THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J2819/16

In the matter between:

STEVEN MOTALE **Applicant**

and

THE CITIZEN 1978 (PTY) LTD **First Respondent**

EUREKA ZANDBERG **Second Respondent**

PIET GREYLING **Third Respondent**

PAUL JENKINS **Fourth Respondent**

Heard: **19 January 2017**

Delivered: **27 January 2017**

Summary: **Review. Urgent Application**

JUDGMENT

GUSH J

[1] The applicant in this matter is the erstwhile editor of the first respondent.

[2] The applicant's employment with the first respondent was terminated by the respondent on 28 November 2016. The second respondent is the publisher of the first respondent and was the applicant's immediate superior and the person to whom the applicant reported and the person who terminated the applicant's contract on behalf of the first respondent.

[3] The third respondent is the managing director of the first respondent and the person who concluded that the first respondent was entitled to dismiss the applicant with immediate effect. It is apparent from the papers that the second respondent acted on the "findings" of the third respondent and terminated the applicant's employment.

[4] The relief that the applicant seeks in his application can conveniently be divided into two separate parts. The first part relates to an averment by the applicant that his suspension and dismissal is a violation of "editorial independence" and a violation of section 16(1)(a) of the Constitution of the Republic of South Africa.

[5] The relief that the applicant seeks in the second part of his application is for an order declaring the termination of his contract to be a breach of his employment contract dated "1 November 2013 read together with the first respondent's

disciplinary code" and accordingly for an order declaring the termination of his employment to be null and void. The effect of such an order would be to reinstate the applicants contract of employment with the first respondent.

[6] The sequence of events which led to this application being brought can be briefly summarized as follows:

6.1. During the course of the applicant's employment with the first respondent it is clear that certain tensions developed between the applicant and the second respondent the person to whom he reported.

6.2. The source of this tension appears to have arisen from differing attitudes towards what to the applicant and first respondent understood to be editorial freedom. During the course of this debate it appears that the first respondent adopted a policy that was by articulated by the second respondent in her instruction to the applicant *"to ensure that potentially sensitive articles, published as exclusive stories by The Citizen, be cleared by designated lawyer prior to publication."*[1]

6.3. This tension came to a head on 2 November 2016 when the second respondent addressed a letter to the applicant suspending him with immediate effect. The letter specifically records:

> "The reason for your suspension is the breakdown in the trust relationship between you and your employer, particularly owning (sic) to the publication of stories that have not been adequately cleared and for failing to comply with direct instructions, and generally failing to act in a trustworthy way and to implement agreed-upon standards and procedures in your newsroom, all of which taken together have caused a breakdown in the trust relationship between you and your employer,

[1] See the letter of 10 November 2016 in the pleadings at page 22.

represented by the publisher of The Citizen. Your presence in the workplace, given your position, is untenable until the processes regarding a disciplinary inquiry are finalized.[2]

6.4. On 10 November 2016 the second respondent again wrote to the applicant this time apparently endeavouring to set out in some detail the allegations of misconduct committed by the applicant that had led to his suspension and inviting him to make representations in response thereto. In particular, the second respondent, having detailed the various instances she complains of, advised the applicant:

> "Having regard to the facts and circumstances recorded above, it is my contention, as the publisher of The Citizen, that the necessary levels of trust and confidence inherent in the relationship between publisher and editor have irretrievably broken down in consequence of the following:
>
> (i) you have acted in complete and wilful disregard of the instruction provided to you that the timeous intervention of our legal advisors is be sought in relation to exclusive articles of politically sensitive nature where a high profile political individuals are involved;
>
> (ii) your failure to ensure that the publication and in particular, you and the editorial staff (or certain members thereof) complied with instructions provided, firstly, in relation to the acquiring of legal input and advice (as referred to above) and, secondly, in relation to the requirement that editorial content must remain factual, accurate and truthful *in all respects* (including the heading thereof) and reflect the values and ethos of our publication as recorded above; and

[2] Pleadings at page 63.

(iii) you have, in the end result, failed to uphold the fundamental duties of the office of editor of The Citizen."[3]

6.5. In the same letter the second respondent continues by affording the applicant an opportunity to *"deal with all the* ***allegations and contentions*** *set out in this communication to you … in writing … together with any* ***mitigating factors****."* (Emphasis added)[4]

6.6. On 17 November 2016 the applicant responded to the second respondent's letter of 10 November 2016. In this letter the applicant makes it clear that he regards himself to be *"innocent until proven guilty"* and that he wishes to exercise his right that the matter be determined by a disciplinary inquiry before an independent chairperson.[5]

6.7. The second respondent replied to the applicant on 21 November 2016 advising him that the *"legal and factual conclusions set out in [his] letter of 17 November 2016 are incorrect"* and that he in fact was being given a right to state his case.

6.8. The "case" or "issue" however to which the second respondent referred was no longer based on allegations of misconduct viz the disregard of the policy but her conclusion that the *"trust relationship had broken down"*. It can only be assumed that the second respondent had concluded that the applicant was guilty of the misconduct and based on this conclusion the only issue to be addressed was the breakdown of trust. The second

[3] Pleadings at page 29-30.

[4] Pleadings at page 30.

[5] Pleadings at pages 65-6.

respondent simply invited the applicant *"to provide a basis why you believe the trust relationship between us has not broken down"*.[6]

6.9. The applicant responded on twenty-four November 2016 by clearly indicating that he did not believe he was guilty of misconduct or that the relationship had broken down. The applicant repeated his insistence on exercising his right to a formal disciplinary inquiry regarding his alleged misconduct:

> "In my letter dated 17 November 2016, I specifically indicated that I have a right to a formal disciplinary hearing, which right is also entrenched in the company's disciplinary code and procedure. Therefore, if you are of the view that I have committed serious misconduct (which seems clear that you are of that view) warranting my potential dismissal, then the company does not have an option but to institute a formal disciplinary inquiry in compliance with its disciplinary code and procedure. … I am of the view that is not necessary for me to motivate for formal disciplinary hearing, to the contrary, please note that you are the one who is required to explain why you wish to deviate from the company's disciplinary code and procedure. … I therefore maintain that in the event that you are of the view that I have committed serious misconduct warranting my potential dismissal, I should be afforded the right to present my case before an independent chairperson, call my own witnesses if necessary, and cross-examine your witnesses, which right you must also be afforded. … In so far as allegation of a breakdown in trust relationship is concerned, I wish to state firmly that I do not view that there is a breakdown in trust relationship between us."[7]

[6] Pleadings at page 69.

[7] Pleadings at page 71-2.

6.10. Somewhat startlingly in response to the applicant's letter, the second respondent repeats the invitation to the applicant to make written submissions, by 12h00 on 28 November 2016 on the grounds that—

> "…I say [the trust relationship] has broken down and I provided you for the reasons why I say the relationship has broken down irretrievably. … The factual circumstances on which I rely on are not reasonably capable of dispute. … this matter turns not undisputed facts but on subjective viewpoints which are matters for argument. And lastly, I note that you have not provided reasons or any motivation as to why this matter should be referred to disciplinary inquiry, as I requested of you, instead you have baldly alleged that you have certain rights and instead suggested that I should motivate why I am entitled deal with the matter as I propose doing.[8]

6.11. On 28 November 2016 at 11h48 in reply the applicant again records that he does not believe that the relationship is broken down and repeats his insistence on a formal disciplinary inquiry "so I can properly answer the charges against me"[9]

6.12. Unsurprisingly, given the second respondent's attitude that her view of the issue in question was the only view, on the same day, 28 November 2016, by email and by hand served the notice of dismissal on the applicant together with a record of the finding by the third respondent also dated 28 November 2016.

[7]. What is abundantly clear from the above is that the second respondent not only assumed as a matter of fact, in the absence of an enquiry, that her view of the applicant was guilty of misconduct was correct and that her conclusion that this relationship had caused an irretrievable breakdown.

[8] Pleadings at pages 73-4.
[9] Pleadings at pages 75-6.

[8]. As far as urgency is concerned the applicant relies on the averment that he will suffer irreparable harm, that he warned the second respondent of his intention to bring an urgent application and that his dismissal was a breach of his contract of employment which incorporated the first respondent's disciplinary code.

[9]. I am not persuaded that any of these averments justified the application being brought as a matter of urgency. I am, however, mindful of the fact that this application was launched at the end of November 2016 and that the parties have had an opportunity to file not only answering and replying affidavits but in addition an amended notice of motion. After the filing of the respondents' answering affidavit both parties filed supplementary affidavits. As I am seized of the matter and have read the papers and the parties were at *idem* that I should deal with the merits of the application even if urgency had not been established I have done so.

[10]. As set out above the applicant seeks two distinct orders. The first being an order declaring the suspension and dismissal of the applicant to be a violation of section 16 of the Constitution.

[11]. There is nothing in the papers to substantiate the applicant's averment that the first respondent's policy requiring the submission of stories to the first respondent's legal advisors constitutes a breach of the Constitution. It is clear from the correspondence attached to both the applicant and the respondents' papers that the existence of the policy is not in dispute. What is in dispute is whether or not the applicant is guilty of contravening that policy.

[12]. This is not a constitutional issue and I am not persuaded that the applicant is entitled to any consequential relief arising from the alleged violation of the Constitution.

[13] What remains therefor is to consider the second part of the relief sought by the applicant viz. the applicant's application for an order declaring termination of his contract to be a *"breach of his employment contract read with the disciplinary code"*.

[14]. It is so that the applicant, in addition to challenging the termination of his contract, sought an order declaring his suspension to be a breach of his contract. As far as the suspension is concerned, I can find nothing in the papers to justify an order setting aside the suspension as a breach of his contract. In fact, it would appear that the first respondent not only complied with the contract and disciplinary code in effecting the suspension but, although not an issue in this matter, the Labour Relations Act. During argument Mr. Ngcukaitobi conceded that should the applicant succeed in having the termination of his contract being held to be a breach of the contract the appropriate remedy would be to set aside the dismissal and reinstate the applicant to the position he held immediately prior to the termination of the contract. At that time the applicant was on suspension.

[15]. Mr. Ngcukaitobi also conceded during argument that should the termination be set aside it should be accompanied by an order directing the first respondent to comply with the applicant's contract in so far as the disciplinary procedure was concerned.

[16]. The first respondents disciplinary code is contained in a document headed "Disciplinary Codes Procedures and Guidelines; The Citizen 1978 (Pty) LTD" that specifically provides that *"and procedure forms part of the individual contract of employment of every employee"*.[10]

[17]. The Disciplinary Code under the heading *"GENERAL PRINCIPLES"* allows the first respondent the *"discretion to suspend an employee"* for the purposes of the

[10] Pleadings pages 52-60 at page 54

disciplinary investigation and hearing. Under the heading *"THE RIGHTS OF THE EMPLOYEE"* the employee is entitled *"to hear the case against him"* and when subject to *"formal disciplinary action"* the rights include inter alia: the right to a clear explanation offence an opportunity to state their case the right to representation the right to share testimony against him in question the witnesses.[11]

[18]. Mr. Bruinders who appeared for the respondents argued that the decision to terminate the applicant's contract of employment had nothing to do with misconduct. He was adamant that as the second respondent was of the view that the employment relationship had broken down and that the parties were incompatible the respondent was not obliged to conduct a disciplinary hearing and was entitled to simply and summarily terminate the applicant's contract. Mr. Bruinders also suggested that it was common cause that the applicant was guilty of failing to comply with the policy.

[19] Unfortunately, the respondents' affidavits do not support this argument. It is clear that the applicant at all times denies being guilty of failing to comply with the policy. It is equally abundantly clear that it was the second respondent's concern about the applicant's conduct related to the policy that led firstly to his suspension and then to the exchange of correspondence culminating in the termination of the applicant's contract.

[20] The third respondents' attitude towards the applicant and the procedure deemed appropriate is set out by the second respondent in her answering affidavit where she avers *inter alia* the following:

> "20.1. On 1 November 2016 … I indicated that from my perspective the trust relationship … And irretrievably broken down and that there were two alternatives … The one wasn't the applicant considered a possible termination on

[11] Pleadings page 57

mutually accepted grounds. … The second alternative was any be suspended and to that end place appropriate **disciplinary** measures."[12] (Emphasis added)

20.2. Nowhere in his correspondence and the applicant make any reference in the fact that he wished to call witnesses or cross examine.[13] This is at best for the second respondent simply wrong. (see paragraph 6.8 above)

20.3. Relying formalistically on the disciplinary code for his allegation that he was denied a hearing is a further example of why incompatible and why there is a breakdown in the relationship of trust between the editor and publisher.[14] This is a rather starling conclusion given that the first respondent's disciplinary code sets out the employees' rights and specifically makes the code a part of the employees' contracts of employment.

20.4. I am advised that the applicant is no contractual right to insist in compliance with the disciplinary code or insist on a hearing permitting calling witnesses of cross-examination.[15] It would abundantly clear that the second respondent has not read the disciplinary code." (See paragraph 16 above)

[21]. The third respondent, who somewhat grandiosely concluded that the first respondent was *"entitled to dismiss Motale with immediate effect"*,[16] contradicts in his report that the averment that the matter was not about conduct or misconduct on the part of the applicant but simply incompatibility. In his report[17] he records:

[12] Pleadings at page 90.

[13] Pleadings at page 94.

[14] Pleadings at page 95.

[15] Pleadings page 96.

[16] Pleadings at page 98 - para 1.

[17] Pleadings at page 98.

21.1. That he had considered the representations made by the second respondent regarding the *"**alleged** breakdown in the relationship trust and confidence"*. (Emphasis added)

21.2. *"accordingly, I consider that this matter relates, not to what was published in the newspaper, but rather about adherence to the agreed procedures and upholding the editorial principles of the Citizen."*

I find that the relationship of trust and confidence is broken down between the publisher and Motale. I further find that Motale is solely responsible for this breakdown, that the breakdown is irretrievable and that the ongoing employment of Motale is accordingly rendered untenable. In this sense then, Motale is found guilty, to the extent of a guilty finding is necessary of being responsible for irretrievable breakdown in trust and confidence…"

[22]. What emerges from the papers is that the second respondent and the applicant were at loggerheads over the applicant's compliance with the policy regarding the submission of specific articles to the first respondent's legal advisors before publication. The second respondent was clearly of the opinion that the applicants had failed to comply with the policy and as such he was guilty of misconduct. Having so concluded, the second decided initially that the alleged misconduct warranted the institution of disciplinary proceedings against the applicant. Accordingly, the second respondent suspended the applicant.

[23]. During the course of the correspondence between the applicant and the second respondent, possibly having taken advice, decided that the issue was no longer one of misconduct on the part of the applicant but simply an issue of compatibility. The second respondent appears to have conveniently ignored the fact that what led to her alleging breakdown the trust relationship was the alleged misconduct of the applicant.

[24]. It is also clear from the papers that the applicant did not regard himself as having committed misconduct and sought the opportunity to defend himself at the disciplinary inquiry he had been offered at the time of his suspension.

[25]. The second respondent, having made the unexplained and unjustified leap from accusing the applicant of misconduct to simply assuming he was guilty thereof then decided that this constituted an irretrievable breakdown in the relationship between the applicant and the first and second respondents. This not only ignored the applicant's contractual right to be treated in accordance with the disciplinary procedure with regard to the applicant's guilt or otherwise. The second respondent simply assumed that as a fact the relationship had broken down. A conclusion unsurprisingly shared by the third respondent.

[26]. One of the difficulties in the procedure adopted by the second and third respondents in their desperate attempt to avoid the issue of deciding on whether or not the applicant was guilty of the misconduct was to decide as a fact that the trust relationship had broken down. They appear simply to have elected to disregard the applicant's alleged misconduct that was initially put to him as being the cause of the breakdown of the employment relationship.

[27]. What remains unexplained is what led the respondents to abandon the original proposal of affording the applicant a properly constituted disciplinary inquiry procedure regarding his alleged misconduct. Whilst the second and third respondents make much of the failure of the applicant to make written representations on what was essentially an issue in mitigation, what is abundantly clear from the applicant's correspondence is that he did not regard himself as being guilty of the alleged misconduct.

[28]. There are number of judgments dealing with the failure of an employer to comply with its disciplinary procedure, specifically when the disciplinary procedures form part of the contract of employment. In both *Ngubeni v NYDA* and *Solidarity v*

SABC[18] the Court held that failure of an employer to comply with its disciplinary code procedure, where the disciplinary code procedure forms part of employee's contract is a breach of that contract entitling the employee to relief. In both matters the court declared the decision by the employer to terminate the contract without complying with the disciplinary code to a breach of contract entitling the employees to be reinstated.

[29]. The applicant's contract of employment specifically incorporates the disciplinary code and procedure and it is clear that the respondents had not complied with the disciplinary code and procedure when they terminated the applicant's contract. As a result, I am satisfied that the respondents' termination of the applicant's contract of employment constituted a breach thereof and that the applicant is entitled to be reinstated.

[30]. Given the specific circumstances of this matter and in particular the applicant's complaint regarding the failure of the respondents to conduct a disciplinary inquiry and the position he found himself in at the time of termination of his contract it is appropriate that his reinstatement be accompanied by an order directing the respondent's comply with the disciplinary code and procedure, in other words in order for specific performance.

[31]. Mr. Bruinders suggested that an order of specific performance was inappropriate. I disagree. This court has in similar matters ordered specific performance.[19]

[32]. There is no reason why despite the absence of urgency and the limited relief that the applicant is entitled to that cost should not follow the result.

[18] See *Ngubeni v The National Youth Development Agency and Another* (2014) 35 ILJ 1356 (LC); and *Solidarity and Others v South African Broadcasting Corporation* 2016 (6) SA 73 (LC); (2016) 37 ILJ 2888 (LC).

[19] Dyakala v City of Tshwane (J572/15) [2015] ZALCJHB 104.

Order

[33]. In the circumstances and for the reasons set out above, I make the following order:

1. It is declared that the decision of the respondent to terminate the applicant's contract of employment is a breach of the employment contract read with the first respondent's disciplinary code procedure;

2. The termination of the applicant's employment is set aside and the applicant is reinstated in the first respondent's employee in the same position that the applicant was in at the date of the termination of his contract. The applicant is accordingly reinstated on suspension pending compliance by the respondent's with the applicant's contract of employment and its disciplinary code and procedure.

3. The first respondent is ordered to pay the applicant's costs.

D H Gush

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: T Ngcukaitobi and R Tulk

Instructed by: Thapelo Kharametsane Attorneys

FOR THE RESPONDENT: T Bruinders SC and S Scott

Instructed by: Fluxmans Inc.