Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J 1752/18

In the matter between:

BLAKE LEFATOLA **First Applicant**

TOIVO MOHAPI **Second Applicant**

and

CITY OF JOHANNESBURG **First Respondent**

JACK ZEBEDIA *N.O.* **Second Respondent**

Heard: 24 May 2018
Delivered: 06 June 2018

Summary: (Urgent – intervention in incomplete joint disciplinary proceedings – ruling that enquiry be conducted on written submissions of parties – one employee contractually entitled to lead oral evidence – no evidence in any form yet led in enquiry – clear breach of contract of employment – circumstances warranting order of specific compliance - review of ruling – record of application not provided – inappropriate to review ruling on an urgent basis – urgency satisfied as applicants acted promptly when ruling was handed down and it would have been premature to approach court before ruling made)

JUDGMENT

LAGRANGE J

Background

[1] This is an application for final, or alternatively interim, relief brought on an urgent basis. It was launched on 21 May and is set down for a hearing on 24 May 2018. The applicants Mr B Lefatola ('Lefatola') Ms T Mohapi ('Mohapi) are respectively employed as Group Head: Group Strategy, Policy Coordination & Relations and as Unit Head: Integrated and Community-Based Planning by the first respondent, the city of Johannesburg. Lefatola is employed on a fixed term contract in terms of section 56 of the Municipal Systems Act 32 of 2000 ('the MSA') and reports directly to the Municipal Manager. Mohapi reports to Lefatola, and is not employed in terms of section 56 of the MSA.

[2] The applicants seek final relief in the form of an order in the following terms:

2.1 interdicting the disciplinary proceedings against them from proceeding by way of motion;

2.2 reviewing and setting aside the second respondent's ruling of 16 May 2018;

2.3 directing the second respondent to conduct the disciplinary proceedings against them in the form of an oral hearing.

In the alternative, the applicants ask that an interim interdict preventing the proceedings from proceeding by way of motion granted pending a final determination of the relief mentioned in paragraphs 2.1 to 2.3 above.

Brief chronology

[3] On 3 October 2017 Mohapi was placed on precautionary suspension by the City Manager of the first respondent, the City of Johannesburg Metropolitan Municipality ('the COJ'). On 19 October 2017, following a Council resolution, Lefatola was also placed on precautionary suspension by the City Manager of the first respondent, the City of Johannesburg Metropolitan Municipality ('the COJ')

[4] An investigation commissioned by the COJ into allegations of misconduct against Lefatola concluded that there was sufficient evidence against him which revealed serious misconduct on his part, of the kind described in Annexure A to the Disciplinary Regulations for Senior Managers. The report was compiled after interviewing the City Manager and other senior employees working in or with the executive mayor's office. The investigation report dated 6 November 2017 recommended the institution of disciplinary proceedings against Lefatola. Both the applicants were presented with notices to attend disciplinary hearings on 20 December 2017.

[5] The notices of the disciplinary enquiry, as amended, called on both applicants to answer 12 charges of gross misconduct. Notices of amended charges appear to have been given to the applicants twice. For the purposes of this application it is not necessary to go into the details of the alleged misconduct, save to state that the alleged misconduct concerns the preparation and finalising of the COJ's Integrated Development Plan. In essence, the applicants are accused of negligently or wilfully hampering the preparation of a draft IDP and its finalisation, and of not cooperating or wilfully obstructing the efforts of the Executive Mayor and staff in the Private Office of the Executive Mayor ('POEM') to finalise it. The charges referred to specific instances of the alleged failure to perform specific duties or instructions, or of a course of conduct which undermined the preparation of the plan. Six of the charges narrow down the alleged misconduct to a specific date or confine the charge to a period of a week or less. Other charges canvass periods ranging from 3 to 7 months.

[6] In the notices of the enquiry issued to both applicants, they were advised of the procedures applicable to the enquiry. Procedural aspects of the enquiry were itemised in the notices, and their attention was specifically drawn to the provisions. Pertinent provisions in Lefatola's notice stated:

> 2.1 You have the right to be represented by a fellow employee or any other suitably qualified person, provided that any costs incurred will be borne by you.
>
> 2.2 If you or your representative should fail to attend the hearing that the scheduled time and venue, the hearing may proceed in your absence.

2.3 You will be required to plead to the charges set out against you in the charge sheet.

2.4 The municipality will call witnesses and adduce evidence, orally or by way of documents, and you or your representative will have the right to cross-examine the witnesses called on behalf of the municipality, subject to the rights of any such witnesses.

2.5 You have the right to present a case and call witnesses and adduce evidence, orally or by way of documents.

2.6 The proceedings will be conducted in English, and should you require an interpreter, you must inform the prosecutor in writing there of with 5 days of receipt thereof.

2.7 Your attention is specifically drawn to the fact that the municipal council has appointed Salijee Govender Van der Merwe Inc all it designated a pointy to act as the evidence leader and Advocate Eric Nwedo to act as the presiding officer in the hearing.

2.8 Any request for further particulars or access to documentation or copies thereof must be directed to the person leading evidence, in writing within seven days of the date of receipt of the charge sheet.

2.9 Any request for a postponement must be directed to the person you evidence, in writing, forthwith but not live later than 7 days after the date of receipt of the charge sheet.

2.10 Your attention is drawn to the provisions of the Labour relations act, 1995 (act number 66 of 1995) as well is the Code of Conduct contained in Schedule 2 to the Local Government: Municipal Systems act, 2000 (act number 32 of 2000) which provisions will, where applicable apply to the hearing.

[7] Mohapi's notice contained slightly different provisions. I will only mention the most relevant ones here, viz:

1. You have the right to be represented by a fellow employee or shop steward.

2. If you or your representative should fail to attend the hearing that the scheduled time and venue, the hearing may proceed in your absence or in the absence of your representative.

> 3. You may call witnesses to testify on your behalf and you will be granted opportunity to cross-examine the witnesses called by the city.
>
> 4. The proceedings will be conducted in English, and should you require an interpreter, you must inform Mr Mathews Lengwasa … in writing thereof 5 days before the hearing.
>
> 5. Your attention is drawn to the provisions of the Labour relations act, 1995 (act number 66 of 1995) as well as Schedule 8 thereto - code of good practice: dismissal, which provisions will apply, where applicable, to the hearing.

Mohapi's notice also contained details of the presiding officer and the prosecutor.

[8] The applicants further claim that when the enquiry first convened on 20 December 2017, it was agreed amongst other things that "the (oral) hearing" would commence on 5 February 2018 and that the applicants could be legally represented. They claim that this constituted a further agreement on the conduct of the hearing. The respondent denies that the arrangements made on 20 December included an agreement that the hearing would be conducted orally.

[9] When the enquiry resumed on 5 February 2018, Mohapi applied for a ruling that the COJ should contribute towards her legal costs. Lefatola was granted a postponement because his legal representative was not present and he 'wanted time to consider whether he should apply to join' Mohapi's application for a contribution to costs to be made by the COJ. The net result of this interlocutory process meant that a further six days that had been scheduled for the enquiry in February were lost.

[10] A further application was brought by Lefatola in which he challenged the validity of the resolution to institute disciplinary proceedings. It appears that the chairperson rightly accepted that he had no jurisdiction to consider that application. Nonetheless, hearing that application appears to have consumed another three days of the hearing in February and March 2018.

[11] On 13 February, the CEO applied for a ruling that the hearing which was due to resume on 20 February should proceed in the form of application proceedings based on affidavits, without recourse to oral evidence and

that any disputes of fact could be determined in accordance with the conventional rules governing the resolution of such disputes on paper in motion proceedings. The application also sought that argument would be conducted by way of written submissions.

[12] On 16 May 2018, the chairperson agreed that it was not necessary for the proceedings to be conducted by way of leading oral evidence and ruled that the hearing would proceed by way of written submissions. He then ruled that the employer would make its submissions by 18 May 2018 and employees would make theirs by 25 May 2018. It is not entirely clear whether his ruling on 'written submissions' was intended to encompass evidence on affidavit or not.

[13] In arriving at his decision, he appears to have been influenced *inter alia* by case authority that has acknowledged that the hearing may be conducted by way of written submissions in the interests of expediting proceedings especially in circumstances of delay such as in the current enquiry. He noted that the employer would essentially stand or fall by its written submissions and the applicants' right to be heard would be satisfied by the opportunity to make their own written submissions. He was of the view that this was compatible both with the conduct of disciplinary enquiries with the minimum of legal formalities as contemplated in Schedule 8 of the LRA and the Senior Management Regulations.

Urgency

[14] The applicants would have approached the court prematurely without waiting for the chairperson's ruling on the conduct of the proceedings. The mere fact that it became an issue when the COJ made the application would not have warranted approaching the court then.

[15] In so far as it is not appropriate for the court to intervene in incomplete enquiries except in exceptional circumstances[1], I am satisfied that the removal of Lefatola's clear contractual right to choose how he wishes to conduct his defence in terms of the applicable regulations amounts to a clear breach of contract, for the reasons set out below. It is also easily

[1] *Booysen v Minister of Safety & Security & others* (2011) 32 *ILJ* 112 (LAC) at 129, para [54].

remedied at this point in the proceedings when no evidence in any form has yet been led.

[16] This also points to the lack of a meaningful alternative remedy to address the contractual breach as it is a process right fundamentally affecting his scope for conducting his defence. It is not an incidental or insignificant issue in the conduct of the inquiry. The existence of the contractual right does make it possible for a contractual remedy for specific performance to be sought at the time of the breach. In terms of s 77A (e) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'), the Court has the power to order specific performance.[2] However, that does not mean all such breaches, even if proven will warrant the exercise of the court's discretion to order specific performance.

Review of the ruling

[17] The grounds of review of the chairperson's ruling on conducting the proceedings by way of written 'submissions' are thinly pleaded. Moreover, only his ruling was provided for the court to consider. No record of the proceedings in the form of the parties' various affidavits in that application are provided. On the material available, the court is not in a position to review the ruling in these proceedings. However, given the fact that the order for specific performance will inevitably conflict with the commissioner's ruling, it is necessary to suspend it pending any future review of the ruling, though it will probably be moot by the time such an application is heard in due course.

[18] In passing, I must stress that the order made in this matter does not in any way try to suggest, as a matter of principle, that disciplinary proceedings must entail the leading of oral evidence. Provided the accused employee has an opportunity to present their response to the employer's case, in a format equivalent to that of the employer there is no reason why evidence on affidavit would not satisfy the need to give the employee a sufficient

[2] Section 77A (e) of the BCEA reads: "Subject to the provisions of this Act, the Labour court may make any appropriate order, including an order – (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, and award of damages or an award of compensation." Asian

opportunity to respond, in the absence of other complicating considerations like the contractual issue in this application or a situation in which poor levels of literacy may materially hamper an employee's ability to deal with evidence in writing.

[19] What that leaves is the applicants' claim that they are entitled to an oral hearing in terms of a contractual agreement.

Existence of a clear contractual right to a hearing?'

Did a contract enforceable by this court arise from the issuing of the notices of the enquiry and, or alternatively, the first day of the enquiry?

[20] The first basis on which the applicants contend they have a contractual right to an oral hearing is based on the entitlements set out in the notices of the disciplinary enquiry constituted an agreement between them and the COJ , which the employer is attempting to resile from. The COJ accepts that it originally contemplated and instituted an oral hearing but by issuing the notices contemplating such a procedure, it did not conclude any agreement with the applicants on the format of the hearing.

[21] In the course of considering this contractual ground, it came to my attention that nowhere in the pleadings is it stated that this purported agreement formed part of the applicant's employment contracts. It is pleaded as a self-standing agreement, but is not directly or indirectly linked by them to their contracts of employment. The same goes for their supplementary claim that this agreement was 're-enforced', or alternatively, a fresh agreement was reached to conduct an oral enquiry when the enquiry first convened on 20 December 2017. I am not sure that an arrangement struck in the course of a disciplinary enquiry necessarily concerns the applicants' employment contracts. Quite apart from that, the conclusion of a distinct agreement that the subsequent proceedings would be conduct as oral proceedings is poorly substantiated in the founding affidavit and denied in the answering affidavit. The applicants did not file a replying affidavit, so the respondent's version would have to be preferred if it had to be determined.

[22] As the founding affidavits stand, I am of the view that the applicants have not laid the necessary factual jurisdictional basis why the Labour Court would be entitled to adjudicate on this particular alleged agreement under its powers to deal with contractual matters. The court's power to determine contractual disputes is confined to what is set out in the s 77(3) of the BCEA. That section states:

> (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

(emphasis added)

[23] In the absence of any allegation of how this agreement concerns their contracts of employment as such, this contractual claim cannot be entertained. At the very least this should have been set out in the affidavit. Merely because it *could have been* part of their contracts of employment and arose in an employment relationship context is not enough. As it stands, it was pleaded as a self-standing agreement, quite independently of the claim based directly on their contracts of employment, which is discussed below.

The applicant's contracts of employment and their rights to an oral hearing

[24] Turning to their claim to be entitled to an oral hearing based directly on their employment contracts, Lefatola contends that in terms of clause 20 of his employment contract, the Disciplinary Procedure for Senior Managers is incorporated into his terms and conditions of employment. He further contends that clause 20.5.2.3 of his contract provides, in respect of serious misconduct, that regulations 8 to 12 of the Local Government: Disciplinary Regulations for Senior Managers, 2010[3] are applicable. Although a copy of the contract should have been attached, the COJ does not dispute these contentions but maintains that they only require it to give Lefatola a hearing but that hearing does not have to be an oral one.

[3] GN 344 of 21 April 2011 (GG no 34213)

[25] The notice issued to Lefatola conforms with the provisions of Regulation 8 which state inter alia that:

> **8. Serious misconduct**
>
> (1) The officer leading evidence who has been appointed in terms of sub-regulation 5(7)(b) -
>
> (a) must, within 30 days of his or her appointment, formulate and serve charges of the alleged misconduct in a format compliant with Annexure D; and
>
> (b) may summons any witness to appear before the disciplinary hearing in a format substantially compliant with Annexure E.
>
> (2) The charge sheet contemplated in sub-regulation (1) must inform the senior manager of -
>
> (a) the alleged act or acts of misconduct;
>
> (b) the time, date and venue at which the hearing will be conducted;
>
> (c) the name of the presiding officer and the officer leading evidence;
>
> (d) the address at which notices and correspondence may be served on such officer;
>
> (e) the right to appoint a representative of his or her choice, who may be a fellow staff member, shop steward, union official or any other suitably qualified person;
>
> (f) the right to request further particulars or access to documentation or copies thereof from the officer leading evidence, in writing, within seven [7] days of receipt of the charge sheet;
>
> (g) the right to an interpreter, whose presence must be requested by notice in writing, addressed to the officer leading evidence within seven [7] days of receipt of the charge sheet;
>
> (h) the right to call witnesses to testify on his or her behalf;
>
> (i) the fact that any request for a postponement should be directed to the officer leading evidence in writing not later than seven [7] days after receipt of the charge sheet; and
>
> (j) the fact that the enquiry may be conducted in his or her absence if the senior manager or his or her representative fails to attend the hearing,

which includes the making of a finding and the possible imposition of a suitable sanction.

[26] Regulation 10 sets out the procedure for the conduct of a disciplinary enquiry and provides:

10.Conducting disciplinary hearing

(1) The disciplinary hearing must commence -

(a) within three months of the resolution to institute disciplinary action; and

(b) on a date not less than seven [7] days and not more than ten (10) days from the date of service of the charge sheet and the written notice of the disciplinary hearing on the senior manager.

(2) The hearing must be conducted by the presiding officer who may determine the procedures to be followed, provided that the -

(a) rules of natural justice are adhered to at all times;

(b) matter is speedily resolved with the minimum of legal formalities;

(c) presiding officer in discharging his or her obligations -

(i) exercises care, diligence and acts impartially; and

(ii) does not consult or confer with any of the parties or their representatives on the merits or demerits of the case.

(3) The officer leading evidence -

(a) must commence the disciplinary hearing by reading out the charges to the senior manager;

(b) may call witnesses and produce book[s], documents] or object(s);

(c) may cross-examine any witness called to testify on behalf of the senior manager;

(d) may inspect any book[s], documents] or object[s] produced by the senior manager; and

(e) must present arguments on the merits of the case.

(4) The senior manager has the right to -

> (a) be heard in person or through a representative;
>
> (b) call witnesses and produce book[s], documents] or object[s];
>
> (c) cross-examine any witness called to testify by the officer leading evidence; and
>
> (d) inspect any book[s], documents] or object[s] produced by the officer leading evidence.

(emphasis added)

[27] Having regard to the above, I am satisfied that Lefatola has a contractual right by virtue of the regulations above, which are specifically incorporated into his contract of employment to an oral hearing in the sense that he is clearly contractually entitled to exercise those rights set out in Regulation 10 (4) including his right to call witnesses in terms of regulation 10(4)(c) and to cross-examine witnesses called by the COJ. Thus, as the regulations stand, he cannot be confined to present his evidence on affidavit or in the form of submissions. However, it is important to note that Regulations 10(3) and 10(4) do nothing more than determine the different ways that each party is entitled to present their respective cases. Thus, if one party chooses to present its case primarily using documents such as affidavits, it may do so. A party will assume the risks of the methods of producing evidence it chooses under those provisions. The methods it adopts do not oblige the other party to mirror its approach. It is up to the presiding officer to weigh up the value of the different forms of evidence adduced. For this reason, rather than referring to an 'oral hearing' being a contractual entitlement, the relief granted must be confined to the contractual entitlements set out in the regulations.

[28] Strictly speaking, Mohapi, who is not employed under section 56 of the MSA, is compelled to rely on the more limited basis of an alleged contract concluded when the notices were issued, which was renewed or agreed upon anew at the enquiry on 20 December 2017. For the reasons mentioned above, those alleged agreements cannot be entertained. As such, the employer does not necessarily have to conduct her enquiry in

conformity with the regulations, though for practical purposes it appears to have decided to conduct a joint enquiry and not to treat her less favourably than Lefatola in the conduct of the proceedings. As a matter of law though her entitlements are not the same.

Can applicants' rely on general contractual principles?

[29] Lastly, the applicants contend that an employment contract must be interpreted to include fairness and the SCA has held that employees are contractually entitled to a pre-dismissal hearing. In ***SA Maritime Safety Authority v McKenzie*** [4] the SCA held that there is no implied right in contract not to be unfairly dismissed in respect of employees to whom the Labour Relations Act, 66 of 1995 applies. By necessary implication, this also means a dismissal which is procedurally unfair does not necessarily imply a breach of contract.

Conclusion

[30] Although I am not satisfied the presiding officer's ruling, as such, can be set aside in these proceedings, Lefatola nonetheless has a right to an oral hearing to the extent set out in Regulation 10(4) above. Mohapi has not established a clear, or *prima facie* right to a particular form of hearing based on her contract of employment or otherwise. Nevertheless, as Mohapi and Lefatola's hearings are being conducted jointly it will probably make little practical sense to differentiate between them in the conduct of their defence in the enquiry. As a matter of law, the relief granted, strictly speaking is confined to Lefatola's entitlements.

[31] However, as mentioned above, the practical consequence of this outcome is that the chairperson cannot give effect to his ruling by *requiring* the hearing to be conducted by way of written submissions, even though the parties would still be free to determine how they wished to present their cases within the confines of Regulations 10(3) and 10(4). Consequently, it is necessary to suspend the effect of the ruling, pending any subsequent review.

[4] (2010) 31 ILJ 529 (SCA) at 553-4, para [56].

Costs

[32] I am disinclined to order costs, as the applicants' success is limited and the parties are still locked in an employment relationship.

Order

[1] The application is dealt with as an urgent application in terms of Rule 8 of the Labour Court Rules and any non-compliance with the rules relating to form, service and time periods is condoned.

[2] The first applicant is entitled to exercise his contractual rights in terms of Regulation 10(4) of the Local Government: Disciplinary Regulations for Senior Managers, 2010, and cannot be required to conduct his defence in the form of written submissions.

[3] The second respondent's ruling of 16 May 2018, attached as Annexure "FA11" to the founding affidavit, is suspended pending the outcome of any review of that ruling in due course.

[4] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M Sikhakhane instructed by Mbuyisa Moleele Attorneys Inc
RESPONDENT:	P Buirski instructed by SGV Attorneys