

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO. J 1454/99

In the matter between:

BESTER, MARIUS CHRISTIAAN

Applicant

and

SOL PLAATJE MUNICIPALITY

Respondent

JUDGMENT

TIP AJ

1. The applicant has been dismissed. He has noted an internal appeal against that result. There is now an urgent approach to this Court for an order relating principally to the issue of who should chair that appeal.
2. The essential features of the background are as follows:
 - 2.1. The respondent had requested an investigation by the Public Protector in relation to certain property transactions. Pursuant to

the report that was furnished disciplinary charges were brought against the applicant, together with others unrelated to the report.

- 2.2. On 9 July 2002 the Council of the respondent adopted a resolution in the following terms:

“1 That the recommendations in Report of the Public Protector on the proposed disciplinary action be noted.

- 2 That the composition of a disciplinary committee be as follows:*

*Chairperson: Neville Cloete
Employers Representative (Prosecutor): Dali Mjila*

Human Resources Representative: Pierre de Villiers

Liaison Officer: Faizel Voster

- 3 That it is also prudent that the Council appoint a chairperson if it proves necessary that an appeal committee be convened. In this instance the City Manager will then chair such a meeting. In this instance Mrs Bernadette Matsepe will represent Human Resources. The rest of the committee will remain the same.*
- 4 That the decision of the disciplinary committee and appeal committee (if necessary) will be the decision of Council.”*

- 2.3. From the charge sheet it appears that the applicant had by then

been suspended, presumably on full benefits, on 8 May 2002 and that the charge sheet had been served on 28 May 2002.

2.4. The disciplinary proceedings began on 22 July 2002 and ran over some ten days, spread over the next several months. The applicant had legal representation as did the respondent. Heads of argument were apparently lodged on or before 7 February 2003.

2.5. The disciplinary findings were delivered on 17 February 2003. The applicant was found guilty on two of the five charges that had been brought against him; he was acquitted on the others, including those formulated in consequence of the report of the Public Protector.

2.6. Representations in relation to the sanction were made. In a finding dated 21 March 2003, the Chairperson concluded: “*I recommend that the employee be dismissed.*”

2.7. The applicant was formally advised of the disciplinary outcome by way of letter dated 25 March 2003. This letter is in the name of the City Manager, Adv Sehunelo. It includes the statement that: “*The nature of your misconduct, together with your*

disciplinary record, as well as your position, period of service and your conduct that has lead to a breakdown of the trust relationship, necessitates dismissal.”

2.8. An internal appeal has been noted by the applicant.

3. The prospect of this appeal has brought into focus the question of who should hear it. The applicant has apparently not at any time accepted that it should be the City Manager. His concern was evidently raised in the course of the disciplinary enquiry. The finding notes that: *“The point was also raised that it was irregular that (even before the conclusion of the disciplinary hearing), the City Manger, who was allegedly involved in various aspects of the dispute, had been appointed as the chairperson of the Appeal Hearing and that it had been decided that his findings would be regarded as those of the Sol Plaatje Municipal Council etc.”* For reasons that I need not set out here, the chairperson of the enquiry was of the view that it did not fall within his area of competence to deal with complaints of that sort.
4. Other than through this complaint, there is no suggestion in the papers that the applicant did anything else to object to the terms of the Council resolution of 9 July 2002, until the events that have directly given rise to

the present application. They were set in motion with a letter from the applicant's attorneys to the Council on 25 March 2003. This was in response to the notice of dismissal of the same day. The letter pertinently addressed the issue of whether the City Manager ought to hear the appeal. It recorded the applicant's objection to that appointment *'in the strongest terms'* and set out several reasons:

"1.1 According to the Agenda of the meeting at which the resolution was taken, the City Manager was consulted about the matter, and he had agreed to the procedure;

"1.2 The contact person regarding the matter is the City Manager himself;

"1.3 The City Manager signed the charge sheet in terms of which our client was charged;

"1.4 The City Manager has stated in a Council meeting that he was driving the matter of the disciplinary charges against our client;

"1.5 The City Manager played an active role in the investigation of the charges against our client.

For instance, it appears from the record of the disciplinary proceedings that he had instructed or requested officials of SAMWU to write letters to the Council in support of Charge 4 against our client."

5. On the strength of these complaints, the applicant concluded that the City Manager was clearly not impartial and proposed that a person from outside Kimberley be appointed, the latter being on the basis that there were very few experienced and independent legal practitioners in Kimberley. The respondent was placed on terms to confirm its concurrence with this proposal by close of business on 2 April 2003, against threat of an urgent application to the High Court.
6. A further letter was addressed to the respondent on behalf of the applicant on 27 March 2003. This letter addressed the status of the dismissal in the following terms;

"The Chairman of the disciplinary committee has shirked his duty by recommending the dismissal of our client instead of imposing the sanction himself.

"The findings of the Chairman are subject to appeal. In

terms of the resolution there is no decision, or deemed decision, of the Council until the outcome of the appeal.

“The dismissal of our client by the City Manager is therefore both premature and ultra vires.”

On the basis of that view, it was suggested that the applicant should remain on the payroll pending the outcome of the appeal.

7. A preliminary response to these letters came from the City Manager on 27 March 2003. It reiterated the respondent's view that the applicant had been properly dismissed and removed from the payroll. It stated further: *“With regard to your request for an independent Chairperson we will revert to you in due course.”*
8. On 1 April 2003 the City Manager responded to the points raised in the applicant's letter of 25 March 2003:
 - 8.1. In relation to *para 1.1* of the letter, it was disputed that the fact that the City Manager had been consulted on the procedure disqualified him from chairing the appeal.
 - 8.2. Likewise, the complaint in *para 1.2* that the City Manager was the

contact person was rejected as a reason for considering him to be biased.

8.3. In respect of *para 1.3* it was stated that the City Manager had signed the charge sheet at the insistence of the applicant, who was said to have refused acceptance of a charge sheet signed by a Mr Mohammed.

8.4. The allegation in *para 1.4* was denied.

8.5. The complaint in *para 1.5* was not denied. Instead there was a somewhat vague statement that: *“the City Manager is the accounting officer of the Municipality, and needs to address issues brought to his attention. In any event he is a professionally qualified person and will conduct all proceedings in a professional and impartial manner.”*

9. The response went on to query the fact that the Council resolution was only now being taken up, although it had been adopted in July 2002.

10. Significantly, it also reacted to the suggestions that had been advanced by the applicant as to who should chair the appeal: *“With regard to your suggestions we attach hereto an item which we intend to take before the*

Mayoral Committee and ultimately Council for your perusal and ease of reference.”

11. Although the letter of 1 April 2003 was annexed to the applicant’s founding affidavit, that ‘item’ was not. It was also not described or in any other way dealt with. It was put up in the answering papers together with a fax confirmation slip indicating that it formed part of the transmission, which was evidently successfully effected on 2 April 2003. The item in question comprises the agenda for a session of the Mayoral Committee, to be held on 17 April 2003. It reviews aspects of the disciplinary proceedings involving the applicant and contemplates that a recommendation will be forwarded to a subsequent meeting of Council for its consideration. It observes that it is not acceptable that employees should prescribe who the chairperson of a particular disciplinary or appeal committee shall be. It refers to the large costs already incurred (R101 356.74). It goes on:

“In any event we would request the Mayoral Committee to consider the request of the attorneys and to refer the matter for a final decision to a full Council meeting in order to amend the decision of Council taken on 9 July 2002, if it so decides. Factors to be kept in mind is [sic] that the matter must be finalised in a cost

effective, expeditious manner, and in fairness to all concerned.

Alternatives that may be considered are:

1 That it be negotiated with the attorneys that the matter be directly referred to the CCMA by agreement for conciliation and arbitration. This will expedite that matter and will ultimately save costs. It should be kept in mind that the CCMA is in any event the next forum in the process.

2 That Council appoint Mr Khuza Bogacwi as chairperson in the place of Adv Sehunelo. It is felt that he would be competent to act in such a capacity.”

12. The applicant's response to the letter received on 1 April 2003, including the information that the question of the appeal chairperson was almost certain to be reconsidered by the Council, was to proceed with the drawing up of papers for an urgent application in this Court. His founding affidavit was deposed to on 4 April 2003. Service of the papers was undertaken on 7 April 2003, with a view to the matter being heard on 11 April 2003. In relation to this correspondence, the applicant had only this to say: *“The respondent replied to my request for an independent chairperson per letter dated 1 April 2003, which my*

attorneys received on 2 April 2003, rejecting my request for an independent chairperson.”

13. The substantial relief sought by the applicant is two-pronged. The first order sought is in these terms: *“Reviewing and correcting the resolution passed by the Council of the respondent on 9 July 2002 by amending paragraph 3 thereof to read as follows: ‘Should Mr Bester appeal against the findings of the disciplinary committee, the Council will request the chairman of the Society of Advocates, Free State Division to appoint a member of that society with at least ten years experience to chair the appeal.’”*
14. The second order sought is as follows: *“Declaring that the applicant remains an employee of the respondent pending the outcome of the appeal against the findings of the chairman of the disciplinary committee in terms of which he was found guilty on charges of misconduct and recommended his dismissal.”*
15. In support of the first prayer Mr Hiemstra, who appeared for the applicant, argued that the respondent is an organ of state and that the bringing and prosecuting of disciplinary charges amounts to an administrative act as defined in the Promotion of Administrative Justice

Act 3 of 2000. He referred also to section 33(1) of the Constitution, which entrenches the right to fair administrative action. I need not examine the jurisprudence in this field of the law. It is trite that one is entitled to an impartial presiding officer, whether that right is asserted in administrative law terms or in terms of the requirements of procedural fairness in the context of the Labour Relations Act.

16. The real task that confronts the applicant in these proceedings is not to persuade me of that right or that the City Manager should not sit as the appeal chairperson. Rather, it is to satisfy this Court that it should intervene at this stage in the disciplinary process. For the reasons that follow, the applicant has failed to do so.
17. The role of this Court *vis-à-vis* uncompleted disciplinary proceedings was fully and carefully considered by Landman AJ (as he then was) in *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & Another* [1997] 10 BLLR 1320 (LC). The learned judge concluded *inter alia* that “*an employee facing dismissal for misconduct or incapacity does not enjoy an independent right to procedural fairness which can be enforced by the Labour Court prior to it resulting in an unfair dismissal.*” I am in respectful agreement with that conclusion and with its underlying reasoning, subject to the *caveat* that some matters may present

exceptional circumstances in which this Court will have jurisdiction to intervene *in res media*. As set out *infra* I do not consider the present facts to constitute such a case.

18. The caution with which this Court will approach applications such as this one has been endorsed more than once. See *Commissioner Staff Association obo Members v CCMA & Others* [2000] 8 BLLR 918 (LC) at 919B; *Chamane v The Member of the Executive Council for Transport, KwaZulu-Natal & Others* [2000] 10 BLLR 1154 (LC) at para [5]; *Mantzaris v University of Durban-Westville & Others* [2000] 10 BLLR 1203 (LC) at paras [5.5] and [5.6]; *Holloway v Merisant (SA) (Pty) Ltd* [2002] 12 BLLR 1189 (LC) at 1190I – 1191B.
19. The difficulties that are latent in interventions by this Court are illustrated in the relief sought by the applicant, being that the Council's decision of 9 July 2002 should be 'corrected' through the substitution of its decision with an entirely different one. The problem is highlighted if the question is posed: on the basis of what right or obligation was the Council required as at 9 July 2002 to have an appeal chairperson appointed through the office of the chairman of the Bar Council of the Free State? Plainly, the answer is that there was no such right and no such obligation. What the applicant seeks is to have his preference enforced

through an intervening order of this Court. The applicant has no such right. That he may indeed have a right to an independent chairperson does not translate into compellable relief of the kind now sought.

20. The applicant in any event must fail on another ground also, being that he has not demonstrated that there is no other remedy. As is apparent from the correspondence set out above, the submission to the Mayoral Committee for consideration on 17 April 2003 clearly contemplates that the City Manager will not sit as the chairperson. In his affidavit, Adv Sehunelo may have put the position a little too strongly, in his statement that: *"It is clear that I have already recused myself as chairperson of the Appeal Tribunal."* It is nevertheless so that the central issue brought to this Court was far from settled at the time that these proceedings were instituted. The way was open for further representations to be made to the respondent. Before a situation of 'deadlock' could be argued in this Court, that should have been attempted. By the same token, as I have already indicated, it was necessary for the applicant to put up the annexure to the letter dated 1 April 2003 in his papers and to deal with its content. His failure to do so must weigh against him.

21. Mr Hiemstra argued that neither of the alternatives that were likely to be put to the Council was suitable or acceptable to the applicant. Thus, he

contended that the notion that the applicant might go directly to the CCMA was dismissed in view of the costs implication and the difference in criteria that might be involved. There may well be merit in that view, but it does not alter the fact that there was not yet a deadlock. The review in this case is directed at the decision of 9 July 2002, not at the recommendation of 1 April 2003.

22. Rather similarly, the complaint about the possible appointment of Mr Bogacwi is a nascent one. No automatic disqualification is apparent from the papers. Moreover, in the event that a biased or otherwise incompetent should be appointed as chairperson, it remains open to the applicant to move for his or her recusal. It is not the role of this Court to pre-empt that or related steps.
23. Ms Linstrom, who appeared for the respondent, submitted that this application was precipitous. Having regard to all the circumstances, I agree with that submission. The applicant has not satisfied the requirements for the principal relief sought and must accordingly fail.
24. That result should not be construed as a finding by me that the applicant's concerns about the City Manager as chairperson are without foundation. Albeit on an *obiter* basis, I have had regard to *inter alia* the

role of the City Manager in inviting complaints from SAMWU and to the terms of the letter of 25 March 2003, cited above, which are in my view incompatible with the capacity of the City Manager to hear an appeal to the standard of impartiality that the applicant is doubtless entitled to.

25. I may add that it is not immediately apparent why the criteria for the appointment of an appeal chairperson might differ from those taken into account in relation to the presiding officer of first instance. As recorded in the agenda for the meeting of 9 July 2002, the appointments of the prosecutor and chairperson were calculated to ensure the necessary skill, expertise, experience in labour law and impartiality, so as to secure a fair hearing. In the affidavit of Adv Sehunelo it is observed by him in paragraph 8.1 that Mr Cloete, the disciplinary chairman, was *“acceptable to both parties”*.

26. I turn now to the second prayer, that relating to the status of the applicant's dismissal. This relief depends entirely on an interpretation of the wording of the concluding part of the resolution of 9 July 2002, namely that *“the decision of the disciplinary committee and appeal committee (if necessary) will be the decision of Council.”*

27. Mr Hiemstra's argument on this point was that the only way that this

statement can be interpreted is that there can be no decision of Council until there is a decision of the appeal committee and, hence, that there can be no dismissal until there is a decision on the appeal. This contention was not buttressed with any reference to a disciplinary code or other regulatory instrument; it depends solely on a linguistic view. In reply, Mr Hiemstra added that the City Manager had no power to dismiss and that the notification of 25 March 2003 was therefore *ultra vires*. Of course, that contention begs the question of the meaning of the resolution here at issue.

28. The language used in the resolution is by no means unambiguous. It is appropriate to give it a purposive construction. Plainly, its purpose is to facilitate the finalisation of the disciplinary process, without the need to summon the Council members to a meeting for a decision. In effect, therefore, its construction is that of a deeming provision, namely that the relevant decision at a committee level will have the force and status of a decision of Council.
29. This construction seems to me to incorporate the view that Council would, in the normal course, take only one decision as to the fate of an employee. I consider that to be the more natural interpretation. If it were not so, there would in many if not most cases be the untenable

result that a Council decision (deemed though it may be) at the stage of the initial disciplinary enquiry would be subject to being overturned or otherwise varied at the stage of the appeal committee reaching a conclusion. It would in my view be a very unsatisfactory and artificial position if a decision of Council were in effect to be no more than provisional in nature, pending the deliberations of an appeal tribunal. Had that been part of what was envisaged for the operation of this resolution, some indication thereof ought to have been given. None is to be found in its wording.

30. That result would be not rest comfortably with the language of the resolution, which refers to the “*decision of Council*” in the singular. That contemplates one product of the disciplinary process that is to enjoy the status of a decision of Council. The resolution distinguishes two routes to that final outcome. The one is if the disciplinary committee’s decision stands. That may be because of an acquittal or because there is no appeal. In such event, the decision is deemed to be that of Council.
31. The second route arises if an appeal committee is “*necessary*”, in which event the fate of the employee who has been convicted will be known only after the appeal. It is that outcome which will have the force of a decision of Council.

32. There are compounding factors in the present case that fortify me in my view that I should adopt this interpretation of the resolution:

32.1. The first is that the disciplinary chairman did not take a 'decision' that the applicant was to be dismissed. He confined himself to a 'recommendation', which in its nature required a different and competent body to make the decision. Clearly, that was not done by Council, nor did it directly fall within the purview of the resolution of 9 July 2002.

32.2. In the second place, the letter from the City Manager of 25 March 2003 notifies the applicant that he has "*been found guilty on 21 March 2003 of misconduct*". Although a "*copy of the verdict*" is attached to the letter, there is no specific reference to a decision by the disciplinary committee that dismissal is the result. To the contrary, the terms of the passage of the letter that I have quoted *supra* suggests strongly that it was the City Manager who exercised original capacity (which he evidently does not hold) to decide upon dismissal as the sanction.

32.3. Thirdly, the interpretation now contended for by the applicant was raised in the course of the disciplinary hearing, in the passage

cited in paragraph 3 *supra*, namely that the applicant viewed the decision of the appeal committee as the one that would be treated as the decision of the Council. There is no suggestion in the papers before me that the respondent reacted to this point and its underlying view.

33. Ms Linstrom advanced only one argument in relation to this aspect of the case. It was her submission that this Court should not grant declaratory relief in urgent proceedings. She cited *Makgato & Others v Hi-Line Chicks (Pty) Ltd* [1998] 5 BLLR 484 (LC). That case is not in point with the present facts, where the formal status of a dismissal is at issue.
34. On balance, I am satisfied that the applicant has shown entitlement to this relief and, given his circumstances, that sufficient urgency has been established. The relief is that he is placed back on the payroll. His suspension remains unchanged.
35. In relation to costs, the applicant has succeeded on one prayer but has failed with the principal one, being the one that has occupied the greatest part of these proceedings. I take into account also the question of the wasted costs of the brief appearance on 14 April 2003. There are strong but not necessarily conclusive indications in the papers that the

respondent in fact received the application papers on 7 April 2003, despite a denial advanced by it. It certainly had all the papers by 11 April 2003 and its answering affidavits could and should have been delivered before 17 April 2003, which was the date of the hearing.

36. Weighing the relevant considerations as a whole, it is my view that it will meet the requirements of fairness for there to be no order as to costs.

37. I make the following order:-

1 The failure of the applicant to comply with the forms and periods of service prescribed in the Rules of this Court is condoned insofar as such failure relates to prayer 3 of the notice of motion.

2 Prayer 2 of the notice of motion is dismissed.

3 The applicant is to remain on the payroll of the respondent, as a suspended employee, with effect from 21 March 2003 until the outcome of the pending appeal against the findings of the disciplinary committee dated 17 February 2003 and the recommended sanction of dismissal dated 21 March 2003.

4 No order is made as to costs.

K S TIP

Acting Judge of the Labour Court

Date of Hearing: 17 April 2003

Date of Judgment : 29 April 2003

For the Applicant : Adv J Hiemstra

Instructed by Hannelie Basson Attorneys

For the respondent : Ms K Linstrom

Perrott, Van Niekerk & Woodhouse Inc