IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: DA2/2000

In the matter between:

VRYHEID TRANSITIONAL LOCAL AUTHORITY Appellant

and

SIBUSISO VINCENT BIYELA Respondent

JUDGMENT:

VAN REENEN AJA:

[1] This is an appeal against an order in an application brought in terms of section 46(9) of the Labour Relations Act, No 28 of 1956 (the Labour Relations Act), declaring the dismissal of the respondent invalid and ordering the reinstatement of the respondent retroactively to the date of his dismissal on terms not less favourable than those that governed his conditions employment prior to his dismissal.

[2] The appellant came into existence on 14 March 1995, as a result of the amalgamation of the Town Council for the Borough of Vryheid, the Bhekuzulu Town Committee and the Town Council of eMondlo.

[3] Such amalgamation came about as a result of the exercise

by the Minister of Local Government and Housing of the province of Kwazulu-Natal of the powers vested in him by section 10, read with the proviso to section 7(2)(b), of the Local Government Transition Act, No 209 of 1993 (the Local Government Transition Act) and promulgated in the Provincial Gazette of KwaZulu-Natal, No LG95, 1995 on 14 March 1994 (the Proclamation).

[4] The respondent was as from February 1992 employed as chief executive officer/town clerk of the Bhekuzulu Town Committee.

[5] The Black Local Authorities Staff Regulations (the staff regulations), promulgated on 25 November 1983 in Government Gazette No 8980 as regulation 2568, pursuant to the powers vested in the then Minister of Co-operation and Development by section 56(1) of the Black Local Authorities Act, No 102 of 1982 (the Black Local Authorities Act), were "statutorily injected" (per Hoexter JA in **Administrator Transvaal and Others v Zenzile and Others** 1991(1) SA 21 (AD) at 34 G) into the contractual relationship between the Bhekuzulu Town Council and the respondent and placed it apart from an ordinary contract of employment (See: **Zenzile's** case at 35 B – C).

[6] As a result of the repeal of the Black Local Authorities Act by section 13 of the Local Government Transition Act No 209 of 1993, with effect from 2 February 1994, and absent any statutory provisions that ensured their preservation, the staff regulations lost their statutory force (See: **Hatch v**

Koopoomal 1936 AD 190 at 197; **R v Madine** 1961(3) SA 29 (AD) at 30 H – 31 A), but continued to remain an integral part of the contractual relationship between the Bhekuzulu Town Council and the respondent (Cf: Section 12(2)(c) of the Interpretation Act, No 33 of 1957).

[7] In terms of section 6(1) of the proclamation all the staff of the Bhekuzulu Town Council, including the respondent, were transferred to and appointed to the service of the appellant with effect from 14 March 1995.

[8] Paragraph 8 of the proclamation provides as follows -

> "(2) The town clerks, town treasurer, medical officer of health and heads of departments of the dissolved local government bodies shall retain the service benefits pertaining to their posts with such local government bodies until such service benefits are changed in accordance with a proclamation as envisaged in paragraph 7(1).
>
> (The "proclamation as envisaged in paragraph 7(1)" is one in terms of sub-sections 10(3)(f)(i) and 10(3)(j) of the Local Government Transition Act.)
>
> 3) The terms and conditions of employment of the officials referred to in sub-paragraphs (1) and (2) may be changed by the Council to conditions no less favourable than under which they serve and in accordance with the applicable labour law."

[9] Paragraph 9(a) of the proclamation provides that "the assets, liabilities, rights and obligations of the local government bodies are hereby transferred to the council". It is apparent therefrom, as

well as the provisions of paragraphs 8(2) and (3) of the proclamation, that the terms of the contractual relationship between the appellant and the respondent are identical to those that previously existed between the Bhekuzulu Town Council and the respondent.

[10] Staff regulation 12(1) provided that any employee guilty of any of the acts of misconduct enumerated therein, shall be dealt with in accordance with staff regulation 13 which, inter alia, provided that -

a) if in the opinion of the local authority grounds exist for suspecting that an employee is guilty of misconduct it shall appoint a committee consisting of three members from the ranks of the members of such local authority and of its employees, to investigate such suspicion, and nominate one of the members of the committee to be chairman (staff regulation 13(1)).

b) the local authority shall appoint a prosecutor to attend the enquiry and adduce evidence and arguments in support of the allegations of, inter alia, such misconduct and cross-examine any person who has given evidence to refute such allegations (staff regulation 13(10)).

c) if the committee finds that the employee concerned is, inter alia, guilty of misconduct, such employee may, within 14 days after the date on which he or she is

informed of the finding, appeal against such a finding to the local authority concerned by giving a written notice of appeal setting out fully the grounds upon which the appeal is based (staff regulation 13(17)).

d) If the committee finds that an employee is guilty of misconduct the chairman of the committee shall as soon as possible after the finalization of the inquiry forward to the local authority (i) any documentary evidence admitted thereat; (ii) a written statement of the committee's findings and its reasons therefor; and (iii) any observations on the inquiry that the committee desires to make; and iv) in the event of there being a minority finding, the particular member's reasons therefor and any remarks in regard to the inquiry that such member wishes to make (staff regulation 13(18)(a)).

e) The local authority concerned, excluding any of its members that were members of the committee, shall consider the record and documents submitted to it by the committee and may uphold the appeal wholly or in part, or alter the finding or dismiss the appeal, and confirm the finding wholly or in part, or may, before arriving at a final decision, remit any question in connection with the inquiry to the committee and direct it to report thereon or hold a further inquiry and arrive at a finding thereon (staff regulation 13(21)).

f) If a disciplinary committee has found that an employee

is guilty of misconduct as charged, and if such employee has not appealed against the findings, or has appealed but his or her appeal has been dismissed, the local authority concerned may –

i) decide to take no further steps in the case;

ii) caution or reprimand such employee;

iii) impose a fine not exceeding R200 upon such employee, which fine may be recovered by deduction from his or her emoluments in such instalments as the local authority may determine;

iv) reduce such employee's salary or grading or both his or her salary and his or her grading to such extent as the local authority may determine or withhold his or her salary increment for a period not exceeding 12 months;

v) discharge such employee, or call upon him or her to resign from the service of the local authority from such date as the local authority may determine.

[11] The Executive Management Committee of the appellant on 10 July 1995 resolved to recommend to the appellant that:

"4. Powers be delegated to the Town Clerk to act on Council's behalf with regard to the Black Local Authorities staff Regulations of 25 November 1983 as amended;

5. Mr SV Biyela be suspended with full pay due to alleged misconduct with immediate effect and he not be permitted to have any communication and/or contact with any municipal officials during normal working hours or enter any

municipal building in his office capacity without prior instruction from the Town Clerk, the Town Secretary or the Provincial Committee of Enquiry;"

[12] The appellant at an ordinary monthly meeting held on 31 July 1995, resolved that "the minutes of the meeting of the Executive Management Committee held on 10 July 1995 be confirmed and approved".

[13] Mr G Olckers, the chief executive officer/town clerk of the appellant, pursuant to the powers delegated to him as aforementioned, appointed Mr Abraham Jacobus Steyn Ackerman (the then head of the personnel section), Mr M. Dickason (the deputy town treasurer) and Mr C. Louwrens (the deputy borough engineer) as a committee to deal with all disciplinary hearings involving the appellant's employees under the chairmanship of Mr Ackerman.

[14] The appellant, during the latter part of 1994, appointed an appeals committee for disciplinary matters, chaired by one of its councillors Me Gezina Jacobs Steenkamp. The other three members of the committee were councillors P. Friend, I.A. Mulla and S. Pieters.

[15] After a number of postponements, the disciplinary committee covened on 28 September 1995, to investigate the following allegations of misconduct against the respondent –

"1. That in contravention of section 12(1)(b) of the Black Local Authority Staff

Regulations, published under Government Notice 2568, on 25 November 1983, as amended, (hereinafter referred to as the Staff Regulations) you on or about 22 march 1995 purported to be authorised to institute legal proceedings against inter alia the Minister of Local Government and Housing, and the Vryheid Transitional Local Council to prevent the proclamation of the Vryheid Transitional Local Council; and/or

2. That in contravention of section 12(1)(r) of the aforementioned Staff Regulations, on or about 16 April 1995, in order to cause prejudice or injury to a person in the employ of the Transitional Local Council, to wit the Chief Executive/Town clerk, mr G OLCKERS, made a false statement by laying a criminal charge of housebreaking and theft against the aforementioned official;
and/or

3. That you unlawfully and/or in contravention of the financial regulations for Black Local Government 1983, as amended, on or about 17 March 1995 removed an amount of R2 840,00 from the cash register in the Bhekuzulu Municipal Offices for private use.

[16] The respondent's legal representative at the commencement of the inquiry raised an objection to the legality of the manner in which the disciplinary committee had been constituted. After the objection had been dismissed the respondent and his legal representative withdrew from the proceedings and took no further part therein.

[17] The disciplinary committee, after it had heard the evidence of a number of witnesses, found the respondent guilty of all three charges of misconduct. The evidence was that all that was conveyed to the appeals committee was the findings of the disciplinary committee.

[18] The Respondent timeously delivered a notice of appeal in accordance with the provisions of staff regulation 13(17).

[19] The appeals committee listened to the mechanically recorded proceedings of the disciplinary committee, and on 3 November 1995, resolved that the respondent had correctly been found guilty and requested him to "submit in writing not later than 12:00 on 10 November 1995 mitigating circumstances" after which sentence would be passed and advised him thereof by letter.

The respondent did not avail himself of the opportunity to make any submissions in mitigation.

[20] When the appeals committee reconvened on 10 November 1995, the respondent failed to make any submissions in mitigation or to put in an appearance. The appeals committee's reaction to such failure is articulated as follows by Mrs Steenkamp:

> "…we had no option, because we took it that he absconded, and we had no other option than to terminate his services immediately."

The conclusion that the respondent had absconded was clearly misguided as in terms of the provisions of staff regulation 13(12)(c) there was no obligation on him to attend the inquiry personally or through a representative.

[21] The chief executive officer/town clerk of the appellant on 3

October 1998, addressed a letter in the following terms to the respondent:

"Dear Sir

TERMINATION OF SERVICES
I have to advise that the Appeal Committee at its meeting held on 10 November 1995 resolved that your services be terminated with immediate effect.
Your severance pay which will include two weeks pay in lieu of notice as determined by the Basic Conditions of Service Act, will be paid into your banking account."

[22] The respondent was of the view that his dismissal constituted an unfair labour practice within the meaning of section 1 of the Labour Relations Act, and as conciliation failed to yield a settlement of the dispute, the respondent in terms of section 46(9) of the said act, referred it to the Industrial Court for determination.

[23] By agreement between the legal representatives of the appellant and the respondent the only issues to be determined by the Industrial Court were firstly, whether the admitted non-compliance by the respondent with the provisions of the staff regulations relating to the institution of disciplinary proceedings against the respondent and secondly, whether the constitution of the disciplinary- and appeals committees, rendered the respondent's dismissal invalid as opposed to procedurally unfair.

[24] The court **a quo** was not alerted to the fact that the Black Local Authorities Act had been repealed and, without having considered the impact thereof on the regulations that were

promulgated thereunder, made the following findings that were pivotal to the outcome of the proceedings -

> "The dismissal of the applicant is void. I do not consider it necessary to look into the reason for such dismissal or to consider whether the respondent followed a fair procedure in effecting such dismissal. The dismissal of an employee in circumstances where dismissal is in contravention of statutory provisions is void "irrespective of whether justifiable cause for the dismissal exists and irrespective of whether other procedures were followed." In this regard, see Brassey et al in The New Labour Law: Juta (1987 at page 366).

It is proper that the lawfulness of the dismissal in question is taken into account as a preliminary step when fairness is considered. I find that the dismissal of the applicant was unlawful. This is the end of the matter.
I agree with Advocate De Wet's submission that this is a court of equity and not a court of law. However, I do not have the power to disregard the express provisions of a statute. The respondent as employer had a duty to comply with duties imposed upon by such statute and the fact that it failed to comply with such duty is fatal."

[25] The appeal before this court was limited to whether the court **a quo** erred in a) having found that the non-compliance with the provisions of the staff regulations rendered the disciplinary proceedings against the respondent invalid, resulting in an unlawful dismissal and; b) having ordered the retroactive reinstatement of the respondent on terms no less favourable than those that governed his employment prior to his dismissal.

[26] The concept "local authority" in regulation 1 of the staff regulations is defined as "a town council or village council", the rights and obligations whereof were transferred to the applicant in terms of proclamation 9(1)(b), so that a) the opinion that reasonable grounds existed for suspecting that the respondent was guilty of misconduct had to be formed by

the appellant (staff regulation 13(1); b) the appellant had to appoint the disciplinary committee, at least one incumbent whereof had to come from the ranks of its members (staff regulation 13(1)); c) the appellant had to function as an appeal tribunal (staff regulation 13(21)); and d) the appellant was empowered to consider the imposition of any of the prescribed sanctions in the event of a finding of guilty (staff regulation 13(25)).

[27] None of the aforementioned powers were specifically alluded to in staff regulation 68 which provides for the delegation by the appellant of its powers to an employee and accordingly, militates against the existence of an implied entitlement on the part of the appellant to delegate such powers (See: **L.C. Steyn: Uitleg van Wette,** 2nd Ed, 223).

[28] Assuming - on the basis of a benevolent reading of the recommendations of the Executive Management Committee that were confirmed and approved by the appellant on 31 July 1995 - that the appellant in fact formed the opinion that reasonable grounds existed for suspecting that the respondent was guilty of misconduct, the disciplinary committee was not appointed by the appellant but by its chief executive officer/town clerk who, despite the absence of expressed or implied powers permitting it, was delegated to act on the appellant's behalf "with regard to the Black Local Authorities Staff Regulations of 25 November 1983 as amended."

[29] The respondent in terms of staff regulation 13(1) was entitled to have any suspicion of misconduct on his part investigated by a committee of three, at least one member whereof had to be a

councillor, appointed by the appellant.

[30] The respondent, in terms of staff regulation 13(21), was furthermore entitled to an appeal to the appellant against the disciplinary committee's finding that he was guilty of misconduct and, if unsuccessful, to have the appellant consider and impose any of the sanctions prescribed by staff regulation 13(25). As already stated, the appellant deputed those functions to a committee consisting of only four of its members.

[31] The delegation by the appellant to its chief executive officer/town clerk of its powers with regard to the "Black Local Authorities Staff Regulations of 25 November 1983" and the devolution by the appellant to a committee consisting of four of its members of its appeal and sentencing functions, amounted to a relaxation of the stringent requirements of the staff regulations as regards disciplinary proceedings and to that extent, in my view, constituted a diminution of the respondent's conditions of service, in direct conflict with the express provisions of subordinate legislation, namely, proclamation 8(2) and (3) and rendered the respondent's dismissal null and void (See: **S.A. Diamond Workers' Union v The Master Diamond Cutters' Association of SA** 1983(3) ILJ 87 (1C) at 138 A – 139 A; **Brassey et al: The New Labour Law** (Juta 1989) 366). There also is ample authority for the proposition that any decision of a

disciplinary body, consisting of less than the prescribed number of incumbents, is a nullity (See: **Ras v Behari Lal and Others v The King Emperor** 150 LTR 3, **R v Silber** 1940 AD 187; **R v Price** 1955(1) SA 219 (A); **Schoultz v Personeel Advies-Komitee Munisipaliteit George** 1983(4) SA 689 (C) at 710 B – 711 B).

[32] In view of the aforegoing I am of the opinion that the termination on 10 November 1995, of the respondent's services with immediate effect, was invalid and did not bring about an end to the employer/employee relationship between the appellant and the respondent. Accordingly, the purported dismissal of the respondent, in my view, constituted an unfair labour practice and the Industrial Court correctly exercised the powers bestowed upon it by subsection 46(9)(c) of the Labour Relations Act, when it ordered the retroactive reinstatement of the respondent.

[33] In terms of item 5 of the resolution of the Executive Management Committee of the Appellant on 10 July 1995, the respondent was, inter alia, suspended on full pay pending the disciplinary inquiry. As in terms of staff regulation 68 thát function was capable of being delegated by the appellant, such suspension is unaffected by the outcome of this appeal.

[34] In my view, the appeal should be dismissed with costs.

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D. VAN REENEN
ACTING JUDGE OF APPEAL

I agree. The appeal is dismissed with costs.

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RMM ZONDO

JUDGE PRESIDENT

I agree.

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M.T.R. MOGOENG

JUDGE OF APPEAL

Appearances:

For the Appellant:
Adv A. de Wet instructed by Cox & Partners, Vryheid.

For the Respondent:
Adv V. Soni instructed by Ngwenya & Zwane, Empangeni.

Date of Hearing: 22 November 2001

Date of Judgment: 28 March 2002