IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO J2211/09

In the matter between:

MANOGRAN MUTHUSAMY Applicant

and

NEDBANK LIMITED Respondent

JUDGMENT

TIP AJ:

1. The issues in this case revolve around the question whether or not an employer can proceed with an inquiry into the conduct of an employee after the employment relationship has come to an end. The respondent ('Nedbank') proposes to hold such inquiry, whereas the applicant seeks in these proceedings to obtain an order interdicting it from doing so and an order interdicting Nedbank from placing the applicant's name on 'the REDS database', which I describe below. Arising out of these basic differences between the parties is a preliminary question concerning this Court's jurisdiction to deal with the matter at all.

2. 'REDS' is an acronym for 'Register of Employees Dishonesty System', this being a system established in the mid-1990s by what was then

known as the Banking Council of South Africa, the predecessor of the current Banking Association of South Africa ('the Association'). The Association represents all registered banks in South Africa, including domestic as well as international banks. Broadly stated, its role is to promote responsible, competitive and profitable banking and all its members subscribe to a Code of Banking Practice which *inter alia* aims to cultivate ethical practices within the industry. The RED system forms an important part of this program. In essence it comprises a centrally maintained database on which are recorded the names of all employees in the banking industry who have been dismissed for dishonesty-related offences. This database provides a screening resource for the use of participating banks in respect of prospective employees.

3. At present, there are 26 such banks. Nedbank has been one of them since November 1999 and it has developed an integrity management system that incorporates the RED system as a recruitment and selection check. Over the past decade or so, Nedbank has added 1348 names of dismissed employees to the database. In all, there are now over 9164 names on the register. The system is there to combat dishonesty in the banking environment and it is plain that by doing so it not only offers some protection to banks but also significantly buttresses the interest that the public has in trustworthy banking services.

4. Participation in the RED system takes the form of a written agreement, which includes implementation guidelines. Three principles are of particular importance in this case. The first is that an employee's name will be placed on the register only if he or she is dismissed for a dishonesty-related offence. The second is that a disciplinary hearing will still take place, in absentia if needs be, in the circumstance where the affected employee resigns or leaves before the hearing takes place. If the RED criteria are met, that employee will be duly listed. The third is that contracts of employment should include consent to the RED process and that existing employees should be advised thereof.

5. The role of these principles in respect of this application must be considered in the context of the relevant facts, which may be summarised as follows. The applicant has been employed in the banking sector since 1989. In May 2007 he took up the position of senior manager credit risk with Nedbank. As from March 2009 queries were directed to him by internal investigators of the bank concerning his relationship with certain clients and on 3 July 2009 he was handed a letter of suspension in which it was alleged that he was involved in "undisclosed conflicts of interest". The letter recorded that he remained subject to *inter alia* the bank's disciplinary procedure and that the suspension did not imply that his services had been terminated. The applicant was dissatisfied with the manner in which he was being treated and he lodged a document headed 'Unfair Labour Practices' on 6 August 2009. There is a difference between the parties as to whether this amounted to a formal grievance and whether or not there was any response to it, but those are not matters which I need to determine.

6. On 24 August 2009 the applicant submitted a resignation notice in these terms: "*Please accept this email as my official notification of resignation with immediate effect from Nedbank. As you are aware, from the 24 April 2009 to date (4 months) there has been no finality with regard to an investigation matter. At this point I am forced to resign ...*" There was a response to this on the following day which stated: "*I wish to confirm and advise that we have accepted and noted your resignation. I am seeking IR input on the impact of the current investigation relating to your resignation. Will keep you posted once this is known to me.*" A certificate of service was subsequently issued, noting the exit date to be 25 August 2009. The applicant's employment contract provided for a notice period of four weeks and he was initially paid his salary for such further period. That payment was however thereafter reversed and his last salary payment accordingly went up to the 25th of August.

7. On 3 September 2009 Nedbank conveyed the following to the applicant: "*I have had the opportunity to study your complaints and the report by*

Group Forensic Services and have also had the benefit of Group IR's input. ... I have decided that it is justified to proceed with disciplinary action at a formal disciplinary enquiry. We are in the process of arranging the hearing ... The proceedings should be finalised before the expiry of your notice period, which is calculated from the date of your notice of resignation. However, for your benefit I need to point out that even if you had left the bank's employ by the time the proceedings started, the bank would still have had to determine through a formal enquiry whether your name should be listed on the REDS database." The applicant reacted to this by asserting that his resignation had been with "*immediate effect*" and that Nedbank's reference to a "*notice period*" was therefore misplaced. I must add that the papers set out a précis of the result of the investigation, amounting to 15 charges. Other than to note that they appear to be quite grave, I express no view on whether they might be sustained upon a hearing.

8. Further correspondence ensued, basically to the effect that, for its part, Nedbank would be proceeding with a disciplinary hearing whereas, for his part, the applicant declared that he would not attend it. The present application has arisen because Nedbank has made it clear that it intends to proceed with the enquiry whether or not the applicant attends. In turn, the applicant seeks to interdict the enquiry from taking place even in his absence.

The Issue of Jurisdiction

9. By way of preface, I observe that the question of jurisdiction is certainly not moot. This follows from my *prima facie* view that the second leg of Nedbank's defence is sound, namely that the applicant has not demonstrated a clear right to interdictory relief. The establishment of an appropriate reference database is no stranger to South African law, which recognises that a variety of fiduciary and professional fields may properly incorporate regulatory mechanisms in the form of a database or in the form of a roll of practitioners in good standing, in order to promote

suitable standards of ethics and competence. See for instance *Hawker v Life Offices Association of South Africa and another* 1987 (3) SA 777 (C) which dealt with the operation of a similar database in the field of life assurance. Indeed, in the present case, the applicant does not mount an attack on the RED system *per se* but confines himself to the submission that his resignation places him beyond that system's reach. At its most elemental, the applicant says that he has resigned, that he is therefore no longer an employee, that he can hence not be dismissed, and that an essential REDS requirement can consequently not be addressed, being that employees can be entered on the register only if they have been dismissed for a dishonesty-related offence. Although I do not decide the point, I would remark that it might be thought a little startling if the underlying purpose of such database – bearing as it does an important public interest ingredient – could be stultified in a particular instance through no more than a resignation.

10. The ambit of the jurisdiction issue is narrow. It concerns only the question whether the Labour Court can adjudicate the principal prayers moved by the applicant, namely the interdiction of the hearing and, in any event, the prohibition of the entry of his name on the REDS database. Whilst those questions may be described as narrow, they do not yield ready answers. In part, that is so because the positions of both parties appear to some extent to contain anomalies. I deal with these below.

11. The first anomaly presents itself in the applicant's case. On the one hand, the applicant is insistent that he ceased to be an employee on the date of his resignation and that the employment relationship between him and Nedbank correspondingly terminated on the same day. On the other hand, he has approached this Court for relief and not the High Court. This issue was traversed in the affidavits in the following way. The founding affidavit merely described the nature of the application, but made no allegation concerning jurisdiction. Nedbank's answering affidavit denied that this Court had jurisdiction, pointing out that the applicant had identified no basis for it. This issue was not squarely dealt

with in reply, the gist of which was this statement: "*The respondent is in effect seeking to enforce a right which it does not have and it is on this basis that I have turned to this Honourable Court for assistance.*"

12. Although that statement broadly reflects a cause of action, it does not pertinently establish a ground for jurisdiction of the Labour Court. In the course of the hearing Mr Lennox, who appeared for the applicant, was given an opportunity to deal further with this difficulty. He confined himself to the submission that the powers to be found in section 158(1)(a) read with section 157(1) and (2) of the LRA vest this Court with the necessary jurisdiction. This is neither a novel submission nor a sound one. The relevant portion of section 158(1)(a) reads as follows:

> "*The Labour Court may-*
>
> *(a) make any appropriate order, including-*
>
> *(i) the grant of urgent interim relief;*
>
> *(ii) an interdict;*
>
> *(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;*
>
> *(iv) a declaratory order; ...*"

These provisions, however, do no more than describe the powers which the Labour Court may exercise in the adjudication of matters which are otherwise properly before it and within its zone of jurisdictional competence, as conferred on it through the LRA or any other applicable law.

13. It is to section 157 that one must turn in order to determine the jurisdictional parameters:

> "*(1) Subject to the Constitution and section 173, and except*

> *where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
>
> *(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-*
>
> *(a) employment and from labour relations; ...*"

14. Nowhere in these provisions is a peg to be found for the proposition that this Court can deal with a post-termination hearing in circumstances where the applicant himself contends that such hearing should not take place precisely because an employment relationship is no longer in existence. As was pointed out by Mr Myburgh, for Nedbank, the applicant has not raised any allegation that an entrenched constitutional right has been or will be violated. He similarly pointed out during his argument that the applicant has alleged no reliance on section 77(3) of the Basic Conditions of Employment Act 75 of 1997 ('BCEA'). Notwithstanding that these points were thus pertinently raised during argument, applicant's counsel offered no suggestion in his replying address that any of those provisions should indeed be applied to his case.

15. Section 77(3) of the BCEA warrants some attention. It provides:

> "*The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.*"

The wording of this is in many respects broader than that to be found in the LRA. See for instance the Labour Appeal Court's interpretation of its scope in *University of the North v Franks and others* (2002) 8 ILJ 1252 (LAC):

> "*[29] There is no indication that s 77(3) of the BCEA was*

> *enacted solely to solve the so-called dual claims problem. Section 77(1), with certain exceptions, grants exclusive jurisdiction to the Labour Court 'in respect of all matters in terms of this Act'. The Act seeks 'to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment'. In those matters exclusive jurisdiction is conferred. Section 77(3) goes much wider. It expressly also deals with employment contracts which have no statutory basic conditions and thus fall outside the scope of the Act. Consequently the legislature had in mind that the Labour Court should also have jurisdiction in such matters. Even if there is no dual claims problem. In short, the Labour Court is to have jurisdiction in respect of all employment contracts and exclusive jurisdiction in respect of some. But the jurisdiction is even wider. It is in respect of* any matter concerning *a contract of employment.*
>
> *[30] In this appeal it is not necessary to decide exactly how wide the jurisdictional net is cast. The termination of an employment contract and the terms and conditions upon which this is to occur are clearly matters concerning such contract. The Labour Court correctly held that it had jurisdiction.*"

16. The LAC was there dealing with the offer and subsequent withdrawal by the University of voluntary severance packages and not with a post-resignation issue such as the one before me. Nonetheless, it cannot be said, at least in the abstract, that an argument on the basis of section 77(3) could not have been mounted by the applicant. Practically, of course, this would inevitably have led him to a conundrum in that section 77(3) could be invoked only when coupled to the premise that the REDS inquiry was a matter concerning his contract of employment. Equally inevitably, this would import the latent consequence that the employment contract had not been as thoroughly extinguished as the applicant would have it for the purpose of his primary contention that his resignation had given him immunity from disciplinary measures, especially the outcome of dismissal. In this sense the applicant's case is an uneasy one, reflected in the submission by Mr Lennox that this Court could deal with the matter since it involved the 'dying embers' of the employment relationship.

Picturesque though that image may be, it does not add much by way of forensic precision. Either the applicant relies on section 77(3) or he does not. In this case, it is clear, he has elected not to.

17. As far as the case for Nedbank is concerned, it must be remarked that it too is not free from ambiguity. On the one hand, it has put forward contentions that incline towards establishing a contractual root for the proposed REDS inquiry, including these allegations: that all the impugned conduct of the applicant occurred before his resignation; that the resignation was accepted by Nedbank with the qualification that the position regarding the current investigations had to be clarified with IR; and that the applicant was at all material times aware that a REDS inquiry could take place after a resignation. Ultimately, though, Nedbank's case was formulated as follows: "*The reason why Nedbank wishes to proceed with the disciplinary hearing is because it is duty bound to do so in terms of the RED System guidelines, with it owing this duty to the council and all the participating banks (including itself).*" During his argument, Mr Myburgh underscored this position with the dual submission that Nedbank accepted that it had not established a contractual basis for the intended hearing and that the authority and obligation to hold it flowed from the REDS agreement, with the bank in effect acting as an industry representative.

18. When it comes to jurisdiction, a court must act with caution. It is trite that jurisdiction cannot be created through agreement between the parties. By the same token, the manner in which one or other of the parties characterises the issues placed before a court cannot *ipso facto* lead to a conclusion as to whether or not that court is competent to determine them. Such characterisation may need to be considered in relation to an objective evaluation of the subject matter of the dispute. At the same time, though, if a party has chosen to frame its case on a particular basis then it is generally not for a court to entertain the prospect that it could have been formulated differently, with a different consequence as to jurisdiction. Grogan AJ has recently carried out an extensive and

illuminating examination of this and related issues in *Tsika v Buffalo City Municipality* (2009) 30 ILJ 105 (E).

19. In this case, the applicant's departure point for his approach to this Court is that the employment relationship between him and Nedbank is entirely at an end. Although it appears that he has referred a constructive dismissal dispute to the CCMA, that does not alter the essential fabric of his present application. The main thrust of Nedbank's defence corresponds. The composite result of this is that the applicant finds himself without a jurisdictional niche in the LRA and without any recourse to the BCEA. Accordingly the preliminary point raised by Nedbank that this Court does not have jurisdiction over the applicant's claims must be upheld. There is no reason why costs should not follow the result.

Order

20. I therefore make the following order

    The application is dismissed with costs.

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K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	10 FEBRUARY 2010
DATE OF JUDGMENT:	16 APRIL 2010
FOR APPLICANT:	ADV M A LENNOX Instructed by Harry Goss Attorneys
FOR RESPONDENT:	ADV A T MYBURGH Instructed by Cliffe Dekker Hofmeyr Inc