IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D310/2024
Not Reportable

In the matter between:

ANDRE DEAN MELVYN PETERSEN	Applicant
and	
ETHEKWINI MUNICIPALITY	First Respondent
DR S B MNGUNI (CHIEF FINANCIAL OFFICER)	Second Respondent
SINDY MBELE (HR MANAGER)	Third Respondent
MUSA MBHELE (CITY MANAGER)	Fourth Respondent
MBALI NGCOBO (DEPUTY HEAD: EMPLOYMENT RELATIONS, HUMAN CAPTAL AND EMPLOYER REPRESENTATIVE)	Fifth Respondent

Heard: 18 June 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 12h00 on 21 June 2024.

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] This matter initially came before this court on 11 June 2024 as an urgent application. By agreement between the parties, and with the leave of this court, it was adjourned to 18 June 2024 to enable the parties to deliver heads of argument, which was done.

[2] Although the applicant initially challenged the authority of the deponent to the answering affidavit delivered on behalf of the respondents to have done so, the point was not persisted with and no finding need be made in relation thereto.

[3] Insofar as urgency was concerned, the respondents did no more in their answering affidavit than contend that the applicant had not made out a case for such an order to be granted. In view of the fact that a full set of affidavits was exchanged between the parties and the issues were fully ventilated at the hearing of the matter, with the benefit of heads of argument this court will exercise its discretion in favour of dealing with the matter as one of urgency. To do otherwise would achieve no more than to cause unnecessary delay, which would result in the parties remaining in a state of uncertainty as to their own respective positions in the interim.

[4] The substantive issue in dispute between the parties concerns the legality of the termination of the applicant's employment by the first respondent. In this regard, the applicant seeks the following relief,

> *'1.2 Declaring that the termination of the contract of employment of the Applicant by the Respondents constituted a breach of its contractual obligations in instances where the Respondents had consented to dealing with the allegations of misconduct by way of pre-dismissal arbitration as contemplated in section 188A(11) of the Labour Relations Act, no 66 of 1995;*
>
> *1.3 Declaring the dismissal of the Applicant by the Respondents unlawful in instances where the Respondents had consented to dealing with the allegations of misconduct by way of pre-dismissal arbitration as contemplated in section 188A(11) of the Labour Relations Act, no 66 of 1995;*

1.4 Ordering that the termination of the contract of employment of the Applicant by the First Respondent is set aside;

1.5 Ordering that the Applicant is to be reinstated in his employment with the First Respondent with retrospective effect from 23 May 2024, without loss of remuneration or benefits;

1.6 Ordering that in the event that the Respondents wish to pursue further charges of alleged misconduct by the Applicant, it is directed to do so by way of supplementing the existing charges in the pre-dismissal arbitration currently underway under case number EMD052303;

1.7 The Second to Fourth Respondents are ordered to pay the cost, jointly and severally, of this application in accordance with scale C of the amended Rule 69(7) of the Uniform Rules of Court.'

Background

[5] On 24 May 2024 the third respondent ('Mr Mbhele') addressed a letter to the applicant ('Mr Petersen') in which he was notified of the termination of his services. The circumstances in which such termination was effected constitutes the basis of the present application, Mr Petersen having asserted that such termination was unlawful.

[6] Mr Petersen was first employed by the first respondent ('the Ethekwini Municipality') some 40 years ago, and was appointed to the position which he occupied at the time of the termination of his employment, Head: Supply Chain Management Unit, on 14 January 2014.

[7] Nothing before this court indicates that there had been any issues regarding his employment with the Ethekwini Municipality prior to 1 November 2022, the applicant having described his employment record as having been unblemished. On that date, however, he was issued with a notice of intention to suspend him, the author of which was identified only as 'Authorised Representative'. In that letter he was notified that it had been alleged that certain of his conduct in the course of his employment had constituted both dereliction of his duties and gross insubordination, and that such matters required further investigation. The author of that letter

asserted that fears had arisen that he might somehow jeopardise the intended investigation, and it was this which informed the intention to place him on a precautionary suspension.

[8] Notwithstanding the response given by Mr Petersen, and without having explained the basis upon which he then did so, Dr Mnguni notified him that he was being suspended on 10 November 2022. One way or another, Mr Petersen has since then been barred from tendering his services to the Ethekwini Municipality, either by way of suspension or by having been placed on 'special leave'.

[9] On 6 March 2023 Dr Mnguni appointed the fifth respondent ('Ms Ngcobo') as the representative of the Ethekwini Municipality pursuant to his having constituted a disciplinary enquiry to determine the allegations of misconduct against Mr Petersen. Obviously then appreciating that the issue of Mr Petersen's alleged misconduct was one which required expeditious resolution, Ms Ngcobo applied herself in earnest to the consideration of the contents of whatever investigation report must then have been in her possession, and was able to draft a charge sheet comprising twenty six allegations of misconduct, and to provide it to Mr Petersen within a period of two days thereafter.

[10] Pursuant to a number of other preliminary matters having been raised in the course of the disciplinary enquiry which had commenced on 27 March 2023 Mr Petersen acted in terms of the provisions of s188A(11) of the LRA read with the relevant South African Local Government Bargaining Council ('SALGBC') rules, and thereby required the SALGBC to conduct the inquiry into the allegations of misconduct detailed in the notice give to him on 8 March 2023. Although the Ethekwini Municipality initially opposed such a process, by 9 June 2023 Ms Ngcobo withdrew such opposition and a Ruling was issued under case number EMD052303 that the SALGBC convene an inquiry by arbitrator in terms of s188A.

[11] That process has been beset by further delays and it appears that any evidence has yet to be led concerning the substance of the allegations of misconduct themselves. For reasons which need not be canvassed in any detail, the Ethekwini Municipality has indicated that it does not currently intend to proceed with the first

nine allegations of misconduct at this stage. The effect of this is that the remaining allegations embodied in charges 10 to 26 of the notice to attend a disciplinary hearing remain extant and before a commissioner of the SALGBC for determination.

[12] The issue of Mr Petersen's alleged misconduct not yet having been finalised, Dr Mnguni addressed further correspondence to him on 20 May 2024 in which he was asked to provide certain information pertaining to his qualifications. The reason given for such request was that certain deficiencies in his qualifications relevant to his suitability for the position of Head: Supply Chain Management had been perceived by the Ethekwini Municipality in consequence of a review of his personnel file having been conducted pursuant to certain findings contained in an audit report which had been finalised in February 2023. Mr Petersen was given until close of business on 22 May 2024 to respond.

[13] In the response given by Mr Petersen on 22 May 2024 he requested that he be furnished with certain documentation and information by close of business that day, asserted to have been necessary to enable him to provide the response sought. He further requested that he be afforded until close of business on 24 May 2024 to provide his substantive response to the issues raised in Dr Mnguni's letter of 20 May 2022.

[14] In his subsequent response of 23 May 2024 to the queries raised by Dr Mnguni Mr Petersen took issue with the fact that not all the information which he had requested had been provided to him under cover of Dr Mnguni's response to him the previous day, but he nonetheless briefly explained the circumstances of his having been appointed and sought to establish that he did, indeed, possess the requisite qualifications for the position.

[15] Mr Mbhele apparently did not agree with Mr Petersen's assessment of his suitability to have been appointed and, on 24 May 2024, Mr Petersen was given a letter in terms of which his services were terminated,

> *'It is with regret, that the qualifications that you provided as you assumed your duties, as per the employment processes, do not satisfy the minimum*

prescribed requirements of the position. Consequently, your contract with the municipality is hereby terminated in accordance with Clause 20 of your contract of employment with the municipality, effective immediately.'

[16] In the circumstances of Mr Petersen's employment having been terminated, he approached this court to set such termination aside on the basis of the unlawfulness thereof.

Analysis

[17] Having disavowed reliance on the requirements of fairness embodied in the LRA, Mr Petersen's claim was premised on contract. He asserted that he sought to enforce both a statutory right to a lawful process as well as his rights in terms of the agreement reached between himself and the Ethekwini Municipality in terms of a collective agreement. It was his case, in essence, that the termination of his contract of employment, properly considered, constituted nothing more than his dismissal, as defined in section 186(1) of the LRA and that such dismissal had been effected in breach of the agreement that an inquiry by arbitrator be convened in terms of s188A of the LRA ('the s188A agreement'), a process endorsed by clause 19.2 of the Disciplinary Procedure Collective Agreement.

[18] In opposing the application, the respondents asserted that,

- The Ethekwini Municipality was not, as a matter of either the s188A agreement or the law, obliged to deal with the matter of the termination of Mr Petersen's employment, howsoever arising, through the existing s188A process; and
- As the termination of Mr Petersen's employment occurred as a result of the non-fulfilment by him of the suspensive condition embodied in his contract of employment and the issue was not treated as misconduct on his part by the Ethekwini Municipality, there was no basis for the inclusion thereof as part of the s188A(11) process.

[19] In so far as Mr Petersen had founded his claim in contract, it was incumbent upon him explicitly to articulate the terms thereof and to identify which of those terms were alleged to have been breached by the respondents. The applicant's allegations in furtherance with these obligations were imprecise.

[20] As to the s188A agreement, the applicant's founding affidavit revealed that on 3 May 2024 he requested the SALGBC to convene a pre-dismissal arbitration, and that the basis upon which he had made such request was in terms of the Protected Disclosures Act, 26 of 2000.[1] Albeit that the Ethekwini Municipality had initially objected to such process, it withdrew its objection and, *'consented to the matter proceeding in terms of s188A(11) of the LRA as a pre-dismissal arbitration.'* The Ruling issued by the commissioner then presiding over the matter on 9 June 2023 recorded that the withdrawal of the Ethekwini Municipality's opposition to the request was effected without admission that Mr Petersen had made any protected disclosure. The Ruling itself was that,

> *'An inquiry is to be held in terms of Section 188A by an Arbitrator under the auspices of the South African Local Government Bargaining Council.'*

[21] Neither Mr Petersen's request in terms of s188A(11) of 3 May 2023 nor the Ethekwini Municipality's opposition thereto have been disclosed to this court. In consideration of the circumstances under which the request was made together with reference in the Ruling to *'the matter'* the only conclusion which can be drawn is that the ambit of Mr Petersen's request was confined to the determination of the allegations of misconduct which had been set out in the notice to attend a disciplinary enquiry dated 8 March 2023.

[22] This conclusion is fortified by the provisions of s188A(11) itself,

> *'Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No 26 of 2000), that employee or the employer may require that an inquiry be*

[1] Founding Affidavit, paragraph 23

conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.'

[23] In consideration of the wording of the aforementioned subsection, the request by Mr Petersen could have been made only in relation to the disciplinary enquiry that was by then underway, and the ambit of the proposed inquiry by arbitrator in terms of s188A could have extended no further than in respect of the allegations of misconduct which he was then facing.

[24] The Ethekwini Municipality's acquiescence to the process constituted no more than capitulation to Mr Petersen's express request, being that an arbitrator be appointed to arbitrate the question of the misconduct which he had been alleged to have committed, as detailed in the notice to attend a disciplinary enquiry dated 8 March 2024.

[25] This being the case, there is no basis upon which it could be found, as a matter of fact, that the agreement between the parties constituted anything more than an agreement that the question of Mr Petersen's culpability in relation to the charges contained in the notice to attend a disciplinary enquiry dated 8 March 2023 would be decided by an arbitrator of the SALGBC, rather than a chairperson of an internally convened disciplinary hearing.

[26] Distinct from the express s188A agreement itself, Mr Titus who appeared for Mr Petersen directed this court's attention to a number of cases which were argued to be authority for the proposition that once a s188A process has been agreed to by an employer and an employee, with the concurrence of either a bargaining council or the Commission for Conciliation Mediation and Arbitration, the employer is thereby bound to that process, thereby axiomatically and impliedly divested of its ability to take disciplinary steps against such an employee outside of that process.

[27] The first of these was South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others (2013) 34 ILJ (LC) in which the court was asked to set aside the dismissals of two employees whose services had been terminated by their employer. Such dismissals had occurred pursuant to the

employer having convened a disciplinary enquiry in respect of certain allegations of misconduct alleged to have been committed by the employees. Those allegations of misconduct had previously been the subject matter of a s188A enquiry, which had led to an award, which award had ultimately been set aside on review. This court then found,

> *'It seems to me from the wording of s188A that once an employer and an employee consent to refer the determination of allegations of misconduct or incapacity to an arbitration hearing in terms of s188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its internal disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. That being so, and since the consent of the affected employee and the CCMA is necessary to achieve that result, it is not open to the employer to abandon the process on a unilateral basis.'*[2]

[28] The same principle was applied in Mchuba v Passenger Rail Agency of South Africa (2016) 37 (ILJ) 1923 (LC) in circumstances in which the employer, initially having elected to proceed by way of a pre-arbitration hearing, abandoned that process upon having established that its chosen dispute resolution forum, Tokiso Dispute Settlement Services, was not accredited to conduct such arbitrations. It duly informed the employee of its intention to proceed by way of a disciplinary hearing in the form of written representations, in which process the employee refused to participate. In succeeding in challenging the termination of his employment in the result, this court found that,

> *'… When the tripartite agreement was reached, the respondent had no residual power to take any step against the applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of*

[2] Paragraph 15

misconduct against the applicant by means of a pre-dismissal arbitration, the [respondent] acted in breach of the applicant's contract of employment.'[3]

[29] Both these cases dealt with situations in which the employers sought to proceed by way of internal disciplinary hearings in respect of the self-same allegations of misconduct which had previously formed the subject matter of the abandoned s188A processes, and the principle established that an agreement entered into in relation to such a process cannot be abandoned should be seen in that light.

[30] The further case relied on, however, dealt with a situation in which the allegations of misconduct which formed the subject matter of the internal disciplinary were additional to the allegations of misconduct which formed the subject matter of the agreed s188A process. In Rabie v Department of Trade and Industry and Another (J515/18) [2018] ZALCJHB 78 (5 March 2018) this court interdicted an internal disciplinary enquiry in circumstances in which a s188A process had contemporaneously been underway. In defending its position, the employer argued that it did not intend to abandon the s188A process, but that it nonetheless was entitled to exercise its prerogative to conduct an internal disciplinary enquiry in relation to charges that differed from those which had been placed before the arbitrator for determination. The employee, on the other hand, argued that he had a legal right not to be subjected to parallel disciplinary enquiries.

[31] This court's finding that the employer's conduct was impermissible rested on its conclusion that the further charges which were intended to be determined internally were so closely aligned to the initial charges as to render them incapable of separation from the first,

'The DTI is clearly disingenuous. The common thread in the charges against Mr Rabie both before the arbitrator in the pre-dismissal arbitration and the in-house disciplinary enquiry is conduct pertaining to EOH, its service provider. The fact that the second charge sheet emanates from Mr Rabie's version of

[3] Paragraph 16

defence that was put to the DTI's witnesses during the pre-dismissal arbitration proceedings gives credence to Mr Rabie's contention that both proceedings deal with the same matter."[4]

[32] From the aforementioned it is clear that upon parties agreeing to proceed with disciplinary action by way of a s188A process, it is legally impermissible for the employer subsequently to renege on that process and attempt to revert to an internal disciplinary hearing in relation to the very charges which formed the subject matter of the s188A process, or in relation to charges which are so closely associated with the initial charges that, by implication, they fall within the ambit of the S188A agreement.

[33] Ostensibly having been alerted to certain deficiencies in Mr Petersen's personnel file by the contents of an internal audit report which had been provided to the Ethekwini Municipality on 27 February 2023, more than one year thereafter and one week prior to Mr Petersen's anticipated resumption of his duties on 27 May 2024, Dr Mnguni addressed correspondence to him in which Mr Petersen was requested to provide an explanation in regard to his qualifications,

'Based on the review of your personnel file, we are unable to confirm if you had met all the essential academic requirements stipulated on the advertisement. In view of this gap, you are required to provide your supervisor with evidence of how you satisfied the minimum academic requirements of the advertisement in order to apply for the position.

In addition, in your application you claimed that you were a member of CIPS before the closing date of the advertisement. However there is no evidence on your file confirming your membership as of 26 July 2013 or before. Therefore, kindly provide us with confirmation of membership as at or before 26 July 2013. Furthermore, we do not have the copies of the minimum required relevant qualification in SCM, Accounting, Finance or Economics on your file, please provide us with certified copies and reasons for not submitting these documents before signing your employment contract.'

[4] Paragraph 19

[34] Mr Mbhele was seemingly not convinced that Mr Petersen had demonstrated that he was possessed of the requisite qualifications for the post and, relying on clause 20 of Mr Petersen's contract of employment, terminated his services with immediate effect.

[35] Clause 20 embodied a condition, the relevant portion of which read,

> *'20. DOCUMENTATION REQUIRED ON ENGAGEMENT*
> *It should be noted that in appointing you the Municipality has taken into account education qualifications and previous relevant experience claimed by you and consequently, when reporting to the Human Resources Unit for the purpose of engagement formalities, you are requested to produce originals of the following:*
> *20.1 Qualifications*
> *Masters Diploma*
> *MBA*
> *Member: CIPS*
> *We specifically record that our offer of employment was conditional upon you producing the originals of the above documents within the required period. In the event that you do not produce these documents timeously, it cancels our conditional offer of employment to you and / or any employment contract entered into between us. You may resign from your existing employment provided you are certain that the documents you are able to produce will adequately cover the educational qualifications and experience claimed by you and required for the position.'*

[36] In light of the fact that Mr Mbhele described Mr Petersen's perceived failure to have established that he had the requisite minimum qualifications for the position as *'a material breach of the condition in [his] contract of employment'* the issue could have been treated by the Ethekwini Municipality as a form of misconduct. Had this been done, it would then have been open to Mr Petersen to argue that the issue of his qualifications was so closely aligned to the Ethekwini Municipality's allegations

embodied in charge 26[5] that, by parity of the principle applied in Rabie, the issue was one which was required to be dealt with under the s188A agreement, by the inclusion thereof in the existing s188A process.

[37] The issue was not, however, dealt with as a form of misconduct on Mr Petersen's part. On the respondents' version,

> *'The Applicant's contract of employment was conditional upon him producing proof of the essential educational qualifications and experience for the post. His failure to comply with the provisions of clause 20 of his appointment contract, read with the prescribed minimum competency levels for his post, meant that the condition contained in his contract was not fulfilled, thereby resulting in the cancellation of the contract.'*[6]

[38] In response to the allegations contained in the respondents' answering affidavit concerning the rationale behind the decision taken to terminate his contract, Mr Petersen sought in reply to persuade this court of the fallacy of such contentions. Although having expressed the view that the decision taken ought to be attributed to an ulterior motive, Mr Petersen did not dispute the factual correctness of the proposition that the termination of his services had been effected as a result of the Ethekwini Municipality's reliance on the alleged non-fulfilment of the suspensive condition embodied in clause 20 of his contract of employment,

> *'As previously stated I had the necessary qualifications / competencies. And once again, in the absence of all the requisite documentation that was in the custody of the First Respondent or ought to have been in its possession and in the absence of either of the Second to Fifth Respondents being present when I was interviewed / or having my qualifications verified for the position of*

[5] Charge twenty six reads, 'You are charged with serious dereliction of your duties and responsibilities and/or gross negligence in that in have you failed have failed [sic] to obtain Unit standards 116342; 116362 and 116361 within the stipulated time frame as required by the Municipal Regulations on Minimum Competency levels and its amendments and/or your job description,' which, on the face of it, derives from the finding in relation to Mr Petersen in paragraph 1.3.6 of the Internal Audit Report of 27 February 2023, in circumstances in which the queries raised in relation to his qualifications in the letter of 20 May 2024 were stated to have arisen as a direct result of such Internal Audit Report.
[6] Answering affidavit, paragraph 34

Head SCM, it is unjustified of Second Respondent to conclude based on what is clearly incomplete documents, no affidavits from anybody with personal knowledge, no adverse findings / recommendations against me in the audit report of February 2023 to terminate my services. Whilst I am on this point, there is no explanation why a report that has been available for more than a year was suddenly the reason for my dismissal 2 days before my return to work. Therefore, the only conclusion that I one [sic] can draw is that the reason to dismiss me was mala fides.'[7]

[39] Issues extraneous the question of whether Mr Petersen was entitled, as a matter of either contractual agreement or as a matter of law, to insist that the issues which informed the decision were to be dealt with by way of the s188A process, were not before this court and are accordingly not for this court to determine. In the absence of Mr Petersen having challenged the factual position, this court must accept that his services were terminated by the Ethekwini Municipality on the basis of the reliance placed by it on the suspensive condition contained in clause 20 of his contract of employment, as was alleged by it.[8]

[40] The termination of a contract of employment as a consequence of either the non-fulfilment of a suspensive condition or the fulfilment of a resolutive condition is not prohibited as a matter of law, and nor is this court able to conceive of any basis upon which the Ethekwini Municipality would have been compelled to deal with the issue of Mr Petersen's qualifications as a species of misconduct.

[41] In these circumstances, and in consideration of specific relief sought by Mr Petersen and the grounds upon which such relief was claimed, this court is unable to conclude that he has been subjected to a parallel disciplinary process; that his services were terminated for any type of misconduct; or that the respondents were obliged to deal with the issue of his qualifications as part of the s188A process which commenced by way of the Ruling under EMD052303 on 9 June 2023. The application will accordingly be dismissed.

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[7] Replying affidavit, paragraph 41

[8] See Nogtansi v Mnquma Local Municipality and Others [2017] 4 BLLR 358 (LAC) at paragraphs 34 - 42

Costs

[42] The respondents sought an order as to costs in the event of the dismissal of the application. The basis upon which such an order was sought was not explained in the respondents' answering affidavit, however, Ms Naidoo SC for the respondents argued that this rested on the fact that Mr Petersen's claim was in terms of the BCEA and not the LRA.

[43] S162 of the LRA provides that costs orders in this court are to be granted in consideration of the requirements of law and fairness. The fact that Mr Petersen relied on contract rather than any claim under the LRA must accordingly be but one of the factors which this court has taken into consideration of the requirements of law and fariness, in the exercise of its discretion.

[44] Militating against a costs order in favour of the respondents is that there was no suggestion when having opposed the application that it had been initiated for frivolous or vexatious reasons, and nor is such a conclusion self-evident. In addition, Mr Petersen is currently unemployed.

[45] In view of the aforegoing, Mr Petersen will not be ordered to pay the respondents' costs.

Order

1. The application is dismissed.

2. There is no order as to costs.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr M Titus, MacGregor Erasmus Attorneys Inc

Respondent:

Ms L Naidoo SC, briefed by Hughes-Madondo Inc