

SOUTH AFRICA / JUDGMENT

Mathabathe v Nelson Mandela Bay Metropolitan Municipality and Another (J1197/16) [2016] ZALCJHB 414; [2016] 12 BLLR 1228 (LC); (2017) 38 ILJ 391 (LC) (23 September 2016)

[2016] ZALCJHB 414

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J1197/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no J 1197/16

In the matter between MARIA MORWENYANE MATHABATHE Applicant and NELSON MANDELA BAY METROPOLITAN MUNICIPALITY First Respondent DANIEL C OOSTHUIZEN Second Respondent

Heard: 21 July 2016

Delivered: 23 September 2016

VAN NIEKERK J

- [1] This is an application brought on a semi-urgent basis in which the applicant seeks declaratory orders to the effect that the summary termination of her employment contract be declared unlawful and of no effect, that the disciplinary proceedings initiated against her and which served before the second respondent constitute a nullity and that there be an order of specific performance of the applicant's contract by reinstating her retrospectively from 1 June 2016, the date on which the applicant contends that the first respondent repudiated her contract. The application is opposed by the first respondent.

- [2] The claim is brought as one in terms of s 77(3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA). That section confers

jurisdiction on this court, concurrently with the civil courts, to hear and determine matters concerning contracts of employment.

- [3] The material facts are not in dispute and are recorded in the papers. For present purposes it is sufficient to record that on 1 February 2014, the applicant was employed by the first respondent as its municipal police chief: safety and security. Her primary obligation was to establish a metro police force for the first respondent. The applicant's appointment was for a period of five years, subject to terms that entitle either party to terminate the contract prior to the completion of the fixed term. Specifically, the contract provides that it will be terminable at the employee's initiative by the giving of two months' notice and by the employer party on one month's notice, if the applicant is found guilty of serious misconduct or deliberate neglect in the discharge of her duties.

- [4] Clause 15.2 of the applicant's contract of employment is central to these proceedings. It provides as follows:

The Employer will be entitled to terminate the Employee's employment contract for any sufficient reason recognised in law,

provided that the Employer must comply with its disciplinary code and procedures, if in the absence of which, the disciplinary code and procedures of the South African Local Government Bargaining Council will apply, as well as in accordance with the Labour Relations Act, 66 of 1995. Reasons for terminating the employment contract may include the Employee:

15.2.1 committing any serious or persistent breach of any of the provisions of his\her employment contract;

15.2.2 being guilty of any serious misconduct or deliberate neglect in the discharge of his\her duties under the employment contract and signed performance agreement;

15.2.3 being unreasonably absent from employment without approval;

15.2.4 disobeying a lawful instruction or direction of the Employer;

15.2.5 having been convicted of a criminal offence other than an offence, which in the reasonable opinion of the Employer, does not effect his\her position as an employee; or

15.2.6 failing to place the whole of his\her time at the disposal of the Employer, when reasonably required.

- [5] The parties have agreed that for the purposes of these proceedings, the operative element of clause 15.2 is the phrase 'as well as in accordance with the Labour Relations Act>...' For reasons that are not entirely apparent, the first respondent's disciplinary code is not applicable, nor is any procedure established by the bargaining council.

[6] On 4 April 2016, the first respondent delivered a charge sheet to the applicant and called her to a disciplinary hearing in regard to three charges. These charges, in broad terms, concerned allegations of misconduct in the form of a failure to disclose the receipt of remuneration from a third party (the Road Traffic Management Corporation), ignoring an instruction from the executive director: safety and security to complete a declaration of interest form, and culpable negligence in the form of a failure to take any or adequate steps to prepare for the establishment of the metro police force, the principal task for which the applicant had been employed. On the same date, the applicant was booked off from work after a diagnosis of anxiety and depression. The applicant had previously been booked off work for the period 29 February 2016 to 11 March 2016 for similar

reasons.

[7] On 12 April 2016, the disciplinary hearing was convened before the second respondent. The applicant's counsel moved for a postponement of the hearing. The postponement was sought on account of the applicant's medical condition and on the basis that she had had insufficient time to prepare for the hearing. The first respondent opposed the application. In his reasoned ruling, the second respondent recorded that it would not be practical for the matter to proceed but that it would equally serve no purpose for the matter to be postponed indefinitely, as it would inevitably be given the applicant's prognosis. The second respondent came to the following conclusion:

It is therefore my ruling that there is exceptional circumstances that exists in this matter and that the matter should be dealt with differently to ensure that it is finalised as soon as possible. Therefore my reading is that the employer is to file a statement of case with supporting affidavits by 21 April 2016, with all supporting documents. That must be served on the employee and his legal team as well as on me..... The employee to file an answering statement by 9th of May 2016 by 15:00 hours.

[8] It is significant that the applicant's counsel did not object to the procedure that was the subject of the second respondent's

ruling, nor did she contend that the procedure was either unlawful or unfair, or seek to reserve the applicant's rights.

Indeed, both parties proceeded to file documents in terms of the ruling. On 22 April 2016, the first respondent submitted a statement

of case and submissions to the second respondent. On 11 May 2016, the applicant submitted an affidavit in support of what she described as her answering statement. At this stage, the applicant denied an assertion by the first respondent that there was agreement as to the manner in which the enquiry was to be conducted, i.e. on paper. She further submitted that disputes of fact disclosed by the papers would have to be resolved by the adoption of the rule applicable in the civil courts when factual disputes are disclosed in motion proceedings (the Plascon Evans rule).

- [9] On 23 May 2016, the second respondent issued what is referred to as the ‘outcome of the disciplinary enquiry’. I do not intend for present purposes to canvas the whole of the ruling; it is sufficient to state that in relation to the nature of the proceedings the second respondent observed that there had been no objection from the applicant in regard to his ruling that the matter be dealt with by way of a statement of case and response, and that the decision to determine the matter on paper had been taken, amongst other things, on account of the applicants poor prognosis and in the absence of any indication as to when she would be fit to attend a formal disciplinary hearing. The second respondent specifically recorded that the applicant’s representative had not objected to the process at the time, and had agreed to the timeframes for the filing of submissions. The second respondent characterised the hearing as a disciplinary hearing ‘although on paper without hearing oral evidence and argument’. After considering the submissions made by the parties in the documents that they had filed, the second respondent found the applicant guilty on all three charges of misconduct. He then ordered the parties to submit mitigating or aggravating factors for consideration of sanction by no later than 30 May 2016.
- [10] On 30 May 2016, the applicant filed an application for the recusal of the second respondent. In the application, the applicant contended that the second respondent had unfairly and without justification resorted to a procedure which is inappropriate to the

determination

of factual disputes and further, that he could not properly in advance have made an assessment as to whether the matter was capable of determination on paper. The applicant submitted that the procedure dictated by the second respondent had the consequence of a serious deprivation of her rights, and then proceeded to attack the findings made by the second respondent. The applicant concluded that the findings were so at variance with what any objective chairperson’s findings ought properly to be that the inference of actual bias was warranted.

- [11] On 1 June 2016, the second respondent issued a further ruling. He considered the application for recusal, which he dismissed. The essence of his ruling is to be found in the following paragraph:
5. The parties agreed to the timeframes for submissions to be filed which included the submissions of mitigating and aggravating arguments if the employee is found guilty. The ruling that the matter be decided on papers was made on 12 April 2016 and none of the parties objected when the ruling was made. If the employee felt as strong about the ruling as per her application she could have at that stage before filing her answering statement taken actions as suggested by the application for my recusal. However, the employee decided, as agreed on 12 April 2016, to proceed with the process and only when found guilty on misconduct as per the disciplinary outcome report raised her the objection. I find it unacceptable that the

employee filed an application on the date that submission on mitigating factors was due, which in my view only [sic] an attempt to delay the finalisation of this matter.

- [12] The second respondent went on to find that dismissal was an appropriate sanction for the misconduct found to have been committed and he summarily dismissed the applicant with effect from the date of the outcome i.e. 1 June 2016.
- [13] As I have indicated above, the applicant's claim is that she had a contractual entitlement to a disciplinary hearing (at least in accordance with the principles laid down in the LRA) prior to any valid termination of the employment contract and that she was in any event entitled to one month's notice of termination of her contract.
- [14] The applicant specifically does not request this court to make findings as to whether a properly conducted enquiry could sustain the charges brought against her or whether those charges, even if they are proven, would sustain the sanction of dismissal. She accepts that if this application were to succeed, the first respondent would be entitled to reinstate the charges against her. In other words, the applicant insists on specific performance of the contract only to the extent that she asserts her right to a fair disciplinary hearing.
- [15] Mr Grogan, who appeared for the first respondent, submitted that the court ought not to deal with the present dispute under its jurisdiction in terms of the BCEA, because claims by dismissed employees based on alleged breaches of contract must necessarily be contested under the LRA. The submission, as I understood it, contemplates that the right not to be unfairly dismissed is protected

by a single comprehensive statute (the LRA) and where, as in the present instance, an employee brings what is in reality an unfair

dismissal dispute under the guise of a contractual claim, that dispute should not be entertained because to do so would conflict

with the LRA's statutory dispute resolution procedure.

- [16] The applicant on the other hand, concedes that the common law of contract makes no provision for a hearing before termination of employment, but relies on the express term (clause 15.2) that establishes such a right. The applicant also contends that she is not precluded by the statutory protection against unfair dismissal from enforcing a contractual right to fair procedure. Mr Watt-Pringle SC, who appeared for the applicant, relied on *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA). In that matter, the court said the following:

However, there can be no suggestion that the constitutional dispensation deprived employees of the common law right to enforce the terms of the fixed term contract of employment. Thus irrespective of whether the 1995 Act was declaratory of rights that had this source in the interim Constitution or whether it created substantive rights itself, the question is whether it simultaneously deprived employees of the pre-existing common law right to enforce such contracts, thereby confirming them to the remedies for 'unlawful dismissal' as provided for in the

1995 act... The 1995 act does not expressly abrogate an employee's common law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications that in the 1995 act that the legislature had no intention of doing so.

And further:

When a particular dispute falls within the terms of s one and one depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. The dispute falls within the terms of the section only if the 'fairness' of the dismissal is the subject of employees complaint. Word is not, the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employees complaint is about.

[17] I do not understand the law to have changed since Fedlife, certainly not to the extent of depriving a dismissed employee of any contractual rights where the employee elects to enforce those rights either as an alternative or in addition to any claim for unfair dismissal that may be available under the LRA. This much was made clear by the SCA in the later decision of Boxer Superstores Mbatha and another v Mbenya 2007 (5) SA 450 (SCA)). The situation is different where an employee employed by the state seeks to rely on an administrative law remedy. Here, the courts have held that when a party alleges that the employer has failed to comply with the LRA, a remedy must be sought under that Act; the employee may not clothe the dispute as one that concerns the application or enforcement of an administrative law right (see Chirwa v Transet Ltd and others

[2008] 2 BLLR 97 (CC)). In the present instance, the applicant does not seek a remedy that is available to her under the LRA. Her

complaint is that the respondents have breached her contractual rights, and it is those rights that she seeks to enforce. I do not understand the more recent decision by the Constitutional Court in Steenkamp and others v Edcon Ltd (2016) 37 ILJ 564(CC) to have changed that position. In that case, the affected employees brought their claim directly under the LRA; their cause of action was one based directly on a breach of an LRA obligation. The fact that the content of her contractual right to a fair hearing is defined by reference to what is provided by the LRA does not necessarily require the applicant to invoke an LRA remedy, nor does it deprive her of a contractual right – the issue is one of the nature and content of the contractual right. In short, the reference to the LRA in the present instance is one of definition. Clause 15.2 does no more than define the scope of the contractual right to a fair hearing.

[18] The issue to be decided therefore is the scope of a right to fair procedure defined by the phrase 'as well as in accordance with the LRA?'. Further, to the extent that it becomes necessary, the court must determine whether there has been a breach of that rights and if so, whether the applicant is entitled to the remedy of specific performance.

- [19] The applicant submits that whatever the precise nature of the contractual right to a fair hearing, the procedure adopted by the second respondent did not comply with the terms on which the employee was summoned to a disciplinary hearing, that the hearing was a 'hatchet job', and that the second respondent's failure to recuse himself once his conduct established a reasonable apprehension of bias rendered the entire process a nullity.
- [20] To the extent that the applicant relies on the terms on which she was summoned to her disciplinary hearing to define the scope of her right to a fair hearing, those terms were overtaken by events and in particular, the ruling by the second respondent that the hearing would be conducted 'on paper'. The second respondent correctly observed in his ruling dismissing the application for recusal that the applicant, who was represented by counsel, did not object after he issued the ex tempore ruling as to how the hearing would proceed, nor was there any reservation of rights. If the applicant has objected so strongly to the form that the procedure was to assume, one would have expected immediate and vociferous opposition to the ruling. It was only when the statement in response was filed that in answer to an averment that the procedure had been agreed, that the applicant raised her objections to the nature of the process. The terms on which the applicant was invited to attend the disciplinary hearing cannot therefore form the basis of any contractual right that the now seeks to enforce.
- [21] In so far as the nature of the enquiry and the averments of bias on the part of the second respondent are concerned, the nature and extent of the right to procedural fairness in terms of the LRA was the subject of a decision of this court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*
- [2006] 9 BLLR 833 (LC). The court held that the Act, read with the code of good practice, fundamentally and significantly departed from the previously applicable 'criminal justice' model which likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, in that context. The court said the following at p 838-9:

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognise that for workers, to justice lies in a right to an expeditious and independent review of the employer's decision

to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers,

this right of the resort to expeditious and independent arbitration was intended not only to promote rational decision-making about

workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that have been developed prior to the new Act were inefficient and inappropriate and that if a dismissal for conduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

[22] The court went on to hold that properly construed, the right to fair procedure in terms of the code of practice provides for no more than the following:

When the code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by item 4 of the code requires the conducting of an investigation, notification to the employee of any allegations that may flow from the investigation, and an opportunity, within a reasonable time, to prepare response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing. If the decision is to dismiss the employee the employee should be given the reason for dismissal and reminded of his or her rights to refer any disputed dismissal to the CCMA, a bargaining council with jurisdiction, or any procedure established in terms of the collective agreement.

[23] In my view, the applicant was afforded a right to be heard on terms that satisfy the requirements of the code of good practice. The applicant was afforded an opportunity to state her case, which she did with the assistance of counsel. The second respondent considered the applicant's submissions, and made a decision. He communicated that decision to the applicant and advised her of her right to pursue the matter further. Whether the second respondent's decision is right or wrong, fair or unfair, is irrelevant for present purposes.

[24] In so far as bias is concerned, the applicant was afforded the benefit of an independent chairperson. This is more than what the code provides and more than what is common in most workplaces, where disciplinary enquiries are ordinarily chaired by a more senior member of management. Further, as the court observed in *Avril Elizabeth Home*, the code does not provide for a test for bias in the form that it applies in the civil or criminal courts, nor was the second respondent obliged to assess the recusal application on the basis on which it would be in those courts. I fail to appreciate why the fact that the second respondent elected to conduct the enquiry in the manner in which he did is necessarily an indication of bias. Further, I cannot overlook the fact that the applicant's averments of bias arose only at the stage where the second respondent had decided that the applicant was guilty of the alleged misconduct, a stage where it became apparent to the applicant that the outcome was not to her liking. In any event, bias is a procedural point. To the extent that the applicant contends that the second respondent's refusal to recuse himself nullified the disciplinary proceedings, the applicant's criticism of the second respondent on that basis cannot be elevated to a submission that the first respondent breached the applicant's contract by abiding by the second respondent's

ruling.

[25] This is not the first time that the a disciplinary process involving the submission of written representations has received judicial sanction (see, for example, *Broadcasting Electronic Media and Allied Workers Union & others v SA Broadcasting Corporation & others* (J 2239/2015)). In my view, the procedure adopted by the second respondent constituted compliance with the code of good practice and thus did not constitute a breach of the applicant's contract of employment. The application therefore stands to be dismissed.

[26] Finally, in relation to costs, the court has a broad discretion to make an order for costs according to the requirements of the law and fairness. This court is traditionally reluctant to make a cost orders against aggrieved employees who initiate proceedings against their employers, at least in circumstances where the dispute is a genuine one and the employee acts in good faith. In the present instance, there are a number of issues that warrant mention. The first is the fact that the application was filed in Johannesburg, in circumstances where the parties are based in Port Elizabeth, which is where the cause of action arose. The applicants counsel act pro bono, and were prepared to do on the basis that the matter was heard in Johannesburg. The matter was also heard during recess, in circumstances in which the applicant avers that the court in Port Elizabeth is not able to hear applications such as the present out of term. I would observe though that there appears to have been discussion either with the registrar or with the judge initially

allocated to this case as to whether the matter could be heard in Port Elizabeth. The applicant appears to have decided unilaterally to enrol the matter in Johannesburg, despite the fact that she was aware that the first respondent, its attorneys and counsel were all based in Port Elizabeth. To say that the first respondent's representatives have been inconvenienced is an understatement.

Secondly, the averments made against the second respondent, particularly in relation to the allegations of bias, are made in intemperate terms. While I appreciate that the applicant no doubt has strong feelings concerning the injustices which she considers herself to have suffered, there is no basis to resort to ad hominem argument or to attack the personal integrity of the second respondent, as the applicant has done. That notwithstanding, on balance and with some misgivings, I will accept that the applicant has acted in pursuit of a genuinely felt sense of grievance. I therefore intend to make a no order as to costs.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv C Watt-Pringle, with him Adv S van Niekerk, instructed by Cinga Nohaji

For the first respondent: Adv J Grogan, with him Adv I Voultzos, instructed by Gray Moodliar

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