IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case Nr: JR898/2004

In the matter between:

M M TSHISHONGA Applicant

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 1st Respondent

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF JUSTICE AND CONTSTITUINAL DEVELOPMENT 2nd Respondent

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JUDGMENT: H.M. MUSI, J

HEARD ON: 9 DESEMBER 2005

DELIVERED ON: 16 FEBRUARIE 2006

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[1] This is a judgment on a point *limine* identified by the parties during the pre-trial conference held in preparation of the hearing of the main case herein and which was by consent set aside for argument on a separate date.

[2] The factual background to the dispute is common cause. The applicant was employed as a Deputy Director General of the Department of Justice and Constitutional Development, the first respondent. The second respondent is the Director General of the first respondent and I shall for the sake of convenience refer to both respondents collectively as the Department. On 7 October 2003 and 8 October 2003 the applicant made certain serious allegations to the media about the conduct of his employer, the then Minister of Justice and Constitutional Development, Dr. P.M. Madoena, in his capacity as such. The applicant was immediately suspended and charges of misconduct were duly preferred against him. The Department duly instituted disciplinary proceedings in terms of its Senior Management Services Handbook Procedure for Disciplinary Action against Senior Managers, and appointed an independent person in the name of Mr. Bosch to chair the proceedings.

[3] The chairman of the Disciplinary Tribunal issued his findings on 27 July 2004, in terms of which he found that the information that the applicant had divulged to the media was a protected disclosure as defined in section 1 of the Protected Disclosures Act no. 26 of 2000 (the PDA) and therefore that the applicant's suspension and disciplinary enquiry to which he had been subjected were occupational detriments as defined in section 1. It would be noted that in terms of section 3 of the PDA no employee may be subjected to an occupational detriment as a result of having made a protected disclosure. In effect the disciplinary tribunal upheld the applicant's defence thereat.

[4] Before getting into the merits of the dispute, a few preliminary comments will do. The effect of the disciplinary tribunal's findings was that the applicant's suspension would lapse and he would have been entitled to resume his normal duties. Now the disciplinary tribunal made no such order but it is a natural or inevitable *ex lege* consequence of the acquittal. And although the disciplinary tribunal had

no power to order that the applicant be paid his salary for the period of the duration of the suspension, just like it would not normally order the lifting of the suspension, in practice the applicant would normally have been paid such outstanding salary if the suspension had been without pay.

[5] The above-mentioned practice is in line with the notion of fairness that underlies the resolution of disputes under the Labour Relations Act no. 66 of 1995 (the LRA). In the case of an employee who has been dismissed but a subsequent arbitration finds that the dismissal had been substantively unfair, section 193 (2) provides that reinstatement must be ordered, subject of course to certain qualifications. In most cases, reinstatement is with retrospective effect, which means that the employee is paid the salary that he/she would have earned for the duration of the period of dismissal.

[6] With that prelude I turn to consider the preliminary point that I have been called upon to decide. In fact three points

were initially raised in the pre-trial minutes. As Mr. Hulley for the respondent indicated the third point *in limine* was never intended to be argued if this court was satisfied that it had jurisdiction in the matter. There can be no doubt that this court has jurisdiction. Though Mr. Hulley made it known that he does not agree that the media could ever be regarded as persons or bodies to whom/which a disclosure can legitimately be made in terms of section 9 of the PDA, he nonetheless conceded that the second point *in limine* is bound up with the first point. A determination of whether the media are persons or bodies to whom/which a disclosure could legitimately be made falls within the findings of the disciplinary tribunal that the information disclosed was a protected disclosure within the meaning of section 1 of the PDA.

[7] The real bone of contention is the first point *in limine*. It is important to restate it here:

> "1. Whether the respondents are bound by the findings of

> the chairman of the disciplinary enquiry to the effect that the disclosures were protected in terms of the Protected Disclosures Act. The Applicant contends that the findings made by the chairman cannot be challenged by the respondents in these proceedings and that the respondents are accordingly bound by those findings. The respondents contend that they are neither entitled nor obliged to review a decision of an internal disciplinary enquiry but that they are not bound, for the purposes of the present proceedings, by the findings of the chairperson."

[8] In support of the applicant's case, Mr. Haycock, who argued the matter on behalf of the applicant, cited authority for the proposition that it is generally not permissible to subject an employee, who had been acquitted of misconduct charges, to a second disciplinary enquiry on the same or similar charges, as this would amount to double jeopardy (the autrefois acquit doctrine of criminal procedure). That being so, the employer would be bound by the determination of its own disciplinary tribunal in the absence of any internal regulation providing for the

overruling of such findings by a more senior official of the employer entity.

[9] Counsel pointed out that *in casu* the disciplinary code of the department has no provision for the overruling of the findings made by its own disciplinary tribunal nor has the Department sought to have such determination reviewed. He pointed out that the Department could not, for example, dismiss the applicant, precisely because it is bound by the acquittal verdict. Counsel submitted that in arriving at its decision, the disciplinary tribunal had regard to all the evidence before it and applied the applicable law to the facts and that it was fully empowered to do so.

[10] Mr. Hulley contended that the double jeopardy rule is used by an employee as a defence where the employer, dissatisfied with the outcome of a disciplinary enquiry, arraigns the employee before another disciplinary tribunal on the same or substantially similar charges. He submitted that since the applicant has instituted action, there can be

no question of a double jeopardy. Counsel submitted that the real issue in this case is whether the court is bound by a finding of another body on the same issues which the court is called upon to determine. He contended that in essence the findings of a disciplinary tribunal constitutes its mere opinion on the conclusion that should be reached based on the facts placed before it and as such it is evidence of the opinion of an expert, which is generally inadmissible. He pointed out that for such evidence to be admitted the expert would have to testify and the normal rules of evidence in this regard will then have to be followed. In support of his argument, Mr. Hulley referred to the cases of **BIRKETT v ACCIDENT FUND AND ANOTHER** 1964 (1) SA 561 T and **PHILLIPS N.O. v GOLDSTUCK** 1959 (3) SA 951 N all of which applied the rule of English law stated in the case of **HOLLINGTON v HEWTHORN COMPANY LTD** 1943 KB 587 (CA).

[11] Now it is so that the rule in **HOLLINGTON v HEWTHORN** has become part of our law of evidence. This is by virtue of

the provisions of section 42 of the Civil Proceedings Evidence Act 25 of 1965 which enjoined our courts to apply the English law of evidence that was applicable as at 30 May 1961. The court in **HOLLINGTON v HEWTHORN** ruled that a person's conviction of a criminal offence is not admissible in subsequent civil proceedings to prove that the person has committed the relevant offence. The rationale for this judgement was that the decision of a court is its own opinion and as such is not binding on another court.

[12] This rule has, however, evoked a lot of criticism so much so that in England it was abolished by legislative intervention. See generally the South African Law of Evidence (formerly Hoffmann and Zeffertt) 2003 edition at page 316 *et seq*. Now, there has not been any intervention by the legislature in South Africa but the courts have excluded the rule's application in at least one particular class of case, as indicated below, and there are indications that its continued application might be reviewed. See the South African Law of Evidence *op cit* at page 318.

[13] In the case of a striking off of an attorney the courts have excluded the application of the rule. In such cases a previous criminal conviction is admitted as *prima facie* proof of the commission of the offence but the attorney is given the indulgence of showing that he/she was wrongly convicted. See **HASSIM v INCORPORATED LAW SOCIETY OF NATAL** 1977(2) SA 757 (A), the leading case in this regard. The rationale for this position is interesting and may have had some relevance to the instant case to the extent that it was held that an application for the removal of an attorney is of a disciplinary nature and not a civil proceeding. However it is clear that the instant case is a civil proceeding.

[14] In my view, this matter can best be resolved with reference to the procedures for resolution of labour disputes under the LRA. The applicant is claiming compensation for an unfair labour practice. The normal procedure for enforcement for such a claim is provided for in section 191

of the LRA. In terms hereof the dispute would be referred to the CC.M.A. or the bargaining council concerned for conciliation. If that fails, it would go to arbitration. Now it is trite that arbitration under the LRA is a hearing *de novo* of all disputed issues and the findings of an earlier disciplinary enquiry are irrelevant and not binding. The record of the disciplinary enquiry itself becomes relevant only insofar as it is evidentiary material before the arbitrator and of course it can be used for purpose of cross examination and to asses the credibility of witnesses and the cogency of the respective versions of the parties.

[15] However, subsection 13 of section 191 permits an employee to approach the Labour Court directly for adjudication in a situation as such as the present where the employee alleges that he has been subjected to an occupational detriment by the employer in contravention of section 3 of the PDA for having made a protected disclosure. This is to be read with section 4 of the latter Act which provides that an occupational detriment short of

dismissal, is deemed to be an unfair labour practice and that any disputes in relation thereto must follow the procedure set out in the Labour Relations Act and may be referred to the Labour Court for adjudication. See also section 186(2)(b) of the LRA. Adjudication in this regard would proceed in the same way as adjudication of *inter alia* an automatically unfair dismissal or retrenchment in terms section 187 read with section 191(5)(b) of the LRA and it would be a trial *de novo*. It can hardly be suggested that the findings of the preceding disciplinary enquiry would be binding on the court. No authority to that effect has been cited nor am I aware of any.

[16] It is apposite to refer again to the minutes of the pre-trial conference. The issues in dispute and which the court is required to determine are identified as follows:

> "(a) Ad the Merits
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> 1. Whether the disclosures made by the Applicant on 7 and 8 October 2003 were protected in terms of the Protected Disclosures Act, 2000.

2. Whether the suspension from duty of the applicant and/or the disciplinary hearing constituted "*occupational detriments"* as defined in section 1 of the Protected Disclosures Act.
3. Whether the suspension from duty of the applicant or the disciplinary hearing constituted "*unfair labour practices"* as defined in section 186 of the Labour Relations Act. …"

The applicant is in effect saying that the court is bound by the findings of the disciplinary tribunal on the very same issues that the court is called upon to decide. It is a contradiction in terms.

[17] In my view, a different approach may have been called for had the applicant formulated his claim differently. Such would be the case, for instance, if he had sought from the court an order compelling the respondent to pay him the salary he would have earned for the duration of the suspension and the legal costs he incurred in contesting the charges at the disciplinary enquiry, this, on the basis

that these would be entitlements inevitably flowing from the determination made by the disciplinary tribunal. Significantly, the Department has admitted that it considers itself to be bound by such determination as indeed it should. In this regard, I refer to the comments I made at paragraphs 3 and 4 of this judgment.

[18] I conclude that the point *in limine* must be decided in favour of the respondents. The relevant findings made by the chairman of the disciplinary enquiry are not binding on the respondents in these proceedings. The applicant is to pay the costs of the hearing of the 9th December 2005.

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H.M MUSI, J

On behalf of Applicant: Adv. H. Haycock
Instructed by
Henning Viljoen Attorney

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On behalf of Respondents: Adv. Hulley
Instructed by
The State Attorney
JOHANNESBURG

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