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Reportable

# THE LABOUR COURT OF SOUTH AFRICA,

# HELD AT JOHANNESBURG

**Case no: J 1904/19**

In the matter between:

| | |
|---|---|
| **TRACEY MAYLENE WERELEY** | **First Applicant** |
| and | |
| **PRODUCTIVITY SOUTH AFRICA** | **First Respondent** |
| **KOMESHAN NAIDOO *N.O*** | **Second Respondent** |

**Heard**: 7 November 2019

**Delivered**: 4 December 2019

**Summary:** (Urgent – Employer's unilateral abandonment of disciplinary enquiry mid-stream – summary dismissal of employee - right to a formal disciplinary enquiry part of employee's contract of employment – right to summarily dismiss not the same as right to dismiss without a hearing – unlawfulness of termination of contract of employment a matter within labour court's jurisdiction – special circumstances warrant order of specific performance – punitive cost order)

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## JUDGMENT

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LAGRANGE J

Background

[1] This is an urgent application brought to rectify an alleged fundamental breach of the applicant's employment contract when the respondent ['PSA'] summarily terminated the applicant's employment before the completion of internal disciplinary inquiry proceedings against her. The applicant ('Wereley') asks the court to declare her dismissal on 5 September 2019 a breach of contract and unlawful and void *ab initio*.

[2] The application was later launched on 16 September and initially set down on 19 September 2019. It was then postponed until 9 October and subsequently to 7 November 2019, to permit the filing of answering and replying affidavits. Both parties accept that the matter is urgent.

[3] Prior to her dismissal, the applicant was employed as Executive Manager: Human Resources.

Brief chronology of material facts

[4] On 10 April 2019, Wereley was issued with a notice of a disciplinary inquiry scheduled for 25 and 26 April 2019. In summary, the charges she was called to answer concerned her alleged:

4.1 unreasonable interference in the businesses supply chain management ['SCM'] process relating to the appointment of a firm of attorneys to represent the PSA in two labour matters, contrary to the SCM policy and in breach of the prescript of the Public Finance Management Act, 1 of 1999, ['the PFMA'];

4.2 disrespect for her superiors and her peers and abuse of her authority;

4.3 failure to adhere to the PSA's BCE- Recruitment and Performance Management Policy, and

4.4 failure to perform the function of HR Executive at the Bargaining Forum and failing to update and revise HR policies despite guidance and requests from the CEO, which resulted in 'audit findings' for two consecutive years.

[5] Apart from setting out the charges above, the letter went further and accused Wereley of creating a toxic and hostile working environment in the human resources management. The letter advised that, even though these issues were "perhaps not misconduct in the strict sense", it would argue that they impacted on her "suitability for continued employment".

[6] The letter identified that the behaviour in question concerned: the tone and extent of her email correspondence with the CEO and the board; her reaction to attempts to understand the nature of her medical condition, and complaints of being undermined by the CEO.

[7] Significantly, the letter made it clear that regardless of the outcome of the findings on charges of misconduct, her alleged persistent fostering and aggravation of a disharmonious working environment alone warranted the termination of her service. It was also stated that the PSA would lead evidence in support of this contention and Wereley would be entitled to respond thereto.

[8] To emphasize its intentions regarding these issues, apart from requiring the independent chairperson to make findings of guilt on the misconduct charges and to recommend a sanction to the PSA in the event she was found guilty of any of them, the letter stated that "regardless of the findings and recommendations" the independent chairperson made in relation to the misconduct charges, he was also mandated to:

> "... consider all the evidence presented by our client in relation to [*the matters described in paragraph [6] of this judgment*] and, after hearing your client's response to all such evidence, make recommendations to our client as to the nature and extent of your incompatibility with our client and, where appropriate, remedial action that may be taken (taking into account the cumulative effect of this evidence, your client's response and any recommendations [*made by the chairperson in relation to sanctions for any findings of misconduct*]).

[9] On 17 April, the applicant requested further particulars but was told that the complaints were apparent from the charges. The further particulars requested in effect concerned the issues that a prior investigation before instituting disciplinary action was supposed to address and answer. Quite unusually, clause 2.3.1 of the PSA's Disciplinary Code and Procedure ['the

code'] provides for a prior investigation. This investigation essentially takes the form of a preliminary inquiry to establish whether there is a case against the employee. In particular, clauses 2.3.1.6 and 2.3.1.7 state:

> "2.3.1.6 Each employee shall have the right to an investigation prior to any disciplinary action being taken against him/her. The purpose of the investigation will be to establish whether there are facts to warrant warning the employee or calling the employee to a disciplinary hearing. The investigation need not be a formal process. An investigation is simply a fact-finding meeting/s. The investigation of an alleged misconduct should involve talking to the employee is alleged to have committed an offense/s and two other witnesses, taking statements, taking photographs and collecting other relevant documents.
>
> 2.3.1.7 In the investigation it should be established whether:
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> a. The employee concerned was aware and/or could reasonably be expected to be aware of the applicable standards, rules, and regulations with which he is expected to comply; and
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> b. the employee breached/broke the rule; and
>
> c. The employee does not have a reasonable/acceptable reason for breaking such rule.
>
> d. The employee knew about the rule she allegedly breached and whether or not s/he has a reasonable and acceptable explanation for breaking the rule."

[10] When the inquiry convened on 25 April, Wereley, who was legally represented in the inquiry, raised a complaint that there had been no investigation as required before charges were initiated. The chairperson, Mr K Naidoo, an attorney issued a ruling the following day on this objection. He found that in so far as an investigation as envisaged in the code had not been carried out, the breach was not a material one that necessitated making a declaration that the disciplinary proceedings be declared void *ab initio*, for want of compliance with the investigative phase. Further, he found that, in any event, the code is only an important guideline in terms of clause 1.1 of the code. That provision, which is titled 'Objective of the Policy and Procedures', states *inter alia* that:

"This Human Resource Policies and Procedures document is an important guideline for ensuring that discipline in the workplace is fairly, equally and consistently applied thereby enabling a fair and harmonious employment relationship between the company and its employees"

On this basis, he appeared to conclude that a contractual right to an investigation is not as clear as it might appear, and that, if it did exist it had not been breached. Ultimately, he concluded that he did not have the power to determine this in the first place.

[11] The hearing was due to resume on 15 May, but on 14 May the applicant was admitted to hospital by her psychiatrist. A letter dated 6 September claims that she was booked off for a month until 17 June. On the same day Wereley also made a request for more detailed information on which each of the charges was based. The PSA declined to provide the requested details on the basis that the charges were self-explanatory and only needed to be supplemented by evidence at the inquiry. It also suggested that she already had sight of the extensive bundle of documents the employer would rely on. The letter also accused the applicant of removing a large quantity of documentation from its premises at the time of her suspension the previous October and demanded the return thereof.

[12] Nevertheless, on 12 June 2019 the respondent did provide further particulars while reserving its right to deal with some of the material when it produced evidence. The applicant claims she accepted this, as she was satisfied in the knowledge that everything would be addressed in the course of the evidence.

[13] The inquiry resumed on 20 June. Before the inquiry started, Wereley submitted a written plea in the form of a statement in relation to the first charge concerning breaches of the SCM procedures. The PSA complains that this delayed the start of the proceedings on that day, but Wereley maintains that it was only when she had received certain documents that morning from the PSA that she was able to finalize a statement on the first charge.

[14] On the 20 June, the PSA led evidence relating to Wereley's alleged interference with the supply chain management and continued leading

evidence on 3 and 4 July. On 4 July, Wereley submitted a complete and amended statement. The final statement also addressed the remaining charges in the notice of the enquiry as well as an additional charge levelled by the PSA stemming from email correspondence Wereley had conducted with the Department of Labour, in which she *inter alia* complained that the CEO of PSA was using public funds to pursue his own private vendettas against staff. The final version of her statement ran into some 31 pages.

[15] The respondent re-scheduled the inquiry for 18 and 19 July. Wereley requested a postponement because her attorney was in Port Elizabeth on those dates. Subsequently, the parties agreed the inquiry would reconvene on 6 and 8 August. Apart from agreeing on these dates, by 26 July the parties had also reached agreement on limiting the scope of the inquiry and that the chairperson would be asked to determine if a *prima facie* case had been made out, in which case the matter would proceed.

[16] At the inquiry on 6 August, it is common cause that Wereley experienced difficulties breathing towards the end of the proceedings but it was agreed that evidence could continue to be led in her absence. On 7 August before the inquiry could resume the following day, Wereley was booked off until 9 August with bronchitis, laryngitis and pneumonia. Wereley's attorney indicated they would be able to reconvene the hearing on 3 September. The chairperson was unavailable from 20 September to 8 October. On 14 August, her attorney then proposed additional dates on 17 and 18 September. The PSA's attorney did not respond to these proposed dates directly, but asked if Wereley's attorney was available during the week of 26 August as the CEO had become available that week. Wereley's attorney indicated his availability for an afternoon during that week, which appear to suit the PSA's attorney, who promised to revert once he had spoken to the client.

[17] Despite these genuine difficulties and reasonable efforts between the representatives to arrange subsequent dates for the hearing, the PSA simply decided to terminate Wereley's services.

On 5 September, PSA's attorneys advised that her services had been terminated in terms of clause 7.1 of her contract of employment[1] because it was of the view that:

17.1 she was incompatible with the employer and in consequence thereof she had broken the trust and confidence of the PSA, and the incompatibility could not be remedied, and

17.2 she had continuously and deliberately used avenues available to her to frustrate processes instituted by the PSA relating to her employment, which could not be allowed to continue.

[18] The PSA Board reserved its right to amplify the reasons underpinning the decision. In the PSA's heads of argument, it was emphasized that Wereley's employment was not terminated based on charges of misconduct but on a breakdown of trust and confidence in her and her incompatibility with the PSA. Hence it argues that it was entitled to invoke clause 7.1 of the employment contract, which presupposes a distinct method of terminating employment, which avoids the strictures of any applicable pre-dismissal procedure.

[19] Her attorney immediately demanded a retraction of the termination and that the PSA should reconvene the inquiry which last sat on 7 August 2019, and which the parties were attempting to reschedule. No reply was received by 9 September.

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[1] Clause 7 of Wereley's contract of employment reads:

> "7.1 The Employee' s service may be terminated by either party giving not less than one weeks' written notice during the first six months of employment and not less than two weeks' written notice thereafter up to one year's service. After one year's service, the period of notice shall be four weeks' written notice. The Employer may summarily terminate the contract for any cause recognised by law as being sufficient.
>
> 7.2 This agreement may be terminated by the Employer without any notice or any payment in lieu of notice in the case of gross misconduct on the part of the Employee."

The contract of employment and the code

[20] Wereley contends that clause 26.6 of her contract of employment incorporates the code into her terms and conditions of employment because it states:

> "26.6 the parties agree that all terms and conditions of employment are:
>
> - as specified in this Contract,
> - those conditions of employment not specified in this agreement shall be in terms of the Employer's rules, regulations and procedures, and
> - should the Employment Contract and also the Employer's rules, regulations and procedures be silent on any specific point in any relevant labour legislation shall apply."

[Emphasis added]

[21] Apart from clause 26.6 of the employment contract itself, clause 1.2 of the code also expressly confirms that the code forms part of each employee's contract of employment. Clause 2.2 provides that for any disciplinary action of any sort to be fair, there must be a good reason for taking the disciplinary action and a fair procedure must be followed. Clause 2.2.2 states:

> "2.2.2 PROCEDURAL FAIRNESS
>
> In addition to having a good reason for discipline, disciplinary action is only fair if the procedure is also followed. THE PROCEDURE to be followed however is not always formal. Formal procedures, requiring disciplinary hearing notices and the appointment of a chairperson, are usually unequalled for when the expected outcome for an employee is alleged unacceptable behaviour is a final written warning or dismissal. To issue verbal warnings and a written warning the procedural requirements are not as strict. The procedure to be followed to issued various levels of warnings and to dismiss an employee are set out in paragraph 2.3 below."

[22] Somewhat unusually, clause 2.3.1.6 provides that each employee shall have the right to an investigation prior to any disciplinary action being taken against him or her and that "(t)he purpose of the investigation will be to establish whether there are any facts to warrant warning the employee or calling the employee to a disciplinary hearing. The investigation need not be a formal process". Clause 2.3.1.8 also stipulates that disciplinary action

is only warranted if the investigation establishes that the principles set out in Schedule 8 of the LRA governing substantive fairness for misconduct have been satisfied.

[23] Clause 2.3.1.9 of the code states:

> "In deciding whether to discipline an employee through warnings or to call the employee to a disciplinary hearing, each case shall be treated on its own merits and discretion exercise depending on the circumstances and nature of the infringement. At times the guidelines on sanction provided by the code may be deviated from if the circumstances of the case justify this."

[24] Further, it provides that formal procedures requiring disciplinary hearing notices and the appointment of a chairperson are usually uncalled for when the expected outcome for an employee's alleged unacceptable behaviour is a final written warning or dismissal. Clause 4.2.1 provides that a formal hearing should be held where the employee appears to have committed very serious misconduct or is already on a final written warning for similar type of behaviour. The requirements of holding a prior investigation are repeated in the case of employees facing the prospect of dismissal in close 4.2.2 of the code.

<u>Argument</u>

[25] The Applicant claims that clause 7.1 permitting the summary termination of the contract for any cause recognized by law as being sufficient does not deprive her of her contractual right to a hearing.

[26] She claims she has not had an opportunity to present her case before the enquiry chairperson except in the form of what she set out in her written statement, which was submitted before all the PSA's evidence had been led. In particular, the PSA had yet to lead evidence on her alleged incompatibility, as was stated in the initial notification of the inquiry.

[27] Further, she contends the PSA had no right to act once it had appointed a chairperson and the inquiry was underway. In addition, she argues that the PSA was not entitled to unilaterally abandon the detailed agreement reached between the parties on 3 July 2019 about how the inquiry would proceed going forward.

[28] For its part, apart from setting out some of its motivation for dismissing the applicant which was absent from the letter terminating her services on 5 September, the PSA contends:

28.1 The disciplinary code is merely a guideline on the general approach to disciplinary action, but is not prescriptive regarding the processes and procedures to be adopted in instances of workplace discipline. Accordingly, there are no rigid rules and departures from the procedure are permissible. The code simply recommends steps that should be taken in the event of misconduct.

28.2 Even though the PSA accepts that clause 26.6 (b) of the contract does entitle Wereley to insist on the application of the code, the provisions of the code itself are not peremptory and do not include an absolute right to the holding of a formal disciplinary inquiry which has to be concluded.

28.3 In any event, clause 7.1 of the contract of employment permits it to terminate an employee's service summarily, which means any pre-dismissal procedures can be obviated in a case where the grounds of dismissal are not misconduct but a loss of trust and incompatibility.

28.4 Also, merely because a formal disciplinary hearing was underway, the PSA was not deprived of its rights to invoke clause 7.1 of the contract of employment as a basis for dismissing her.

28.5 It rejects any contention that the agreement of 3 July 2019 on the further conduct of the disciplinary inquiry amounted to an amendment or novation of the contract of employment, because that agreement was never intended to create contractual obligations.

28.6 Even if Wereley was contractually entitled to a formal disciplinary inquiry, which the PSA denies, there was a tacit or implied term that any procedural right to a hearing was provided for the purpose of enabling a fair and harmonious relationship between the company and its employees. This necessitated that Wereley had to act in concordance with that purpose whereas she had undermined that objective through her conduct since the process began. As such, her conduct constituted a breach of the contract of employment which was material and entitled the respondent to cancel it summarily.

28.7 Under circumstances where an employee indulges in conduct which establishes that the employer can no longer reasonably or fairly be expected to provide the employee with the opportunity for a pre-dismissal hearing, it should not be obliged to do so. In support of this argument, the PSA contends that she has attempted to obstruct, delay and avoid the disciplinary process. Further, in circumstances where it claims that the applicant has used the inquiry not to advance *bona fide* defences but to pursue scandalous allegations against management, and employer cannot be expected to permit employment relationship which has broken down to be kept alive for the purposes of finalizing a disciplinary process which the employee is undermining. The basis of this submission is the PSA's justification of the decision of the board taken on 20 August 2019, viz:

> "The decision was taken against the backdrop I have sketched above in relation to the delays and frustrations experienced by PSA. By the time this decision was taken, Wereley had been on suspension for nearly 10 months and inquiry into her conduct was nowhere near conclusion. Wereley, via absenteeism and other means, had ensured her ongoing employment for a period of nearly a year in circumstances in which self-evidently, and employment relationship is no longer tolerable or appropriate."

[29] Lastly, an argument was made with reference to a judgment handed down on the same day this application was argued, in *DEMAWUSA & Others v City of Johannesburg.*[2] In that application Van Niekerk J had dismissed an application to set aside the suspension of municipal employees on the basis that their suspensions were unlawful. The municipality had argued that the Labour Court had not jurisdiction to determine the lawfulness of a dismissal based on the dicta in the Constitutional Court judgment in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* [3]

> [106] Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. It's heading is: 'Unfair dismissal and

[2] J 1849/2019.

[3] (2016) 37 *ILJ* 564 (CC).

unfair labour practice'. Under the heading appears an indication of which sections fall under the chapter...

Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA...

[107] This indication is reinforced when one has regard to the definition of "dismissal" in section 186 (1) ... Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if the dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA."

[30] The PSA argued that consequently this application was still-born because the court similarly had no power to hear this application either.

<u>Evaluation</u>

*The jurisdictional issue*

[31] There is a difference between a claim that a dismissal is unlawful for want of compliance with a statutory provision, which was the case in *Edcon*, and a claim that dismissal is unlawful because it entails a fundamental breach of contract. In this instance, Wereley bases her claim purely on breach of contract. The Labour Court derives its power to deal with such a claim not from the LRA but from its jurisdiction read with its powers under s 77 and s 77A of the Basic Conditions of Employment Act, respectively which state:

"77 Jurisdiction of the Labour Court

...

(3) The Labour Court has concurrent <u>jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment</u>, irrespective

of whether any basic condition of employment constitutes a term of that contract.

and

77A Powers of the Labour Court

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, an award of damages or an award of compensation..."

(emphasis added)

[32] The cause of action in this case is therefore quite distinguishable from that in *Edcon* and *Demawusa* and any resemblance between those cases and this one is completely superficial. I note in passing that the court in *Demawusa* pointedly noted at paragraph [5] of the judgement that neither the claim relating to suspension nor the claim relating to unlawful deductions were based on a breach of contract.

[33] Consequently, I am satisfied Wereley is entitled to bring an application based on breach of contract and seeking specific performance as a remedy.

*The contractual obligations and the code*

[34] It is common cause that the code formed part of Wereley's conditions of employment. Where the parties differ is on whether the code itself was intended to be peremptory or not in prescribing procedures to be followed prior to a dismissal for misconduct. It is true that the code states that it is a guideline, but it also stresses that it is an 'important' one. The code itself sets out a detailed and elaborate procedure that should be followed.

[35] As mentioned, an unusual feature of the code is that even before a written warning is issued it is anticipated that an investigation ought to be held, in which it must be established whether the requirements for substantively fair disciplinary action as set out in item 7 of Schedule 8 of the Labour Relations

Act, 66 of 1995 ['the LRA'], have been met. If anything, the code anticipates more elaborate procedures than the LRA requires. Nothing in the wording of the code indicates that the provisions governing when a formal inquiry should be held were intended to be optional at the election of the employer. In addition, clause 4.2 of the code sets out in some detail the steps that should be taken to initiate a formal inquiry in cases of potential 'dismissal or summary dismissal', which is a clear indication that summary dismissal was not envisaged as a *sui generis* reason for dismissal line beyond the reach of the code. Further there is no wording in that clause which hints that it was intended that those provisions could simply be unilaterally departed from if it suited the employer. Moreover, the express incorporation of the code in Wereley's conditions of employment both in the contract of employment and the code itself, suggests that it was intended to create enforceable obligations, and not obligations which could simply be jettisoned at the whim of one party. If the content of the procedures was far less detailed and simply provided an opportunity to exercise the right to *audi alteram partem* within a rudimentary hearing framework, it might be more plausibly argued that the employer enjoyed greater freedom in determining the conduct of an inquiry. That is not the kind of procedure under consideration here. The fact that the employer has seen fit to include such an elaborate procedure in the contract of employment, which goes beyond what is required of it in terms of the LRA does not mean that it can simply revert to the default provisions of the LRA, when its own procedure does not suit it.

[36] The second primary leg of the PSA's argument relates to its contention that the summary termination provision in clause 7.1 of the contract of employment, is a license to avoid compliance with any pre-dismissal procedures. The first point to make is that when dealing with the procedure to be followed in cases of potential dismissal the code itself clearly anticipates that the same procedure should the followed both in ordinary cases of dismissal and in cases of summary dismissal. Secondly, to equate a summary dismissal to a dismissal without a disciplinary inquiry is to conflate the requirements for conducting an inquiry prior to a dismissal with the grounds for dismissal. This distinction was dealt with, albeit in a somewhat different context in the case of *Ngongoma v Minister of Education*

*& Culture & others*.[4] That case dealt with the interpretation of the provisions of a provincial general service ordinance. The employee in question, a temporary employee, had been summarily dismissed, in reliance on a provision in the ordinance permitting the administrator to summarily terminate an employee's services.

[37] The court cited with approval the following interpretation of a summary termination:

> "The word 'summary' in the context of the dismissal of an employee or the termination of his services has a well-recognized meaning and usage. Under the common law, an employee may be dismissed summarily only on the grounds of some misconduct justifying such summary dismissal; and it is only misconduct of such a nature that it constitutes a breach of the contract of employment so material that it goes to the root of the contract which amounts to such misconduct (Thompson De Kock's Industrial Laws of South B Africa 2ed at 914)."[5]

[38] In *Ngongoma*, section 15 [3] of the relevant ordinance provided that in cases of misconduct the provincial secretary in each case had to ensure that the employee was given an opportunity to state their case verbally or in writing before action was taken against them. The court found that the provision permitting the administrator to summarily terminate an employee's services could not be utilized to avoid the requirement of holding an inquiry.[6] Although that case was concerned with the principle that a statutory provision could not be used for an ulterior purpose for which it was not intended, what it also highlights is that the mere fact that grounds of misconduct might warrant summary termination, does not obviate the requirement to hold an inquiry to establish that the misconduct was committed. Similarly, I see no reason why the provisions of clause 7.1 of Wereley's contract of employment should be read as a license for not complying with the procedures in the code applicable to dismissals for misconduct. Summary dismissal might be warranted once it has been determined that the gross misconduct in question has been established,

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[4] (1992) 13 ILJ 329 (D)

[5] At 335A

[6] At 337F-H.

which should be the outcome of an enquiry. To reason otherwise entails making the curious distinction that gross misconduct justifying summary termination need not be established in an enquiry but lesser forms of misconduct should be.

[39] The case mentioned also addresses another contention advanced by the PSA , namely that incompatibility and a breakdown of trust can be advanced as distinct reasons for invoking the summary dismissal provision. In *Jabari v Telkom SA (Pty) Ltd* [7], the Labour Court characterised a dismissal based on incompatibility in the following terms:

> "[3] An employer is entitled, where the conduct of an employee creates disharmony, to –
>
> (a) evaluate the nature and seriousness of the problem, address same, and assist the employee to overcome his personal difficulties; and
>
> (b) effect remedial action, and if unsuccessful, to place the employee in a position suitable to his qualifications and experience.
>
> [4] In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony.
>
> [5] In determining the applicant's alleged incompatibility, it is appropriate to enquire whether the fault for the disharmony is attributable to the applicant's conduct in that, he was unable to fit within the respondent's 'corporate culture' despite attempts by colleagues and the respondent, to accommodate him and to remedy the situation or that his conduct was unacceptable or unreasonable."

[40] This characterization of incompatibility was also adopted by LAC in *South African Rugby Union v Watson and Others*.[8] The type of incompatibility complained of in this instance is clearly premised on Wereley been found to have acted in an unacceptable or unreasonable manner. The PSA was intending to lead evidence of this in the inquiry and Wereley was to be given a chance to respond to it. Though the PSA tries to avoid characterising her actions as further acts of misconduct, essentially that is what the PSA

[7] (2006) 27 *ILJ* 1854 (LC) at paragraphs [3]–[5].

[8] (2019) 40 *ILJ* 1052 (LAC)at para [30].

accuses her of. There is no reason in principle why that inquiry should not follow the normal procedure of a disciplinary inquiry, as it is obviously misconduct for an employee to foster and aggravate a disharmonious working environment. I am alive to the other possibility that incompatibility might conceivably be dealt with as an operational requirements matter, which could lead to the employer following a path of retrenchment, but that is not the factual scenario here.

[41] The proposition was also advanced by the PSA that the determination of intolerability is something the board was entitled to determine unilaterally and that there was no requirement to hear the representations of Wereley before making such a decision. In support of this contention, the applicant alludes to the SCA decision in Rustenburg Platinum Mines Ltd v & Others[9] , in which the court held that the code of good conduct for dismissals in schedule 8 of the LRA located the first line of responsibility for workplace discipline and sanction with the employer *inter alia* because:

> The Code states that generally it is not appropriate to dismiss for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship "intolerable". "Intolerable" means "unable to be endured" (Concise Oxford Dictionary). This necessarily imports a measure of subjective perception and assessment, since the capacity to endure a continued employment relationship must exist on the part of the employer. It follows that the primary assessment of intolerability unavoidably belongs to the employer. This is not to confer a subjective say-so. Allowing some leeway to the employer's primacy of response does not permit caprice or arbitrariness. A mere assertion on implausible grounds that a continued relationship is intolerable will not be sufficient. The criterion remains whether the dismissal was fair.[10]

The first point to make is that the Constitutional Court subsequently has made it clear that deferring to the employer's choice of sanction is wrong and the appropriateness of a sanction should be objectively determined.[11]

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[9] [2006] 11 BLLR 1021 (SCA)

[10] At 1039, paragraph [45]

[11] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) at 2427-8, paragraph [61].

Secondly, even on the earlier SCA decision it is apparent from the last portion of the passage cited that the SCA did not agree that the subjective say-so of the employer was the final word on the question of intolerability, even though it endorsed an approach which deferred to the employer's judgement.

[42] Accordingly, on the basis of the cause of the incompatibility raised by the employer in this instance, the PSA is plainly accusing Wereley of unacceptable conduct giving rise to an alleged breakdown of trust in the employment relationship. Determining whether she has committed such conduct and whether it has led to an irretrievable breakdown, warranting her dismissal, is plainly a dismissal based on misconduct, which ought to be the subject matter of a disciplinary inquiry. Consequently, I am not satisfied that the PSA can rely on clause 7.1 of the contract to sidestep the obligation to conduct an inquiry.

[43] The PSA also argues that because Wereley's complaint is essentially one concerning the failure to follow a fair procedure and that accordingly the proper remedy is to refer an unfair dismissal claim to the CCMA. It is trite that noncompliance with disciplinary procedures might lead to a finding that a dismissal was procedurally unfair, but the power of an arbitrator is limited to awarding compensation. The CCMA is not empowered to determine the contractual lawfulness of a decision to dismiss an employee, in the absence of complying with a contractually binding pre-dismissal procedure. The contractual remedies for noncompliance with an obligatory procedure remedies are not equivalent to the remedy for procedurally unfair dismissal in the LRA.[12] It is a conceptual mistake to collapse the two causes of action simply because both concern issues of procedural noncompliance.

[12] See in this regard *Ngubeni v National Youth Development Agency & another*, (2014) 35 *ILJ* 1356 (LC) where the court held, at para [21], that:

> 'Insofar as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. F Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages.'

*Was the discontinuation of the disciplinary inquiry and the dismissal of Wereley a fundamental breach of her employment contract?*

[44] At the time the PSA board made a decision on 20 August 2019 to summarily dismiss Wereley, the disciplinary inquiry was proceeding albeit with setbacks. By that stage, the parties appear to have made considerable progress in narrowing down issues that needed to be canvassed. The applicant had also pleaded reasonably extensively to the misconduct charges against her.

[45] At no stage prior to abandoning the inquiry did the PSA ask the chairperson to adopt a more expeditious approach to the proceedings. The provisions of clause 4.2 governing the conduct of formal disciplinary enquiries are not unduly restrictive or overly prescriptive. It appears that the respondent simply tired of the process and was angered by some of the questions put to one of its witnesses as well as the discovery of Wereley's email correspondence to the Department of Labour in which she impugned the integrity of the CEO. In any event, the consequence of its decision was that the disciplinary procedure was abruptly discontinued before all the evidence had been led on all the charges and before Wereley had any opportunity to lead evidence in rebuttal. Effectively, the disciplinary proceedings were simply unilaterally abandoned and Wereley was dismissed contrary to the provisions of the disciplinary code which entitled her to a formal hearing to determine whether the conduct complained of was probably true and whether it warranted her dismissal.

[46] This case is not concerned merely with a departure from certain requirements governing the conduct of a disciplinary inquiry set out in a disciplinary code. It concerns a wholesale disregard of a contractual prerequisite for dismissal for misconduct, which is an internal safeguard against an arbitrary or capricious dismissal. By disregarding the disciplinary process in its entirety, in terminating the employment relationship, I am satisfied that this amounted to a fundamental breach of Wereley's contract of employment, and she was entitled to seek to enforce her contractual remedies following that breach.

*The appropriate remedy for the breach*

[47] Wereley seeks an order for specific performance consequent on a decision that her dismissal on 6 September was void *ab initio* on account of the fundamental breach committed by the PSA by dispensing with an inquiry before dismissing her. The PSA correctly points out that an order of specific performance is a discretionary remedy.[13] The primary relief sought by Wereley, consequent upon a finding that her dismissal was void *ab initio*, is her reinstatement from the date of dismissal and the reconvening of the disciplinary inquiry. One of the considerations in deciding whether to restore the employment relationship after a declaration that a dismissal is a nullity, is whether on the evidence available that there has been a breakdown in the trust relationship.[14]

[48] Wereley contends that there is a dispute about whether or not the relationship has broken down. The primary reasons advanced by the PSA for a breakdown in the relationship concerned Wereley's correspondence to the Department of Labour and questions put in cross-examination of one of the PSA's witnesses at the last sitting of the hearing. In the email correspondence, which I can only assume Wereley sent without her attorney's knowledge, she directly accused the CEO of being responsible for six executives being dismissed or forced to resign and of using taxpayers' money to pursue a personal vendetta against her. She also claimed that the board of PSA had not been interested in her proposal to engage in mediation, which was not true as the parties had engaged in mediation, but without success. When these emails were brought to the attention of Wereley's attorney she tendered an apology and put the emails down to being very emotional at the time having been recently discharged from hospital and other family related issues arising from the suspension since October 2018. Wereley also stated that she had no intention of

[13] See e.g. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 777A-B, viz: 'Even where performance is possible it is not always ordered because the Court has a discretion in the matter. This discretion must be exercised judicially but is not confined to specific types of cases, nor is it circumscribed by rigid rules.'

[14] See e.g. *Ramabulana v Pilansberg Platinum Mines* (2015) 36 *ILJ* 2333 (LC) at 2343-4, paragraph [55].

insulting the CEO and she had publicly apologized for that. The email was also sent to the official at the Department of Labour she had been corresponding with.

[49] However, she did not specifically retract the allegations made in the emails. Accordingly, it is not apparent if she still believes some of the things she said. Notwithstanding the apology, the PSA has added an additional charge arising from those emails to the misconduct charges she was already facing. So that conduct which the PSA claims is destructive of the trust relationship was something the chairperson was seized with before the PSA decided to undermine the mandate it gave him by deciding the issue unilaterally.

[50] It is also clear from the notice of the inquiry that from the beginning it was the undisguised intention of the PSA to argue for Wereley's dismissal, irrespective of the outcome of the formal charges of misconduct on grounds that she was creating disharmony and a toxic work environment. The PSA board's decision to dismiss Wereley on 6 September, to a large extent reflected that it has already decided that her dismissal was warranted mainly on that basis, without waiting for the outcome of the inquiry. This is further evidence that the parties are deeply divided on whether a restoration of the relationship is possible. It is difficult on the available information to be optimistic in this regard.

[51] However, the primary reason Wereley seeks an order of specific performance is to ensure that the disciplinary enquiry which had been convened before an independent chairperson is concluded before she can be dismissed on account of her alleged misconduct. At the time she was dismissed she was still on suspension, so her reinstatement does not mean that weaknesses in the trust relationship between her and the PSA will immediately be tested by her returning to work. Her only involvement with the PSA until the enquiry is concluded and a decision is made will be in the course of the inquiry proceedings. For this reason, I do not think that the state of the trust relationship under existing circumstances is a weighty factor affecting my discretion to make an order of specific performance and it does not assume the same importance it might if she was not on suspension.

[52] It is true that the inquiry had progressed in fits and starts since May 2019 and that Wereley has been on suspension for over a year, but it was progressing and tangible, meaningful progress was being made when the PSA decided to jettison it. Nothing prevented the PSA from asking the chairperson to take steps to expedite the conclusion of the enquiry. Some of the employer's evidence had already been given, by agreement, in Wereley's absence when she was ill. The chairperson is obviously entitled to limit evidence to only what is materially relevant and can issue directions on narrowing down the key issues in dispute.

[53] I am not satisfied the prejudice to Wereley of being dismissed without the conclusion of the disciplinary enquiry is outweighed by the prejudice to the PSA of the enquiry continuing. It could have started the enquiry much earlier after it first suspended Wereley in 2018 and was not obliged to accede to a mediation process before commencing it. Moreover, if its case is a compelling one it will be vindicated by the independent chairperson's findings, which ought to carry more weight and credibility than its own peremptory judgement. Concluding the enquiry will also mean that all the alleged misconduct will be evaluated in making a decision, rather than a decision being made solely on some elements thereof, leaving the process somewhat incomplete.

[54] Lastly, I should mention that this is not a case concerning some technical infringements of provisions in her contract of employment governing the conduct of her disciplinary enquiry. It entails the employer's complete subversion of a process that was well underway, and which is supposed to precede a dismissal. The PSA's actions, in my view, reinforce the considerations weighing in favour of making an order of specific performance.

[55] Therefore, in these circumstances, an order of specific performance is appropriate. I have slightly modified the relief sought by the Applicant relating to the resumption of the disciplinary enquiry as it is ultimately up to the chairperson to determine the future course of proceedings, including the further dates on which the hearing will convene.

Costs

[56] This application arose because of the high-handed unilateral action of the PSA in sweeping aside a process which was already underway and to which the applicant was entitled and determining issues it had expressly agreed to place before a neutral chairperson for determination. It acted in bad faith in undermining the enquiry by acting as it did to pre-empt its outcome and put Wereley to the unnecessary expense of restoring the process. In my view this warrants a punitive cost award.

Order

[1] The requirements of Rule 7 of the Labour Court are dispensed with and the matter is heard as one of urgency in terms of Rule 8.

[2] The First Respondent's dismissal of the Applicant constitutes a fundamental breach of contract and is declared to be unlawful and void *ab initio.*

[3] The Applicant is reinstated in her employment by the First Respondent with effect from her dismissal on 5 September 2019.

[4] The First Respondent must comply with its contractual obligation towards the Applicant in respect of its disciplinary code, as incorporated in her contract of employment, by reconvening the disciplinary enquiry before the Second Respondent, in order for him to conclude it.

[5] The First Respondent must pay the Applicant's costs on an attorney-and-client scale.

**R G Lagrange**

**Judge of the Labour Court of South Africa**

APPEARANCES

APPLICANT: Z Navsa instructed by Lawtons Africa

FIRST RESPONDENT: P Kennedy SC, assisted by G Snyman instructed by Webber Wentzel Inc.