THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2796/16

In the matter between:

BUBELE VAKALISA **Applicant**

and

THE SOUTH AFRICAN WEATHER SERVICES **First Respondent**

MS MMAPULA KGARI *N.O.* **Second Respondent**

ANNAMART NIEMAN **Third Respondent**

Heard: **8 December 2016**

Delivered: **6 January 201**7

Summary: **Application in terms of section 77(3) of the BCEA for an order for specific performance in respect of the alleged unlawful termination of an employment contract; *Ngubeni v National Youth Development Agency*** and ***another* (2014) 35 ILJ 1356 (LC) distinguished.**

JUDGMENT

RABKIN-NAICKER J

[1] This matter came before me on an urgent basis. The applicant seeks the following relief:

1. "Dispensing with the forms and service provided for in the rules of this court and disposing of this application as urgent.
2. Setting aside as unlawful the decisions of the second respondent of 16 November 2016, to terminate the employment of the applicant, with the first respondent.
3. Reinstating disciplinary enquiry against the applicant, as convened in terms of the notice of 13 June 2016.
4. Interdicting the respondents from interfering with the finalisation of the disciplinary enquiry which commenced on 22 June 2016.
5. Costs of suit on a punitive scale."

[2] I have decided to treat the matter as urgent and I deal with the merits of the application below.

[3] The reason and purpose of the application is set out in paragraphs 9 and 10 of the founding papers. In essence it challenges:

3.1 The legality of the Second Respondent's decision in her capacity as Acting CEO of the First Respondent (SAWS) to terminate an 'independent' disciplinary enquiry convened to enquire into charges of misconduct against the applicant, and to find the applicant guilty of the charges against him and summarily dismiss him;

3.2 The lawfulness of her decision to adjudicate the charges after terminating the said disciplinary enquiry;

3.3 The lawfulness of the adjudication of the charges by written submission after the respondents elected to call the applicant to the said enquiry process replete with all the rights that attach thereto, including the right to cross examination and to call witnesses in his own defence. The applicant

submits that having elected to afford him these procedural entitlements it is not open to the respondents to deprive him of these rights.

[4] The applicant submits that he seeks an order of specific performance of his employment contract and the terms incorporated in it by reference to the SAWS Disciplinary Policy, which he is required by clause 5 of his contract of employment to be conversant with.

[5] Clause 5.2 of the Disciplinary Policy deals with disciplinary hearings and provides that as soon as a decision is made to charge an employee the CEO must:

> "a) Appoint a Chairperson who must neither be directly or indirectly involved in the allegations against the employee nor have any direct or indirect interest in the case;
>
> b) At the sole discretion of the CEO the Chairperson may be a person not in the employ of SAWS and who has the necessary knowledge, appropriate qualifications and experience if the CEO regards the misconduct as serious due to the factual or legal complexity of the charge;
>
> c) The Chairperson will also be vested with the delegated power to reach a verdict of whatever nature at the Chairperson's discretion without having to consult the SAWS Board first about such verdict;
>
> d) Appoint an employee to act as initiator in the further conduct of the case."

[5] The disciplinary policy sets out procedural rights for an employee in clause 5.3.2. These include the rights to representation, including legal representation on application to the Chairperson, the right to state his or her case, the right to call witnesses or have them called, the right to cross-examine any witnesses or have them called, the right to cross-examine any witnesses testifying against the employee or to have them cross examined, the right to re-examine the employee's witnesses and the right to appeal.

[6] The applicant pleads his case as one for breach of contract being in terms of sections 77(3) and 77A(e) of the BCEA. These sections provide in relevant part that:

> "(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract…."; and
>
> Section 77A Powers of the Labour Court
>
> "(e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation;"

[7] In submission, Mr Ngcukaitobi for the applicant pointed to common cause facts on the papers before me including that:

7.1 The first responded opted to convene a formal disciplinary process before an independent Chairperson to adjudicate the charges of 13 June 2016. The hearing was to be chaired by Dr Annamart Nieman, an independent advocate and member of the Johannesburg Bar.

7.2 On 3 November 2016, the hearing was suspended and to date it has not reconvened. When the hearing was suspended, the first respondent had not closed its case. The applicant therefore had not cross examined all the respondent's witnesses and had not opened his case. On the day the enquiry was suspended the first respondent, acting through its attorney of record made an application to the second respondent for the termination of the disciplinary enquiry; a finding on the charges levelled against the applicant and a finding on the appropriate sanction. The application was supported by an affidavit of the employee who had levelled the charges against the applicant, General Manager: Operations, a Mr Ndabambi. The application sought the determination of the charges and the sanction "with exclusive reference to written submissions by both parties."

7.3 On receipt of the first respondent's application on November 3 2016, the second respondent decided to suspend the disciplinary hearing. She went on to call for written submissions from the applicant before 11 November 2016. At that stage, no final decision was made on the termination of the enquiry.

7.4 In response to the notice of 3 November 2016 the applicant's attorney addressed a letter to the second respondent which stated that since the General Manager: Operations together with the second respondent had asked the third respondent to terminate the enquiry, the charges against him fell away. It was further stated that the applicant would not make submissions in respect of the application supported by an affidavit deposed to by the General Manager, because the affidavit constituted testimony, the veracity of which was still in dispute at the disciplinary hearing. The applicant also sought confirmation that the charges against him, in the light of the request to terminate the enquiry had been abandoned.

7.5 Second respondent replied on the 7th November 2016 recording that the purpose of allowing the applicant to respond to the 'submissions' on behalf of SAWS "is to state which aspects of SAWS submissions Mr Vakalisa disputes and why and in what respects he disputes those submissions. Furthermore Mr Vakalisa has the opportunity to place any other information before me which he may consider relevant to the determination of the matter." She also recorded that the charges against the applicant had not been dropped and that the opportunity to make submissions was still open to him. Further that she had not made a final decision on the question of the disciplinary enquiry.

7.6 In reply to this communication the applicant stated among others that the hearing was initiated for the parties to prove their respective cases before an independent chairperson and that the termination of the enquiry denied the parties' this right. He submitted through his attorney that the only way to fairly test the allegations against him was at the disciplinary hearing convened by the respondents in terms of the disciplinary hearing. On the 10th November he asked to report for duty and for confirmation that the charges had been abandoned in the light of the request that the enquiry be terminated.

7.7 The decision to terminate the enquiry, find the applicant guilty of the charges against him and summarily dismiss him, was made on the 16 November 2016 by the second respondent.

Evaluation

[8] Essentially the applicant is seeking the enforcement of a contractual right falling outside of the LRA. He pleads that the contractual clause in question contained in his contract of employment and reads as follows:

> "5. You are expected to be conversant with SAWS policies and procedures as amended from time to time. The policies and procedures are available in the Human Capital Management Department."

[9] The applicant submits, and indeed his case is predicated upon accepting, that the above clause incorporates by reference, the SAWS Disciplinary Policy. Reference was made in submission ***to Ngubeni National Youth Development Agency* and *another*.** [1] In that case the applicant brought his case precisely on the grounds as pleaded *in casu*[2] and was successful. However, in that matter, the employment contract contained the following clause:

> "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."

[1] (2014) 35 ILJ 1356 (LC)
[2] See para 3 of the judgment

[10] In *Ngubeni*, my brother Van Niekerk J was guided in his interpretation of the clause in question by the principles as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [3] in which Wallis JA said at paragraph 18:

> 'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used 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 at para 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

[3] 2012 (4) SA 593 (SCA)

consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[11] In my view, the interpretation of the clause *in casu* advocated by the applicant, i.e. that it incorporates by reference the disciplinary policy, must also mean that it incorporates by reference all SAWS policies and procedures as amended from time to time - given that no one policy is specifically mentioned. Can this be the sensible meaning to attribute to the clause given that *'conversant with'* means 'having knowledge or experience with'[4]? I do not believe that it is. The approach to statutory interpretation now favoured by our courts takes inspiration from English law emphasising that: 'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.' [5]

[12] The sensible construction of the clause in issue is that the applicant was expected to be familiar with the policies and procedures of his employer and keep abreast of any amendments to them. A reading of it to the effect that the parties to the agreement were bound by reciprocal obligations arising from each and every policy issued by the employer would stultify the operation of the employment contract. This would more especially be the case in situations in which either party wished to rely on a breach of its terms, or assert a right in its terms.

[4] Merriam-Webster.com dictionary

[5] Per Lord Clarke SCJ in *Rainy Sky SA v Kookmin Ba*nk [2011] UKSC 50 ([2012] Lloyd's Rep 34 (SC)) para 21. Referred to in *N*ovartis *SA (PTY) LTD v M*aphil *T*rading *(PTY) LTD* 2016 (1) SA 518 (SCA) at para 29

[13] Further, the use of the Disciplinary Policy did not amount to the employer 'electing' to be bound by it as submitted on behalf of the applicant. The application of the Disciplinary Policy by the employer is mandatory in its own terms[6]. It does not appear to me that any election took place when it was used to initiate the charges. The election to stop observing those terms may well give rise to claims under the rubric of the right to fair labour practices. But I must deal with the pleadings as they are.

[13] For the above reasons, I find that Clause 5 of the contract of employment did not incorporate the disciplinary policy by reference and a claim for specific performance in the policy's terms is therefore not sustainable. The eloquent arguments by Mr Ngcukaitobi in *Ngubeni* were persuasive given the clause in issue in that matter, but are not in this case. The distinction between the clause contained in the contract of employment in that matter, and clause 5 of the applicant's contract of employment is glaring.

[14] In all the circumstances therefore, this application falls to be dismissed. I do not intend to order that costs follow the result. I do not regard the application as anything but a *bona fide* attempt by the applicant, an individual employee, to exercise his rights in this court. I make the following order:

Order

1. The application is dismissed with no order as to costs.

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[6] See clause 2 of the Disciplinary Policy and especially that "non-compliance with the provisions of the policy may result in the necessary legal and/or disciplinary action or otherwise being instituted against the party in question'

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate T Ngcukaitobi with Advocate R Tulk

Instructed by : MMM INC

For the First and Second Respondents: Fasken Martineau

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