IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JS 637/07

In the matter between:

MONGEZI TSHONGWENI Applicant

And

ERKUHULENI METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

VAN NIEKERK J

Introduction

[1] This court has been reproached, justifiably, for systemic delays in a statutory dispute resolution system designed to ensure expeditious, informal and efficient justice in the workplace.[1] I have had occasion previously to comment on the role of practitioners in contributing to the delay in finalising litigation initiated in this court, and noted that far from the judge-driven system of case management established by the rules of this court, practitioners effectively

[1] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 *ILJ* 273 (CC) at 292. See also *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 *ILJ* 2507 (CC), and *Netherburn Engineering t/a Netherburn Ceramics v Mudau NO & others* (2009) 30 *ILJ* 1521 (CC). For similar criticism by the Supreme Court of Appeal, see *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2009) 30 *ILJ* 829 (SCA) and *Republican Press (Pty) Ltd v CEPPWAWU & others* (2007) 28 *ILJ* 2503 (SCA).

manage the course of litigation and to a large extent, control its timing.[2] This is not to suggest that practitioners are the only parties responsible for prolonging proceedings; on the contrary, the fact that the court-managed process envisaged by the rules is not functional is a reflection on this court and the manner in which it functions. But systemic delay in the labour dispute resolution system is rooted more deeply than the managerial or administrative shortcomings of any particular institution. It also extends to the manner in which disciplinary enquiries are conducted by employers, and especially the phenomenon of enquiries chaired by practising lawyers at which both parties are legally represented.

[2] The present case is an example of an individual dismissal dispute that from the outset was handled in a manner that entirely undermines the purpose of the Labour Relations Act (LRA). That purpose is recorded in the Explanatory Memorandum that accompanied the first draft of the current LRA.[3] The Memorandum dealt with what was referred to as the highly legalistic and expensive system of dispute resolution, and proposed the following solution:

> "*In cases concerning the alleged misconduct of workers, the courts have generally required an employer to follow an elaborate pre-dismissal procedure and have thereafter conducted a fresh, full hearing on the merits of the case. Apart from its duplication and lengthiness, this approach has obvious cost implications for the parties and the State. The draft Bill requires a fair, but brief, pre-dismissal procedure, and quick arbitration on the merits of the case…*
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> *By providing for the determination of dismissal dispute by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal… In order or this alternative process to credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These*

[2] *Karan t/a KAran Beef Feedlot & another v Randall* (2009) 30 *ILJ* 2937
[3] The memorandum is published in (1995) 16 *ILJ* 268 -336.

are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies.

[3] Just how elusive the objects of the LRA remain and how legalism continues to undermine the purpose of the Act is well-illustrated by the facts of this case. The applicant was dismissed in July 2006. Far from the brief pre-dismissal procedure envisaged by the Act,[4] the disciplinary enquiry was chaired by a member of the Johannesburg Bar, and both the applicant and respondents were represented by practising lawyers. The transcript of the disciplinary hearing extends to some 2240 pages, the bulk of it devoted to technical legal issues. The applicant was found guilty of two charges of misconduct and dismissed. The applicant disputed the fairness of his dismissal, and referred the matter to the CCMA. After conciliation failed, the applicant applied in terms of s 191 of the LRA to have the matter referred to this court for adjudication. The application was granted, for reasons that I am unable to fathom. None of the criteria set out in s 191(6) apply in the present instance, and there is no basis for the ruling made by the director of the CCMA to refer the dispute to this Court for adjudication. The matter was referred to this court more than a year later, on 4 September 2007, when the applicant's attorneys filed a statement of claim. After the close of pleadings, the Registrar allocated 12 May 2008 as a trial date. The matter was removed from the roll. After an interlocutory application concerning pre-trial documentation heard on 16 April 2009, the matter was again enrolled for trial on 30 November 2009. For reasons that are not apparent, the trial did not proceed on that date. The matter was again enrolled for trial on 19 April 2010, in circumstances where the papers (excluding the 2240 pages that comprise the transcript of the disciplinary enquiry) exceed 1500 pages, and where the pre-trial documentation filed exhibits a lamentable lack of any willingness or ability even to narrow the issues in dispute. The trial was set down for ten court days, and during its course, the applicant's counsel advised the court that the trial was likely to continue for a period longer than that scheduled.

[4] See especially the Code of Good Practice and *Avril Elizabeth Home for the Mentally Handicapped C CMMA & others* [2006] 9 BLLR 833 (LC).

[4] At various stages, the court sought formally and informally to intervene in order to narrow the issues in dispute and in particular, to curtail the lengthy cross examination, but to no avail. The first witness, Mr. Khanye, gave evidence, as a matter of general background, about the nature and application of the respondent's tender policies and procedures. Mr. Mamane, who appeared for the applicant, cross-examined him for three days. The applicant's representatives had clearly adopted a strategy of war by attrition - a style of litigation inimical to the purposes underlying the LRA and not welcome in this court.

[5] Matters took a different turn when Mr. Boda, who appeared for the respondent, elected at the end of Mr. Khanye's evidence to seek the provisional admission into evidence of the record of the disciplinary hearing, and then closed his case. The applicant then testified, after which he closed his case. In the event, the trial was completed within five court days.

[6] The court is now required, almost four years after the date of dismissal, to consider a claim of unfair dismissal (and reinstatement) by an individual employee, in circumstances where the papers before the court exceed 5000 pages and where both parties and their representatives (excluding Mr. Boda, who came into the matter only when he was briefed on trial) appeared intent to conduct the proceedings from beginning to end in as adversarial a manner as possible, and to obfuscate the real issues as far as possible. Froneman J noted in the *Billiton* judgment (*supra*) that systemic delay is not an impersonal, inevitable and independent force – people within the labour dispute resolution process cause delay. Those who do so should be held accountable.

Section 191 (6)

[7] The present matter concerns a dispute about the dismissal of an individual employee for misconduct, and comes before the court after a referral by the director of the CCMA in terms of s 191(6), thus crossing the jurisdictional lines between the CCMA and this court. In *Gibbs v Nedcor Limited* [1997] 12 BLLR 1580 (LC), Jali AJ held that a dispute that is referred to this court in terms of s 191 (6) must be heard by this court on the same terms as an arbitrator would, i.e. the applicant is entitled to a re-hearing on the merits of the allegations of misconduct brought against him. The parties agreed that this was a correct interpretation of the Act, and that the proceedings would be conducted on the basis that it was for the respondent to establish in these proceedings that the applicant's dismissal was substantively and procedurally fair.

Factual background

[8] The following additional facts are relevant. The applicant was employed on a fixed term contract that commenced on 1 April 2002. The contract was entered into for a period of five years, subject to the respondent's right to terminate the contract summarily in the event that the applicant committed any act of serious misconduct. After a disciplinary enquiry conducted by Adv H West, the applicant was found not guilty of certain of the charges brought against him, but guilty on the following charges:

> "*Misleading the City Manager Mr. Paul Maseko with regard to the appointment of existing companies to serves summonses for the Metropolitan Municipality on a month to month basis.*
> *Appointing companies to serve summonses for the Ekurhuleni Metropolitan Municipality without having proper authority to do so and without following proper procedures and without having regard to the stated tender requirements for the prospective appointees to duly render the services required to the Ekurhuleni Metropolitan Municipality*"

On 5 July 2006, approximately nine months before the applicant's contract was to expire, the respondent was dismissed.

[9] Given the conclusion to which I have come on the merits of the matter, it is not necessary for me to canvass the substance of the allegations against the applicant in any detail. It suffices to say that the applicant, the executive director for public safety, headed the department given the responsibility to appoint service providers to serve summonses under the Criminal Procedure Act. The specification required the appointment of service providers on a month to month basis, for a period of three months. An advertisement was issued in February 2003, inviting bids for appointment. Each bidder completed a pro forma document. The document required inter alia the bidder to furnish an original tax clearance certificate not older than six months, banking details, details of infrastructure and resources available, the size of the enterprise, details of its ownership, SSME status, job creation, details of similar work previously undertaken, references, etc. After the opening of tenders on 5 March 2003, five service providers were appointed. The respondent contends that the bids submitted by these service providers did not meet the basic requirements of the applicable tender policies, and that other bids, which did comply, were rejected. On 24 June 2003, the applicant wrote a letter to the respondent seeking to extend the appointment of four of the service providers appointed in March. The applicant claims that he had no knowledge of the content of any of the bid documents, and no knowledge or control over the appointment of successful bidders. The recommendation that he made under cover of the letter signed by him was made in circumstances where he relied on officials responsible for procurement. The applicant was suspended on 4 October 2004, and dismissed, as I have indicated above, on 5 July 2006.

[10] Mr. Khanye, employed by the respondent as a chief accountant, gave evidence concerning the tender process applicable in terms of the respondent's

policy. In brief, he testified that the department requiring a particular service drafted a specification, which was forwarded to the tender office. An advertisement was complied and published on the basis of the specifications, and tender documents were drawn up. The procedure is quite clear – the tender document must be properly completed, and all documentation (e.g. income tax clearance certificates) must be attached. A failure to do so is generally fatal, and will result in the disqualification of the bid. In his cross examination, Mr. Mamane sought to elicit a concession to the effect that where a tender document was incomplete it was competent for the department requiring the services effectively to waive the tender requirements, and to award a tender regardless. Mr. Khanye, a senior official with some 30 years experience in these matters, was resolute in his denial that it was competent for a department to act as Mr. Mamane suggested. All employees of the respondent were bound by the tender policy, and were obliged to apply it.

[11] Mr. Mamane accused Mr. Khanye of being dogmatic, and submitted that I view his evidence in that light. While at the end of the day Mr Khanye's evidence, being the background sketch that it was, contributes little to a determination of the issues in dispute, I have no hesitation in accepting his evidence, and see no need to qualify that acceptance. His evidence was clear, and despite a protracted but ultimately fruitless cross-examination, his responses remained consistent. Mr. Khanye had occasion more than once to remark that the thrust of the cross-examination was astounding – it suggested that the applicant was above the prescribed policies and procedures. In matters relating to the awarding of tenders by both private and public entities, dogmatism is the guardian of integrity. If Mr. Khanye's approach was dogmatic, he is to be commended rather than criticised.

The admissibility as evidence of the record of the disciplinary enquiry

[12] Mr. Boda sought to have the record of the disciplinary enquiry admitted as evidence first to rely on certain admissions made by the applicant during the hearing and secondly, to substantiate the respondent's case on procedural fairness and especially to establish that the arbitrator was unbiased and that the proceedings were authorised. Mr. Mamane objected to the admission of the record on the basis that it was hearsay.

[13] Given the limited purpose for which Mr Boda ultimately relied ion the record of the disciplinary enquiry, I need say no more than that the parties are agreed that the record is what it purports to be, and that there is no dispute that the record reflects what in fact took place at the disciplinary hearing. In relation to the admissibility of hearsay evidence, generally speaking, this court does not adopt the approach that Mr Mamane advocates. For example, in *Naraindath v CCMA & others* (2000) 21*ILJ* 1151 (LC) Wallis AJ (as he then was) held that an arbitrating commissioner was entitled to have regard to the record of an internal disciplinary hearing and to the evidence of a witness who had been cross examined at the hearing – the fact that the evidence was hearsay did not render it inadmissible. This approach was recently approved by the Labour Appeal Court in *the Foschini Group v Maidi & others* (JA 12/08 25 March 2010)).

[14] I did not understand Mr Boda to rely on the records of the disciplinary enquiry to establish the substantive fairness of the applicant's dismissal. Rather, he relied on it to for the more limited purpose of establishing that the applicant was dismissed after a fair procedure. In this regard, I have already expressed the view that the procedure adopted by the respondent was not consistent with the objectives underlying the LRA. The statutory requirements for fair procedure are clearly spelled out in the Code of Good Practice: Dismissal, and are elaborated on in *Avril Elizabeth Homes for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC). In so far as the disciplinary enquiry was chaired by an independent advocate and the parties were represented by legal practitioners, the enquiry far exceeded the procedural standard set by the Act. It is

unnecessary to consider, as would a review court, the issues of lack of authority and bias that occupied so much of the proceedings before Adv. West. The standard against which procedural fairness must be determined is that established by the LRA. To the extent that the record indicates that the applicant was entitled to respond to the allegations made against him and that the respondent took a decision and communicated it to the applicant, the applicant's dismissal was procedurally fair. It is not necessary to admit the transcript of the disciplinary enquiry to arrive at this conclusion – this is a matter of common cause. To the extent that Mr. Mamane submitted that the enquiry should be judged on its own terms (I understood this to mean that some form of review at the level of a superior court was appropriate) there is no merit in this submission. The existence or otherwise of procedural fairness is determined by whether or not the employer complies with the relevant statutory requirements. If an employer in its folly chooses to engage an independent counsel to conduct a hearing to a standard that would make a High Court judge proud, it does not follow that the CCMA (or this court) must act as if it were the Supreme Court of Appeal when determining whether a dismissal was procedurally fair.

[15] In short, the procedure adopted by respondent met the standards of fairness prescribed by eth LRA, and the applicant's dismissal was accordingly procedurally fair.

[16] In relation to substantive fairness, the respondent is required to discharge the onus of proving that the applicant committed the misconduct complained of, and that dismissal was a fair sanction. For the reasons already recorded, Mr. Boda elected to call only Mr. Khanye. I have already noted that Mr. Khanye's evidence comprised background information relating to the tender procedures applicable at the time of the applicant's dismissal. By his own admission, he had no knowledge of any conduct by the applicant in relation to those procedures, and in particular, he was not able to comment on whether the applicant had committed the misconduct alleged by the respondent. In these circumstances, I

fail to appreciate how it can be said that the respondent has established either that the applicant committed the misconduct that he is alleged to have committed, or whether his dismissal was an appropriate sanction in all the circumstances. I accordingly find that in these proceedings, the respondent has not established that the applicant committed misconduct, and that the applicant's dismissal was substantively fair.

Remedy sought

[17] The applicant as employed for the period 1 April 2002 to 31 March 2007. His contract records the following:

"It is specifically recorded that there is no expectation that this agreement will be renewed or extended beyond the period referred to in 3.2, other than by agreement between the parties, authorized by the council and provided that:

3.3.1.1 All performance agreements concluded and required to be concluded between the City Manager and the Executive Director have been fulfilled;

3.3.1.2 *The failure to renew or extend the period referred to in 3.2 above shall not constitute an extension of the contract and the Executive Director shall be entitled to such additional remuneration calculated in terms of the applicable financial agreement with Municipality."*

[18] In the context of an interpretation of s 186(1) (b) of the Act[5] the Labour Appeal Court has held that such clauses are not determinative.[6] It is common cause that the applicant's contract had some nine months to run when the respondent terminated the agreement. The applicant claims that had he not been

[5] Section 186 (1) concerns the existence of a dismissal. It defines a 'dismissal' to include circumstances where "an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favorable terms, or did not renew it …".

[6] *SA Rugby (Pty) Ltd v CCMA & others* [2008] 9 BLLR 845 (LAC); see also *SACTWU v Cadema Industries (Pty) Ltd* [2008] 8 BLLR 7090 (LC).

dismissed, he would have been employed by the respondent for a further five year term. In support of this contention, he testified that the majority of his peers were offered such contracts, on a variety of terms. On this basis, and given that his performance had not been called into question (but for the incidents that led ultimately to his dismissal), it was submitted on his behalf that he reasonably expected the respondent to offer him a second fixed term contract, for a further five years.

[19] The applicant obtained alternative employment on 1 February 2010. He is currently employed as a head of department in the Gauteng provincial government. He does not wish to leave this employment. The nature of the order that the applicant seeks is not one that would reinstate him into the respondent's employ in any physical sense – he seeks reinstatement into a new contract, on the basis of a reasonable expectation that after the contract in force at the time of his dismissal terminated on 31 March 2007, he would have been offered a new five-year contract, presumably from 1 April 2007 to 31 March 2012. The applicant qualifies his request by seeking reinstatement only to 31 January 2010, the date immediately prior to the commencement of his employment with his new employer. Under cross-examination, the applicant conceded that despite his claim to be reinstated, he has no intention of continuing an employment relationship with the applicant. In effect, therefore, the applicant's claim for reinstatement is one for the remuneration that he would have earned for the unexpired portion of the fixed term contract that expired on 31 March 2007, plus what he says he would have earned under the contract that he claims would have been entered into but for his dismissal, up to and including 31 January 2010.

[20] Section 193(1) of the LRA reads as follows:

> *"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may –*

(a) *order the employee to reinstate the employee from any date not earlier than the date of dismissal;*

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or n any other reasonably suitable work on any terms and from any date not earlier than the date of dismissal;

(c) order the employer to pay compensation to the employee.

(2) *The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-*

(a) *The employee does not wish to be reinstated or re-employed;*

(b) *The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*

(c) *It is not reasonably practicable for the employer to re-instate or re-employ the employee; or*

(d) The dismissal is unfair only because the employer did not follow a fair procedure."

[21] In *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC), a recent judgment by the Constitutional Court, the meaning of "reinstate" was explained as follows:

"*The ordinary meaning of the word "reinstate" is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on*

the same terms and conditions that prevailed at the time of their dismissal." [7]

[22] If (as in the present instance) the dismissed employee was engaged in terms of a fixed term contract, and the date on which that contract would ordinarily have expired by the effluxion of time precedes the date on which the unfair dismissal proceedings are concluded, the question arises whether it is competent for this court to place the employee in the position that he or she occupied, and further, whether it is competent to place the employee into a position established by a new contract, on the basis that the employee expected that the initial contract would have been renewed for a further fixed term.

[23] Mr. Mamane was unable to direct me to a single authority to support the remedy sought by the applicant. On the contrary, all the available authorities, both judicial and academic, indicate the contrary. In *SEAWU v Trident Steel* (1986) 7 *ILJ* 418 (IC), John AM held that an order of reinstatement restores the original contract, it does not make a new one.[8] Du Toit *et al* suggest that reinstatement implies *continuity of the employment relationship* notwithstanding the attempt by the employer to terminate it.[9] Brassey refers to *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC), and observes that an award of reinstatement has the effect of regenerating the pre-existing employment relationship – "*the court does not and cannot create a contract on new terms when it reinstates*".[10] Similarly, Grogan states that "… because reinstatement revives the original employment contract, *the court and arbitrators cannot fashion new contracts when they order reinstatement* "[11]

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[7] At paragraph [36] of the judgment.
[8] At 437E-F.
[9] *Labour Relations Law- A Comprehensive Guide* (Lexis Nexis Butterworths, Durban, 5th ed., 2007) at p.468.
[10] My emphasis, see *Employment and Labour Law* (Juta & Co) vol 3 at A8-146.
[11] My emphasis, see *Dismissal, Discrimination & Unfair Labour Practices* (Juta 2005) at p. 449.

[24] This approach was recently applied by Molahlehi J in *Cash Paymaster Services Northwest (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2009) 30 *ILJ* 1587 (LC), where the court dealt with a case of a fixed term contract that was to terminate within a month of the arbitration hearing. The court held that the commissioner had a duty to establish the nature of the contract when fashioning a remedy, and that by making an order of reinstatement, and effectively extending the contract beyond its fixed term, the commissioner had exceeded her powers. The award was set aside and substituted with an award of compensation for the unexpired portion of the fixed term contract.

[25] To the extent that the applicant relies on a reasonable expectation that his fixed term contract would be renewed for a further five years, and to the extent that in his evidence he sought to draw a parallel between his situation and that of one of his colleagues, a Dr Thanga, was found by an arbitrator to have be dismissed when the respondent failed to renew her fixed term contract on the same terms, the applicant confuses the definition of dismissal with the nature of the remedy. It is abundantly clear from the terms of the arbitration award referred to by the applicant that the issue in those proceedings was whether Dr Thanga had a reasonable expectation that her five year fixed term contract would be renewed, for the purposes of establishing the existence of a dismissal under s 186(1) (b). The present case does not concern the existence of a dismissal in the face of a refusal to renew a fixed term contract where there is a reasonable expectation that it would be renewed. In effect, the applicant is asking this court to make a new five-year fixed term contract for him and in doing so, to make assumptions about the level of remuneration and the benefits to which he would have been entitled. He also asks the court to assume that he would have left that employment on 31 January 2010 to take up other employment.

[26] This is a big ask. All of the authorities referred to suggest that the remedy of reinstatement is confined to reinstatement into the contract of employment in

existence on the date of dismissal. In my view, if the duration of that contract was limited, and the expiry of the contract precedes the date on which a finding of unfair dismissal is made, reinstatement is not a competent remedy. Even less can an employee claim reinstatement into a contract that he or she asks the court to create, and nor can the employee claim that the court should recognise that the contract would have been prematurely terminated. The applicant plainly does not seek the restoration of his employment relationship with the respondent – his claim is nothing less than a claim for compensation. That being so, the applicant's claim is subject to the limits on compensation prescribed by s 194 of the LRA.

[27] Even if this is too narrow a view of the applicable legislation, it seems to me that in circumstances such as the present it cannot be said that reinstatement is a reasonably practicable remedy, and that the exception in s 193(2) (c) is thus applicable. All of the circumstances described above (and in particular, the applicant having concluded a five year fixed term contract with his new employer, which he has no wish to terminate) render reinstatement impracticable. First, even if the applicant was willing to terminate his existing employment contract and seek reinstatement into the respondent's employ, this court has previously observed that the impracticability of resuming the relationship of employment increases with the passage of time.[12] In the present instance, almost four years have elapsed since the date of the applicant's dismissal. Secondly, it is not practicable for a court to create a contract, even on the basis of a legitimate expectation, in the absence of any evidence of what the terms of that contract may have been. The applicant testified that his peers were re- appointed on further fixed term contracts, on a variety of terms and conditions. The levels of remuneration were widely disparate, and there does not appear to be a norm that might easily be applied. It is not an answer to suggest, as the applicant appears to do, that the terms and conditions applied to the incumbent of the position during the period for which the applicant seeks notional reinstatement should be

[12] See *Republican Press (Pty) Ltd v CEPPWAWU & others* [2007] 11 BLLR 1001 (SCA).

applied. This begs the question of the personal attributes (including experience, skill and qualification) that inevitable account for the differentials in remuneration packages. Finally, the applicant occupied a position in which employment contracts remain regulated by statute. Section 57 of the Local Government: Municipal Systems Act, 32 of 2000, requires that the employment contract of a so-called section 57 manager can be renewed only by written agreement and subject to a performance agreement. For these reasons, even if the applicant was entitled to claim reinstatement on the terms that he seeks, it is not in my view reasonably practicable in the present instance to require the respondent to reinstate the applicant.

[28] The maximum compensation to which the applicant is entitled is the equivalent of 12 months' remuneration. The court has discretion in this regard, which must be exercised judicially having regard to all of the relevant facts, and ensure that the requirements of fairness are met. [13] In the present instance, the most material fact is the applicant's engagement on a fixed term, and that as at the date of his dismissal, the contract had some nine months to run. In these circumstances, and in accordance with the authorities referred to above, an award of compensation equivalent to what the applicant would have earned had he remained employed for the full period of five years is appropriate. This accords with the approach adopted in *Nkopane & others v Independent Electoral Commission* [2004] 6 BLLR 585 (LC) (where this court stated that there is no basis in law or in equity for any compensation for a period that extends beyond the terminated date of a fixed term contract) and equates to a sum equivalent to nine months' remuneration.

Costs

[29] Section 162 of the LRA provides that this court may make an order for the payment of costs, according to the law and fairness. When deciding whether or

[13] *Kemp v Rawlins* (2009) 30 ILJ 2679 (LAC).

not to order the payment of costs, the court may take into account the conduct of the parties both in proceeding with or defending the matter before the court, and the conduct of the parties during the proceedings before the court. The court is also entitled to order costs against any person who represented a party in proceedings before the court.

[30] Rule 22A provides that a party against whom a claim is made may at any time make an offer, in writing to settle the claim. An offer made in terms of this rule is not a secret offer or tender – it may be disclosed to the court at any time. Rule 22A (7) provides that the court may take into account any offer made by a party in terms of the rule in making an order for costs. At the outset of the trial, Mr. Boda, on behalf of the respondent, submitted a written offer in terms of which the applicant undertook to pay to the respondent nine months' remuneration within 21 days of acceptance of the offer, provided that the offer was accepted by 14h00 on the first day of the trial. The offer was not accepted.

[31] In view of my finding that the applicant is entitled to compensation of not more than the amount that he would have received for the remainder of his contract, the rejection of the offer of settlement and taking into account the manner in which the various proceedings relevant to this dispute have been conducted and having regard to the manner in which these proceedings have been conducted from the disciplinary enquiry to the end of the trial, it is fair, in my view, that although the applicant has partially succeeded in his claim, there should be no order for costs in respect of these proceedings up to the first day of the trial, but that the applicant should bear the costs of the trial itself.

I accordingly make the following order:

1. The dismissal of the applicant was substantively unfair.

2. The applicant is awarded compensation equivalent to nine months' remuneration to be calculated at the rate of remuneration earned by the applicant on the date of his dismissal.
3. The applicant is to pay the costs of these proceedings, limited to the costs of the costs of the trial.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Appearances:

For the applicant Mr. FR Mamane, instructed by Lennon Moleele & Partners

For the respondent Mr. F Boda instructed by Malherbe Rigg & Ranwell Inc.

Date of trial: 19 April – 23 April 2010
Date of judgment: 18 May 2010