REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no. J1374/2012

In the matter between:

NALELI WASA **Applicant**

and

KWAZULU-NATAL TOURISM AUTHORITY **First Respondent**

THOLAKELE DLAMINI **Second Respondent**

NDABEZITHA KHOZA **Third Respondent**

Heard : 08 January 2014

Delivered: 25 June 2014

Summary: Unlawful termination of contract. Applicant entitled to claim damages in respect of remuneration she should have earned for the remaining period of the contract had the contract not been unlawfully terminated.

JUDGMENT

BALOYI AJ

Introduction

1. The present dispute concerns the lawfulness and validity of the termination of Applicant's fixed-term contract on account of misconduct prior to the expiry of the agreed 5 year period. In her founding affidavit the Applicant sets out the cause of action upon which she relies. She relies upon the relevant provisions of her five year-fixed contract of employment, sections 77(3) and 77A (e) of Basic Conditions of Employment Act 75 of 1997, (the "BCEA"), the Public Finance Management Act 1 of 1999 (the "PFMA"), the PFMA Treasury Regulations ('the Treasury Regulations'), First Respondent's delegation of authority and First Respondent's disciplinary code and procedure, and KwaZulu-Natal Tourism Act of 1996.
2. In summation of her lengthy notice of motion, the Applicant is essentially seeking an order declaring the decision of the First Respondent to terminate her contract to be invalid and in breach of contract and unlawful. Secondly, ordering the First Respondent to pay the Applicant damages in the amount of R1 159 132.34. Thirdly, to refund her the amount of R40 057.89 unlawfully deducted from her May 2012 remuneration plus interest at 15.5% per annum from 04 May 2012. Finally, the Applicant sought costs of the application in the event of opposition. This application is opposed. The late filing of the answering affidavit is with Applicant's consent hereby condoned.

The facts

3. On 1 July 2008, the First Respondent and the Applicant concluded a five-year contract of employment in terms of which the First Respondent employed the Applicant as its Chief Operating Officer for a period of five years commencing on 1 August 2008 to 30 July 2013. First Respondent's conditions of service were part of the said contract. Her main job description was to provide strategic leadership to the Tourism Information Services, Marketing & Communications and Tourism Development functions at the First Respondent, by devising, implementing and controlling systems and

procedures, supervising subordinates, developing and driving initiatives reporting on key issues to the CEO and management in order to ensure that these departments are positioned to support the First Respondent in accomplishing its strategic tourism objectives through the effective implementation.

4. In terms of First Respondent's employment hierarchy of authority, almost all Managers were the Applicant's subordinates and reported to her including the HR & Admin Manager, (M P Shinga). The Applicant reported to Chief Executive Officer. The Chief Executive Officer reported to the Board. First Respondent's revised disciplinary policy and procedure recognizes the employment hierarchy of authority and seniority both in terms of the grade and delegations of authority. According to First Respondent's revised delegation of authority prepared in terms of the Public Finance Management Act 1 of 1999 and First Respondent's policies and procedures, the authority to appoint Chief Operating Officer and to institute disciplinary action against the Chief Operating Officer, is vested upon the Board of the First Respondent.

5. There is an existing memorandum of agreement between the First Respondent and Comrades Marathon Association which, inter alia, provides for or sanctions Comrades, an ultra-marathon event organized under the auspices of the Comrades Marathon Association. Prior to February 2010, the survey or research regarding Old Mutual Two Oceans Marathon was already one of the First Respondent's planned research projects to be undertaken. During February 2010, the Applicant registered as a runner in Two Ocean Marathon scheduled for the Easter weekend of 01 April 2010 to 04 April 2010.

6. On Applicant's request for approval of the trip event during March 2010, the Chief Executive Officer (Third Respondent) approved or authorized the trip and its associated costs of flights, transport, food and accommodation to Cape Town for the Old Mutual Two Oceans Marathon in question. The trip was eventually undertaken by the Applicant and Ms T S Dlamini, First

Respondent's Public Relations and Communications Manager. The purpose of the said trip event was to conduct a research or survey on Two Oceans Marathon with a view of undertaking a project of starting First Respondent's own annual comrade marathon in TKZN. The purpose of the research fell within scope of Applicant's job description of Marketing and Communications under promotional activations and contracts such as the Memorandum of Agreement between the First Respondent and Comrades Marathon Association. During the marathon, the Applicant also ran the race and was one of the finishers, during which she was also conducting surveys. The Applicant together with Ms Dlamini returned to work on 5 April 2010.

7. On 6 April 2010, the Third Respondent received a complaint from the Research Manager, Ms Karen Kohler complaining inter alia that;

   7.1 She had not been informed by the Applicant of the survey that was to take place at the Two Oceans Comrades Marathon event, or,

   7.2 The Research team and the Information Officer in First Respondent's Cape Town office had not been involved in the planning and the execution of the activation at the Two Oceans comrades marathon event or,

   7.3 That the Applicant had given instructions to Kohler's staff to perform certain activities which purported to be an activation/commissioning of a survey of the Old Mutual Two Oceans Marathon of which Kohler was not informed nor involved as the Manager responsible for the Unit, or

   7.4 The Applicant did not involve Kohler in some survey or research of her Unit staff who got involved without her knowledge, or,

   7.5 The Applicant gave instructions to Kohler's staff to do certain activities which purported to be activation for a survey of the Old Mutual Two Oceans Marathon of which Kohler was not informed nor involved as the Manager responsible for the Unit.

8. As a result, the Third Respondent requested the Applicant to submit a research report which would be tabled and discussed at the First Respondent's Marketing and Tourism Development Board Committee

meeting that was scheduled to take place in July 2010. On 2 August2010, the Third Respondent appointed the internal audit unit of the First Respondent's Provincial Treasury to investigate the Applicant for allegations relating to abuse of First Respondent's resources. On 25 August 2010, the Third Respondent informed the Applicant that he had not yet received the research report from her. In response on 26 August 2010, the Applicant informed the Third Respondent that she had already prepared the research report and submitted it for the last Marketing & Tourism Development Board meeting. The Third Respondent however, alleged that the first time that any report of her trip to Cape Town was ever produced by the Applicant was during her disciplinary enquiry.

9. The forensic investigation report dated August 2011 was only distributed to the Third Respondent in approximately September 2011 about a year after the appointment. According to the report, the investigator(s) recommended that disciplinary proceedings be instituted against the Applicant for the alleged misconduct and that recovery proceedings be instituted against the Applicant for the amount of R21 049.31 incurred by the First Respondent in respect of the costs of the Cape Town trip. On 17 January 2012, MP Shinga instituted disciplinary action against the Applicant thereby issuing and serving the Applicant with notice to attend a disciplinary hearing scheduled for 2 February 2012. On 23 March 2012, the disciplinary chairperson found the Applicant guilty as charged.

10. On 30 March 2012, the Board held a meeting during which the disciplinary chairperson's findings were apparently discussed. It was thereafter resolved that Human Resources and Compensation Committee should after receiving a sanction decide on the appropriate course of action in consultation with the Corporate attorneys and a labour representative Board member. On 13 April 2012, the HR & Admin Manager, the Corporate attorneys and the members of the Human Resources and Compensation Committee, together with labour representative Board member recommended that;

10.1 The members of the Board approve on a round robin basis, the disciplinary chairperson's finding;

10.2 The members of the Board approve through a special Board meeting or on a round robin basis, the sanction issued by the disciplinary chairperson;

10.3 The Board delegate its authority to the Third Respondent to enable him to draft, sign and issue a letter dismissing the Applicant with immediate effect and thereafter conclude the disciplinary process (this approach was regarded by the corporate attorney to be legally sound taking into account that the Applicant reported to the Third Respondent and a possibility that the Applicant might lodge an appeal with the Board); and

10.4 The Third Respondent submitted a final report on the conclusion of the disciplinary enquiry to the Board for ratification by the Board at its meeting scheduled for June 2012.

11. On 19 April 2012, the Third Respondent issued a letter terminating the Applicant's services wherein the Third Respondent informed the Applicant that she would be paid her last remuneration by 15 May 2012 and that R21 049.31 termed the fruitless and wasteful expenditure resulting from her trip to the Two Oceans Marathon in Cape Town would be deducted from her remuneration. The Applicant's payslip dated 04 May 2012 reflected a deduction of R21 049.31 from her remuneration under the banner of being staff account.

12. On 12 May 2012, Ms Tholakele Dlamini, the chairperson of the Board (Second Respondent) signed a report stating that the members of the Board considered and approved, on round robin basis the disciplinary chairperson's finding. On 12 June 2012, the Applicant filed this application after having served it on 1 June 2012 on the First Respondent. On 18 June 2012, the Respondents' attorneys of record filed a notice of appointment as attorneys of record as well as notice of opposition by fax.

13. Prior to the Respondents' filing of their opposing papers, on 19 June 2012, an unidentified person signed a document with a heading 'extract from the minutes of the Board of Tourism Kwazulu-Natal meeting held on 08 June 2012 at the Durban Hotel'. In the said document it is stated amongst others that on 08 June 2012 the Board members ratified the decision taken on around robin basis to dismiss the Applicant for misconduct, to delegate authority to the Third Respondent to draft, sign and issue a letter dismissing the Applicant with immediate effect. Further that he must thereafter conclude the disciplinary process, and to submit a final report on the conclusion of disciplinary enquiry to the Board for ratification at its meeting scheduled for June 2012. This document formed part of annexures to the answering affidavit filed on 22 June 2012.

Cause of action

14. The Applicant alleges that the charges for which she was dismissed, the disciplinary process and her dismissal are unlawful and void on two or more grounds listed below :

14.1 The reasons for dismissal are merely repetition of baseless allegations of misconduct as incorrectly set out in the unsigned forensic investigation report made by a person referred to as Mr Mente Mollo, who was never called as a witness at the disciplinary hearing, nor made any representations to give some credence and authenticity to such report. Notably so, in the HR & Admin Manager's report signed on 13 April 2012, it is confirmed that the allegation of misconduct against the Applicant was based upon the findings of the said forensic investigation.

14.2 The HR & Admin Manager who happened to be the Applicant's subordinate and not part of First Respondent's senior management as defined in regulation 24.1 of the Treasury Regulations, did not have the requisite authority to charge and to institute disciplinary action against her.

14.3 The Third Respondent did not have the requisite authority to dismiss the Applicant for the alleged misconduct.

14.4 The Third Respondent's contract was to expire at the end of April 2012 and that she was likely to act in the Third Respondent's position and ultimately be appointed as such.

15. The Respondents in opposition contended that Applicant's case has no merits because of the following reasons;

15.1 The First Respondent was entitled to terminate the Applicant's five-year-contract before its expiry on account of misconduct.

15.2 The Board through the Third Respondent was responsible for and dealt with the disciplinary process up to a decision to dismiss the Applicant.

15.3 The application should be dismissed with costs on the ground that the Applicant should have realized when launching her application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.

15.4 The Applicant had failed to mitigate the damages and she is not entitled to the damages claimed. The Applicant's response to this point was that the First Respondent gave negative references on her attempts to secure employment after termination of her employment.

Evaluation

Dispute of Facts

16. The underlying issue requiring determination is whether this application can properly be decided on affidavit and if so, whether the Court should dismiss the application or make such other order with a view of ensuring that a just and expeditious decision is made *(See Moosa Bros and Sons (Pty) Ltd v Rajah and Nkwentsha v Minister of Law and Order and Another)*[1]*.* Under the circumstances the Court hereby examines the disputes of fact as raised by the Respondents in their opposing papers and Heads of Argument as pointed herein below;

[1] 1975 (4) SA (D) at 91A; 1988 (3) SA 99 (A) at 117C

16.1 Whether the Applicant's trip to Cape Town could be considered to fall under her obligations as Chief Operating Officer, was not in dispute at the time the Third Respondent approved the trip. In his own version, the Third Respondent approved the trip because he trusted that the Applicant was undertaking the trip for the benefit of the First Respondent having worked with her for more than two years. He approved it because he knew it fell under her contractual obligation.

16.2 Whether the disciplinary code applies to the Applicant is not in dispute. It is common cause between the parties that the disciplinary code applied to her.

16.3 Whether the internal Audit Report is 'unfounded' and not properly authorized, is not a dispute of fact, but is merely Applicant's submission to be considered in the light of relevant and material facts placed before this Court.

16.4 Whether she was charged by the Human Resources Manager, and who was not properly authorized, can properly be decided on affidavit, read with Human Resources Manager's notice to attend disciplinary enquiry and the First Respondent's delegation of authority.

16.5 Whether the disciplinary process and her ultimate dismissal were properly authorized, can properly be decided on affidavit read with Board chairperson's report signed on 12 May 2012, Board and Committee Co-ordinator's extract signed on 19 June 2012 and all other applicable annexures incidental to this issue.

16.6 Whether her representations at the disciplinary enquiry 'fell on deaf ears', whether the report she handed in at the disciplinary enquiry was previously brought before the Marketing Committee, and whether the report was a proper activation report, evidencing a fruitful trip to Cape Town, can properly be decided on affidavit, read with applicable annexures incidental to these issues.

16.7 Whether the Board's round-robin decision was flawed and unlawful, and whether round-robin decisions of the Board are permitted, are

both question of fact which are neither serious nor incapable of resolution on the papers and question of law to be decided by this Court after having considered all relevant material concerning such round-robin decision.

16.8 Whether the conspiracy allegations leveled against the Third Respondent by the Applicant have any merit, can properly be decided on affidavit, especially having regard to Third Respondent's bald denial of these allegations.

16.9 Whether Dlamini should have been charged, is not a question of fact, but is a question of law, and it is even common cause between the parties that Dlamini went to Cape Town on Applicant's instruction or request and that Dlamini was not disciplined.

16.10 Third Respondent's allegation that it was only in Cape Town that Dlamini realized the real reason for the Applicant's visit there, contradicts Dlamini's confirmation during forensic investigation that she travelled with Applicant for the Old Mutual Two Oceans Marathon and that there was minimal discussion around what was to happen for the Two Oceans Marathon.

16.11 Whether the Applicant 'performed (her) duties in terms of her contract, can properly be decided on affidavit, especially having regard to the fact that the Applicant was not dismissed for poor work performance, but for the alleged misconduct.

16.12 Whether charges leveled against her amounted to 'unfounded allegations of an alleged misconduct', is not a dispute of fact, but Applicant's submission based on the facts contained in annexures attached to the affidavits.

16.13 With regard to proof of damages, there is clearly no material dispute of facts as the Applicant is claiming R1 103 427.10 being an equivalent of the unexpired portion of her contract period calculated on her rate of remuneration on the date of dismissal, R55 705.24 thirteenth cheque payable on 15 December 2012. The same goes with R40 057.89

refund of deductions made by the Respondents from her May 2012 remuneration. These amounts are not in dispute. Whether or not she is entitled to be paid such amounts, is a question of law to be decided by this Court on papers.

17 In this regard any bare denial of the Applicant's allegations in her affidavit will not in general be sufficient to generate a genuine or real dispute of fact, the Court shall take 'a robust, common-sense approach' to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so *[*See *Peterson v Cuthbert and Co Ltd*[2]*; Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] *and Soffiantini v Mould*[4]*].* After having examined the alleged dispute of facts, I am satisfied that in truth there is no real dispute of facts which cannot be satisfactorily determined without the aid of oral evidence. In the absence of a serious dispute of facts, incapable of resolution on papers, there is no need for the Court to dismiss the application, or to order the parties to go to trial, or to order oral evidence to be heard on any of specified issues as listed by the Respondents.

Was there any compliance with the Law?

18 It is not in dispute that within a week after the Easter weekend of 1 to 4 April 2010, the Third Respondent discovered the misconduct. The Third Respondent however, instituted the investigation on 02 August 2010 in Contravention of Regulation No 33.1.2 of Ministerial Treasury Regulations of March 2005 issued in terms of Section 85 (1)(b) of PFMA and which provides that 'the accounting authority must ensure that the investigation is instituted within 30 days from the date of discovery of the alleged financial misconduct'.

19 The Third Respondent's explanation that the delay of four months to institute investigation was attributed to Applicant's delay in producing a research report is under the circumstances unsatisfactory. This is in view of the fact that as early as 06 April 2010 the alleged financial misconduct had already

[2] 1945 AD 420 at 428-9
[3] 1984 (3) SA 623 (A) at 634I – 635A.
[4] 1956 (4) SA 150 (E) at 154G-H.

been discovered and that its nature and extent were limited by the Third Respondent to Applicant's undertaking of a personal trip to Cape Town to participate in the 2010 Old Mutual Two Ocean Marathon under the guise of a business trip. On 26 August 2010, the Applicant informed the Third Respondent that she had already prepared the research report and submitted it for the previous Marketing and Tourism Development Board meeting and during forensic investigation held in August 2010. I am therefore unable to find merit in the Third Respondent's statement that the first time that the Applicant's report was ever produced by the Applicant was during her disciplinary enquiry.

20 On the other hand, I find merit in Applicant's point that the HR and Admin Manager took almost 21 months to institute disciplinary proceedings as supported by documentation before me. The investigator in the unsigned forensic investigation report distributed in September 2011 does not confirm the Third Respondent's allegation that the reason for the delay since August 2010 until September 2011 was because during its compilation its author resigned and had to be replaced by a senior Manager in the unit. The names of the previous author and the replacement senior Manager were not disclosed in Third Respondent's answering affidavit. Despite the Third Respondent having received a copy of the forensic investigation report in approximately September 2011, it was only on 17 January 2012 that HR and Admin Manager charged and instituted disciplinary action against the Applicant. In their opposing affidavit the Respondents did not provide any explanation for this unreasonable delay.

21 Undoubtedly so, the Respondents did not comply with regulation No 33.1.2 of Treasury Regulations. No good reason for deviation from this standard was given. A reasonable impression is that from discovery of the alleged misconduct the First Respondent had no intention of investigating the Applicant for the alleged misconduct. This in fact gives credence to the Applicant's claim that the Third Respondent was insecure about the renewal

of his contract. The timing of institution of disciplinary action and dismissal of Applicant by him was of essence.

22 In short, the Third Respondent dismissed the Applicant two years after commission of the alleged offence. The cumulative effect of the above-mentioned undue delays is that the decision to dismiss the Applicant has been vitiated with such unreasonable delays likely to make a reasonable person to believe the Applicant's allegation that the Third Respondent's dismissal decision of 19 April 2012 may have been precipitated by the fact that his contract was due to expire in April 2012. The dismissal was probably executed by him on fear that his contract might not be renewed and that the Applicant may have had to act in the vacant position of Chief Executive Officer with a likelihood of being promoted and ultimately appointed as Chief Executive Officer on or before her contract expired in July 2013. In his opposing affidavit, the Third Respondent did not meet the substance of Applicant's aforesaid allegation, save having vaguely pleaded that all alleged acts of impropriety leveled against him are denied. Therefore, it is not known what his defence is [See *Department of Public Works, Roads and Transport v Motshoso and Others*[5] *and Riekert v CCMA and Others*[6]*]*.

Did the Third Respondent have authority to dismiss the Applicant?

23. The gist of the Applicant's case concerning this issue is that a decision to dismiss her, so she said, is invalid because on 17 January 2012, the HR and Admin Manager charged and instituted disciplinary action against her without having the Board's requisite authority or delegated authority to do so. Furthermore on 19 April 2012, the Third Respondent dismissed her for alleged misconduct without having the Board's requisite authority or delegated authority to do so. On the other hand the Third Respondent contends that despite the delegation given to the Board chairperson, the

[5] (2005) 10 BLLR 957 (LC).
[6] (2006) 4 BLLR 353 (LC).

Board, through him was responsible for and dealt with the disciplinary process.

24. Section 56(1)(a) of PFMA provides that the accounting authority for a public entity may in writing delegate any of the powers entrusted or delegated to the accounting authority in terms of PFMA, to an official in that public entity. What follows is that where the Applicable body of the employer is vested with authority to make a decision in terms of a statute, but such decision is made by another person who has no authority to do so under such statute, and the applicable body of the employer purports to ratify the decision, such ratification is invalid and the decision is liable to be set aside. While the employer's applicable body can ratify decisions (to charge, discipline or dismiss an employee) with retrospective effect, this would not reverse the legal consequences of such decisions and unless and until such decisions are ratified by the competent Body, the employee cannot be regarded as dismissed. *(See Mathipa v Vista University and Others*[7] *and NEHAWU v University of Transkei and Others*[8]*).*

25. In terms of Section 17 of KNTA the meetings of the First Respondent's Board must be held on such dates and at such times and places as may from time to time be determined by resolution of the Board. The quorum for such meeting must be a simple majority of the total number of members appointed at that time. A decision of majority of members present at a meeting of the Board shall be a decision of the Board. In the event of an equality of votes the chairperson shall have a casting vote in addition to a deliberative vote. Section 19 of KNTA requires First Respondent's Board to cause minutes to be compiled of the proceedings of every meeting of the Board and of any Committee established by the Board and of cause copies of such minutes to be circulated to all the members. The minutes prepared in terms of Section 19 (1) of KNTA when signed at a subsequent meeting of the Board by the chairperson, shall in the absence of proof of error therein be deemed to be a

[7] 2000 (1) SA 396 (TPD).
[8] (1999) 3 BLLR 244 (LC).

true and correct record of the proceedings which they purport to minute. Such minutes shall at any proceedings in terms of KNTA or before a court of law, tribunal or commission of inquiry, constitute *prima facie* evidence of the proceedings of the Board and the matters they purport to minute.

26. In *Wessels and Smith v Vanugo Construction (Pty) Ltd*[9] it was held that an invalidly constituted board (improperly convened and without a quorum) cannot take a valid decision and nothing exists in law to ratify, where the decision maker is incompetent to make the decision (at 638D). Furthermore in *Schierhout v Union Government (Minister of Justice)*[10] it was held as follows

> 'When several persons are appointed to exercise judicial powers, then in the absence of provisions to the contrary, they must all act together, there can only be one adjudication,and that must be the adjudication of the entire body. And the same rule would apply whenever a number of individuals were empowered by statute to deal with any matter as one body, the action taken would have to be the joint action of all of them…for otherwise they would not be acting in accordance with the provisions of the Statute'.

27. A similar approach was also adopted in *Yates v University Bophuthatswana and Others*[11] wherein the following was said;

> '…This implies that there must be full attendance and participation by all the members of the committee and that they must reach their decisions unanimously or by the requisite majority. They have been selected for a purpose and that purpose would be defeated if one or more of them were not present at the time of adjudication. The fact that they may have conveyed their views to the chairman of the committee individually is irrelevant. What is important is that they should all have the opportunity to discussing and considering their respective views in the presence of each member of the committee. The fact that one or two were unavoidably absent does not cure the position. A time should have been

[9] 1964 (1) SA 635 (O).
[10] 1919 AD 30 at 44.
[11] 1994 (3) SA 815 (BGD) at 848G-I.

fixed for all of them to be present in order to consider what were very serious and strong allegations against the applicant'.

28. This position was restated in *Disciplinary Committee for Legal Practitioners v Makando and Anotherr, Makando v Disciplinary Committee for Legal* Practitioners and Others[12] where it was held at paragraph 32 that;

> '[32] Indeed, in my opinion, that a binding decision of the applicant can be taken by the applicant only at the applicant's meeting is put beyond doubt if regard is had to the abovementioned sections on quorum. What majority carries a vote, and the chairperson's casting vote in addition to his or her deliberate vote. If, for example, one or two members can take a decision in the privacy of their home, office, or chambers or suchlike places and approach the rest individually for their endorsement of such decision- not at a meeting of the applicant where the issue could have been openly discussed and deliberated on by members who are present and form a quorum - why should the Legislature go into the trouble of prescribing a quorum and what majority carries a vote, and also provide for the chairperson's casting vote in addition to his or her deliberative vote? Any argument that where there is a consensus there is no need to take the decision at a meeting is, with the greatest deference, illogical: it misses the point. The question that arises is this: who decides – and at which venue – whether there is or there has been a consensus? A consensus can only be reached at a meeting after the issue at hand has been openly discussed and deliberated on..'.

29. Since the First Respondent's existence and operations are founded on the statutes its activities should by large be executed in compliance thereof. The round robin method relied upon cannot be outrightly said to be defective for not being sanctioned by the empowering legislation. Existence of a rule creating application of the round robin process could have permitted members of the Board to take decisions other than at meetings requiring a quorum. In the absence of the rule, it is however, of prime importance to have compelling reasons why it was applied ahead of the conventional method set out in the legislation.

[12] (A 216/2008,A 370/2008) [2011] NAHC 311 (18 October 2011)

30. In *Norval and Others v Consolidated Sugar Investments (Namibia) (Pty) Ltd and Others*[13] a round-robin decision was defined as a written decision or resolution made in accordance with a round-robin procedure for Executive Authority's decisions created by a regulation, rule, article, or policy of the applicable body and such decision must be signed by all members of the Executive Authority or, if such regulation, rule, article or policy provides that a round-robin resolution need not be unanimous, it would still be sufficient if the signatories constitute a quorum, even though all the directors did not sign the resolution. In this instant case none of the above prevailed nor appearance of any sign of compliance with such relevant regulations nor any explanation for deviation to a prescribed process. In any event, for reasons set out below there is no evidence that the First Respondent had a round-robin procedure for its Board's decisions in April 2012.

31. Nevertheless, I will assume that even if there was no regulation, rule, article or policy of the First Respondent creating a "round-robin" procedure of Board members' decisions, there was nothing in law which precluded the First Respondent's Board from making a 'round-robin' decision. Based on this assumption I will now deal with validity of these decisions pertinent to the controversy. It is not in dispute that it is the responsibility of the Board to discipline the Applicant which can be delegated. What requires scrutiny is the Respondents' contention that the charging and dismissal of the Applicant were done by the Board through the Third Respondent. Under Section 56 of PFMA the powers and duties of the First Respondent's Board may be delegated by the Board in writing to any official in the First Respondent. Therefore, the Third Respondent's contention that Board's authority may be delegated is correct. However, there is no sufficient evidence showing that such authority was delegated to him to charge and/or dismiss the Applicant. There is no evidence showing that on or before 17 January 2012, the Board delegated its authority either to HR and Admin Manager or the Third

[13] 2007 (2) NR 689 (HC).

Respondent to charge the Applicant and to institute any disciplinary action against her.

32. Where the First Respondent's Board is vested with authority to charge and institute disciplinary action against the Applicant in terms of the aforesaid statutes, but such acts were performed by HR and Admin Manager who had no authority to do so under such statutes, and the Board purports to ratify the acts, such ratification is invalid and the acts are liable to be set aside. (See *Mathipa v Vista University and Others)*[14]*.*

33. It is therefore clear that such HR and Admin Manager acted unlawfully and breached Applicant's contract and that his action is a nullity because there is no Board's ratification of authority showing that later the Board ratified his acts of 17 January 2012. It is absolutely improper for the HR and Admin Manager who was a subordinate to and reported to the Applicant to have charged and instituted disciplinary action against the Applicant, without the Board's delegated powers. This is certainly not consistent with the First Respondent's internal hierarchial system/relationship. Even if the Applicant was charged by the Third Respondent on 17 January 2012, there is no Board's approval or delegation of authority showing that before or on 17 January 2012, the Board authorized or delegated its authority to the Third Respondent to discipline and institute disciplinary action against the Applicant. There is also no Board's ratification of authority showing that later the Board ratified the Third Respondent's decision or acts of 17 January 2012. Consequently such decision is a nullity because it was taken before the authority was delegated to the Third Respondent by the Board and it was later never ratified by the Board.

34. It goes without saying that the finding of the disciplinary chairperson does not automatically mean the decision to dismiss. A disciplinary hearing decision is normally threefold. First, the chairperson decides whether or not an accused employee is guilty as charged or otherwise. If he/she is found not guilty, the accused is free to go and cannot be tried again on the same charge.

[14] 2000 (1) SA 396 (TPD).

However, if the accused is found guilty, the parties are given an opportunity to lead evidence of mitigating factors and aggravating factors. Thereafter the chairperson decides whether or not an offence for which the accused has been convicted is serious and of such gravity that it justifies dismissal. If such offence is found to be a dismissible offence, then the disciplinary chairperson will make a decision imposing a penalty of dismissal or if he/she is not authorized to make final decision, he/she will make a recommendation that the convicted employee be dismissed.

35. The Respondents do acknowledge the difference between the disciplinary chairperson's finding of guilt and the decision to dismiss. In the HR and Admin Manager's report signed on 13 April 2012 HR and Admin Manager stated that 'the Board at its meeting held on 30 March 2012 discussed the findings of the Chairperson of the disciplinary enquiry. It was thereafter resolved to mandate the Human Resources and Compensation Committee to deal with a report to be submitted by the Chairperson of the disciplinary enquiry comprising a sanction relating to this cas*e'*. It is worth noting that the Third Respondent contended that the Applicant was found guilty as charged and that, thereafter, the disciplinary chairperson recommended that she be dismissed, and that, each and every Board member approved the finding and dismissal recommendation of the disciplinary chairperson. Even if it may be assumed (in favour of the Respondents) that the finding of the disciplinary chairperson referred to in the Second Respondent's report signed on 12 May 2012, was a finding that the Applicant was guilty of a dismissible offence, or, that the dismissal was appropriate, or that, it was a recommended decision of the disciplinary chairperson to dismiss the Applicant, the Respondents have failed to prove that on or before 19 April 2012, the Board approved such decision and that the Board consequently delegated authority to the Third Respondent to dismiss the Applicant.

36. Once again the Third Respondent's version that from 11 April 2012 to 18 April 2012 each and every board member, by e-mail, approved the finding and recommendation of the disciplinary chairperson, contradicts HR and

Admin Manager's report signed on 13 April 2012. The report was essentially requesting approval by the Board of the disciplinary chairperson's sanction through a special Board meeting or on a round robin basis that the Applicant be dismissed with immediate effect. It also asked members of the Board to delegate Board's authority to the Third Respondent for him to draft, sign and issue a letter dismissing the Applicant with immediate effect and thereafter conclude the disciplinary process. Furthermore that the Third Respondent should submit a final report on the conclusion of the disciplinary enquiry for ratification by the Board at its meeting scheduled for June 2012. It does not seem probable that from 11 April 2012 to 18 April 2012 each and every Board member did approve the finding and recommendation of the disciplinary chairperson by email while on 13 April 2012 the recommendations were still being made to the Board for such approval through a special Board meeting or on a round robin basis. The reasonable inference to be drawn from the aforegoing is that from 11 April 2012 to 18 April 2012 none of the Board members approved the finding and recommendation of the disciplinary chairperson by email. The round robin approval could not have been made before or on 13 April 2012.

37. Furthermore, there is no evidence placed before this court showing that subsequent to 13 April 2012 each and every member of the Board was provided with such recommendations for their perusal and consideration, that they did peruse and consider such recommendations and they approved such finding and recommendation by email. The Respondents do not explain the exact dates on which after 13 April 2012, did each and every Board member approve disciplinary chairperson's finding and recommendation. Since this approval forms crux of the Respondents' case in respect of the Third Respondent's authority to execute the Applicant's dismissal, certainly the Respondents would have ensured that copies of emails from the Board members were attached to its papers to deal with this in the light of the Applicant's denial of the allegation. I accordingly do not find any reason to accept that from the 11 April 2013 until Applicant's dismissal on 19 April

2013 each and every Board member approved disciplinary chairperson's finding and recommendation. More so, the Board Chairperson's report of 12 May 2012 is silent about details relating to the exact dates on which the board members acted on the finding and recommendation in question.

38. The Third Respondent's allegation that from 11 April 2012 to 18 April 2012 each and every Board member, by e-mail, approved the finding and recommendation of the disciplinary chairperson, certainly appears to be a well-calculated move to cover up the fact that on 19 April 2012, he dismissed the Applicant without Board's approval. The Board chairperson's report on 12 May 2012 does not even confirm that he was delegated by the Board to convey the dismissal decision to the Applicant. The only reasonable conclusion in this regard is that on or before 19 April 2012, the Board never approved the disciplinary chairperson's recommended dismissal sanction nor did the Board delegate any authority to the Third Respondent to dismiss the Applicant nor convey such decision to her. The purported ratification of the round-robin decision signed by a Board and committee co-ordinator on 19 June 2012 almost seventeen (17) days after the Respondents had received the present application on 01 June 2012, appears to be a creation of a defence in response to Applicant's challenge of validity of HR and Admin Manager's decision to charge her and the decision of the Third Respondent to dismiss her, without Board's approval or delegated authority. I am therefore not persuaded to accept that a validly-constituted Board was properly convened with a quorum on 08 June 2012 to ratify Third Respondent's dismissal decision of 19 April 2012.

39. Faced with Applicant's challenge to the Third Respondent's claim of having Board's authority to dismiss her, the Third Respondent should have, at least, attached to his answering affidavit both purported ratifications, copies of notice to attend such a Board meeting on 08 June 2012, an agenda for such a meeting and a signed attendance register showing the total number and names of Board members present and entitled to vote at such meeting, and the presence of the requisite quorum for such meeting to show that on 08

June 2012 during the alleged meeting there was full attendance and participation by all the members of the Board (or the quorum for such meeting of a simple majority of the total number of members appointed at that time) and that an unanimous decision or a decision of the majority of the members present at a meeting of the Board was reached as required by Section 17 of KNTA. In the absence of sufficient evidence showing that on 18 June 2012 a valid decision was reached at a validly constituted meeting of the First Respondent's Board with a requisite quorum, the Third Respondent did not have authority to dismiss the Applicant.[15] The Respondents' failure in complying with the law read with terms of the Applicant's contract of employment establishes a breach and unlawfulness thereof. On this point alone the relief sought by the Applicant cannot be denied.

Merit of the misconduct

40. The Respondents contended that the First Respondent was entitled to terminate Applicant's five-year-contract before its expiry on account of misconduct. Precisely there is nothing in the Applicant's fixed-term contract affecting the right of the First Respondent to terminate a fixed-term contract of employment for any cause recognized by law e.g misconduct. Dismissal will be appropriate if such misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. This is however, subject to the rule that each case should be determined on its own merits. There is no evidence before the Court showing why and how the disciplinary chairperson found the Applicant guilty as charged or, otherwise. The names and material evidence of the witnesses who might have testified and cross-examined during the disciplinary hearing were not disclosed by the Respondents in their answering affidavit. Since the report containing findings and recommendation leading to the conclusion about Applicant's misconduct and dismissal was challenged by the Applicant, the findings of the forensic

[15]Wessels & Smith v Vanugo Construction (Pty) Ltd; Schierhout v Union Government (Minister of Justice); YATES v University of Bophuthatswana and Others; Disciplinary Committee for Legal Practitioners v Makando and another, Makando v Disciplinary Committee for Legal Practitioners and Others *supra.*

investigator(s) who did not even depose to any confirmatory affidavits to confirm the allegations in Respondents' answering affidavit are unconfirmed hearsay evidence which remain inadmissible[16]. The senior manager in the unit who replaced the author of the said report was also not called as witness at the disciplinary hearing to give some credibility to the unattested findings contained in such report. In other words the author(s) of such report were not subjected to any cross-examination by the Applicant. It was thus impermissible and inappropriate for the Respondents to have relied on them.

41. From the above, it is clear that insufficient evidence was placed before this Court on whether the Disciplinary Chairperson had sufficient evidence before him to prove the commission of the alleged offences. No evidence to prove any offence was placed before this court. The findings of the investigator(s) were hearsay evidence, regarding the implication of the Applicant in the commission of whatever offence. According to the Third Respondent, he approved the trip after having been misled by the Applicant. He does not however, specify the factual basis upon which he claimed to have been misled by the Applicant. From the perusal of his affidavit, it appears that when he approved the trip on 30 March 2010 the Applicant misled him by not disclosing to him and any member of the staff that in February 2010 she had registered as a runner in the marathon and that she would be participating as a runner in the marathon in April 2014.

42. No facts were placed before me to prove any existence of any conflict of interest on the part of the Applicant or any form of legal duty on the Applicant to disclose her registration and participation in the marathon. It is not in dispute that prior to February 2010 the survey or research regarding Old Mutual Two Oceans Marathon was already one of the First Respondent's planned research projects to be undertaken. Before February 2010, a survey of the Two Oceans Marathon was conducted previously. The Third Respondent's statement that on 30 March 2010, he approved the trip because he trusted that the Applicant was undertaking the trip for the benefit

[16] *Rema Tip Top (Pty) Ltd v Osman N.O and Others* Case No: JR2024/2008 at paras 6 and 19.

of the First Respondent, is a safe indication that he knew that the trip was the First Respondent's pre-arranged business trip. Furthermore when the Applicant made a request for his approval, the First Respondent had already planned a survey or research to be done regarding Old Mutual Two Oceans Marathon. It appears that the Respondents were upset by the Applicant's participation in the marathon than whether the Applicant did what was expected of her in discharging her duties. There is no indication that the Respondents ever deliberated on her report to establish whether she genuinely pursued the First Respondent's interests in Cape Town. If she really lacked integrity and wanted to cheat, lie or act fraudulently, the Applicant would not have facilitated staff involvement and management involvement in one and same event in which she could be seen by her fellow managers and staff members publicly and openly participating as a runner. I do not see any dishonesty on the part of the Applicant.

[43] Consequently, on 19 April 2012, the First Respondent repudiated the contract by terminating it without Board's authorization or delegated authority and without any cause recognized by law. Such action entitled the Applicant to accept the repudiation and to claim damages. Therefore, the Applicant is entitled to relief because the Respondents did not prove that she had breached or repudiated the contract. The allegations of misconduct were not established.

Relief

44. The Applicant is claiming the balance of her fixed-term contract being 15 months at R73 561.81 per month calculated as R 1 159 132.34 consisting of R1 103, 427.10 (i.e R73 561.81 monthly salary x 15 months = R1 103, 427.10) plus R55 705.24 thirteenth cheque payable on 15 December 2012 as agreed in clause 3, paragraph 2 of the contract. The total amount is,

therefore, R 1 159 132.34 (i.e R1 103, 427.10 + R55 705.24 = R 1 159 132.34).

45. The Applicant was dismissed on 19 April 2012. Her fixed-term contract expired on 30 July 2013. In *South African Football Association v Mangope,*[17] the Labour Appeal Court held that the unlawfully dismissed employee is under duty to mitigate damages. In my view *Mangope* case is distinguishable from the present matter. In that matter the Labour Appeal Court held that the Labour Court's reasoning that the appellant had repudiated the contract by failing to follow the evaluation procedure in clause 5 and that such entitled the Respondent to damages in the amount of R1, 777 000, was unsustainable. The LAC at paragraph 40 further held that;

> '40…The procedural flaws alone may not directly have resulted in damages and would have been immaterial from a contractual perspective if it was established on the evidence before court that the respondent had not performed satisfactorily in terms of the contract..'.

46. In the present matter the dismissal is not only unlawful because the First Respondent did not follow a fair procedure. In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile Others*[18] the Constitutional Court held that unfairly dismissed employees are under no obligation to try to mitigate loss by seeking alternative employment – Failure to prove such attempts do not affect quantum of back pay. The Constitutional Court at paragraph 41 further held:

> '[41] To talk in legal terms of a burden on an employee to mitigate loss in the context of an unfair dismissal strikes one as decidedly off, if not somewhat perverse. In real life, dismissed employees will seek alternative means of income in order to sustain their own survival and that of their dependants. It requires little imagination to appreciate that for many people in South Africa obtaining employment is, at best, a very difficult task. Equitable considerations militate against

[17] (2013) 34 *ILJ* 311 (LAC) at para 40.
[18] [2010] 5 BLLR 465 {CC} at paras 39 to 44.

> transforming this practical necessity of life into a legal burden on employees to mitigate their loss in dismissal cases. To do so might even serve to undermine their claim to the primary statutory remedy of reinstatement available under the provisions of the LRA'.

47. There is no reason why the Constitutional Court's reasoning should not find application in the present matter. There is no unreasonable period of delay that was caused by the Applicant in initiating or prosecuting her present proceedings. Save denying indebtedness to the Applicant, the Respondents did not prove any failure by the Applicant to mitigate her accrued damages. There is nothing to suggest that the amount claimed by the Applicant does not represent the true amount because of a failure to take reasonable steps to mitigate. Bad references from the First Respondent on Applicant's attempts to find alternative employment were undisputed. Faced with adverse disciplinary record that she was dismissed, *inter alia,* for gross dishonesty, there is likelihood that it has been a very difficult task for her to have mitigated her damages when seeking alternative employment.

48. In the exercise of my discretion in terms of Section 77(A) of the BCEA, to make a determination that I consider reasonable, I hereby conclude that the Applicant is entitled to be paid the remuneration payable for the balance of her fixed-term contract, together with her December 2012 thirteenth cheque.

Furthermore, the Respondents have failed to prove that R21 049.31 (deducted from her remuneration) was a fruitless and wasteful expenditure. This was clearly the total costs or expenditure in relation to business trip duly authorized by the third Respondent. Therefore, this expenditure was not made in vain and would not have been avoided subsequent to the Applicant having exercised reasonable care by having first obtained Third Respondent's approval before such business trip could be undertaken. Despite recommendation of forensic investigator(s) that recovery proceedings be instituted against the Applicant for recovery of R21 049.31, the First Respondent opted to self-help by having deducted R21 049.31. The

First Respondent clearly violated Regulation 12.7 of March 2005 Treasury Regulations which outlines legal means to be undertaken for recovery of losses or damages through acts committed or omitted by officials.

49. Third Respondent's allegation that the Applicant was paid the bonus that was owed to her which was correctly calculated in the amount of R19 615.05, contradicts First Respondent's pay slip issued to Applicant on 04 May 2012 and showing R19 008.58 deduction under the banner of advance payment. In the absence of the Respondents having shown that R19 008.58 was deducted from Applicant's May remuneration with her written consent or, that such deduction was required or permitted in terms of a law, collective agreement, court order or arbitration award, the First Respondent acted unlawfully by having made such R19 008.58 deduction from Applicant's remuneration. She is accordingly entitled to be refunded R19 008.58 unlawfully deducted from her remuneration.

50. In conclusion, the Applicant has succeeded in establishing her case against the Respondents and is entitled to the relief sought. Regarding costs, there is no reason why awarding of costs should not follow the result. There is no longer any continuing relationship between the parties which may be strained by the cost order. It appears that the Applicant only engaged attorneys after close of pleadings in this matter, meaning that her costs are limited to attendances after appointment of her attorneys and disbursements incurred by the trade union prior to the appointment of attorneys.

51. In the result, the following order is made;

51.1 The decision of the First Respondent to terminate the Applicant's contract on 19 April 2012 is declared to be invalid and in breach of contract and unlawful;

51.2 The First Respondent is ordered to pay the Applicant damages in the amount of R1 159 132.34 within ten (10) days of this order;

51.3 The First Respondent is ordered to refund R40 057.89 to the Applicant within ten (10) days of this order.

51.4 The First Respondent is ordered to pay Applicant interest at rate of 15.5% per annum from date of this order to date of full payment in respect of amounts in 51.2 and 51.3 above.

51.5 The First Respondent is ordered to pay the costs of this application, subject to paragraph 50 above.

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Baloyi A.J

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant:	Mr M.S Sebola
Instructed by:	Nchupetsang Attorneys, Johannesburg
For the Respondents:	Mr T E Seery
Instructed by:	Ndwandwe & Associates, Durban