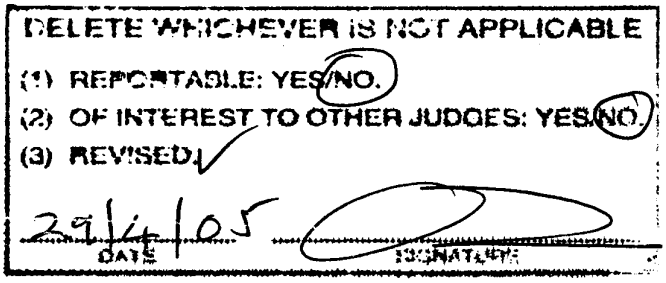
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 05/05/2005

Case Number: 5147/05



In the matter between:

ASHOOK KIRPAL Applicant

and

DENEL (PTY) LTD First Respondent

MPHO JABARI Second Respondent

JUDGEMENT

DE VOS, J:

[1] The applicant seeks a final interdict against the First and Second Respondents in the following form:

1. That the first and second respondents are ordered to comply with the Disciplinary Code and Procedure, Policy Nr. 46, Grievance Procedure and Conditions of Service of the first respondent and in particular the

first and second respondents are ordered to adhere to the prescribed procedure in regard to the investigation of allegations of sexual harassment.

2. The first and second respondents and any employee or functionary of the first respondent, charged with forensic investigation or disciplinary matters, are ordered not to publish any information in regard to the alleged allegations of sexual harassment against the applicant, to any third party and that the first and second respondents and any such employee or functionary of the first respondent are ordered to maintain the utmost confidentiality in regard to any such further investigation or proceedings.

3. That the first respondent is ordered to afford the applicant the full opportunity to participate in any forensic investigation by or on behalf of the first respondent, the South African Police or any other competent investigation entity, related to acts of fraud and/or corruption, discovered by the Applicant.

4. That the first respondent is ordered not to proceed with any disciplinary proceedings against the applicant until such forensic investigation has been finalised.

5. That the upliftment of the suspension of the applicant, is confirmed.

6. That the First and Second Respondents are ordered to afford the Applicant full protection as provided for in the Protected Disclosures Act, Act No 26 of 2000, in regard to the fraudulent and corrupt activities discovered by the Applicant.

7. That the Respondents are ordered, jointly and severally, to pay the costs of this application on an attorney and client scale, alternatively on a party and party scale.

[2] The applicant in a separate application asked that an interim interdict granted by this court be made final. The court order reads as follows:

"It is ordered

1. That the rules of this Honourable Court with regard to service and format, be condoned and that the matter be and is hereby heard as an urgent application in terms of Rule 6(12).

2. That the First and/or Second Respondents not proceed with any disciplinary proceedings against the Applicant, scheduled for 14:00 on 11 March 2005, in accordance with the order by the Honourable Deputy Judge President of this Honourable Court dated 4 March 2005.

3. That the First Respondent declare the current employment status of the Applicant and more particularly the full terms and conditions of the suspension of the Applicant.

4. That the Second Respondent is hereby prohibited to intimidate, harass or humiliate the Applicant, in whatever way and that the Second Respondent refrain himself from any contact with the Applicant, in whatever way, except in so far as may be strictly necessary arising from the terms of their employment with First Respondent.

5. That costs reserved for decision in main application."

[3] The applicant has been employed as the acting head of the forensic management unit of the first respondent. It is the applicant's case that during the course of certain investigations made by the applicant he discovered certain corrupt activities within the first respondent. The detail of these discoveries was not made available to the court by the applicant except to state that it transpired that a certain attorney and forensic investigator outside of the first respondent billed the first respondent for services not rendered.

[4] According to the applicant, Ms Jojozi, as the applicant's secretary, typed a report containing this information. Shortly thereafter Ms Jojozi laid a complaint against the applicant of sexual harassment. Thereafter the applicant was given notice by the first respondent to appear at a disciplinary hearing on charges of

alleged sexual harassment and disorderly behaviour. At the time the applicant requested the respondents to postpone the disciplinary hearing in respect of the complaint for two weeks. Thereafter the applicant launched the current application as an urgent application. The applicant insists that a so-called comprehensive investigation be undertaken by the first respondent with the assistance of the applicant into alleged acts of corruption and fraud.

[5] It is the applicant's case that he suspects a conspiracy between the complainant, Ms Jojozi and Mr Pather as a result of the applicant's alleged discovery of corruption and other incidents of corruption within the structure of the first respondent.

[6] For the applicant to succeed in the applications it is necessary to show that the applicant has a clear right, that this right has been infringed or that there is a reasonable apprehension that this right will be infringed and that there is an absence of similar protection by any other ordinary remedy. Whether the applicant has a right is a matter of substantive law but whether that right is clear is a matter of evidence. The applicant has to prove on a balance of probabilities facts which, in terms of substantive law, establish the right relied upon. To establish whether the applicant has proved the facts on a balance of probabilities the ordinary rule must apply; namely that, faced with a factual dispute, if the court is satisfied on the affidavits deposed to on behalf of the respondent, together with those facts admitted in the applicant's affidavit, that the applicant has not proved the requisites for the final interdict sought, then the application cannot succeed.

[7] I now turn to each of the rights that the applicant says he is trying to protect.

Compliance with the procedures.

[8] The applicant does not state in his affidavit in which respect the first respondent has not complied with any of the policies and procedures as set out above. It is of the utmost importance that an applicant should state exactly in which manner a respondent has not complied with policies and procedures so that the respondent can properly answer to the allegations. The manner in which the applicant dealt with the alleged non-compliance is very unsatisfactory. Counsel for the applicant, Mr Dreyer, sought to introduce the specifics in his heads of argument. There reliance was placed on the following: (i) The disciplinary procedure was instituted by a person who is not the line manager of the applicant; (ii) the applicant should have been charged with sexual harassment and not disorderly behaviour; (iii) the applicant should have been given the opportunity to be represented by external legal practitioners; (iv) there was no prior process of consultation with the complainant and the applicant as the alleged perpetrator as set out in Policy 46 dealing with the first respondent's policy on sexual harassment; (v) no incident report was apparently filed by the complainant; (vi) no grievance form or incident report was filed by the complainant.

[9] In this regard it should be noted that it is the first respondent's case that the policy on sexual harassment, the grievance procedures as well as the first respondent's conditions of service are not applicable to the applicant. I do not think

it is necessary to decide this issue. What is clear from the papers before me is that at least on the version of the respondents the second respondent is the line management of the applicant, the charge sheet as well as the question of legal representation should be dealt with at the proper forum and that is during the disciplinary hearing. The process of consultation claimed by the applicant is not available to the applicant on his request but simply only available to a complainant once requested by a complainant. It is clear that the purpose of that procedure is to assist a complainant and not a perpetrator. The complaint as to the incident report seems trivial. In any event it seems to me that the applicant was afforded an opportunity to reply to the complaint during the meeting with Mr Simon. At the time the applicant denied the allegations against him. To my mind the applicant has not shown on a balance of probabilities that his rights In terms of the specific policies and procedures were in any way infringed.

Publishing the allegations of sexual harassment.

[10] The allegations concerning publication are denied by the respondents. There is no evidence that supports the inference that it was the second respondent or another employee of the first respondent who made this information available to the press. I am also not sure in what way the first respondent is supposed to control the actions of a complainant in a matter like this. It is quite possible that the complainant discussed the issue with a third party who mayor may not have contacted the press. I do not think that the applicant is entitled to the relief claimed.

Participation in a forensic investigation.

There is simply no basis in law for this right claimed by the applicant. None of the procedures or rules relied upon by the applicant gives him any such right. The applicant cannot succeed on this point.

[11] In view of what was said above the applicant is clearly not entitled to any of the relief sought.

[12] In essence the applicant wishes the disciplinary hearing to be stopped. He has no such right. The hearing should run its course. The applicant is free to show, as his defence to the complaint, that there is some kind of conspiracy as alleged. This may be a good defence against the complaint but does not entitle the applicant to the relief sought.

The applications are dismissed with costs including all costs reserved.

A de Vos .
Judge of the High Court