

SOUTH AFRICA / JUDGMENT

Appiah v Cricket South Africa and Another (J731/20) [2020] ZALCJHB 119 (13 August 2020)

[2020] ZALCJHB 119

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

J731/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: J731/20

In

the matter between:

OSEI-BONSU
BERKO APPIAH “NAASEI”
Applicant
and
CRICKET
SOUTH AFRICA
First Respondent
P
SELEKA SC
N.O
Second Respondent

Heard:

27 and 31 July 2020 (zoom proceedings)

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 August 2020.

Summary: Urgent application – applicant impugns the breach of his employment contract and seeks specific performance – ‘reading in’ a right that is not discernible from the terms of a contract is impermissible – contractual sovereignty must be accorded some measure of respect.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] The applicant approached the Court on urgent basis seeking to enforce the appeal provisions in terms of the first respondent’s Disciplinary Code which is incorporated into his employment contract. The applicant asserts that the first respondent has breached the terms of his employment contract by failing to enforce the outcome of the appeal enquiry which set aside the sanction of dismissal imposed by the chairperson of the disciplinary enquiry. This application is brought in terms of section 77A(3) of the Basic Conditions of Employment Act[1] (BCEA).
- [2] The issues for determination are predictable and crisp. They directly arise from the Notice of Motion and can be summarised as follows:
- 2.1 That the first respondent’s decision of 19 July 2020 rejecting the outcome of the internal appeal that was presided over by the second respondent and contained in his ruling dated 17 June 2020 be declared unlawful and set aside.
- 2.2 That the first respondent’s decision of 19 July 2020 rejecting the outcome of the internal appeal that was presided over by the second respondent and contained in his ruling dated 17 June 2020 be declared a breach of clauses 1.1, 10.2 and 27 of the applicant’s employment contract.
- 2.3 That the first respondent be interdicted from seeking or directing the applicant to appeal de novo.
- 2.4 That the first respondent be directed to implement the outcome contained in the appeal ruling with immediate effect.
- [3] Tersely stated, apart from urgency, I have to decide whether the appeal contemplated by the Disciplinary Code is confined to an assessment of whether the sanction of dismissal imposed is inconsistent with comparable historical matters or whether the Disciplinary Code allows for a broad appeal against both the merits and sanction.

- [4] I deem it appropriate that I should quickly deal with the issue that was raised by the applicant on 27 July 2020 which pertains to the name of Ms Ziyanda Nkutha (Ms Nkutha), who bears my maiden surname and whose name features in the applicant's papers. Even though she is the subject of some of the allegations that were levelled against the applicant in the disciplinary enquiry,

I took a view that she is not relevant in the determination of the issues before me. I, however, invited the first respondent to deal with this issue in its answering affidavit in the event it objects to me presiding over this matter. To the extent that the first respondent did not deal with this issue in its answering affidavit or in its oral submissions during the hearing on this matter on 31 July 2020, it can be taken as a concession that Ms Nkutha is indeed irrelevant in the determination of the issues before me. As such, the issue of conflict of interest does not arise.

Factual background

- [5] The facts in this matter are common cause. The applicant holds a position of a Chief Operational Officer (COO), a position he was appointed into on 1 March 2019. Before this appointment which is a promotion, the applicant held a position of Chief Financial Officer (CFO) since 2010.
- [6] On 29 October 2019, the first respondent suspended the applicant pending a disciplinary enquiry on allegations of misconduct. The applicant was subsequently summoned to appear before a disciplinary hearing. The charge sheet comprised of the 10 charges with respective subparagraphs which, it would seem, constitute distinct and isolated allegations. The effect thereof is only apparent when regard is had to the findings of the chairperson of the disciplinary enquiry as he pronounced on the allegations mentioned in the subparagraphs respectively.
- [7] The disciplinary enquiry was held over a period between 26 November 2019 and 11 February 2020. Notwithstanding the various charges preferred against the applicant, he was only found guilty in respect of charges 1, 2.1, 2.2, 3.1, 4.1.3, 5.1, 5.2, 7.1 and 9.3. For the purposes of the controversy before me, I do not have to traverse the disciplinary enquiry chairperson's reasons for arriving at the verdict of guilty that is limited to these charges, save to state that some had been abandoned by the first respondent.
- [8] Having delivered a verdict on the merits, the chairperson of the disciplinary enquiry invited the parties to make written submissions on the appropriate sanction, which they did. On 12 March 2020, the chairperson of the disciplinary enquiry delivered his determination on the sanction wherein he imposed the sanction of summary dismissal only in respect of charges 1, 2.1, 2.2 and 4.1.3.

- [9] On 19 March 2020, the applicant accordingly availed himself to the right to appeal in terms of the Disciplinary Code read together with his contract of employment. The second respondent was appointed to preside over the internal appeal. It is not necessary that I deal with the pertinence of the process adopted by the second respondent, save to state that the appeal was determined on the basis of the written submissions from the parties and in relation to charges 1, 2.1, 2.1 and 4.1.3.
- [10] On 17 June 2020, the second respondent delivered his ruling wherein he found as follows:[2]
- ‘121. In the result the appeal against the dismissal sanction imposed in respect of each charges above, namely charge 1, charge 2.1 charge 3.1 and charge 4.1.3. is upheld.
122. The sanction of a dismissal is set aside in respect of each of these charges and replaced only in respect of charge 1, with a sanction of a written warning, for the reasons expressed under charge 1 above, particularly having regard to the appellant’s seemingly less degree of involvement in the alleged misconduct, but nonetheless his designation as the project leader.’
- [11] On 19 July 2020, the first respondent advised the applicant that it does not accept the outcome of the appeal and as such, the sanction imposed by the chairperson of the disciplinary enquiry would remain in full force and effect. Nonetheless, it tendered a de novo appeal enquiry, an opportunity that the applicant was directed to avail himself to by 12h00 of 27 July 2020.
- [12] The applicant rejected the tender to note a de novo appeal enquiry and sought to enforce the outcome of the appeal, hence this application.

Urgency

- [13] The first respondent opposes the application and takes a preliminary point in relation to urgency. Mr Fourie SC, who appeared on behalf of the first respondent, submitted that the applicant failed to plead facts that support this Court’s urgent intervention. In turn, I was referred to the judgment in *AMCU and Others v Northam Platinum Mine and Others*[3] where this Court, per Snyman AJ, addressed unintended and unforeseen consequences following the dictum in *Solidarity and Others v SA Broadcasting Corporation*,[4] which seemingly has been taken to have established ‘some sort of licence for litigants to approach the Labour Court on an urgent basis challenging dismissals as being unlawful’. In my view, the dictum in *AMCU*[5] is distinguishable as Snyman, AJ accepted that in instances, like in *Solidarity*[6], where the breach of contract is coupled with other considerations, the urgent relief would be warranted.

- [14] In the present case, not only does the applicant hinge urgency on breach of contract, but also on the fact that the first respondent had put him to terms that, if not acceded to, his contract of employment would be terminated despite there being a controversy over its right to tender a de novo appeal enquiry. Equally, the dictum in *Netshitomboni v National Consumer Commission*[7] is distinguishable. There remains no doubt that this application must be dealt with on urgent basis.
- [15] The next enquiry is whether the applicant has made out a case for the grant of final relief. First, whether the applicant has shown a clear right; that he has a contractual right enforceable against the first respondent. Second, whether the applicant has shown injury actually committed or reasonably apprehended; whether the first respondent unlawfully infringed or threatened to infringe that right. Third, whether the applicant has no adequate alternative remedy to enforce the employment contract.[8]

A clear right?

- [16] It is common cause that the applicant's cause of action is grounded in the employment contract. In order to establish a clear right, the applicant has to prove, on balance of probabilities, facts which in terms of the substantive law establish the right relied on.[9] The Disciplinary Code, read together with the applicant's employment contract, provides pertinently as follows:[10]

'11.2.4 Appeal

- a) An employee shall be entitled to an appeal against the sanction to the appropriate managerial structure above his/her line supervisor or manager in cases where the sanction imposed is inconsistent with previous decisions within CSA...
 - b) Appeals must be noted in writing within (7) days of the decision, stating the grounds of appeal.
 - c) The appropriate managerial structure may delegate its powers to external person (who did not preside over the hearing) or subcommittee.
 - d) The appropriate managerial structure or external person or committee shall determine if it is necessary to hear further evidence, or to allow further submissions to be made, and confirm, vary or upholds any appeal.
 - e) In the event the dismissal sanction is confirmed, the date of dismissal shall be the date on which the employee is advised of the outcome of the appeal hearing.' (Emphasis added)
- [17] The applicant asserts that, by virtue of the above contractual provisions, he has a clear right to appeal the sanction of the disciplinary enquiry. Since he successfully exercised the right to appeal, the first respondent is bound by the outcome of the appeal enquiry, so he further asserts.

- [18] The main controversy in the present case is the confines of the right to appeal in terms of clause 11.2.4(a). It is notable from the applicant's grounds of appeal and the submissions thereto that he did not limit his appeal to the question of inconsistency in the application of the sanction of dismissal. The applicant's impugn straddled the merits and sanction. The proposition that the applicant has a right to a wide appeal was persisted with in the founding affidavit where the applicant positively asserts that he has 'a contractual entitlement to appeal any finding and sanction'.
- [19] Prudently, the applicant concedes in his replying affidavit that his contractual right to appeal is limited to the question of inconsistency in the application of the sanction of dismissal. In the event that there was any doubt lingering as to the applicant's impugn and the rights he seeks to enforce, that was laid to rest by his counsel, Mr Motau SC, who submitted that the applicant disavows any reliance on wide scope of appeal not catered for in the Disciplinary Code.
- [20] The nub of the probe in this regard is, therefore, whether the second respondent exceeded his powers in his findings and as such, the outcome of the appeal is not enforceable. The applicant asserts that the first respondent is bound by the outcome of the appeal and it has no legal right to seek to subject him to a de novo appeal enquiry. Mr Motau SC, submitted that the second respondent was alive to the fact that his mandate was limited to an enquiry on inconsistency in the application of the sanction of dismissal and as such, his findings attest to that reality.
- [21] When it comes to charge 1, the second respondent's finding cannot be faulted. The applicant successfully proved that a comparator, Mr Van Zyl, who had been charged and found guilty of the same transgression, received a sanction of a written warning. The first respondent takes no issue with the findings in relation to charge 1. The converse is true when it comes to charges 2.1, 3.1 and 4.1.3.
- [22] Charge 2.1 pertains to an allegation that the applicant invited and sponsored one Mr Mota, a service provider that he had introduced, to accompany him on two trips from Johannesburg to Cape Town. The applicant was charged with dishonesty, fraud or gross negligence. The chairperson of the disciplinary enquiry found that the sponsorship of Mr Mota by the applicant must be frowned upon as an abuse of the first respondent's finances. He ultimately found the applicant guilty as charged.
- [23] In dealing with this charge, the second respondent was of the view that the chairperson of the disciplinary enquiry misdirected himself by finding the applicant guilty of abuse of power when he was never charged as such. When the second respondent realised that the enquiry he had undertaken landed him in a difficulty in terms of his mandate, as he could not pronounce on the disparity in terms of the sanction, he extended the scope of inconsistency to include fairness. In my view, the enquiry ought to have ceased once the second respondent realised that he could not pronounce on the sanction because of the chairperson of the disciplinary enquiry's findings on the merits. As correctly submitted by

Mr Fourie SC, the second respondent exceeded his mandate when he set aside the sanction of dismissal on basis on a finding on merits.

[24] I now turn to charges 3.1 and 4.1.3 that pertain to the use of business credit card. The second respondent was suspect of the lapse of time before some of the allegations were brought to light. However, proceeded and interrogated the facts. He then found that to the extent that there was a practice that condoned the discretionary spending on the business credit card, that practice superseded the rule. In essence, he was of the view that there was no breach of a rule. He reckoned that, if the first respondent intended

to enforce the rule, it ought to have communicated its new stance to all its employees. In the end, the second responded found that the sanction of dismissal was inconstantly applied.

[25] The second respondent obviously traversed the issue of the existence of the rule, an enquiry that patently turns on the merits. The first respondent's submission that, given the fact that the enquiries and findings by the second respondent were noticeably ultra vires the Disciplinary Code, the applicant is barred from claiming specific performance on the terms that do not accord with the Disciplinary

Code, is accordingly inch-perfect.

[26] Yet, the applicant is incorrigible in his claim for specific performance. Mr Motau SC, submitted that the first respondent is enjoined by the Disciplinary Code to enforce the outcome of the appeal hearing which is final and binding on the parties and that there is no contractual basis for a de novo appeal enquiry. This stance is mooted despite the applicant's concession that he is only entitled to a narrow appeal, limited only to a determination of whether the sanction imposed is inconsistent with comparable matters.

[27] I am in agreement with the first respondent's submission that, to the extent that the second respondent exceeded his powers by straying away from the contractual mandate and converting the right of appeal to a broad rehearing of the merits, it is not bound by the outcome of the appeal. In my view, it does not avail the applicant to seek 'reading in' an obligation to a wide appeal or any right not discernible from the terms of the contract which he seeks to enforce. The construction that the applicant accords to the appeal provisions in terms of the Disciplinary Code is obviously untenable and, if granted, would lead to impractical, unbusinesslike or oppressive consequences.[11]

[28] In *Barkhuizen v Napier*, [12] the Constitutional Court warned that 'intruding on apparently voluntarily concluded arrangements is a step that judges should

countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties'

individual arrangements'. In the main, contractual sovereignty must be accorded some measure of respect.[13]

[29] It follows that the applicant failed to show a clear right. Ordinarily, the applicant's case should meet its demise on the basis of the finding in this regard as he nailed his colours to a limited mast. Nonetheless, for completeness sake, I proceed to consider the other rudiments of a final interdict.

An injury actually committed or reasonably apprehended?

[30] The applicant asserts that he would suffer reputational and financial injury if the first respondent is not interdicted from directing him to not a de novo appeal and compelled to enforce the outcome of the appeal.

[31] In my view, there is nothing prohibiting a tender of a de novo appeal enquiry. The first respondent is not bound by the outcome of the appeal hearing as it straddles the merits and sanction and, in essence, offends the very Disciplinary Code. Mr Motau SC referred me to the decision of this Court in *Beyers v Anglo American Platinum Ltd Mogalakwena Section and Others*,^[14] where I dealt with the employer's decision to institute a second disciplinary enquiry where there were no exceptional circumstances to justify such a move. Conversely, in the present case, the outcome of the appeal clearly constitutes a requisite exceptional circumstance to justify a de novo appeal enquiry. In my view, the dictum in *Beyers*^[15] finds no application in the present case.

An adequate alternative remedy?

[32] It is well accepted that where there is a breach of a Disciplinary Code that constitutes a term and condition of employment, specific

performance is an appropriate remedy.^[16] In two recent decisions of this Court, per Prinsloo J, and Van Niekerk, J pertaining to the case of *Mpane v The Passenger Rail Agency of South Africa*,^[17] the applicant employee, Ms Mpane, successfully vindicated her right to enforce policies and procedures incorporated into her

employment contract and a relief of specific performance. In *PRASA I*, Prinsloo, J ordered the respondent employer to comply with the terms of Ms Mpane's employment of contract, which include any applicable policies and procedures incorporated into her contract of employment, prior to taking any decision to terminate her employment. In *PRASA II*, Van Niekerk, J ordered that Ms Mpane be reinstated consequent to a dismissal in breach of her contract of employment and the respondent

employer was once more directed to comply with its contractual obligations towards the applicant in respect of its performance

management and development policy read with its disciplinary code and procedure prior to the decision to terminate her services.

[33] In the present case, Mr Motu SC submitted that the applicant is in the same position as Ms Mpane in *PRASA I* and should accordingly be granted a relief of specific performance. On the other hand, Mr Fourie SC submitted that the dicta in both *PRASA I* and *II* are

distinguishable because, notwithstanding the fact that the outcome of the disciplinary enquiry summarily dismissed the applicant, the first respondent's tender to conduct a de novo appeal enquiry before an independent chairperson is in accordance with the limited right of appeal in terms of the Disciplinary Code. In effect, the first respondent's tender to conduct a de novo appeal enquiry amounts to specific performance in accordance with the Disciplinary Code, it was further submitted.

[34] Indeed, I concur with the first respondent's submission that its tender to conduct a de novo appeal enquiry amounts to an invitation to participate in the process that would see the internal disciplinary procedure concluded in accordance with the Disciplinary Code. As stated in PRASA II, it is not for this Court to interpose in the procedures or 'micromanage the process' undertaken as the employer has

a discretion in terms of the further measures to be taken, subject to them being in accordance with the contractual obligations and applicable policies and procedures.[18] It stands to reason, therefore, that a relief of specific performance would suffice in instances where there is no similar process at all.[19]

Conclusion

[35] In all the circumstances, the applicant failed to make a case for the grant of a final interdict. The application stands to be dismissed.

Costs

[36] Turning to the issue of costs, the first respondent charitably did not pursue costs. In any event, the circumstances of this case dictate that each party should pay its own costs.

[37] In the circumstances, I make the following order.

Order

1. The application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate T Motau SC with advocate Y Ntloko

Instructed by:

Thapelo Kharametsane Attorneys

For the first respondent: Advocate G Fourie SC with advocate Z Ngwenya

Instructed by:

Bowman Gilfillan Inc.

[1] Act 75 of 1997, as amended.

[2] See: Annexure 'OBA1' – Ruling: Internal Appeal, page 68.

[3] [2016] 11 BLLR 1151 (LC) at paras 5 – 6

[4] [2017] 1 BLLR 60 (LC),

[5] Id n 3.

[6] Id n 4.

[7] [2018] 7 BLLR 703 (LC)

[8] Setlogelo v Setlogelo 1914 .AD 221 at 227.

[9] Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co 1961 (2) SA 505 (W) at 515.

[10] See: Annexure 'OBA3' of the founding affidavit, paginated pages 114 – 115.

[11] See: Natal Joint Municipal Pension Fund v Endumeni Municipality. 2012 (4) SA 593 (SCA) at para 16 and 26, quoted with approval in Ngubeni v The National Youth Development Agency and Another

(2014) 35 ILJ 1356 (LC) at para 12.

[12]

[2007] ZACC 5; 2007

(7) BCLR 691 (CC) (4 April 2007) para 57 and 70; see also, Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng 2015

(1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) at para 65.

[13] Ibid.

[14] [2020] 2 BLLR 173 (LC); (2020) 41 ILJ 1376 (LC) at para 27.

[15] Id n 14.

[16] See: Ngubeni v National Youth Development Agency and Another

(2014) 35 ILJ 1356 (LC), Wereley v Productivity SA and Another

(2020) 41 ILJ 997 (LC) and Solidarity and Others v SA Broadcasting Corporation

(2016) 37 ILJ 2888 (LC)).

[17] Mpane v Passenger Rail Agency of South Africa and Others, unreported J 3745/18 (9 June 2020), per Prinsloo, J (PRASA I); and case no J608/2020 (13 July 2020), per Van Niekerk J (PRASA II)

[18] PRASA II supra at para 23.

[19] Ibid.

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Prepared on 12 October 2026 · Esheria