REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 2322/13

In the matter between:

STEVEN NGUBENI **APPLICANT**

and

THE NATIONAL YOUTH DEVELOPMENT AGENCY **1ST RESPONDENT**

YERSHEN PILLAY *NO* **2ND RESPONDENT**

Application heard: 18 October 2013

Judgment delivered: 21 October 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant (Ngubeni) was employed by the first respondent (the NYDA) as its chief executive officer. On 8 October 2013, the NYDA board took a decision to

terminate his employment after it satisfied itself that Ngubeni was guilty of charges of financial mismanagement, gross dereliction of duty, and the like. The decision was taken in circumstances where an independently chaired disciplinary enquiry, initiated by the NYDA and appointed to hear the case against Ngubeni, had not yet completed its work.

[2] This application is not about whether Ngubeni is guilty of the charges brought against him, or his fitness to remain in office. Simply put, the case is about whether the NYDA breached Ngubeni's contract of employment when it decided unilaterally to terminate that contract in the face of the uncompleted disciplinary enquiry. Ngubeni seeks an order reinstating him to his position so that the enquiry can continue and the independent chair make a decision, one way or the other, as to whether he is guilty of the charges against him and if so, whether the termination of his employment is warranted.

[3] Ngubeni expressly disavows any reliance on any rights or remedies in terms of the Labour Relations Act, 66 of 1995 (the LRA). He brings this application in terms of s 77(3) of the Basic Conditions of employment Act, 75 of 1997 (the BCEA), which confers concurrent jurisdiction on this court with the civil courts to determine any matter concerning a contract of employment.

Factual background

[4] The material facts are not in dispute. Ngubeni was appointed as the chief executive officer of the NYDA in terms of a fixed term contract that in the ordinary course will expire on 31 October 2014. Clause 10.1 regulates the termination of the contract. It reads as follows:

> '10.1 Misconduct
>
> The employment of the employee may be terminated at any time, either summarily or on notice by the Agency after a fair disciplinary procedure establishes that the employee is guilty of any misconduct or the Employee has committed a breach of material obligation under this agreement which is incompatible with a continued employment

> relationship, or if the Employee is found guilty of any act which would, at common law or in terms of any applicable statute, entitle the Agency to terminate the Employee's employment.'

[5] It is not disputed that Ngubeni's services were terminated in terms of clause 10.1. The termination of his contract was the culmination of a series of events that commenced in July 2013, when Ngubeni was suspended pending an enquiry into allegations of misconduct. As I have indicated, the charges brought against the applicant include a material dereliction of duty, breach of fiduciary duties, gross negligence, and a contravention of the NYDA's policies and procedures.

[6] On 27 July 2013, the NYDA addressed a letter to Ngubeni in terms of which the charges against him were formulated and his rights outlined. For present purposes, paragraph 7 of the letter is significant. Ngubeni was advised that his rights extend to a *bona fide* hearing, the right to be present at the hearing, the right of the hearing to take place timeously, the right to adequate notice prior to the hearing and ample opportunity to consult a representative, the right of representation, the right to state a case, to call witnesses, to a reasoned finding, to cross-examine witnesses, to be treated as innocent until found guilty, to state mitigating factors. It is not disputed that in affording Ngubeni these rights, the NYDA was affording Ngubeni what it conceived to be a 'fair disciplinary procedure' for the purposes of clause 10.1 of the employment contract.

[7] Consistent with this conception, Ngubeni was called to a disciplinary hearing before Adv. Booi, a member of the Port Elizabeth Bar, appointed by the NYDA to independently chair the hearing. The enquiry commenced on 5 August 2013, and sat on 12 and 21 August, and 23 And 27 September. I do not intend to burden this judgment with a recitation of events on each of those days, it is sufficient to say for present purposes that after the NYDA had lead its witnesses on 12 and 21 August after which the NYDA closed its case. On 21 August, Ngubeni brought an application to dismiss the charges against him. The application was opposed, and on 23 September, it was dismissed. The enquiry was then postponed to 27 September 2013. On that date, a bundle of documents was given to the NYDA's

attorney. The NYDA's attorney took the view that the NYDA had been ambushed by the new documentation, and the enquiry was then postponed *sine die* at its request. It is common cause that at that point in the hearing, Ngubeni had not yet led the evidence of his witnesses, nor had he given evidence himself.

[8] On 9 October 2013, NYDA's board held a special meeting. Amongst other things, it discussed progress (or, more accurately, the lack of it) in the disciplinary enquiry. It is not disputed that the board took the view that Ngubeni had been afforded an adequate opportunity to be heard on the allegations against him, and that he did not seriously intend to respond to them. The board decided that since Ngubeni was frustrating progress in the disciplinary, it would abandon the enquiry and consider the allegations of misconduct against him. The board concluded that there was sufficient evidence to establish that Ngubeni had committed the misconduct alleged, and that a continued employment relationship with him was intolerable. On that basis, the board decided that Ngubeni's employment should be terminated summarily.

[9] After the decision was made, a letter of termination of employment was sent to Ngubeni, terminating his employment with immediate effect.

The issue

[10] In essence, Ngubeni contends that by terminating his contract of employment in the circumstances that it did, the NYDA repudiated the contract, vesting him with an election to accept the repudiation and cancel the contract, or to seek its specific performance. Ngubeni has opted for the latter and seeks the restoration of the employment relationship, at least until the NYDA has complied with clause 10.1 of his contract of employment. He interprets clause 10.1 of his contract to require the NYDA to afford him a fair disciplinary procedure in all circumstances before dismissing him for misconduct.

[11] The NYDA interprets clause 10.1 disjunctively, and contends that the board acted within its powers in bringing Ngubeni's contract to an end, since a

termination following a fair disciplinary procedure is not the only circumstance in which the contract can lawfully be terminated.

The applicable legal principles

[12] The principles applicable to the interpretation of legislation and contracts were recently affirmed by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA). What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of the legislature or the parties to a contract only by reference to plain meaning of words with a deferential nod, if necessary, in the direction of the Oxford English Dictionary. Wallis JA said the following:

> '[18]…The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words use in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document….The 'inevitable point of departure is the language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document…
>
> And further,
>
> '[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although

> the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.' [1]

[13] It is important to note that Ngubeni does not seek to read down into his contract any general obligation of fairness or fair dealing between employer and employee, or any right to a fair hearing that is not apparent from the terms of the contract itself. He contends that the wording of the contract itself expressly requires the NYDA to afford him a fair procedure before terminating his employment, and seeks to enforce that right.

[14] The difference in interpretation amounts to this. The NYDA contends that clause 10.1 must be read disjunctively; in other words, the words 'fair disciplinary enquiry' qualifies only what immediately follows, i.e. 'establishes that the employee is guilty of any misconduct…' In any other of the two instances mentioned (i.e. where the employee commits a breach of material obligation which is incompatible with a continued employment relationship, or where the employee is found guilty of any act that would at common law or in terms of a statute entitle the NYDA to terminate the contract), the requirement of fair procedure does not apply. Ngubeni contends that all three categories are qualified by the requirement of fair procedure. In other words, one might insert a colon after the words 'fair disciplinary procedure establishes that …', with the result that the NYDA is entitled to terminate the contract in any of the three instances mentioned, but may only do so after a fair procedure.

[15] In my view, the interpretation proffered by Ngubeni must prevail. First, the manifest purpose of clause 10.1 is to stipulate the terms on which Ngubeni's contract may be terminated by the NYDA when it is alleged that Ngubeni has committed an act of misconduct. The three grounds that form the subject of the

[1] At pages 609-610, footnotes omitted.

clause 10.1 are perhaps best described instances in which the prospect of a termination of employment might arise. On this reading, the employee may be dismissed if after a fair procedure, it is established that the employee is (1) guilty of any misconduct or (2) has committed a breach of material obligation which is incompatible with continued employment or (3) is found guilty of any act that would in law entitle the employer to terminate the contract. The purpose of fair procedure, on this reading, is to establish whether any of these three situations in fact exist. To interpret the contract so as to require fair procedure only in the first instance would do violence to what is clearly an important purpose of the clause, which no doubt was to ensure that whenever the contract was terminated on grounds of misconduct, it would be terminated lawfully. It would entitle the employer to terminate the contract, for example, because it considers him guilty of a material breach of the contract, without any enquiry as to whether in fact there was such a breach. The rule requiring a fair procedure prior to dismissal for misconduct extends to misconduct that assumes the form of a material breach of the contract, or the committing of an act that would entitle the employer to terminate the contract. The rule is a statutory one, and it is inconceivable that the parties would have adopted a purpose that contemplated only partial compliance with the law. To use the expression in the *Edumeni Municipality* judgment referred to above, the interpretation for which the NYDA contends would have consequences that are impractical, unbusinesslike and oppressive. Further, I would add that where the court is faced with a choice where one interpretation of a contractual provision is more likely to be consistent with any fundamental right established by the Constitution than any competing interpretation, the former should prevail. Section 23 of the Constitution guarantees, amongst other rights, the right to fair labour practices. The courts have on a number of occasions held that this right extends to a right not to be unfairly deprived of work security, and that a requirement of fair procedure is an integral element of that right.

[16] In any event, the NYDA's case is not entirely predicated on the assertion that it terminated Ngubeni's employment because he had committed a breach of material obligation which is incompatible with continued employment or because

he was found guilty of any act that would in law entitle the employer to terminate the contract, i.e. the two grounds where the NYDA contends that the requirement of fair procedure is not applicable. The answering affidavit discloses that the board considered the information and documentation at its disposal and came to the view that Ngubeni *'had committed the misconduct for which he was subjected to a disciplinary enquiry*' and that '*the Applicant was indeed guilty of the transgressions tabulated in the notice of disciplinary enquiry and charges which was issued and served on him on 29 July 2013.*' In other words, the NYDA's case, in part at least, is that Ngubeni was found guilty, by the board, of the misconduct with which he had been charged. But on the NYDA's own interpretation of clause 10.1, such a decision could be made only after a fair procedure. The procedure up to the point of the board's decision had encompassed only the presentation of evidence by the NYDA. There was no evidence on record by Ngubeni or any of his witnesses, nor was Ngubeni invited to address the board and put his case or to make submissions as to why he should not be dismissed. One can appreciate the board's frustration – the enquiry had been running on a stop-start basis for some two months, progress was slow and the end was not yet in sight. But this did not entitle the board to abandon the process, without notice it would seem to the chair or to Ngubeni, and then to assume the proverbial role of judge, jury and executioner. That is manifestly not a fair disciplinary procedure.

[17] Even if I am wrong in coming to the conclusion that Ngubeni's contract of employment entitled him a fair procedure before the termination of his employment on grounds of misconduct, the fact remains that the NYDA's letter to Ngubeni on 27 July offered him a hearing on specific terms. The NYDA could have said, as envisaged by the Code of Good Practice, that Ngubeni be afforded the opportunity to state a case in an informal manner in response to the allegations against him. This is what the Code of Good Practice envisages. Instead, for reasons known only to it, the NYDA offered Ngubeni a procedure that would have made any criminal court proud. Ngubeni accepted those terms, and the enquiry was commenced on that agreed basis. In these circumstances, it is

not open to the NYDA unilaterally to change the terms of that agreement, or as it has in effect done, to renege on the agreement.

[18] Having found that clause 10.1 of the employment contract requires the NYDA to afford Ngubeni a fair disciplinary procedure prior to terminating his contract, it remains to consider whether the NYDA's conduct amounted to a breach of that clause. This the NYDA cannot seriously contest – its case is that Ngubeni is not entitled to a hearing. As I have indicated, it is not disputed that Ngubeni's contract was terminated before he presented his version to the chair of the hearing, either by giving evidence himself or by calling witnesses. All the board had before it, assuming it was furnished with the full record of the incomplete hearing, was its own version. It is obvious that there was no fair procedure afforded Ngubeni before the termination of his contract, and self-evident that the NYDA acted in breach of clause 10.2

[19] In so far as it may be contended that the remedy of specific performance is either unavailable or inappropriate, the starting point is to note that in terms of s 77A (e) of the BCEA specifically empowers this court to make such orders. In *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 (5) SA 73 (C), the court noted that courts in general should be 'slow and cautious' in not enforcing contracts, and that performance should be refused only where a recognised hardship to the defaulting party is proved.

[20] In the present instance, Ngubeni seeks specific performance, and his reinstatement as chief executive officer. In so far as the NYDA contends that it would be inappropriate to reinstate Ngubeni, it was confirmed during argument that the he seeks reinstatement on the basis of a restoration of the status quo, i.e. that the disciplinary enquiry continue. Ngubeni had been suspended at the time of the commencement of the enquiry, and I did not understand him to object to a continuation of that suspension pending the outcome of the hearing. This being so, I fail to appreciate why the applicant's reinstatement should pose any particular hardship to the NYDA.

[21] In so far as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages. The balance of convenience dictates that the order sought should be granted – there is little inconvenience to the NYDA should it continue with and complete the disciplinary hearing; the result may well be the same. For Ngubeni, the effect of the NYDA's decision to terminate his employment at this stage is to deprive him of his employment and livelihood. Similarly, I am satisfied that Ngubeni will suffer irreparable harm should the application not be granted. He stands to suffer financially, and the high public profile of this matter (it is not specifically denied that much of the raising of this profile has been at the instance of the NYDA) has ensured that Ngubeni has been branded as corrupt and dishonest, with little prospect of alternative employment.

[22] In its answering affidavit, the NYDA contends that the application is not urgent. This contention was not advanced with much enthusiasm during the hearing, but I am satisfied that the detrimental consequences of the board's decision for Ngubeni are such that the application should be heard on an urgent basis. The court will not often regard financial hardship and loss of income as grounds for urgency, but it seems to me that Ngubeni has adduced sufficient evidence of those grounds and grounds that extend beyond purely financial considerations for the matter to be treated as urgent.

[23] Finally, in relation to costs, Ngubeni has been obliged to approach this court to defend his interests. The NYDA has elected to oppose the application on a basis that borders on the contrived which pays little heed to a constitutionally protected right, the right to fair labour practices. It would not be unreasonable to conclude that the NYDA embarked on a process which it considered that Ngubeni had frustrated and when faced by the prospect of further delay, it was

unceremoniously dumped so that the board could embark on a process that had only one certain outcome. The court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. Having regard to all of the relevant facts and circumstances, in my view, Ngubeni should not be deprived of his costs.

For the above reason, I make the following order:

1. It is declared that the decision by the first respondent to terminate the applicant's employment from 8 October 2013 is a breach of clause 10.1 of the applicant's contract of employment.
2. The termination of employment is set aside, and the applicant is reinstated in the first respondent's employ until there has been compliance with clause 10.1.
3. The first respondent is ordered to pay the costs of these proceedings.

André Van Niekerk
Judge of the Labour Court

APPEARANCES

For the applicant: Adv. T Ngcukaitobi, with Adv. R Tulk, instructed by Ndobela and Lamola Attorneys
For the respondents: Mr NO Voyi, Ndumiso, Voyi Inc.