

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J661/02

In the matter between:

AHMED MOONDA

Applicant

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

JAMMY AJ

1. In terms of a contract concluded by him with the Respondent on 7 August 2001, the Applicant in this matter was appointed, and still holds the position of, "Regional Director: Region 1 & 2, as contemplated by Section 56 of the Systems Act" (the Local Government: Municipal Systems Act 32 of 2000).
2. On 17 January 2002, he received a letter from the Acting City Manager, City of Johannesburg, the relevant terms of which are the following:

“RE: SUSPENSION WITH FULL PAY

You are hereby suspended with immediate effect in terms of clause 9.16.1 of the Conditions of Service as approved by Bargaining Council.

Your terms of suspension are that you may not partake in any Council activity and enter any Council premises without my direct approval.

You are instructed to have no contact with any Council employee and to direct any inquiry you may have to the Office of the City manager, whether personally or through your union. You are furthermore instructed to make your contact details available to the investigating officer in the case, being Mr P Steyn of Internal Audit Services”.

3. On receipt of that letter, the Applicant consulted his attorneys by whom a letter was addressed to the Acting City Manager in which, *inter alia*, the following was stated:

“We note that the letter fails to mention any reason for either the suspension or of a duration thereof.

The letter suggests that the purpose of the suspension is to facilitate the investigation by your Internal Audit Services of certain charges that you contemplate proffering against our client.

In this regard our client has reason to believe that Internal Audit Services has already completed its report, which we presume will form the basis of

the investigation in question ...

Our client also has every intention of giving his full co-operation towards bringing the entire matter to a speedy conclusion.

To this end we will appreciate your furnishing us with a copy of the internal report in question and also to be given an indication of the likely date(s) upon which a disciplinary hearing will take place with a view to enabling our client to properly brief us and in preparing his defence to any charges that may be levelled against him”.

4. That letter elicited an immediate reply. The investigation against their client was still “under way”, the attorneys were told, and the report requested had not been completed. In terms of the Conditions of Service, the City can suspend an employee on full pay if it is deemed to be in its interests and that is what had occurred. To provide a date of inquiry would pre-empt the outcome of the investigation and in any event the employee in any such inquiry was not entitled to legal representation and “may only be represented by either an official or a union representative of which he is a member”. On that basis no further correspondence with the attorneys would be entered into.
5. The Applicant’s attorneys were undeterred and after a further exchange of correspondence, eventually wrote to the City Manager on 4 February 2002, acknowledging the receipt, in response to their request therefor, of their client’s contract of employment and drawing attention to the fact that that contract “expressly provides that any and all disputes of whatsoever nature, and more specifically disputes relating to, *inter alia*, the interpretation and performance thereunder shall be determined by

arbitration. The disciplinary action route that the Council embarked upon is clearly out of line with the terms of the contract in question". Clause 9.16.1 of the Conditions of Service were not applicable either to him or to "the situation in hand" and had "no substance in fact or in law and in fact rendered his purported suspension ineffectual and unlawful". If the suspension was not immediately lifted, application would be made for urgent interim relief. It is that application which is now brought before this court as a matter of alleged urgency.

6. That alleged urgency was challenged by the Respondent but in the light of the fact that the position of each of the parties has been fully pleaded and comprehensively argued by their respective legal representatives, I expressed the view, which was accepted, that the application, in the interests of all concerned, should be determined on its merits.

7. The Applicant seeks from this court an order in the following terms:

"2 Declaring that –

2.1 the disciplinary action initiated by the Respondent against the Applicant in suspending him and any intended disciplinary action consequent upon such suspension are governed by and overridden by the provisions of the Applicant's fixed term contract of employment dated 8 August 2001 ("the Contract"), more particularly by clause 18 thereof;

2.2 that the disciplinary action referred to in paragraph 2.1 above constitutes a dispute which is subject to arbitration in terms of clause 18 of the Contract;

2.3 alternatively to paragraph 2 above, an order compelling the Respondent to

stay the disciplinary action referred to above and ordering the Respondent to declare a dispute in terms of clause 18 of the Contract in the event that the Respondent wishes to have the subject matter of the said disciplinary action resolved and adjudicated upon”.

8. The relevant sub-section of clause 18 of the Applicant’s contract of employment is in the following terms:

“18.1 Any and all disputes of whatsoever nature and however arising concerning this contract and without prejudice to the generality of the foregoing, whether such disputes relate to its validity, its interpretation, the performance of it, its rectification or any other matter, shall be finally determined by arbitration”.

9. It is common cause that at all times material to the issues in this matter, the Applicant was, and remains, a member of the South African Municipal Workers Union (“SAMWU”). It is further not in dispute that, together with the Independent Municipal and Allied Trade Union, SAMWU was a party to a collective agreement entered into with the Greater Johannesburg Transitional Metropolitan Council and the Metropolitan Local Councils. Chapter 9 of that collective agreement deals with discipline and sets out in detail, the disciplinary procedures to be followed by a Council in appropriate circumstances. Simply stated, those procedures involve the establishment of a disciplinary enquiry, the form and manner of the process, rights of appeal where applicable and so forth.

10. The issue before this court presents itself, perhaps deceptively, as a

relatively simple one. Which of the two agreements takes precedence over the other? Is the Respondent entitled, in terms of the collective agreement, to pursue its course of interim suspension and eventual internal disciplinary enquiry against the Applicant as provided for therein, or is it obliged to refer what the Applicant classifies as a dispute falling within the ambit of clause 18 of his employment contract, to arbitration?

11. In the course of argument by the Applicant's counsel in favour of the latter of these two alternatives, it was submitted that the employment contract, having been concluded on 7 August 2001 must take precedence over the earlier collective agreement, which was concluded on 10 June 1999. My attention was properly drawn to Section 23(3) of the Labour Relations Act 1995 which provides that –

“Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement”

The circumstances in which that provision would apply however, it was argued, are limited. Reference was made to –

Brassey: Commentary on the Labour Relations Act: at A3:41,

where, dealing with the issue of precedence and the problems inherent in that concept, the author says this:

“A *viamedia* is to say that collective agreements take precedence when, properly construed, they evince an intention that they should take precedence over employment contracts; otherwise they take precedence

only when the terms they set are more favourable than the individual contracts. This, however, is to stretch the language close to breaking point”.

The language there referred to is that of Section 199 of the Labour Relations Act which defines specific circumstances in which an employment contract, whether concluded before or after the coming into operation of any applicable collective agreement, may not disregard or waive the provisions of such agreement.

12. Of further relevance, it was submitted, is clause 1.4 of the collective agreement which reads as follows:

“1.4 Nothing in these conditions contained shall prevent the Council from concluding a contract of employment with any person containing conditions supplementary to or in conflict with his conditions provided that:

- (a) these conditions shall be binding on such person to the extent that they are not in conflict with the terms of such contract; and
- (b) according to a procedure agreed to with labour”.

13. The clear intention to be drawn from that provision, it was argued, is that to the extent to which the terms of an employment contract are in conflict with those of a collective agreement, the former would take precedence over the latter.

14. The Applicant's counsel then embarked upon a comprehensive analysis of whether the charges against the Applicant in fact related to his contract of employment and emphasised, in doing so, the provisions of clause 18.2 of that contract which, as I have already indicated, provides for the reference to arbitration of "any and all disputes of whatsoever nature and however arising concerning this contract ..." That analysis, to my mind however, begs the essential question and that is whether, in the particular circumstances of this matter, any incidence of conflict or question of precedence exists and is of relevance. There could be no doubt that the charges which the Respondent has indicated that the Applicant will face, if the ongoing investigation indicates that course of action, will involve allegations of serious misconduct, *prima facie* falling squarely within the ambit of the provisions of chapter 9 of the collective agreement and, all other things being equal, entitling the Respondent to pursue the disciplinary procedures there defined. The question of whether or not the conduct complained of is also encompassed by the Applicant's contract of employment and his duties and functions there prescribed, does not constitute an issue which this court is required to determine. I agree entirely with the submission that the only question for resolution in the context of this application, is whether the Respondent is precluded from pursuing that course of action by any provision of the Applicant's employment contract.
15. There is, in my opinion, a basic reason why it is not so precluded, and that is that, leaving aside any question of precedence of either of the agreements over the other, no dispute falling within the ambit of clause 18.2 of the employment contract has as yet arisen. No charges have been formulated against the Applicant and this will not occur, as the Respondent has pertinently pointed out, until the investigation currently in progress has

been completed. At that stage, if so indicated, the Applicant will be called upon to answer those charges in a disciplinary hearing in terms of the Conditions of Service defined in the collective agreement. A dispute falling within the ambit of clause 18 of the contract of employment will only arise if the result of that disciplinary enquiry is adverse to the Applicant and he contests it. That is the stage at which a reference to arbitration as provided for in that clause, might ensue. There is no argument at this time regarding the validity, interpretation, *performance*, rectification of or any other matter concerning the employment contract. In short, the invocation by the Applicant of the provisions of clause 18.1 of that contract is premature and cannot be permitted on an anticipatory basis. There is no ambiguity in its terms which, quite simply, are of no application at the present stage of the contest.

16. The Applicant has misconstrued the meaning and import of section 18 of his employment contract but that misconstruction does not in itself constitute an arbitrable dispute. He cannot feed upon it to create one when none, at this stage, exists.

17. No submissions have been made and no reasons appear to me to exist as to why, conventionally, an order for costs should not follow the result in a matter of this nature and the order that I accordingly make is the following;

17.1 the application is dismissed;

17.2 the Applicant is to pay the Respondent's costs.

B M JAMMY

Acting Judge of the Labour Court

1 March 2002

Representation:

For the Applicant:

Adv H van R Woudstra S.C instructed by Louw Pienaar Attorneys

For the Respondent

Mr Robin Carr: Bowman Gilfillan Inc.