REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

CASE NO.: D827/13

In the matter between:

ANUNATHAN REDDI **Applicant**

and

THE UNIVERSITY OF KWAZULU-NATAL **Respondent**

Heard: **09 September 2014**

Delivered: **04 February 2015**

Summary: Jurisdiction— Dismissal; employer terminating a disciplinary hearing mid-stream and terminating employment; employee alleges breach of a statutory right and a contractual right to a fair hearing; whether employee entitled to an order directing resumption of the disciplinary hearing, or whether employee to approach the CCMA. Court lacks jurisdiction.

Power of labour court—exceptional circumstances pertain to the exercise by court of its power, and not about whether court has jurisdiction.

JUDGMENT

MOOKI AJ

[1] The applicant is the former head of the Department of Cardiothoracic Surgery at the Inkosi Albert Luthuli Hospital in the Faculty of Health Sciences at the University of Kwazulu-Natal, the respondent. The respondent dismissed the applicant on 7 June 2013, when the Vice-Chancellor of the respondent wrote to the applicant advising him of the termination of the applicant's employment. The termination of employment was effected midstream a disciplinary enquiry in which the respondent had charged the applicant with misconduct.

[2] The applicant brought an urgent application following his dismissal. The matter came before Tlhotlhalemaje AJ who heard the matter on 17 October 2013. The court gave judgement in November 2013. The applicant then sought to appeal the judgement. The application for leave to appeal was dismissed on 9 April 2014. Tlhotlhalemaje AJ, in dismissing the application for leave to appeal, pointed out that the substance of the judgement handed down in November 2013 was that the matter was struck from the roll and, for that reason, the applicant could enroll the matter in the ordinary course.

[3] The applicant now seeks an order:

1 …

2 Setting aside the applicant's dismissal on 7 June 2013;

3 Directing the respondent to continue with the disciplinary hearing of the applicant summarily terminated by the respondent, until it is concluded;

4 In the alternative to prayer 3, directing that the appeal procedure afforded by the respondent include the opportunity for the applicant to present his defence to the disciplinary charges laid against him, through the leading of witnesses, and through oral evidence;

5 Directing the respondent to reinstate the applicant to his position of employment on the same terms as those pertaining immediately preceding his dismissal on 7 June 2013;

6 Granting the applicant costs; and

7 For further or alternative relief."

[4] The respondent advised the applicant on 29 March 2012 that it intended to suspend him pending the outcome of disciplinary proceedings. The applicant was invited to show cause why he should not be suspended. The applicant indicated why he should not be suspended. He was suspended regardless.

[5] The respondent notified the applicant on 11 May 2012 that it was to institute disciplinary proceedings against him. The respondent alleged five instances of misconduct on the part of the applicant. The disciplinary hearing commenced on 11 June 2012. The hearing continued over a non-continuous period of almost a year, until the termination of the applicant's employment on 7 June 2013. The applicant had not presented his defence at the time when he was notified of the termination of his employment.

[6] The Vice-Chancellor of the respondent gave various reasons for terminating both the hearing and employment of the applicant, including that:

6.1 The disciplinary enquiry ought to have been finalised in the time allocated to it and that the reason this had not occurred was because of the unduly lengthy cross-examination of the University witnesses which amounted to an abuse of the disciplinary enquiry process;

6.2 The disciplinary enquiry was time-consuming and costly and a gross

abuse of the University's resources; and

6.3 The charges against the applicant were serious and constituted misconduct. The decision was therefore taken to terminate his employment on the grounds set out in the charges.

6.4 The applicant was advised, in the termination letter, that he could appeal the decision of the University, in terms of clause 18.3.4 of the respondent's Conditions of Service. The clause provides as follows:

> "Any appeals (sic) against a recommendation made for dismissal or the imposition of a warning must made in writing setting out the grounds of appeal, within 4 (four) working place of such a recommendation, to the Employee Relations Office".

[7] The applicant submitted an appeal within the specified period. The applicant indicated in his appeal that his dismissal was both substantively and procedurally unfair and that he had not been afforded an opportunity to respond to the allegations made against him and that he was dismissed before the University concluded its case and before he could present his defence.

[8] The filing of the appeal was followed by an exchange between the applicant and the respondent pertaining to the appeal process. The applicant contended that he should be allowed to present evidence during the appeal. The respondent disagreed, stating that the appeal be considered only on the record. The parties reached a stalemate on this issue. The applicant then approached the court for relief as set out above.

[9] The applicant pleads, notwithstanding that he lodged an appeal, that the respondent deprived him of his contractual right to appeal against a recommendation of dismissal as set out in clause 18.3.4 of the Conditions of Service because there was no recommendation of dismissal against which he could appeal.

[10] The applicant seeks relief on the basis that he has a right to a fair disciplinary enquiry and that he has a right to be heard. He contends that the right is founded in contract and on statute. He relies on clause 18.3.1 of the Conditions of Service in relation to the claim based on contract. Clause 18.3.1 provides that:

> "Any disciplinary action taken against a staff member shall be in accordance with a disciplinary procedure regulated by a collective agreement or, in the absence of such an agreement, shall comply with the requirements of the Labour Relations Act, and, in particular, Schedule 8 "Code of Good Practice" of the Act".

[11] The applicant relies on section 188 (1) (b) of the LRA, read with paragraph 4 of Schedule 8 of the Code of Good Practice: Dismissal ("the Code"), for his statutory claim. The applicant contends that there were no exceptional circumstances that justified the respondent to unilaterally terminate the enquiry and to dismiss him.

[12] The applicant says in his affidavit that it is unnecessary for the court to consider or to express a view on the merits of the allegations against him. He avers that his dismissal is procedurally unfair because he was not afforded a fair hearing. He has approached the court to set aside his dismissal and to

compel the respondent to either continue with the disciplinary hearing or to allow him to present oral evidence in the appeal, including calling witnesses. Such relief, according to the applicant, would afford him his statutory and contractual rights to *audi alteram partem.*

[13] The applicant says that the court, and not the CCMA, ought to consider the relief that he seeks. That is because recourse to the CCMA will result in a full re-hearing of the merits; that it would be far more protracted than the completion of the disciplinary enquiry; that a finding in the CCMA would result, at best, in an award of compensation; that he was due to retire and that proceedings before the CCMA were unlikely to be concluded before his retirement date and that the CCMA would therefore not reinstate him to his previous position, thus foregoing the opportunity to clear his name within the respondent before his retirement.

[14] The applicant summarised his complaint as follows:

> "This matter is not simply about money to me: it is about principle, my right to a specific compliance with my contractual right to a fair hearing in accordance with the respondent's own procedures, as well as my right to fair labour practices enshrined in section 35 of the Constitution of the Republic of South Africa, 1996. My case is about the University riding roughshod over my rights to *audi alteram partem*, and then expecting to buy its way out of this abuse. It is also about the opportunity for me to present my case, have a fair hearing, and to retire in dignity with my good name and reputation intact."

[15] The respondent pleads that its offer of an appeal remains available to the applicant. The applicant contends that the appeal process would simply perpetuate the procedural unfairness of the disciplinary enquiry because the respondent does not agree to "a wide appeal" in which the appeal body "would be given the power to review and set aside the decision of the University to dismiss me, and would include a right to lead oral evidence, and thereby provide me with the opportunity to present my defence properly."

[16] The respondent pleads that the court lacks jurisdiction and that the applicant should approach the CCMA because the main relief sought by the applicant is that his dismissal for misconduct be set aside and that he be reinstated to his former position. The applicant took note, in his replying affidavit, that the respondent admits that the applicant was dismissed for misconduct.

[17] The applicant denies that he seeks to be reinstated to his former position. He avers that "The relief that I seek in the notice of motion clearly states that I seek to be placed in the position I would have been in but for the University's unlawful conduct in prematurely terminating the disciplinary proceedings. The disciplinary enquiry will then continue as it had before, and I will remain on suspension pending the outcome of the disciplinary enquiry."

[18] The applicant denies that the court lacks jurisdiction to determine the matter, in that "I am advised that in egregious cases of unfair dismissal proceedings, the Labour Courts have affirmed that they will intervene to prevent injustice, rather than to adopt the attitude that an employee must seek redress in the CCMA." The applicant also avers that the respondent's contentions regarding the CCMA as an alternative remedy "is no answer to my cause of action

based on contract for specific performance…".

[19] The applicant admits in the pleadings (in the sense that he does not, in his replying affidavit, deal with the specific allegations in the answering affidavit) that his rights are determined by the guidelines set out in the Code because the respondent had no separate disciplinary procedure and that there was no collective agreement. The applicant also admits, on the same basis, that he was afforded an appeal even though the Code does not provide for an appeal hearing.

[20] The parties disagree about whether "exceptional circumstances" existed that justified the respondent terminating the disciplinary enquiry and dismissing the applicant. The applicant contends that there were no such "exceptional circumstances". He denies, for example, that witnesses for the respondent were unduly cross-examined. The respondent, on the other hand, points out for example that the hearing started on 11 June 2012 during which its first witness gave evidence-in-chief and was cross-examined on the same day. The cross-examination of the first witness continued on 12 June 2012, 15 June 2012, 20 July 2012, 23 July 2012, and on 24 July 2012, on which day the first witness was re-examined.

[21] Mr Aboobaker SC and Mr Reddy appeared on behalf of the applicant. Ms Naidoo appeared on behalf of the respondent.

[22] The court must first be satisfied that it has jurisdiction to determine the dispute. The respondent contends that the court lacks jurisdiction. The parties agree that the applicant was dismissed. The applicant contends that such dismissal was unfair both substantively and procedurally. The respondent

contends that it was entitled to act as it did in terminating the hearing and dismissing the applicant.

[23] Ms Naidoo submitted that the case pleaded by the applicant falls squarely within the statutory scheme that such disputes be determined by the CCMA. She further submitted that the distinction sought to be drawn by the applicant between a statutory and a contractual right based on clause 18.3.1 was artificial. She submitted that clause 18.3.1 does not confer rights on the applicant that are not already conferred by the Labour Relations Act and the Code. There is no collective agreement governing labour relations within the respondent. Ms Naidoo submitted that absent such a collective agreement, any meaning to be ascribed to clause 18.3.1 of the Conditions of Service is constrained by the law governing dismissals, which illustrates why the distinction drawn was artificial.

[24] Mr Aboobaker did not address the submission by Ms Naidoo that the distinction drawn by the applicant was artificial. The applicant, in his replying affidavit, avers that the respondent's point on jurisdiction was not an answer to the applicant's reliance on a cause of action premised on a contractual right. The applicant admits therefore that that part of his cause of action that is premised on a statutory right is bad in law in the sense that he should have sought recourse in the CCMA for a breach of such a statutory right.

[25] Mr Aboobaker submitted that section 158 (1) (a) (iii) confers power on the court to determine the dispute without the applicant first having to refer the matter to the CCMA; and that the court ought to exercise its discretion by directing the respondent to resume disciplinary proceedings against the

applicant.

[26] Assuming that the court has a discretion in the manner and on the bases submitted by Mr Aboobaker, such discretion must be exercised lawfully. Part of the considerations as to the lawfulness of exercising such discretion must take into account the particular right being invoked as the basis for decision-making by the court. In the context of this matter, the court must have regard to clause 18.1.3 and give effect to its provisions.

[27] Absent a collective agreement governing dealings between the applicant and the respondent, as is the case in this matter, the court would have to have regard to the Labour Relations Act and to the Code regarding dismissals. I am unable to conceive how a court could interpret the LRA and the Code, as regards dismissals, other than in accordance with the current law and the framework for that law. Such a framework is set out in the LRA, particularly section 191. I agree with the submission by Ms Naidoo that the specific provisions in section 191 of the LRA dealing with the appropriate forum for determining disputes has a degree of primacy over the court acting in terms of a discretionary power. If this were not the case, then the court would find itself as a forum competing with specified tribunals such as the CCMA. This will result in an outcome that is contrary to the LRA scheme that governs processes to be followed in the resolution of labour disputes. The court is not intended to be the first port of call in the resolution of such disputes.

[28] I agree with the submission by Mr Aboobaker that a litigant can approach a court for relief and that a court will not allow an injustice to be done. The submission really amounts to a statement that the law does not permit a

vacuum. The fact that a litigant can approach a court for relief does not mean that a court will entertain such relief on the merits. This is consistent with the finding by the appeal court in Booysen v Minister of Safety and Security and Others[1] that the fact that the court has power to grant a remedy does not mean that the court has jurisdiction to determine the issue between the parties.

[29] I am not persuaded, even if the court has the power as submitted on behalf of the applicant, that the court ought to exercise that power in the circumstances of this case and, among others, direct the respondent to set aside the dismissal and to resume disciplinary proceedings against the applicant. The substance of the dispute concerns the dismissal of the applicant. The applicant pleads that the dismissal was unfair both procedurally and substantively. The applicant says however that the court need not entertain the merits of the dispute between the parties. I do not see how the court could grant the relief sought by the applicant, such as setting aside his dismissal, when the applicant says that the court need not consider the merits of the dispute between the parties.

[30] The exercise by the court of power granted to it in section 158 (1) (a) (iii) does not arise in this matter, on the view that I take regarding the challenge to the court's jurisdiction. Section 158(1) (a) (iii) does not confer jurisdiction on the court. It sets out part of the power of the court. Such power can be exercised only if the court has jurisdiction.

[1] [2011] 1 BLLR 83 (LAC), para [41].

[31] The court must have regard to the pleadings when dealing with the challenge to its jurisdiction.[2] The court, in motion proceedings, will consider the notice of motion and the affidavits in determining the issue of jurisdiction.[3] This matter is concerned with the dismissal of the applicant. This is so despite the applicant's averments that the issue is about a breach of his statutory and contractual right to a fair disciplinary hearing. Both parties agree that the applicant is dismissed. The applicant complains that his dismissal was unfair, both procedurally and substantively. Section 191 of the Labour Relations Act prescribes how the applicant must pursue his complaint.

[32] The cause as pleaded by the applicant does not provide scope for the court to intervene and to make an order sought by the applicant. The "contractual right" being asserted by the applicant, on the pleadings, does not grant the applicant an entitlement beyond what the law grants any other employee. Any other employee would, on the case pleaded by the applicant, assert a "contractual right to a fair disciplinary hearing" entitling such an employee to approach the court for relief to, among others, set aside a dismissal without such an employee having to follow the statutory scheme governing dismissals.

[33] The CCMA is the appropriate forum to deal with the dismissal of the applicant.[4] This is so despite the contention by the applicant that he seeks to vindicate a contractual right. The applicant's reliance on the decision in Denel (Pty) Ltd v Vorster[5] is not on point. The particular "contractual right" asserted

[2] Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC), para [74-75].
[3] De Beer v Minister of Safety and Security and Others [2013] 10 BLLR 953 (LAC), para [30].
[4] SA Maritime Safety Authority v McKenzie (2010) 31 ILJ 529 (SCA), [para 16].
[5] [2005] 4 BLLR 313 (SCA).

by the applicant is no more than what the law provides to any other employee. The substance of this dispute concerns the dismissal of the applicant. The applicant is aggrieved by how the dismissal was effected.

[34] The applicant has not shown that clause 18.3.1 of the Conditions of Service is a self-standing right that would allow this court to assume jurisdiction. I agree with the respondent that the court lacks jurisdiction. This determination makes it unnecessary for the court to consider the substance of allegations by the applicant, including whether the court can order his "reinstatement".

[35] I make the following order:

1. The application is dismissed.

2. There is no order as to costs.

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O Mooki

Judge of the Labour Court (Acting)

APPEARANCES:

Applicant: T. N. Aboobaker SC (together with G Reddy)

Instructed by: Reddy Attorneys

Respondent: L.R. Naidoo

Instructed by: Jayshree Moodley and Associates