

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J 2369/02

In the matter between:

Applicant

and

First Respondent

THE PRINCIPAL AND VICE CHANCELLOR

Second Respondent

THE REGISTRAR (ACADEMIC) OF

Third Respondent

REASONS FOR JUDGMENT

- 1 When this matter came before me by way of urgency on 28 June 2002, I issued an order dismissing the application with costs. In addition, the interim order granted

by Ntsebeza AJ on 21 June 2002 granting the Applicant interim relief pending the finalisation of the main application, was discharged. I indicated that reasons would follow and they are contained in this judgment.

2 The Applicant is an academic. He was employed by the University of Venda. He was accused of misconduct and subjected to discipline. In consequence of that process he was dismissed on 28 May 2002. This aggrieved him.

3 He timeously referred his grievance about an unfair dismissal to the CCMA. He also received a notice informing him that he was to vacate the accommodation which formed part of the terms and conditions of employment. No date was stipulated but he regarded it as an eviction notice. This further aggrieved him.

4 In consequence of these developments he launched an urgent application in which he sought relief as follows:

“1 *1.1 That this matter be treated as one of urgency and for which urgent relief is necessary;*

1.2 That, in so far as may be necessary, the noncompliance with the requirements of the Rules, the forms of service and terms be condoned;

2 *That a rule nisi be issued, returnable on 28 June 2002 or any other date as the above Honourable Court may determine, calling upon the Respondents to show cause why the following order should not be made final:*

2.1 *That the notice of dismissal dated 28 May 2002 and which is attached to the founding affidavit to the main application as annexure "JMI" be declared null and void and of no effect;*

2.2 *Alternatively to prayer 2.1 above, that the Applicant's dismissal as contained in the aforesaid notice be set aside and the Applicant reinstated;*

2.3 *Further alternatively, that the Applicant's immediate dismissal as contained in the aforesaid notice be set aside and that the Applicant be reinstated pending the finalisation of the proceedings already referred to the CCMA on 20 June 2002;*

2.4 *That the Respondents be restrained from ejecting the Applicant from its present residence at Plot 186, Unit D, Thohoyandou, Limpopo Province, pending the finalisation of the dispute between the parties;*

2.5 *That prayers 2.2, 2.3 and 2,4 operate as an interim order with immediate*

effect pending the finalisation of the dispute between the parties;

3. *That the Respondents be ordered to pay the costs of this application on a punitive scale;*

4. *That the Applicant be granted further and/or alternative relief.”*

5 When the matter came before this Court on 21 June 2002 Ntsebeza AJ issued an order in the following terms:

“1 *The Applicant is entitled to enjoy the benefits and privileges that he used to enjoy before his purported dismissal, as though he had not been dismissed, pending upon realisation of this application by this Court.*

2 *The question of whether today’s interlocutory application was one that necessitated urgency should heard as part of the main application.*

3 *Costs are reserved.”*

6 As is plain from the contents of the notice of motion, the validity of the dismissal of 28 May 2002 is attacked. This relates to the lawfulness of that act on behalf of the University rather than its unfairness. The second point of controversy is,

independently of the validity of the dismissal, that the dismissal be suspended pending the finalisation of proceedings of which the CCMA became seized on 20 June 2002. This axiomatically relates to the conciliation and the subsequent arbitration proceedings which might proceed if conciliation fails. The third issue is the prayer for an interdict to maintain the Applicant in occupation of the residence provided to him as part and parcel of his terms and conditions of employment, “*pending the finalisation of the dispute between the parties*”. Precisely what event the “*finalisation of the dispute*” is intended to identify is not entirely clear. It does not follow as a matter of course that the conclusion of the CCMA arbitration proceedings would be the latest date at which such finalisation would be achieved. Notionally, finalisation might be when litigation opportunities are utterly exhausted which would mean the potential review of any adverse decision by a Commissioner of the CCMA in arbitration proceedings, and if the review went against the Applicant, the opportunity to lodge and prosecute an appeal in the Labour Appeal Court having been exhausted, and potentially, a further opportunity to challenge the adverse consequences of a decision of the Labour Appeal Court in the Constitutional Court for want of the infringement of some constitutional right. The unsatisfactory nature of the prayer is thus self-evident.

- 7 The thrust of the relief sought is to require of this Court to order specific performance of the Applicant’s contract of employment until such time as

litigation concerning its termination has been exhausted. Moreover, this relief is sought while the very issue of the continuation of his employment is a dispute already referred to the CCMA for resolution.

8 It is not apparent to me on what proper basis it can be contended that the relief sought in this court is competent. An invitation to counsel to point to the provisions in the Labour Relations Act which would confer such a power on the Labour Court did not elicit a positive response.

9 The Labour Court enjoys no jurisdiction which is not expressly conferred upon it by the provisions of the Labour Relations Act. The provisions of the LRA variously, in express language, confer jurisdiction in respect of certain species of dispute on the CCMA and in respect of other species on the Labour Court. There are few exceptions to the general structure of the LRA that the Labour Court enjoys jurisdiction over a labour dispute only after that dispute has been processed by the CCMA.

10 In my view the notion that the Labour Court may be called upon to intervene in respect of a dispute referred to the CCMA whilst it is being dealt with there, is misconceived. In **Maropane v Gilby's Distillers (1990) 8 ILJ 636 LC at 638 H** Landman J considered whether or not it was open to the Labour Court to entertain an application by an aggrieved employee, who having been hauled before a

disciplinary enquiry, was dissatisfied with the lack of particularity of the charge sheet put to him, and wanted better particulars. The learned Judge held that whatever the deficiencies of the charge sheet might be, it was not open to the Labour Court to intervene **in medias res** and that such relief as the Labour Court was entitled to grant for any procedural deficiencies, was to be located in the jurisdiction of the Court to oversee the proper compliance of the provisions of the Labour Relations Act by the CCMA. It is the CCMA which is the primary institution to resolve disputes over allegations of unfair dismissal.

11 In this case, what the Applicant seeks of this Court to do, is not dissimilar. Whilst his referral of a dispute concerning an unfair dismissal is working its way through the labyrinthine processes of conciliation and of arbitration before the CCMA, he seeks the intervention of this Court to prevent such harm as may befall him in consequence of the dismissal. The proposition is novel. If it were valid, it would unquestionably ensure that in respect of every dismissal of any person for whatever reason, the employment relationship could be preserved until such time as litigation about the issue had been exhausted. The remedies provided for in sections 193 and 194 of the LRA point to the dimension of retrospective relief available to a successful grievant.

12 For these reasons it follows in my judgment that there is no general jurisdiction conceivable which is vested in the Labour Court which can preserve the *status*

quo of an employment relationship, pending finalisation of CCMA proceedings or any further proceedings flowing from dissatisfaction with the results of such proceedings.

- 13 Independently of those considerations, a further question arises from the basis of the averment that the dismissal is unlawful, as distinct from unfair. If the Labour Court is satisfied that the dismissal is indeed unlawful, may the court intervene to declare it so, and thus restore the *status quo ante*?
- 14 No sound reason exists in law why an employee, who is the victim of an unlawful dismissal, cannot approach a Court of law in order to have the unlawful act declared thus, and obtain an order of specific performance. In **Fedlife Assurance Ltd v Wolfaardt (2001) 22 ILJ 2407 (SCA)**, Nugent JA has held that the right of an employee to approach an ordinary civil court in order to assert contractual rights is not ousted by the creation of any of the apparatus under the provisions of the Labour Relations Act. In my view, the jurisdiction enjoyed by an ordinary civil court to afford such relief would be also enjoyed by the Labour Court.
- 15 The postulates of the scenario sketched above would be relatively uncomplicated if the only forum which the Applicant had approached for relief had been this Court or High court. The applicant's cause of complaint would have been one

which was plainly premised upon his rights at common law, rather than his rights to fair treatment flowing from the provisions of the LRA. However, in this matter, the Applicant has sought to have his cake and eat it. His initial sortie was to refer a dispute concerning an unfair dismissal to the CCMA. Thereafter he took up the view that he can also approach a court of law to have the dismissal declared invalid for want of lawfulness. The question thus arises, whether or not it is appropriate, even if competent, that the Applicant should be indulged the opportunity to ventilate his dispute in two fora simultaneously? The Judge President of the Labour Courts has in **Langveldt v Vryburg Transitional local council and others 2001 22 ILJ 1116 (LAC) at paras 51 and 55**. pointed to the abuse which results from forum shopping. The Applicant in this case has not shopped for a forum, he has endeavoured to present his *lis* simultaneously in two.

16 It seems to me wholly inappropriate that it is open to a litigant to do so. The fact that this Court has an umbilical relationship with the CCMA makes it particularly odious, but it would only be in a matter of degree less odious had this application been brought before the high court. In my view, for reasons of policy, the Labour court or the High court should decline to entertain an application over the identical *dispute* being prosecuted in the CCMA.

17 However, even if my views on the means by which forum shopping, and worse, are to be discouraged, I am on the facts placed before me not persuaded that any

illegality has attached itself to the decision of the University to dismiss the Applicant, regardless of whether or not fair cause as contemplated by the provisions of the Labour Relations Act are present. I deal now with the grounds of illegality.

18 The first ground relied upon for the contention of illegality is to point to Article 14(2) of the University of Venda (Private) Act No 89 of 1996 which vests the power to dismiss any person in the Council of the University. In consequence of that, the statute of the University provides in paragraph 91 (28) (g) that where an employee is found guilty of misconduct, the Vice Chancellor may after observing certain formalities discharge the employee. The Applicant was discharged pursuant to a written notice notifying him of that fact. It is a letter dated 28 May 2002 in which *inter alia*, it is stated that the Applicant is dismissed with immediate effect. On the typed letter the words “*Professor G M Nkondo, Vice Chancellor and Principal*” appear. However, Professor Nkondo did not sign the document. What appears next to his name are the words “*for*” and the signature “*J N Matidga*” appears above his name.

19 The contention is advanced that the only person who had the lawful power to discharge him was Professor Nkondo, but this letter proves that he was discharged by Mr Matidga. It is upon these facts that it is asserted that a person without authority to discharge the Applicant performed the act, and accordingly,

the discharge was axiomatically invalid and unlawful.

20 In my view the contention is misconceived. It is true the bearer of the power did not sign the document in person. It is plain that another person signed the document on behalf of the bearer of the power. In the absence of some basis for concluding that this form of signature renders the act described in the text of the letter invalid, the document constitutes evidence of a decision taken by Professor Nkondo and not of the person who, upon the authority of the professor, signed the document. It is plain from the papers filed on behalf of the Respondent in this matter, that Professor Nkondo indeed sought to have the Applicant dismissed. The flaw in the Applicant's argument is to argue that the signature of the agent renders the decision the decision of the agent. This cannot be so. Accordingly the applicant's argument fails.

21 The second attack on the validity of the dismissal is to challenge the jurisdiction of the Appeal Tribunal. Article 10 of the University of Venda Act provides that

“The Council... may appoint one or more committees which shall subject to the directions of the Council... as the case may be perform the functions of the Council... as the case may be...”

Article 92(1) of the statute provides that an employee who has been convicted of

misconduct may appeal to an external Appeals Committee appointed by the Council. On the basis of this it is contended that an Appeal Committee can be appointed only by the Council. The allegation is made by the Applicant that the term of office of the Appeals Committee expired prior to the 10th of January 2002, and the next Appeals Committee was appointed only on the 26th of April 2002. During the interim, the Applicant would have it that no Appeals Committee was in existence. In consequence of that premise, he points to a request dated 16 January 2002 by Mr Matidza, the Registrar, to the Chairperson of Council, to request the permission of the Chairperson to continue using the “old” Appeal Committee, until such time as the Council met on 26 April 2002 in order to appoint another Committee. Apparently this request was granted by the Chairperson. In consequence of that the “old” Appeal Committee which on the 16th of March 2002, heard an appeal by the Applicant against his dismissal, was not properly constituted and had no authority to conduct itself as such. In my view if there was no validly constituted Appeal Committee on the 16th of March 2002 and the appeal therefore could not have validly been heard the consequence is simply that no appeal has been heard. The unfairness of the failure to hold a valid appeal timeously is not for the present exercise a point of concern. The effect of these circumstances is not to render the dismissal any less valid or unlawful. All it could establish is that no valid appeal has been heard. Accordingly, even on the premise relied upon by the Applicant, no invalidity or unlawfulness necessarily follows in respect of the dismissal. In my view retaining the ‘old’ committee until

the 'new' committee could be installed was wholly appropriate in the circumstances in order to honour any obligations to afford persons an appeal.

22 An ingenuous contention advanced by the Applicant is that the dismissal visited on him on 28 May 2002 is automatically suspended because he noted an appeal against it. In this regard he relies on the common law rule that the noting of an appeal suspends an order of Court. That such is the law in respect of the orders of courts of law is clear from, *inter alia* the judgment of Roux J in **United Reflective Converters (Pty) Limited v Lavine 1988 (4) SA 460 (W) at 463 F**. What the Applicant's contention does not give due recognition to, is that this principle applies to orders of Court and does not, without more, apply to the decisions of other decision makers in Society. Indeed, this is illustrated in **Leburu v Voorsitter Nasionale Vervoer Kommissie 1983 (4) SA 89 (W)**. In that decision Groskopf J considered whether or not an appeal against a decision of a Local Road Transportation Board automatically suspended the decision of that Board. He held that it did not, the provisions of the governing statute being a clear indication that the common law of automatic suspension would not apply.

23 In my view it is wholly misconceived to attempt to import the doctrine of the automatic suspension of an order of a court upon the noting of an appeal, into the industrial relations environment. It should not be forgotten that a valid lawful dismissal does not incorporate as a matter of law any right to an appeal. A 'right'

to appeal flows solely from the practice, endorsed in a LRA code of good conduct on dismissals, as a ready means by which a procedurally fair dismissal, given the equitable norms promoted under the provisions of the Labour Relations Act, may be proven. The provision of an appeal is confined to the arena of unfairness.

24 In my view, the notion of the noting of an appeal suspending the effect of an order has no place whatsoever in the law of unfair dismissal.

25 The Applicant also relies on a further ground of illegality in that the suspended sentence imposed upon him by the original disciplinary committee could not validly have been put into operation when he failed to comply with one of the suspensive conditions. The foundation for this argument, is that the number of days during which he was required to comply with the condition should have run afresh from the date upon which his appeal was dismissed. Apart from the muddled thinking which advances this argument at the same time as contending that no valid appeal hearing occurred, this contention is not only unconvincing and unpersuasive on its own premises, but would in any event relate solely to the arena of unfairness rather than that of legality.

26 It follows that in my view that no facts have been set out in this matter which afford a basis for concluding that any illegality attaches to the decision taken by the Respondent on 28 May 2002.

27 The upshot of these considerations is that the dismissal stands until and unless the CCMA determines the issue to the contrary. The Applicant has no right in law or in equity to have the *status quo* prior to the dismissal maintained in the interim. He must accordingly restore to his employer any of the benefits of the employment contract including the residence which had been made available to him as part and parcel of his terms and conditions of employment.

28 Accordingly, for these reasons I concluded the order made on 28 June 2002 was appropriate.

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ROLAND SUTHERLAND

**ACTING JUDGE OF THE
LABOUR COURT OF
SOUTH AFRICA**
4 September 2002

Date of Hearing: 28 June 2002
Date of Order: 28 June 2002

For the Applicant: Adv. D.T. Skosana
For the Respondent: Adv. P.M. Leopeng

Reasons Furnished: 4 September 2002