REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: J 572/15

In the matter between :

ANDILE PHILLIP DYAKALA **Applicant**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **First Respondent**
JASON NGOBENI *N.O* **Second Respondent**
UMAR BANDA *N.O* **Third Respondent**

Heard : 20 March 2015

Judgment : 23 March 2015

Summary : Breach of contract. Specific performance ordered.

JUDGMENT

AC BASSON, J

[1] The applicant (Mr Andile Phillip Dyakala) approached this Court on an urgent basis for an order declaring that the decision to terminate his contract of

employment was unlawful, invalid and of no force or effect. The applicant further sought an order that his dismissal consequent upon the termination of his contract be set aside and that he be reinstated as Financial Officer of the City of Tshwane Metropolitan Municipality (hereinafter referred to as "the respondent").The applicant also sought an order declaring that his suspension was unlawful, invalid and of no force or effect. The applicant further sought an order interdicting the respondent from calling upon the applicant to attend a disciplinary enquiry which commenced on 18 August 2014 and to interdict the respondent from preventing the applicant from carrying out his duties in performing its functions as Chief Financial Officer. In the alternative, the applicant sought an order directing the respondent to reinstate his contract of employment and to reinstate him to his former position until there has been due and proper compliance with the provisions of clause 18.2 of the contract relating to its termination.

[2] It was common cause that the applicant was employed as the Group Chief Financial Officer until 9 March 2015 when he was issued with a termination notice by the attorneys for the respondent. The applicant was suspended as far back as 6 August 2014 and was charged with having committed various acts of financial misconduct and with having contravened various items of the Disciplinary Regulations and the Disciplinary Code. More in particular, the applicant was charged for having posted on his Facebook page derogating, defamatory and/or unacceptable comments about the City Manager (Mr Ngobeni).

[3] The disciplinary hearing was convened on 18 August 2014 but postponed on several occasions. The last sitting of the enquiry was scheduled to run on 26 and 27 March and on 1 and 2 April 2015. According to the applicant he had every reason to believe that the enquiry would reconvene on 26 March 2015. By the time the urgent application served before this Court the respondent had already called three witnesses and it was common cause that the third witness was still being cross-examined.

[4] On 9 March 2015 the continuation of the disciplinary hearing was, however, interrupted by a decision to terminate the employment contract of the applicant in the face of the uncompleted disciplinary hearing. The termination notice recorded that the dismissal was based on "*a breakdown of the trust relationship between the parties*".

[5] In essence the applicant is seeking an order (in the alternative) reinstating him to his previous position in order for the disciplinary enquiry to continue and to allow the chairperson of the disciplinary hearing to make a decision whether he is guilty as charged and if so, whether the termination of his employment contract is warranted. The respondent submitted that the disciplinary hearing "has since been rendered moot" and submitted that urgent relief cannot be granted in respect of events that will no longer occur.

[6] It is important to point out that it is not the applicant's case that any of his rights under the Labour Relations Act[1] ("LRA") have been infringed. The applicant therefore does not rely for his cause of action or the relief he seeks on the provisions of the LRA. The applicant relies solely for his cause of action on the terms of his employment contract which incorporates certain sections of the Municipal Systems Act[2] and the Regulations promulgated in terms thereof. More in particular the applicant relies on clause 18 of his contract of employment and submitted that the respondent breached his contract by terminating the contract in violation of this clause. This, the applicant submitted, constituted a repudiation of his contract. He has now elected to reject the repudiation of the contract and sue the respondent for performance on the contract and more specifically, for compliance with section 18 thereof.

Urgency of the matter

[7] At the commencement of the proceedings the respondent raised the point that this application lacks sufficient grounds for urgency. The applicant submitted that the matter is urgent and that urgency arises firstly from the fact that the applicant's dignity is negatively affected by false reporting in the media which is done at the instance of the respondent, and secondly, on the basis of the financial harm that he is suffering as a result of the unlawful termination of his contract.

[8] In respect of the negative effect that the termination of the contract has on the applicant's dignity, the Court was referred to the matter in *Dince and Others v MEC, Education North West*[3] where the Court held as follows in the context of an alleged unlawful suspension:

[1] Act 66 of 1995.
[2] Act 32 of 2000.
[3] (2010 21 *ILJ* 1193 (LC).

> "[23] The important principle enunciated in the *Mhlauli* and *Muller* cases is that the audi alteram partem rule applies in cases of suspension. It is also important to note that the court in the *Mhlauli* case held that the correct approach to adopt in cases of suspension was that enunciated in the *Muller* case and that those cases which held that the audi alteram rule does not apply were wrongly decided. I align myself with that approach and wish to emphasize that the prejudice that an employee may suffer in a case of suspension is not limited to financial prejudice in the case where the suspension is without pay. Suspension with pay also has substantial prejudicial consequences relating to both social and personal standing of the suspended employee. In my view any suspension with or without pay has to bring into question the integrity and dignity of the suspended person particularly where the suspension is based on allegations of dishonesty. And quite often suspensions attract media attention and thus the standing of the person before his or her colleagues and the community is bound to be negatively affected. It is for this reason in particular that in law the employer is obliged to afford an employee the opportunity to be heard before the suspension. The process does not entail affording an employee an opportunity to show that he or she is not guilty of the allegations made against him or her. Affording an employee a hearing is such a simple and informal process that employers who subscribe to best labour relations practice would never have difficulty with it, because what it seeks to achieve is not only to protect the interests of the employer but also those of the employee. The interest of the employee is protected by not only giving him or her an opportunity to show why he or she should not be suspended but also protecting their dignity. It has to be remembered that at the time of suspension the person is presumed innocent. His or her guilt can only be determined at the disciplinary or pre-dismissal arbitration proceedings."

[9] It was further submitted that the dignity of the applicant is continuously affected by the approach of the respondent which claimed that the applicant has been dismissed for financial misconduct in circumstances where the respondent is aware of the fact that the applicant has not been found guilty of any financial misconduct. It was also submitted that the respondent has not explained why the disciplinary process was not completed.

[10] In respect of the issue of financial harm, it was submitted on behalf of the applicant with reference to *Harley v Bacarac Trading 39 (Pty) Ltd*[4] that financial hardship and loss of income can constitute a ground for urgency:

> "In support of his submission on this point, Mr *Van der Merwe* made reference to a number of cases, including *SACCAWU v Shoprite Checkers* (*Pty*) *Limited* [1997] 10 BLLR 1360 (LC) [also reported at [1998] JOL 1686 (LC)–Ed]; *Hultzer v Standard Bank of South Africa* [1999] 8 BLLR 809 (LC) [also reported at [1999] JOL 4896 (LC)–Ed] and *University of the Western Cape Academic Staff Union and others v University of the Western Cape* (1999) 20 ILJ 1300 (LC).
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> The principle established in these cases is one that inclines this Court to avoid granting what amounts to status quo relief in unfair dismissal disputes pending a final determination of the dispute by the appropriate dispute resolution body. None of these cases, it seems to me, establishes that financial hardship and loss of income can never be grounds for urgency. If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this Court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits."

The Court was also referred to the decision in *HOSPERSA and another v MEC* for Health, Gauteng Provincial Government[5] where a similar approach was followed.

[11] It was further submitted on behalf of the applicant that proceedings in due course cannot address the immediate non-payment of salary which is a direct consequence of the unlawful decision to terminate the applicant's services: Had the respondent not breached their employment contract the applicant would have still been employed and accordingly still be earning a salary.

[12] The respondent submitted that the matter is not urgent due to the fact that the applicant had not complied with Rule 12.3 of the Practice Manual which requires that facts must be set out to justify the bringing of the application at a time other

[4] [2009] 6 BLLR 534 (LC) at page 536.
[5] [2008] 9 BLLR 861 (LC).

than 10:00 hours on Tuesdays or Thursdays. Although it is expected of parties to adhere to the provisions of the Practice Manual, the Manual is not intended to limit judicial discretion. Ultimately it is for the Court to exercise a discretion as to whether a matter should be allowed to proceed on the urgent roll or whether the matter should be struck from the roll for lack of urgency.

[13] The respondent also referred the Court to a recent unreported judgment by Fabricius, J, (Gauteng High Court) in the matter between the *Independent Police Investigative Directorate and Robert McBride v The Minister of Police*[6], where the Court held as follows:

> "I have also had the occasion to write a judgment about the requirements of interim interdicts in *Afrisake NPC v City of Tshwane Metropolitan Municipality and Others* under case number 74192/2013 dated 14 March 2014 (not reported). I also emphasized that the proper question would be whether an Applicant in interdictory proceedings required an order now so as to protect a right which he would otherwise not be able to protect at all. One does not require an interdict *pendente lite* to protect the right which one can in any event protecting future by, amongst others, litigation in due course. It is an absolute minimum requirement that in repairable harm must be shown to exist before the Court can grant such an interdict, and in the present context the Constitutional desirability of such an interdict weighs heavily on my mind."

[14] I have considered whether the matter is urgent and whether the matter needs the attention of this Court on an expedited manner in light of the above submissions. In my view the Court cannot ignore the fact that the respondent had embarked on a disciplinary process and that it had abandoned the process midway by dismissing the applicant on a ground which forms the subject matter of one of the charges pending before the disciplinary hearing (see herein below). The Court also cannot ignore the press release in the Pretoria News where the following is stated:

> "Chief Financial Officer of the City of Tshwane, Andile Dyakala, has been fired eight months after being placed on suspension for alleged irregularities relating to printing tender…. Following a lengthy disciplinary process, he received a notice of termination of his contract of employment… It was the council's view that the employment relationship of trust was key and indispensable to its operations. This had broken down irretrievably, it stated."

[6] Case number 6588/2015.

[15] This press release does not state that, at the time of the termination of the contract, the applicant was still being subjected to a disciplinary hearing and that he has been "fired" whilst he had not yet been afforded an opportunity to present his side to the disciplinary hearing. It is trite that an employee remains innocent until proven guilty. I am persuaded under these circumstances that the applicant's dignity has been negatively affected not only by the fact that his right to a hearing has been negated, but also by the negative reporting in the media which was done at the instance of the respondent. It is precisely this type of media reporting that has persuaded the Court in *Dince*[7] to deal with an allegation of unfair suspension on an urgent basis. I am also persuaded that if this matter is not heard on an expedited basis, the applicant will suffer irreparable harm. The disciplinary hearing has commenced and has commenced at the instance of the respondent and should be allowed to continue without undue delay. In these circumstances I am therefore persuaded that the matter is urgent.

Suspension

[16] In respect of the applicant's suspension which had already taken place on 4 July 2014 which is some time ago, I have no hesitation to find that this issue is not urgent. In any event the applicant had already on 1 October 2014 referred the issue of suspension to the Bargaining Council. I can find no reason to interfere with this decision on an urgent basis. Furthermore, in so far as I am inclined to order specific performance by reinstating the applicant to his previous position, such reinstatement will be on the same terms and conditions that governed the employment relationship between the parties at the time of the termination of the contract. Since the applicant was on suspension, he is reinstated on those terms. Should the applicant wish to pursue his remedies under the LRA, he is free to do so.

Termination of the contract

[17] It is accepted that the applicant has the right not only to refer a dispute about the fairness of his dismissal in terms of the LRA to a Bargaining Council but to approach this Court in terms of his contract of service to contest the lawfulness of the termination thereof.[8] In this matter the applicant is contending that the

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[7] *Supra*.

[8] *Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC): "[35] It is further accepted that an employee has rights both in terms of the common law and in terms of the LRA in the event of a premature termination of a fixed-term contract, or in the event of other dismissals, and that the employee has a choice whether or not to pursue his common-law rights to enforce a claim for

contract of employment was unlawfully terminated. I have already pointed out that the applicant is not contesting the fairness of his dismissal. It is also not before this Court whether the applicant is guilty of any acts of misconduct: This is for the chairperson of the disciplinary hearing to decide.

Merits

[18] The applicant has addressed the Court on the merits and has filed detailed Heads of Arguments in this regard. The respondent, on the other hand, has elected to address the Court on the issue of urgency only and has declined an invitation to address the Court on the merits.

[19] The merits must be decided against the background of the following: The respondent has decided to terminate the contract of employment in circumstances where the disciplinary hearing was still in progress. In terms of clause 18 of the applicant's contract of employment the contract will terminate in the following circumstances: on expiry; if the employee gives the employer two months' notice of termination in writing; if the employer terminates the employee's appointment for reasons relating to misconduct, incapacity, unacceptable performance, or the operational requirements of the Municipality or for any other reason recognised by law as sufficient, on one month's notice in writing. In terms of clause 18.2 the employer will be entitled to terminate the contract for any sufficient reason recognised by law if the employer had complied with its disciplinary code and procedures. The respondent did not disclose the reason for the termination of the contract in the notice of termination. In their answering affidavit it simply stated that the contract was terminated due to a breakdown of trust. The reason for the termination of the contract on the basis of a breakdown of trust is, however, now explained in the answering affidavit as follows:

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contractual damages in the event of a termination of the contract or claim on the basis of an unfair dismissal because of a lack of substantive and/or procedural fairness. In this regard the Labour Court in *Jonker v Okhahlamba Municipality and others* stated as follows:

> 'A breach of the common-law contract of employment, insofar it has not been supplanted by legislation, may also be actionable under the Constitution. Remedies for such breaches must be derived from the LRA itself…. The interface between the Constitution, labour legislation and the common law depends on the right claimed and how it is pleaded.'

[36] It is therefore for the employee to choose whether or not she wishes to base her claim on contract or on the principles embodied in the LRA and to make out a case for the relief sought in the pleadings.

[37] In principle, therefore, an employer has the right contractually to terminate the contract. Whether the termination will also be fair is an entirely different question and not relevant in these proceedings. Where a contract is terminated unlawfully it will usually also constitute an unfair termination. The reverse is, however, not always true.

[38] The only remaining question is whether there are facts before this court to indicate that the respondent is intending to terminate the contract unlawfully." (Footnotes omitted.)

> "[T]hat as a result of the posting of information by the Applicant on his Facebook page in particular about the fact that I am a tribalist, which posting the Applicant does not deny, the relationship of trust between the First Respondent, myself as its accounting officer [the City Manager], and the applicant has irretrievably broken down."

[20] I am in agreement with the applicant that it is nonsensical for the respondent to allege that the applicant's contract was not terminated for misconduct but on account of a breakdown in the trust relationship. If regard is had to the charge sheet, one of the transgressions which is alleged to constitute an act of misconduct, is the very fact that the applicant had allegedly made defamatory or derogatory postings on his Facebook page. If regard is had to the applicant's contract of employment it is clear from clause 18.2 of the contract that, where the reason for terminating the employment contract include being guilty of any serious misconduct, the employer is entitled to terminate the contract after due compliance with its disciplinary code and procedures. The applicant therefore has, in my view, established that he has a contractual entitlement to a disciplinary hearing. Insofar as there clearly has been no compliance with this contractual obligation to hold a disciplinary hearing before terminating the contract, the termination of the contract was unlawful.

[21] Apart from the fact that the applicant has a contractual right to a hearing, the applicant also has an entitlement to a hearing in terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010.[9] In terms of these Regulations, an employee has the right to a disciplinary hearing where there are allegations of serious misconduct (regulation 5 and 8). In terms of regulation 5 of the Regulations it is clear that it is mandatory for the respondent to resolve to institute disciplinary proceedings against a senior manager after having considered any report prepared by an investigator into allegations of misconduct levelled against a senior manager. This is in fact exactly what had happened in August 2014 when the applicant was charged to appear before a disciplinary hearing. It is also common cause that while the enquiry was still ongoing the respondent's attorneys terminated the applicant's employment. I am in agreement that the termination of the applicant's contract therefore also violated the regulatory framework governing disciplinary procedures for alleged

[9] Published under Government Notice 344 in government Gazette 34213, dated 21 April 2011. Commencement date: 21 April 2011

misconduct which is binding on the respondents. The respondent therefore not only breached clause 18 of the contract of employment but also Regulations 5; 8 and 10 of the Disciplinary Regulations.

[22] There is a third reason why the termination of the contract was unlawful. The respondent had made an election that the manner it was going to deal with the allegations against the applicant, including the issue of Facebook postings (which ultimately was the reason given for the termination of the contract) would be through a disciplinary hearing. I am in agreement that having elected to do so the respondent is obliged to continue with that process. The centrality of the doctrine of election in our law has been endorsed by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration and Others:*[10]

> "[54] The principle of the right of election is a fundamental one in our law. Equity made an election not to ask Mr Mawelele to render his services, nor did they offer him alternative employment. When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte face is prejudicial or is unfair to another. As long as an employee makes himself or herself available to perform his or her contractual obligation in terms of the contract of employment, he or she is entitled to payment despite the fact that the employer did not use his or her services. Mr Mawelele cannot, in the circumstances, be prejudiced by reason of the manner in which Equity exercised its election."

[23] I am in agreement that in light of the fact that the respondent chose to follow a disciplinary process to deal with the issues of misconduct against the applicant (including the issue of the Facebook postings made by the applicant), it cannot in the middle of the process abandon the process and seek to exercise a contractual right: It is bound by the election which it has made. See in this regard *Ngubeni v National Youth Development Agency and another.* [11]

> "[17] Even if I am wrong in coming to the conclusion that Ngubeni's contract of employment entitled him to a fair procedure before the termination of his employment on grounds of misconduct, the fact remains that the NYDA's letter to Ngubeni on 27 July offered him a hearing on specific terms. The

[10] (2008) 29 *ILJ* 2507 (CC).
[11] (2014) 35 *ILJ* 1356 (LC).

> NYDA could have said, as envisaged by the Code of Good Practice: Dismissal, that Ngubeni be afforded the opportunity to state a case in an informal manner in response to the allegations against him. This is what the code of good practice envisages. Instead, for reasons known only to it, the NYDA offered Ngubeni a procedure that would have made any criminal court proud. Ngubeni accepted those terms, and the enquiry was commenced on that agreed basis. In these circumstances, it is not open to the NYDA unilaterally to change the terms of that agreement, or as it has in effect done, to renege on the agreement.
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> [18] Having found that clause 10.1 of the employment contract requires the NYDA to afford Ngubeni a fair disciplinary procedure prior to terminating his contract, it remains to consider whether the NYDA's conduct amounted to a breach of that clause. This the NYDA cannot seriously contest - its case is that Ngubeni is not entitled to a hearing. As I have indicated, it is not disputed that Ngubeni's contract was terminated before he presented his version to the chair of the hearing, either by giving evidence himself or by calling witnesses. All the board had before it, assuming it was furnished with the full record of the incomplete hearing, was its own version. It is obvious that there was no fair procedure afforded Ngubeni before the termination of his contract, and self-evident that the NYDA acted in breach of clause 10.1
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> [19] Insofar as it may be contended that the remedy of specific performance is either unavailable or inappropriate, the starting point is to note that s 77A*(e)* of the BCEA specifically empowers this court to make such orders. In *Santos Professional Football Club (Pty) Ltd v Igesund and another* 2003 (5) SA 73 (C); (2002) 23 ILJ 2001 (C), the court noted that courts in general should be 'slow and cautious' in not enforcing contracts, and that performance should be refused only where a recognized hardship to the defaulting party is proved."

[24] In the present circumstances the proceedings were interrupted at the point where the respondent had already led its third witness. There is no evidence on record that the applicant had been invited to address the disciplinary hearing and to put his case or to make submissions as to why he should not be found guilty and dismissed. I am in agreement with the submission that this premature termination of the contract constitutes a material and unlawful bridge thereof.

<u>The remedy of specific performance</u>

[25] The remedy of specific performance is available to the applicant. In this regard section 77(A) of the Basic Conditions of Employment Act[12] empowers this Court to make such an order although it is recognised that the Court will only grant such an order where recognised hardship to the defaulting party is proved *(Santos Professional Football club (Pty) Ltd v Igesund and Another 2003 (5) SA 73 (C)).* No such facts have been placed before the Court except for an allegation that any relief sought in the Notice of Motion is moot at this stage. I can find no persuasive reason to refuse specific performance (reinstatement). Furthermore, the applicant was on suspension at the time of termination of his contract. His suspension may continue pending the outcome of the hearing.

[26] The applicant is entitled to claim specific performance and he is not obliged to cancel the contract and claim damages at a later stage. I am also persuaded that the balance of convenience favours the applicant. The applicant will suffer irreparable harm should the relief not be granted whereas the respondent will suffer little inconvenience by simply proceeding with a process it has already started.

[27] I have decided to allow the application with costs. The applicant had to approach this Court on an urgent basis to defend his name and is therefore, in my view, entitled to his costs.

Order

[28] In the event the following order is made;

28.1 The decision by the First Respondent to terminate the Applicant's contract of employment was in breach of his contract.

28.2 The termination of the Applicant's contract of employment is set aside and the Applicant is reinstated until there has been compliance with clause 18.2 of his contract of employment.

28.3 The Respondent to pay the costs including the costs of two counsel.

AC Basson

Judge of the Labour Court of South Africa

[12] Act 75 of 1997

Appearances

For the Applicant : Advocate T Ngcukaitobi with Advocate R Tulk

Instructed by : Qina and Sekhabisa Incorporated

For the Respondent: Advocate ESJ Van Graan SC

Instructed by : Dyason Incorporated