IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

Reportable

CASE NO: **D242/03**

Date heard:

2003/04/15

Date delivered: 2003/04/16

In the matter between:

PRAKASH BISSOON Applicant

and

LEVER PONDS (PTY) LIMITED First Respondent

GAVIN WARD N.O. Second Respondent

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY
ON 16 APRIL 2003

ON BEHALF OF APPLICANT: ADVOCATE TOBIAS

INSTRUCTED BY : JOHAN OBERHOLZER AND

COMPANY

ON BEHALF OF RESPONDENTS: ADVOCATE VAN NIEKERK

INSTRUCTED BY : DENEYS REITZ INC.

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JUDGMENT

PILLAY J

[1] This is an urgent application in which an order is sought, *inter alia*, interdicting the respondent from holding a disciplinary enquiry against the applicant unless the applicant is allowed legal representation and provided with further particulars; and further directing the second respondent to recuse himself. Other relief sought are either ancillary or were not pursued in argument.

[2] An interdict is an extraordinary remedy which is allowed in exceptional circumstances. The Labour Court has been slow to grant applications interdicting employers from holding disciplinary enquiries primarily because employees who are aggrieved by the outcome of disciplinary action have recourse to other remedies via mediation and arbitration. To interdict an enquiry before the employer has determined the

guilt or innocence of the employee is premature. (*South African Commercial Catering and Allied Workers Union & Others v Truworths & Others* (1999) 20 ILJ 639 (LC) at 641 H - J per SEADY AJ. Also *Police and Prison Civil Rights Union v Minister of Correctional Services & Others* (1999) 20 ILJ 2416 (LC) per JALI J, at paragraph 53 and the cases cited therein; *Ndlovu v Transnet Limited trading as Portnet* (1997) 18 ILJ 1031 (LC) per LANDMAN J.)

[3] Whether an employer gives an employee a hearing that is substantively and procedurally fair is best determined after an enquiry is held and a decision is made about the guilt or innocence of the employee and the penalty, if any, to be imposed. To determine the fairness of an inquiry in a piecemeal fashion by means of urgent application must be discouraged for, amongst other things, it thwarts the objective of the Labour Relations Act No 66 of 1995 (the "LRA"), to resolve disputes expeditiously. Furthermore, it is an interference in the execution by the employer of its statutory and contractual duty to conduct a fair enquiry.

[4] The Court will intervene in a disciplinary enquiry if a grave

injustice might otherwise result. (*Police and Prison Civil Rights Union* case, at paragraph 55. *Moropane v Gilbeys Distillers and Vintners (Pty) Limited & Another* (1997) 10 BLLR 1320 (LC); *SACCAWU v Truworths (supra)* and *Mantzaris v University of Durban-Westville & Others* (2000) 21 ILJ 1818 (LC).)

[5] The first ground on which this application is launched is that the applicant, it is submitted, does not have "the fullest and fairest" information about the case he has to meet. For what constitutes full and fair information, reliance was placed on *Van Wyk v Director of Education & Another* 1974 (1) SA 396 (N) at 400 H - 401 A per Milne J; *Van Rooyen v Dutch Reformed Church, Utrecht,* 1915 NPD 323 at 331; and *Kimmelman v Amalgamated Society of Woodworkers of South Africa* 1941 WLD 212 at 219.

[6] The charges against the applicant are:

> "Gross misconduct, in that over the period May 2000 to February 2001:
>
> (1) You individually or in collusion with Mr Vanker of Packaging and Recycling City

CC misappropriated monies due to the company in respect of the sale of scrap metals, causing the company to suffer a loss of approximately R400, 000. 00 (Four hundred thousand Rand).

(2) You wrongfully and unlawfully, alternatively negligently, and in dereliction of your duties, concluded an agreement with Packaging and Recycling City CC for the removal and sale of waste material without ensuring that proper financial controls and procedures were in place and being followed."

[7] It must be noted that all three cases relied upon by the applicant in support of his request for further particulars predate the LRA, its Code of Good Practice: Dismissal in schedule 8 and the Constitution of the Republic of South Africa Act No 108 of 1996 by at least 19 years.

[8] The degree of particularity that is required for a disciplinary inquiry is suggested in section 4(1) of the Code which provides:

"The employer should notify the employee

> of the allegations using a form and language that the employee can reasonably understand."

[9] In the *Police and Prison Civil Rights* case (*supra*) at paragraph 33, JALI J also considered the judgment of MILNE J in *Van Wyk (supra)*, and agreed that the charges should be sufficient to inform the employee of the case it is expected to meet. (See also *Ndlovu* (*supra*) and *Zeelie v Price Forbes (Northern Province) (1)* (2001) 22 ILJ 2053 (LC) per JALI J.)

[10] The charges in this case are in a form and language that the applicant ought reasonably to understand. It provides sufficient particularity about the offences. It informs the applicant what he is alleged to have done and the period over which he is alleged to have committed the offences. Such particularity is sufficient to put the applicant to his defence. (*Zeelie* (*supra*).)

[11] Even if the charges were not sufficiently detailed, the applicant was sent a copy of a letter dated 12 June 2001 from the respondent to the attorneys for Packaging and Recylcling City CC in which the basis and computation of the

alleged loss of R400 000.00 was given. His evidence that he did not receive the letter is irrelevant to the question as to whether he now has sufficient particulars to present his defence. He would certainly have become aware of its contents on receiving the respondents' answering affidavits to which the letter is attached.

[12] Furthermore, many of the questions asked go to the procedure that the respondents might follow during the enquiry. If the procedure adopted does not meet the required standard of fairness, the applicant has a remedy through mediation and arbitration.

[13] The applicant and his attorney obviously understand the charges sufficiently if they conclude, as they do, that the matter is complex.

[14] In the circumstances, I hold that there is no duty on the employer to supply the further particulars before the disciplinary enquiry.

[15] The second ground is that the applicant perceives the second respondent to be biased. (*Moch v Nedtravel (Pty) Limited*

trading as American Express Travel Service 1996 (3) SA 1 (AD) and *BTR Industries South Africa (Pty) Limited & Others v Metal and Allied Workers' Union & Another* 1992 (3) SA 673 (A) at 693 I - J).

[16] The basis for this perception is that the second respondent allegedly informed the applicant and his representatives that he intended to take instructions from management after hearing legal argument about, *inter alia*, the further particulars and legal representation. Although the second respondent cannot recall using the word "instructions", and considered it unlikely that he in fact did so, he nevertheless concedes that he undertook to consult with senior management. What he in fact did, he testified, was to consult with an attorney and obtain advice on the right to legal representation. He denies taking legal instruction from anyone and discussing the matter with anyone from management.

[17] The applicant has no knowledge of what the second respondent actually did and therefore cannot dispute his evidence. The advice the second respondent got was to the

effect that there is no absolute right to legal representation at disciplinary enquiries. He then applied his discretion. His legal adviser was not involved in the exercise of that discretion.

[18] The submission that the second respondent was influenced by management to refuse the request for legal representation is speculative and not born out by the facts. The second respondent's view was that the enquiry would not be required to consider any complex legal issues. This reason for refusing the request for legal representation was justiafiable, consistent with the limited information before him (discussed further below) and with approach in the recent decision of the Supreme Court of Appeal in *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* (2002) 23 ILJ 1531 (SCA)). His approach therefore does not manifest bias.

[19] Given the second respondent's evidence, his statement that he would consult with management is therefore not on its own sufficient to invoke a reasonable perception of bias.

[20] Furthermore, chairpersons of disciplinary enquiries who are drawn from the management of the employer may not be sufficiently knowledgeable about labour law and industrial relations practice. Having heard submissions from the applicant's lawyers about legal representation, the second respondent quite properly

got advice about the law to enable him to making a ruling on a matter about which he was not adequately qualified. A mistake about the law or procedure to be applied at a disciplinary enquiry can be inconvenient and costly for both parties, and should be avoided, if necessary, by taking expert advice.

[21] Managers who chair enquiries are not neutral or oblivious to the employer's interests. They are not judicial officers and they cannot reasonably be expected to exercise the same degree of judicial discipline and independence. Despite this, industrial relations practice permits managers to chair enquiries. Hence the law provides mediation and adjudication to correct any unfairness.

[22] The second respondent falls outside of line management and is, to that extent, more independent than a line manager. This suggests to me that the first respondent is attempting to provide the applicant with an independent chairperson. It would be premature at this stage to hold that the second respondent will not be impartial.

[23] The order for the recusal of the second respondent is refused.

[24] The third ground on which the interdict is sought is the refusal of legal representation for the applicant during the enquiry.

[25] The parties are *ad idem* that there is no absolute bar to legal representation at a disciplinary enquiry. Nor is there an automatic right to such representation. (*Hamata, supra*.) In

complex and serious cases it should be allowed. (*Police and Prison Civil Rights Union (supra)*.)

[26] It is common cause that this case is serious. But, in my view, it is no more so than any other potential dismissal case. The applicant advanced no reasons to the second respondent about the complexity of the matter. He ought to have placed such information before the second respondent that would have persuaded the latter that the matter was complex. He cannot be heard to complain now that the second respondent had no other information but the charge sheet on which to decide the complexity of the matter.

[27] In reply, the applicant contends that the matter is complex because his attorney, having consulted with him, is of that opinion. The attorney refuses to disclose the information on which he bases this opinion because it is confidential and privileged. That is a prerogative of the applicant. But, that stance does not enable the applicant to discharge the *onus* of proving the complexity of the matter. Nor does it move the Court to exercise its discretion in his favour.

[28] The applicant relies on an opinion of the attorney who has not been qualified as an expert before this Court. Like the second respondent, I am also left with not a shred of evidence as to why the matter is complex. I have no reason to prefer the opinion of the applicant's attorney to that of the respondents. The charges on their own and as amplified by the letter dated 12 June 2001, give no indication that the matter is complex. The applicant has not taken the Court into its confidence to present a version. If his defence is to remain a bare denial of all the allegations then the matter can hardly be complex for the applicant.

[29] Many breaches of workplace rules could result in criminal and civil proceedings. That does not *per se* make the matter more or less complicated.

[30] It was submitted that on the first respondent's version alone the alternative charge was complex as it related to the applicant's performance.

[31] When it compared the charges against the applicant with a poor performance dispute, the first respondent was obviously referring to the difficulties inherent in assessing the quality of performance. The alternative charge, I agree with Mr van Niekerk for the respondents, is not about the applicant's quality of

performance but misconduct arising from his failure to comply with his job description. The latter is more easily established by objective facts, whereas the former may involve a degree of subjectivity.

[32] In my view therefore, the matter is not so complex as to warrant legal representation at the disciplinary inquiry.

[33] The disciplinary enquiry has a specific, limited purpose. It is the execution by an employer of its statutory and contractual obligation of determining the guilt or innocence of an employee through a fair procedure. The respondents should be given an opportunity to carry out this obligation first before their actions are adjudicated.

[34] In all the circumstances, the application is dismissed with costs.

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PILLAY, J