted that this court's jurisdiction to determine the dispute was founded in s157(2)(a) read with s158(1)(iv) thereof. The former section provides that this court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of a Constitutional right, arising from employment and labour relations, whilst the latter affords this court the power to issue declaratory relief. In view of the ambit of the applicant's pleaded case, and reference to the Constitution having been limited to the single statement made in his founding affidavit concerning s1(d) thereof,

'Part of the reasons this application is particularly important is that the First Respondent is an organ of state as defined in s239 of the Constitution of the Republic of South Africa Act 108 of 10996 ("the Constitution") and as such it is bound by the legality provisions in section 1(d) of the Constitution. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power by organs of state is regulated by the Constitution. It entails that organs of state "are constrained by

the principle that they may exercise no power and perform no function beyond that conferred upon them by law,”

this court questioned what reliance, if any, the applicant actually placed on any Constitutional right in his application. Mr Luthuli, who appeared for the applicant, accepted that the provisions of the Constitution were irrelevant to his claim.

[14] In the absence of s157(2)(a) having been of any relevance, and s158(1)(iv) being, strictly speaking, an empowering provision, this court was enjoined to consider the substance of the applicant's dispute to ascertain his actual cause of action.¹ In consideration of the factual averments underpinning the applicant's claim, it was evident that his cause of action was contractual, having been premised on an alleged breach by the first respondent of his contract of employment.

[15] Having acknowledged the nature of the applicant's claim, the first respondent disputed that this court had jurisdiction to entertain it. Authority for its proposition was said to be found in Steenkamp and Others v Edcon Ltd 2016 (3) SA 251 (CC), the *ratio* therein stated by the first respondent to have been,

‘... when an applicant's cause of action is unlawfulness as opposed to unfairness there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness.’

[16] It is unnecessary to examine the issues which were involved in Edcon in any detail, however that which was stated by the first respondent to have been the conclusion arrived at by the Constitutional Court is required to be addressed as it was not a correct statement of the law. Having distinguished the causes of action available to litigants in the realm of employment relationships, the Constitutional Court reiterated that the remedies available to a litigant would be circumscribed by the cause of action upon which such litigant elected to rely,

‘My point of departure is that, if a litigant's cause of action is contractual in nature, the remedy will have to be found within contract law. If a litigant's cause

¹ Zungu v Premier, Province of KwaZulu-Natal and Another (2017) 38 ILJ 1644 (LAC)

*of action is based on the law of delict, the remedy will have to be in the law of delict. The applicants' cause of action is a breach of the procedural requirements laid down in section 189A(8) of the LRA that a relevant employer is required to comply with before it can dismiss employees to which the section applies. On the same principle the relief to which the applicants may be entitled by virtue of that breach, if they make out a proper case, should be sought within the four corners of the LRA.'*²

[17] By virtue of the appellants in that matter having founded their cause of action on a breach of an obligation cast upon the respondent in terms of the LRA, the remedies available to them were limited to those provided under the LRA. This did not equate to a finding that employees are barred from pursuing contractual claims. The Constitutional Court confirmed in Baloyi v Public Protector and Others [2020] ZACC 27 that despite the provisions of the LRA, this court has the jurisdiction to hear and determine any matter concerning a contract of employment by virtue of the provisions of s77(3) of the BCEA.³

[18] Notwithstanding that the applicant pleaded no reliance on the provisions of s77(3) of the BCEA, in light of the fact that his claim clearly concerns a contract of employment, this court has the requisite jurisdiction to adjudicate his dispute.

[19] It was the first respondent's further assertion that this court lacked jurisdiction to determine the application by virtue of the applicant's failure to have established any exceptional circumstances warranting this court's intervention in the incomplete disciplinary proceedings currently underway.

[20] Whilst s158(1B) prohibits this court from reviewing any decision or ruling made during conciliation or arbitration proceedings until the main issue in dispute has been finally determined (save where it appears to the court just and equitable to do so) no equivalent provision may elsewhere be found imposing a similar restriction in relation to disciplinary processes. In Jiba v Minister of Justice and Constitutional Development

² At paragraph 103

³ S77(3) of the BCEA provides that, 'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment concerns a term of that contract.'

and Others (2010) 31 ILJ 112 (LC) this court confirmed that it has jurisdiction to make interim orders in the course of disciplinary processes, from which it may be accepted that the issue of intervention is not one of jurisdiction. The issue is rather, despite that it may do so, whether it should do so. That issue is to be assessed in consideration of the principle that piecemeal litigation ought to be discouraged, unless the circumstances are such that the interests of justice requires this court's intervention.

[21] As there is no reason to conclude that this court does not have jurisdiction to determine the applicant's claim, the merits thereof will be considered.

[22] It is trite that a litigant whose cause of action is founded upon a contract is required to both plead and prove the terms of the contract upon which he or she relies. It is also trite that a litigant who contends that such a contract has been breached by the other contracting party is required to both plead and prove such breach.

[23] The applicant's contract of employment was not in dispute and nor did the first respondent dispute that its Disciplinary Code had been expressly incorporated therein, its provisions thereby having become contractual terms of his employment by it.⁴

[24] The term of the contract of employment which was alleged to have been breached by the first respondent was clause 6.8 of the first respondent's Disciplinary Code, which provides,

'disciplinary matters shall be handled expeditiously and every employee shall have a right to have their disciplinary matter finalised within a period not exceeding three months from the date that the matter comes to the attention of the entity, failing which the entity will have to show cause for the extension of the period, which may not under any circumstances exceed 6 months.'

[25] The assertions made by the applicant from which he concluded that clause 6.8 had been breached were,

⁴ As was accepted to have been the consequence in a similar scenario in Denel (Pty) Ltd v DPG Vorster (2005) 4 BLLR 313 (SCA) at paragraph 5

‘31. The first respondent became aware of the allegations of misconduct levelled against me on 5 April 2024 when one Zukiswa Mgcemu sent an incident report to the First Respondent’s Chief Executive Officer, Mr Bheki Mbanjwa (‘the CEO’) and to Ms Nokubonga Magubane. The incident report for all intents and purposes reached to the accounting officer of the First Respondent on the mentioned date. A copy thereof is attached hereto marked “EVM9”.

32. Subsequent to the delivery of the incident report to the CEO on 05 April 2024, I was interviewed on 13 June 2024 by the investigator as already indicated elsewhere in this affidavit. Accordingly, on a proper construction of clause 6.8 of the Disciplinary Code, the disciplinary enquiry ought to have commenced and concluded no later than 05 July 2024.

33. Further, in terms of the same clause, the period to finalise the disciplinary enquiry could have, on good cause shown, be extended to, but not beyond 05 October 2024.

34. During argument before the Second Respondent, the First Respondent argued that the First Respondent became aware of the incident on 21 June 2024, which I deny. But even accepting this, the First Respondent would have had to initiate the disciplinary enquiry no later than 21 December 2024.’

[26] Despite having asserted that the time limit stipulated in this clause had been exceeded, he neither pleaded nor established that a breach had occurred. In consideration of the elements of the clause, in order for the applicant to have sustained his claim that the first respondent had breached such time period he was required to plead and prove that ‘the matter’ had come to the attention of ‘the entity’ at a point in time in excess of three months before 9 January 2025, neither of which aspects were established on his own version.

[27] In having alleged a breach, the time period relied upon by the applicant was asserted to have commenced running on the date on which the incident report had reached the first respondent’s accounting officer. Self-evidently, the clause did not stipulate that the time period in question would commence upon the date of an incident report. This being the case, it was incumbent upon the applicant, in having asserted a breach, at the very least to have set forth in his affidavit the basis upon which he

contended that the term 'the matter' was intended and understood by the parties to have been the incident report upon which he relied. He failed to do so.

[28] Even if this aspect had been open to interpretation and had been capable of determination by way of legal argument alone, the applicant's further difficulty was that he failed either to allege or to establish that the first respondent's accounting officer was, for the purposes of clause 6.8, 'the entity'. The Disciplinary Code defined 'the Entity' as having been,

'KwaZulu-Natal Liquor Authority, including any committee thereof or employee of the organisation acting in accordance with the powers which have been vested in the organisation and which have been delegated to such committee or employee.'

[29] The definition of 'the entity' in the Disciplinary Code included any number of committees or individuals with delegated powers. In the context of clause 6.8, 'the entity' would have been the committee or the individual(s) with delegated authority to deal with matters of discipline. It was accordingly incumbent upon the applicant to have established that the first respondent's accounting officer, as the recipient of the incident report (if such could have been construed to have been 'the matter'), was 'the entity' for the purposes of clause 6.8. He did not do so. His failure to have alleged and established that the accounting officer was, in the context of clause 6.8, 'the entity' resulted in his having failed to establish that 'the matter' had come to the attention of 'the entity' at the time alleged by him.

[30] In the result, the applicant's own founding affidavit did not establish that clause 6.8 of the Disciplinary Code had been breached by the first respondent.

[31] Even if it were to have been possible somehow to have found that the applicant had established that the first respondent had breached the term of the contract relied upon by him, having founded his claim in contract, he thereby excluded the relief sought by him as a possible remedy: an order that the disciplinary enquiry be *'declared to be unlawful and invalid.'* This is so for the reason that even if it could have been found that his contract of employment had been breached, and that the continuation

of the disciplinary hearing was consequentially 'unlawful', the first respondent was correct that no finding of 'invalidity' could arise therefrom.

[32] The concept of invalidity concerns actions taken by the State. Declarations of invalidity are most commonly ordered in circumstances in which administrative action has been successfully subjected to a process of judicial review; or law or conduct found to be inconsistent with the Constitution is declared to be invalid in terms of s172(1)(a) thereof.

[33] The applicant sought to persuade this court that a declaration of invalidity arose as a direct consequence of a finding of unlawfulness. In substantiation of this assertion Mr Luthuli referred this court to the decision of the Constitutional Court in Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC) which he claimed was authority for the proposition that where neither cancellation nor specific performance will provide relief for an applicant, a court must declare the conduct unlawful, and the natural consequence of such a declaration is the invalidity thereof.

[34] In the first of its decisions in Allpay⁵ the Constitutional Court had declared the award of a tender by SASSA to Cash Paymaster Services (Pty) Ltd to have been Constitutionally invalid. Such declaration had been granted in consequence of the court having found that SASSA, prior to having issued the tender to it, had failed to have ensured that its empowerment credentials had been objectively confirmed, and further that one of the notices which had been issued in the course of the bidding process had been vague in its specifications. The court suspended the declaration of invalidity and adjourned the matter with specific directions concerning the steps the parties were to take to enable it to determine a just and equitable remedy in accordance with s172(1)(b) of the Constitution. It was such determination with which the judgment in Allpay (No 2) was concerned. Whilst that matter did, to a limited extent, involve contractual obligations, those contractual obligations did not inform the declaration of invalidity, and the 'unlawfulness' related to the contract between SASSA

⁵ Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC)

and Cash Paymaster as a whole as a result of the failures in the administrative process which had preceded its conclusion. Allpay (No 2) was therefore not authority for the proposition advanced by the applicant, and nor could this court find any other support for his assertion that invalidity was a natural consequence of a declaration that a contract, or the actions taken in terms of a contract, are unlawful.

[35] In a contractual case, for a declaration of invalidity to be granted, were it notionally possible for such a declaration to be made in relation to conduct arising out of the contract rather than in relation to the contract as a whole, it would have been incumbent upon the applicant, again, to have pleaded that the terms of the contract itself envisaged such a consequence.

[36] Clause 6.8 was silent as to what, if any, consequences would ensue in the event of the breach thereof. In the absence of any express term of the contract having stipulated the consequences which would ensue in the event of non-compliance with the time period(s) envisaged therein, the only basis upon which a consequence of 'invalidity' could have been established would have been by way of a tacit or an implied term.

[37] Not only did the applicant not plead the existence of such a term, but confined his claim to the express terms of the contract alone. His claim having been limited to the express terms of the contract only, he was axiomatically precluded from having placed any reliance on any other potential tacit or implied term. Moreover, to have done so would have stood in contradiction to his reliance on the express contractual terms which provided that the contract of employment constituted the whole agreement; that no other representations made formed part of the contract; and that any variation was to have been reduced to writing.

[38] In the circumstances, even if it could have been found that the first respondent had breached clause 6.8, a declaration of invalidity was not an order which could competently have been granted. The first respondent's assertion that the only relief available to a litigant whose claim was premised on breach of contract is that of either specific performance or cancellation and damages is correct. As was stated by the

Labour Appeal Court in Passenger Rail Agency of South Africa and Others v Ngoye and Others 2025 (2) SA 556 (LAC),

‘As has been stated earlier and particular in the matter of Edcon, where the Constitutional Court held that if a matter is brought in terms of the LRA, only the remedies set out in the LRA are competent. If a claim is made in terms of contract, only contractual remedies are competent.

Since the Respondents have disavowed any reliance on the LRA and having succeeded in having the termination of their contracts declared unlawful, the only relief to which they would be entitled is specific performance or damages.’⁶

[39] Mr Luthuli asserted that in the circumstances of the present matter neither a claim for specific performance nor for cancellation and damages would avail the applicant. This is not correct: the manner in which specific performance of a negative contractual obligation is enforced is by way of an interdict.⁷ To the extent that the applicant’s case was predicated upon the first respondent having been contractually prohibited from commencing and/or continuing disciplinary proceedings post fact the expiration of the time period(s) envisaged in terms of clause 6.8, specific enforcement by the applicant would have necessitated that he applied for an interdict.

[40] This court having found that the applicant, on his own papers, failed to establish the existence of a breach of clause 6.8, and its further finding that the relief sought by the applicant was incompetent, it is unnecessary to make any findings concerning the first respondent’s specific defences that (1) the provisions of the Disciplinary Code were not immutable, the Disciplinary Code having been no more than a guideline in matters of discipline; and (2) the absence of exceptional circumstances.

[41] The application will accordingly be dismissed.

Costs

⁶ At paragraph 44 and 45

⁷ See, for example, Badenhorst v Theophanous 1988 (1) SA 793 and Makeshift 1190 (Pty) Ltd v Cilliers 2020 (5) SA 538 (WCC)

[42] Both parties sought payment of their respective legal costs, and neither presented any argument as to why, in the event of the failure of their own case, they ought not to be ordered to pay the successful litigant's costs. In consideration of this issue, whilst this court is mindful of the fact that there is an ongoing employment relationship between the parties, neither party expressed the view that this consideration constituted an impediment to an award of costs.

[43] The applicant is a senior official in the ranks of the first respondent, and is not currently unemployed. The first respondent's funds, on the other hand, are sourced from the public purse which will have been unnecessarily depleted by the incurrence of legal fees as a result of the applicant's ill-conceived application.

[44] Mr Kuboni for the first respondent suggested that the appropriate costs order would be at the rate of Scale C on the basis of the complexity of the issues involved. This court is however of the opinion that the appropriate scale would be that suggested by Mr Luthuli, Scale B.

Order

1. The ordinary rules relating to service and notice in motion proceedings are dispensed with and the application is enrolled as an urgent application.
2. The application is dismissed.
3. The applicant is ordered to pay the first respondent's costs, the scale, where applicable, to be scale B.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr S Luthuli, instructed by Nompumelelo Hadebe Inc

Respondents:

Mr W S Kuboni, instructed by Mpanza and Associates Inc

LABOUR COURT