166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: **J753/99**

In the matter between:

WILLIAM RALPH JOEY LANGEVELDT	Applicant
And	
VRYBURG TRANSITIONAL LOCAL COUNCIL	First Respondent
J HIEMSTRA N.O	Second Respondent
J P STEMMETT N.O.	Third Respondent
PREMIER (NORTH WEST PROVINCE) N.O.	Fourth Respondent

JUDGMENT

STELZNER AJ

1. The applicant was employed as the Town Clerk of the first respondent. His services were terminated on 27 August 1998 in terms of a resolution by the first respondent. Applicant alleges that the termination is irregular, setting out some eight different grounds of review in his founding affidavit. He brought an application to this court in terms of section 158(1)(h) of the

provisions of the Labour Relations Act No 66 of 1995 (“the Act”).

2. At the commencement of the proceedings I was alerted to a decision of the Transkei High Court in which it was held that a municipality or local authority is not to be regarded as the State as an employer, but rather can sue and be sued in its own name (see *Mcosini v Mancotywa & another* (1998) 19 ILJ 1413 (Tk)). The parties themselves did not dispute the jurisdiction of this court to hear the matter in terms of the provisions of section 158(1)(h) of the Act and that was also the view of Landman J in *SA Agricultural Plantation and Allied Workers Union v Premier of the Eastern Cape & others* (1997) 18 ILJ 1317 (LC). Based on the reasoning as set out in the *SAAPAWU* judgment I am approaching the matter on the basis that this court does have the requisite jurisdiction.

Relevant chronological events

3. The applicant was employed by the first respondent in the capacity of Town Clerk. His services were suspended on 21 April 1998, pending the holding of a disciplinary enquiry.

4. The disciplinary enquiry against the applicant was chaired by the third respondent and proceeded on 4, 7, 8 and 21 May 1998. The third respondent is not employed by first respondent,

but was appointed as an independent third party to chair the enquiry. The third respondent found the applicant guilty on some 23 charges and recommended to first respondent that he be dismissed with effect from the end of July 1998.

5. On 29 June 1998 the first respondent resolved that the findings of the third respondent against the applicant be upheld and that the services of the applicant be terminated with immediate effect.

6. The applicant was allowed to appeal against the decision of the third respondent in terms of clause 10.2.1.8.14 of the disciplinary procedure contained in the Standard Conditions of Service, which were being applied by the first respondent at the time. These Standard Conditions of Service were promulgated by the then Minister of Manpower in terms of the provisions of section 48(1)(a) of the Labour Relations Act of 1956 and constituted an agreement concluded at the Industrial Council for the Local Authority Undertaking of the Province of the Cape of Good Hope. The Standard Conditions of Service were made binding by the Minister for the period 13 May 1994 to 1 December 1996. It was common cause between the parties at the hearing of the matter that, in the circumstances, the Standard Conditions of Service were no longer applicable by

operation of the law at the times material to this dispute.

7. The Standard Conditions of Service make provision for disciplinary enquiries to be chaired by a Disciplinary Committee and appeals to be chaired by an Appeal Committee.

8. Clause 10.2.1.8.15.1 of the Standard Conditions of Service provides for the following procedure where an employee notes an appeal:

"*The appeal of an employee shall be heard as a* de novo *disciplinary enquiry by an appeal committee appointed by the Council and having higher authority than the departmental head concerned or his assignee or the disciplinary committee concerned against whose finding and/or disciplinary measures that appeal is being lodged: Provided that where the Council is of the opinion that it is not necessary to hold a* de novo *enquiry the Appeal Committee shall merely entertain representations/arguments without a de novo enquiry: Provided further that the employee concerned or his representative shall have the right in terms of the Labour Relations Act, 1956, to contest such decision and that the record of the previous enquiry shall be made available to the Appeal Committee by agreement."*

9. It is common cause that the applicant appealed against the

decision of the first respondent and that the first respondent resolved that a *de novo* hearing was not necessary. It is apparent from the papers that applicant failed to approach the first respondent as he was entitled to do in terms of the clause quoted in full above in order to contest the first respondent's decision not to allow the appeal to proceed *de novo*.

10. The first respondent appointed the second respondent to act as the appeal chairperson. The second respondent is also not an employee of first respondent and was appointed as an independent party to chair the appeal. At the commencement of the appeal hearing the applicant was represented. Neither the applicant nor his representative objected to the fact that the hearing was not to be conducted *de novo*. In fact the record shows that second respondent, at the start of the hearing, confirmed the agreement of applicant's representative to the effect that the hearing would not be conducted *de novo*.

11. On 26 August 1998 second respondent produced his finding in a written report and recommended that applicant's dismissal be confirmed. On 27 August 1998 the first respondent resolved to accept the appeal findings of the second respondent.

The grounds of review

12. A number of the grounds of review relied upon by the applicant arise from the alleged failure by the first respondent to comply with various of the specific provisions of the Standard Conditions of Service. For instance, clause 10 of the Standard Conditions of Service makes provision that the enquiry would be presided over by a committee, whereas it is common cause that the third respondent acted as the sole presiding officer of the disciplinary enquiry. In this regard applicant alleges that he has been prejudiced by the fact that only one person acted as the presiding officer which deprived him of the "benefit of multiple deliberation and cross-advice". The applicant raises the same argument in respect of the second respondent being the sole presiding officer of the appeal hearing. As far as the further conduct of the appeal is concerned the applicant alleges that the failure by the second respondent to conduct the appeal hearing *de novo* was a violation of the provisions of clause 10.2.1.8.15.1 of the Standard Conditions of Service. Secondly, he alleges that first respondent failed to afford applicant a hearing before deciding that no *de novo* hearing would be held and, thirdly, he complains that the record of the disciplinary hearing was made available to the second respondent in the absence of an agreement. All of these, he alleges, constitute gross irregularities in the procedure.

13. I deal with the above grounds of review before proceeding to deal with the further grounds. As I have already stated it is common cause that the Standard Conditions of Service were no longer in force at all material times pertinent to this dispute. Mr Van Graan, who appeared on behalf of the first respondent, submitted that in the circumstances the applicant could not approach this matter in terms of the precepts of administrative law. That submission is clearly correct. Instead, submitted Mr Van Graan, the matter should be approached with reference to the provisions of the Act. In particular, the conduct of the first respondent in disciplining and dismissing the applicant should be judged with reference to the provisions of Schedule 8 of the Act.

14. It is apparent that as a matter of fact the third respondent was at the very least using the provisions of the Standard Conditions of Service as a guideline in regard to the procedure followed by it in disciplining the applicant. Upon expiry of the validity of the Standard Conditions of Service and in the absence of the introduction of an alternative disciplinary procedure and code there seems no reason why the third respondent could not continue as a matter of practice to apply the Standard Conditions of Service as a guideline. Mr Van Graan submitted that the provisions of the Standard Conditions of Service are compatible/reconcilable with the provisions of Schedule 8 to the

Act in regard to the requirements for a fair disciplinary procedure. Judged on that basis I agree that there does not appear to be a valid challenge to the fairness of the procedure followed by the first respondent.

15. I turn to consider the particular complaints of irregularity in more detail. Although the Standard Conditions of Service refer to a disciplinary and appeal enquiry being conducted by a committee it would not appear that there was real prejudice to the applicant by virtue of the fact that he appeared before a sole presiding officer in both instances. Certainly within the ambit of what is generally regarded as fair labour practice the appointment of a single person to chair an enquiry is standard practice. Moreover, in these instances, the fact that an independent outside party was appointed (as was common cause) would ensure impartiality in the proceedings. Although the decision to dismiss applicant (and to confirm his dismissal on appeal) were finally made by adoption of resolutions to this effect by first respondent, the terms of the resolutions were simply to adopt the recommendations of third and second respondent respectively. In the circumstances I do not think that first respondent can be said to have acted as *iudex in sua causa* as argued by the applicant.

16. As far as the alleged irregularities in regard to the fact that the appeal hearing was not conducted as a *de novo* hearing are concerned, I am satisfied that in terms of the provisions of clause 10.2.1.8.15.1 of the Standard Conditions of Service first respondent was entitled to form the view that it was not necessary to hold a *de novo* enquiry. What the wording of the section does is provide the employee with the right to contest that decision once it has been taken. It was common cause that the applicant as a matter of fact did not contest the decision. Moreover, I am satisfied on the papers before me that the issue was pertinently raised at the commencement of the appeal and that applicant's representative agreed to proceed on the basis that the appeal would not be a *de novo* hearing. In that context any rights which the applicant might have had were clearly waived. In those circumstances it was not inappropriate, also, that the record of the disciplinary enquiry was made available to the appeal chairperson.

17. I am satisfied thus in all respects that the procedure followed by the first respondent was fair. I have already dealt with the fact that any failure to comply with the strict terms of the Standard Conditions of Service cannot constitute a ground for review under general administrative law provisions given the fact that those conditions of service were no longer in force.

18. That leaves me to deal with the allegation that there has not been compliance with the provisions of section 67(2) of the Municipal Ordinance No 20. of 1974. Mr Van Graan conceded that the provisions of this Ordinance are still operative having been assigned to the Province of the Northern Cape by the President under the provisions of section 235(8) of the Constitution of the Republic of South Africa, by way of Government Notice 108 of 1994.

19. Section 67(2) of the Ordinance reads as follows:

"*No Council shall terminate the services of its Town Clerk, whether upon or without notice, except with the approval of the Administrator who, before granting such approval, may, and, if he is so requested in writing by the Town Clerk in any case where an enquiry in terms of section 69 has not been held, shall act in terms of section 200 and cause an investigation to be undertaken into the circumstances surrounding the proposed termination of the services of the Town Clerk.*"

Applicant's complaint related to the fact that the approval of the Premier (which in the present context should be substituted for the reference to a referral the Administrator) had not been obtained. The Premier is the fourth respondent in these

proceedings.

20. Mr Van Graan submitted that the contents of section 67(2) of the Ordinance are in conflict with the provisions of the present Labour Relations Act which "authorises" an employer to dismiss its own employees. There is no dispute in this matter that the first respondent was the applicant's employer. In that regard he argued further that there is a distinction to be drawn between original and provincial / subordinate legislation. Because the Ordinance concerned is subordinate legislation it should yield to the provisions of the Labour Relations Act in the event of a conflict. (See *LAWSA* Volume 25 p186 para 261). Furthermore, he submitted, the provisions of section 148 of the Constitution of the Republic of South Africa are applicable, which section provides that in the case of a conflict the national legislation prevails over the provincial.

21. I accept that the Labour Relations Act authorises an employer to dismiss its own employees, at the very least by implication. Indeed, one can probably go further and infer that the Act requires that an employer itself take the decision to dismiss one of its employees in that if the employer did not itself take the decision it is likely that the decision to dismiss would be found to be unfair under the provisions of the Act. In that sense there is

clearly a conflict between the provisions of the Act and those of the Ordinance and it was not necessary, therefore, for the first respondent to approach the fourth respondent for approval before dismissing the applicant.

22. Mr Van Graan argued in the alternative that, in any event, section 67(2) of the Ordinance had been complied with. He argued this with reference to a letter directed to the MEC of the North West Province in which first respondent advised the MEC of the findings against the applicant and the decision of first respondent to terminate his services. The letter concludes with the following words: "*We hope you will find this in order*". The MEC then writes back as follows:

"*I must confirm that your Council as a Municipality and therefore an independent sphere of government in terms of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), has the power, in its own right, to investigate the actions of its officials and may, in accordance with applicable Labour Law, act against any Council official, including the CEO. In such matters the Municipality acts independently without any "endorsement" from any other person or public authority.*

I, as the responsible MEC, can only confirm a note that your

Council is authorised by law to terminate the services of your CEO as set out in your abovementioned letter."

The position taken by the MEC in the aforesaid letter is an endorsement of the conclusion that it is not in fact necessary to obtain approval for the dismissal of a Town Clerk. As far as the issue of whether or not the letter indeed constitutes approval as contemplated by the provisions of the Ordinance is concerned, in the light of the conclusion which I have reached above I am not required to decide that aspect of the matter. In the papers first respondent avers that the MEC was the authorised representative of the fourth respondent. This is placed in dispute by the applicant as a matter of fact and law, the averment being that there is no evidence before me to show either that the fourth respondent could delegate that function to the MEC or that such delegation as a matter of fact occurred. This is not a dispute which I can resolve on the papers. If the delegation point were resolved, however, I would be satisfied that the wording of the letter of the MEC is sufficient to constitute "approval" as contemplated by section 67(2) of the Ordinance. If I am wrong on the point of whether the approval of fourth respondent is required or not, therefore, I am of the view that this aspect of the matter would have to be referred to oral evidence for resolution of the dispute of fact.

23. The applicant seems to raise what could be construed as a separate ground of review in relation to the provisions of s 67(2) of the Ordinance, namely, the failure by fourth respondent to afford him a hearing before deciding whether or not to approve his dismissal. He alleges that he had a legitimate expectation that there would be compliance with the rules of natural justice in this regard. I have already found that the approval of fourth respondent was not required and it follows therefore that this ground of review also falls to be dismissed.

24. There were certain additional grounds for review raised which remain to be dealt with. When second respondent confirmed the applicant's dismissal on appeal he made a further recommendation that in the event of any further legal action favouring the applicant at any level he not be reinstated but that a retrenchment package be negotiated with him. The first respondent adopted this recommendation in a formal resolution. In the event, however, the resolution was not carried out as no further legal action to date has resulted in applicant's reinstatement. It was argued on behalf of the applicant that the adoption of this resolution was grossly unfair and unreasonable since at the time of its adoption first respondent had not complied with the provisions of section 189 of the Act. The applicant was, however, dismissed on the grounds of misconduct

and the issue of retrenchment has as a matter of fact not entered into the picture. If at some future stage the applicant were to be reinstated and first respondent were to then consider retrenchment as an alternative it would be at that stage that the provisions of s 189 would become applicable. The applicant cannot now seek relief on the basis of an anticipated breach by the first respondent which may or may not arise at some stage in the future.

25. The applicant alleged further that the various acts performed by first, second and third respondents were irregular as they were performed in terms of the Standard Conditions of Service which had expired on 1 December 1996. I have already to a certain extent dealt with this aspect in addressing the specific complaints regarding procedure. The fact that first respondent purported to follow the terms of the Standard Conditions of Service as a guideline, in the absence of some other procedure which it was bound in law to follow, does not render its actions irregular or reviewable, particularly where the procedure adopted was legitimate and fair when viewed against the requirements of fair labour practice contained in the Act.

26. Finally the applicant complains that first respondent failed to obtain an exemption from the Industrial Council (as it was at the

time) as required by the provisions of section 1(3) of the Standard Conditions of Service, to permit departure from the terms of those Conditions of Service. On his own case, however, the Standard Conditions of Service were no longer in operation at all material times to this dispute. The requirement having become obsolete failure to comply therewith can have no effect on the validity of the applicant's dismissal.

27. Both parties were *ad idem* that this is a matter in which costs should follow the result.

28. In the circumstances I make the following order:

28.1 The application in terms of section 158(1)(h) is dismissed.

28.2 Applicant is to pay first respondent's costs, such costs to exclude any costs associated with the transcripts of the disciplinary enquiry and the appeal hearing which were filed separately from the record and which were not necessary for the determination of this matter.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:		13 August 1999
DATE OF JUDGMENT:		23 August 1999
APPEARANCE APPLICANT:	FOR	Mr N Cloete
OF:		Neville Cloete & Company Attorneys
APPEARANCE RESPONDENTS:	FOR	Mr E Van Graan
INSTRUCTED BY:		