

SOUTH AFRICA / JUDGMENT

Fourie v Amatola Water Board (P 830/00) [2000] ZALC 133; (2001) 22 ILJ 694 (LC) (16 November 2000) [2000] ZALC 133

COURT
Labour Court

BEFORE
Basson

CASE / FILE NUMBER
P 830/00

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REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P 830/00

In the matter between:

PHILIP FOURIE Applicant

and

AMATOLA WATER BOARD Respondent

J U D G M E N T

BASSON, J:

- [1] As this is an urgent application, I reserve the right to supplement my reasons because it is not always possible to deal with every issue in full when delivering an urgent ex tempore judgment.
- [2] The applicant, Mr Philip Fourie, the Chief Executive Officer of the respondent, Amatola Water Board, brings an urgent application in terms of which the applicant seeks to interdict the disciplinary enquiry, initiated by the respondent against the applicant for alleged misconduct, and scheduled to have taken place on 7 November 2000.

- [3] The applicant seeks an order that the said disciplinary enquiry be postponed sine die, pending the conclusion of criminal proceedings instituted by the respondent against the applicant.
- [4] The applicant also seeks an order that, should the disciplinary enquiry go ahead, the applicant shall be entitled to legal representation at the enquiry.
- [5] In essence, the applicant contends that his right to remain silent, that is, his right not to incriminate himself at criminal proceedings (if and when such criminal proceedings take place) is infringed upon by the employer (the respondent) that wishes to exercise its right to hold a disciplinary enquiry in regard to the applicant's alleged misconduct in circumstances where such misconduct will also form the basis of the said criminal proceedings.
- [6] If such harm could indeed result from future criminal proceedings, I am of the view that at this stage, that is, after criminal proceedings have already been instituted by the respondent in casu (although the proceedings are not pending at the moment), such harm would indeed be "reasonably apprehended", as it is at least probable that such criminal proceedings will eventually take place.
- [7] However, that is to put the cart before the horses. The crucial question is whether the said right of the applicant will be infringed by the respondent in holding a disciplinary enquiry in regard to the misconduct of which the applicant stands accused, which misconduct, I reiterate, will form the basis of the foreseen criminal proceedings even though the criminal proceedings have not at present commenced or are not pending as yet. See in this regard *S v MBONGE* 1988 (2) SA 391 (SWA) at 395D; and *AFRIKAANSE PERSPUBLIKASIE (EDMS) BPK EN 'N ANDER v MBEKI* 1964 (4) SA 618 (A) at 629D.
- [8] In regard to the possible infringement of the applicant's said right to remain silent *NUGENT, J* stated the following in *DAVIS v TIPP, N O AND OTHERS* 1996 (1) SA 1152 (W) at 1157E-H: "Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented" (emphasis supplied).
- [9] *NAVSA, J* held as follows in *SEAPOINT COMPUTER BUREAU v McLOUGHLIN AND DE WET, N N O* 1997 (2) SA 636 (W) at 649E-I:

- [6] If such harm could indeed result from future criminal proceedings, I am of the view that at this stage, that is, after criminal proceedings have already been instituted by the respondent in casu (although the proceedings are not pending at the moment), such harm would indeed be “reasonably apprehended”, as it is at least probable that such criminal proceedings will eventually take place.
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- [8] In regard to the possible infringement of the applicant's said right to remain silent NUGENT, J stated the following in *DAVIS v TIPP, N O AND OTHERS* 1996 (1) SA 1152 (W) at 1157E-H:

"Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented" (emphasis supplied).

- [9] NAVSA, J held as follows in *SEAPOINT COMPUTER BUREAU v McLOUGHLIN AND DE WET, N N O* 1997 (2) SA 636 (W) at 649E-I:

"Why, one may well ask, is no authority available from any jurisdiction to show that in civil litigation involving two private parties, and where no coercive State machinery can be brought to bear on one of them, a court was willing to stay proceedings. The answer readily presents itself and is alluded to in the *DAVIS* judgment and referred to by the plaintiff's counsel. The improper application of this principle will cause the administration of justice to fall into disrepute. To protect the right to remain silent is eminently desirable. To deny a plaintiff recourse to a judgment to which he may be entitled, because a police investigation against the opposing party may materialise, and where the defendant is not subject to coercive means, is not serving the course of justice. I agree with NUGENT, J that in principle a defendant should be left with his choice as to how he conducts civil proceedings. In this case, if the defendant is of the view that it cannot succeed on its present plea, and that it is unable to file one, because it might thereby incriminate Kennedy, or expose himself to criminal charges, it must then face the consequences of having filed a plea it cannot succeed on or it must face the consequences of not having a plea at all. The consequence may be judgment for the plaintiffs. This is not in the field of 'coercive power of the State'. Bona fide litigants ought not to be thwarted merely because their opponents

are unable to resist their claims. Allegations of pending criminal investigations or proceedings, without indicators that State coercive means are to be employed in the civil proceedings, are not sufficient to prove prejudice of a kind that will justify a stay"(emphasis supplied).

[10] In *EQUISEC (PTY) LTD v RODRIGUES AND ANOTHER* 1999 (3) SA 113 (W) NUGENT, J held at 115I-116D: "The prejudice to which the first respondent is said to be exposed in the present case is not extraordinary. I think that on a fair reading of his affidavit it comes down to this. The first respondent would prefer for the moment to say nothing at all about the matters which had given rise to his prosecution, which of course he is ordinarily entitled to do. If the sequestration proceedings are not stayed, however, he might be called upon to disclose information relating to those self same matters and he wishes to avoid being placed in that position. There are two circumstances in which the first respondent will face the prospects of disclosing information which may be relevant to whether he has committed the offence with which he is now charged". And I pause to say that only the first of these is relevant in the present proceedings in casu: "Firstly, he is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final sequestration order. There is, of course, no legal compulsion upon him to do so. Whether a court should intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in *DAVIS v TIPP, N O AND OTHERS* 1996 (1) SA 1152 (W) which was subsequently followed in *SEAPOINT COMPUTER BUREAU (PTY) LTD v McLOUGHLIN AND DE WET, N N O* 1997 (2) SA 636 (W). I see no reason to depart from the conclusion which was reached in those cases. In my view the choice which the first respondent may face between abandoning his defence to the civil proceedings or waiving his right to remain silent (cf. *TEMPLEMAN, LJ in RANK FILM DISTRIBUTORS AND OTHERS v VIDEO INFORMATION CENTRE AND OTHERS* (1982) AC 381, especially at 423D-G) does not constitute prejudice against which he should expect to be protected by a court and I will not exercise my discretion in favour of the first respondent on those grounds alone"(emphasis supplied).

"Why, one may well ask, is no authority available from any jurisdiction to show that in civil litigation involving two private parties, and where no coercive State machinery can be brought to bear on one of them, a court was willing to stay proceedings. The answer readily presents itself and is alluded to in the *DAVIS* judgment and referred to by the plaintiff's counsel. The improper application of this principle will cause the administration of justice to fall into disrepute. To protect the right to remain silent is eminently desirable. To deny a plaintiff recourse to a judgment to which he may be entitled, because a police investigation against the opposing party may materialise, and where the defendant is not subject to coercive means, is not serving the course of justice. I agree with NUGENT, J that in principle a defendant should be left with his choice as to how he conducts civil proceedings. In this case, if the defendant is of the view that it cannot succeed on its present plea, and that it is unable to file one, because it might thereby incriminate Kennedy, or expose himself to criminal charges, it must then face the consequences of having filed a plea it cannot succeed on or it must face the consequences of not having a plea at all. The consequence may be judgment for the plaintiffs. This is not in the field of 'coercive

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And I pause to say that only the first of these is relevant in the present proceedings in casu:

"Firstly, he is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final sequestration order. There is, of course, no legal compulsion upon him to do so. Whether a court should intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in *DAVIS v TIPP, N O AND OTHERS* 1996 (1) SA 1152 (W) which was subsequently followed in *SEAPOINT COMPUTER BUREAU (PTY) LTD v McLOUGHLIN AND DE WET, N N O* 1997 (2) SA 636 (W). I see no reason to depart from the conclusion which was reached in those cases. In my view the choice which the first respondent may face between abandoning his defence to the civil proceedings or waiving his right to remain silent (cf. *TEMPLEMAN, LJ* in *RANK FILM DISTRIBUTORS AND OTHERS v VIDEO INFORMATION CENTRE AND OTHERS* (1982) AC 381, especially at 423D-G) does not constitute prejudice against which he should expect to be protected by a court and I will not exercise my discretion in favour of the first respondent on those grounds alone"(emphasis supplied).

[11] Mr Kroon, on behalf of the applicant, argued that the distinction drawn by NUGENT, J and NAVSA, J in the above judgments on the basis of what constitutes a compellable witness is an artificial one. I do not believe that this is an artificial distinction to draw. The fact that the person in the position of the applicant has a choice to exercise his right to remain silent in civil proceedings (or at a disciplinary enquiry) and is not compelled to give evidence, is an important consideration to decide whether this difficult choice is sufficient to prove prejudice of a kind that will justify a stay or, as it was also put, whether this constitutes prejudice against which such person should be protected by a court.

- [12] In my view, there is no reason why the same reasoning should not apply to internal proceedings held by an employer in the exercise of its right or prerogative to discipline an employee who is allegedly guilty of serious misconduct, as is the case in casu.
- [13] In my view, there is no merit in the argument that it depends upon the stage at which an employer wishes to institute criminal proceedings whether the employer is entitled to go ahead with a disciplinary enquiry. In the present matter, as I have stated above, it would appear that the disciplinary enquiry will take place at a stage when criminal proceedings already have been instituted, although the proceedings are not yet pending. I see no a difference, in principle, between this position and the position where criminal proceedings have not been instituted but are likely to be instituted or, on the other hand, where criminal proceedings are indeed pending. In all of these cases it is at least foreseeable, and more so in the last-mentioned case, where it is highly probable, that the criminal proceedings will take place.
- [14] However, the employee concerned always has the choice whether to give evidence at the disciplinary enquiry, that is, whether he or she wishes to put up a defence. In other words, the employee has the choice whether to abandon his or her defence or, on the other hand, to waive his or her right to remain silent. Clearly, there is some prejudice involved for such employee (who faces possible future criminal proceedings based upon the same alleged misconduct), but I would agree with the principles enunciated in the cases (quoted above) that it is not the type of prejudice against which the employee should expect to be protected by a court.
- [15] Mr Kroon, on behalf of the applicant, did refer me to case law in which an opposite approach appears to have been taken and he referred also in this regard to Canadian cases that were quoted in the above judgments.
- [11] Mr Kroon, on behalf of the applicant, argued that the distinction drawn by NUGENT, J and NAVSA, J in the above judgments on the basis of what constitutes a compellable witness is an artificial one. I do not believe that this is an artificial distinction to draw. The fact that the person in the position of the applicant has a choice to exercise his right to remain silent in civil proceedings (or at a disciplinary enquiry) and is not compelled to give evidence, is an important consideration to decide whether this difficult choice is sufficient to prove prejudice of a kind that will justify a stay or, as it was also put, whether this constitutes prejudice against which such person should be protected by a court.
- [12] In my view, there is no reason why the same reasoning should not apply to internal proceedings held by an employer in the exercise of its right or prerogative to discipline an employee who is allegedly guilty of serious misconduct, as is the case in casu.
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- [15] Mr Kroon, on behalf of the applicant, did refer me to case law in which an opposite approach appears to have been taken and he referred also in this regard to Canadian cases that were quoted in the above judgments.
- [16] However, I am not persuaded that this principle is not the correct principle which should be adopted in the present matter. I say this also because of the fact that such prejudice that the applicant may suffer is clearly outweighed by the prejudice that the employer will suffer if the employer is not allowed to exercise its prerogative to discipline employees who are guilty of misconduct, especially serious misconduct.
- [17] This is illustrated in the present matter where charges of serious misconduct were laid against the applicant-employee who is, no less, the Chief Executive Officer of the respondent. Clearly, the respondent will suffer severe prejudice if its right to take disciplinary steps is kept in abeyance until the outcome, one way or another, of the criminal proceedings. The balance of convenience clearly favours the employer in such circumstances.
- [18] In the event, the applicant is not entitled to the relief claimed, that is, an order to postpone the contemplated disciplinary enquiry sine die, pending the conclusion of the criminal proceedings instituted by the respondent against the applicant.
- [19] I now turn to the second leg of the relief claimed by the applicant in that, should the enquiry go ahead, the Court is requested to order that the applicant shall be entitled to legal representation at the contemplated disciplinary enquiry.
- [20] Mr Goosen, on behalf of the respondent, pointed out, and in my view correctly, that there is no general right to legal representation at

internal hearings. However, in assessing the fairness or not of an unrepresented defendant before a disciplinary hearing, it is clear that the Court has a discretion. See, *inter alia*, CUPPAN v CAPE DISPLAY SUPPLY TRAIN SERVICES (1995) 16 ILJ 846 (D) at 853A-B.

- [21] Mr Goosen argued, however, that this matter was not of a complex nature so as to justify legal representation and referred to the charges in this regard (contained at pages 17 and further of the papers). He also pointed out that it was not the practice of the respondent to allow legal representation at internal hearings.
- [22] On the other hand, Mr Kroon, on behalf of the applicant, argued that there was at least some complexity in the matter and that this was borne out by the fact that counsel was involved in drawing up the charges, as well as the fact that a forensic witness will testify and that certain forensic evidence will be needed to prove the charges.
- [16] However, I am not persuaded that this principle is not the correct principle which should be adopted in the present matter. I say this also because of the fact that such prejudice that the applicant may suffer is clearly outweighed by the prejudice that the employer will suffer if the employer is not allowed to exercise its prerogative to discipline employees who are guilty of misconduct, especially serious misconduct.
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- [22] On the other hand, Mr Kroon, on behalf of the applicant, argued that there was at least some complexity in the matter and that this was borne out by the fact that counsel was involved in drawing up the charges, as well as the fact that a forensic witness will testify and that certain forensic evidence will be needed to prove the charges.
- [23] Another important aspect in this regard and which may constitute an exceptional circumstance is the fact that the applicant is the most senior employee of the respondent. There is also acknowledgement, albeit on the periphery, that the respondent recognises the unique position of the applicant in that an independent outside chairperson who is legally qualified will chair the contemplated disciplinary enquiry.
- [24] Yet another factor to be taken into account is the fact that, as I have stated above, the applicant will have to make an important and difficult choice and that is whether to abandon his defence in the proceedings before the disciplinary enquiry or whether he should waive his right to remain silent, especially in the light of the criminal proceedings that may eventually take place.
- [25] Taking into account the factors in favour of legal representation, it is my view that the applicant has made out a case that his right to fair procedure will be infringed upon should he not be allowed to be represented by a legal representative. In the result, the applicant must be successful in his bid to obtain an order that he shall be entitled to legal representation at the contemplated disciplinary enquiry.
- [26] I deal with the question of urgency last for the very reason that I reject the respondent's arguments in this regard as I believe that the matter is urgent.
- [27] The respondent argued that the applicant was responsible for or created his own urgency, referring to the case of CALEDON STREET RESTAURANT CC v MONICA FERREIRA (South Eastern Cape Local Division, Case No. 2656/97 per KROON, J at pp 7, 9 and 11). The respondent's representative argued that a litigant who creates his or her own urgency should not be entitled to relief from the Court.
- [28] In my view, it was contended convincingly on behalf of the applicant, in regard to the question of his right to remain silent that was allegedly in the process of being infringed upon by holding a disciplinary enquiry on 7 November 2000, that the applicant only became aware of the fact of the criminal proceedings that were instituted against him on 24 October 2000. I therefore believe that he proceeded with sufficient swiftness in bringing his application in this regard.
- [23] Another important aspect in this regard and which may constitute an exceptional circumstance is the fact that the applicant is the most senior employee of the respondent. There is also acknowledgement, albeit on the periphery, that the respondent recognises the unique position of the applicant in that an independent outside chairperson who is legally qualified will chair the contemplated disciplinary enquiry.

- [24] Yet another factor to be taken into account is the fact that, as I have stated above, the applicant will have to make an important and difficult choice and that is whether to abandon his defence in the proceedings before the disciplinary enquiry or whether he should waive his right to remain silent, especially in the light of the criminal proceedings that may eventually take place.
- [25] Taking into account the factors in favour of legal representation, it is my view that the applicant has made out a case that his right to fair procedure will be infringed upon should he not be allowed to be represented by a legal representative. In the result, the applicant must be successful in his bid to obtain an order that he shall be entitled to legal representation at the contemplated disciplinary enquiry.
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- [28] In my view, it was contended convincingly on behalf of the applicant, in regard to the question of his right to remain silent that was allegedly in the process of being infringed upon by holding a disciplinary enquiry on 7 November 2000, that the applicant only became aware of the fact of the criminal proceedings that were instituted against him on 24 October 2000. I therefore believe that he proceeded with sufficient swiftness in bringing his application in this regard.
- [29] In regard to the applicant's contention that legal representation should be allowed and that the refusal to allow legal representation constituted an infringement of his right to fair procedure in terms of the Labour Relations Act, 66 of 1995 ("the LRA"), it would appear that the applicant raised this matter early in October
2000. It would also appear that this matter was raised further in correspondence between the parties, with the respondent stating that it persisted in its refusal. However, there seems to have been at least some reconsideration of this issue in letters exchanged at the end of October / beginning of November 2000. All in all, therefore, I do not believe that it can be said, in fairness to the applicant, that he had caused his own urgency and therefore that the Court should not assist him in this regard.
- [30] I turn to the question in regard to an order as to costs. It is clear that the applicant was unsuccessful in obtaining an order to interdict the disciplinary enquiry, pending the conclusion of the future criminal proceedings. On the other hand, the applicant has been successful in obtaining relief in regard to legal representation. Mr Kroon argued that the two are interlinked, and to an extent this may be correct. However, even if this is not correct, I

regard it as fair, especially taking into account that the applicant was both successful and unsuccessful in bringing this urgent application

before Court, to make no order as to costs.

[31] In the event:

- (a) The application to obtain an interdict ordering that the disciplinary enquiry initiated by the respondent against the applicant which was scheduled to take place on 7 November 2000 be postponed sine die, pending the conclusion of criminal proceedings instituted against the applicant by the respondent, is DISMISSED. The application that it be ordered that the applicant shall be entitled to legal representation at the contemplated disciplinary

enquiry SUCCEEDS.

[32] I make the following ORDER: It is ordered that the applicant shall be entitled to legal representation at the contemplated disciplinary enquiry.

2. There is no order as to costs.

[33] As an aside, I notice that, in terms of the order given by my Brother LANDMAN J, it was ordered that the disciplinary enquiry be held over until five court days from the date of judgment granting final relief, or otherwise. I am, in my view, bound by this order and the contemplated disciplinary enquiry therefore cannot be held until five days from the date of today's order.

BASSON, J Date of Hearing & Judgment : 16/11/00 (ex tempore) Appearing for the applicant : Adv Kroon (instructed by Smith, Tabata & Partners) Appearing for the respondent : Adv Goosen (instructed by Wesley Pretorius & Associates)

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[32] I make the following ORDER:

It is ordered that the applicant shall be entitled to legal representation at the contemplated disciplinary enquiry.

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BASSON, J

Date of Hearing & Judgment : 16/11/00 (ex tempore)

Appearing for the applicant : Adv Kroon (instructed by Smith, Tabata & Partners)

Appearing for the respondent : Adv Goosen (instructed by Wesley Pretorius & Associates)

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