

WIKUS VAN RENSBURG ATTORNEYS

Labour Law Practitioner & Attorneys

36 Western Road, CENTRAL, PORT ELIZABETH, 6001 P O Box 12339, CENTRAHIL, 6006
Tel: +(27) 41 582-2205 / 582-2737, Fax: +(27) 41 582-3131
eMail: wvratt@mweb.co.za

NEWSLETTER 22

MOODLEY v KNYSNA MUNICIPALITY & ANOTHER (2007) 28 ILJ 1715 (C)

Disciplinary code and procedure-Chairperson - Employee contending he had right to be heard on appointment of presiding officer - Nothing in disciplinary code indicating that employee had right to participate in selection and appointment of presiding officer - No legitimate expectation that employee would be heard created by employer. Disciplinary code and procedure-Enquiry - Interdict to stay enquiry - Existing interim interdict to allow employee opportunity to have appointment of presiding officer reviewed and set aside - Presiding officer recusing herself - Once she did so interdict lapsed - Employer at liberty to appoint new presiding officer and continue with disciplinary enquiry. Interdict - To stay disciplinary enquiry - Employee contending that he had right to be heard on appointment of presiding officer - Nothing in disciplinary code indicating that employee had right to participate in selection and appointment of presiding officer - No legitimate expectation that employee would be heard created by employer - Interdict refused. Interdict - To stay disciplinary enquiry - Existing interim interdict to allow employee opportunity to have appointment of presiding officer reviewed and set aside - Presiding officer recusing herself - Once she did so interdict lapsed - Employer at liberty to appoint new presiding officer and continue with disciplinary enquiry. Local authority - Disciplinary proceedings - Senior employee seeking urgent interdict to stay disciplinary enquiry - Employee contending that he had right to be heard on appointment of presiding officer - Nothing in disciplinary code indicating that employee had right to participate in selection and appointment of presiding officer - No legitimate expectation that employee would be heard created by employer - Interdict refused.

Summary

The applicant, a senior employee of the first respondent municipality, had obtained an urgent interdict preventing the municipality from proceeding with disciplinary proceedings against him to enable him to take the appointment of the presiding officer on review. The applicant instituted review proceedings; however, the presiding officer, Ms S, recused herself. The municipal manager appointed a new presiding officer, Ms B, and the municipality set the disciplinary enquiry down for hearing. The applicant then launched urgent proceedings in the High Court for an order that the re-enrolled disciplinary enquiry be stayed or postponed sine die pending the outcome of the review application. The applicant also instituted a second review application against the municipality's appointment of Ms B as presiding officer. In the urgent I application the applicant contended, inter alia, that he had the right, arising from his contract of employment and administrative law, to the application of the rules of natural justice and fair procedure in the appointment of a presiding officer and in particular the right to be heard on the suitability of the presiding officer. Alternatively, he submitted that he had a legitimate expectation to be heard, which legitimate expectation had been created by the municipal manager's statement to a local newspaper that the applicant would be allowed to comment on the nomination of a presiding officer. The court noted that the entire purpose of the original interim interdict was to allow the applicant an opportunity to deal with the appointment of Ms S in particular. Ms S's exit as presiding officer when she recused herself rendered the interim order non-existent. The municipality had correctly adopted the view that after the recusal of Ms S the interim interdict had lapsed and it was at liberty to proceed with the appointment of a new presiding officer to chair the enquiry. The applicant's contention that the municipality had acted in breach of an order of court failed to accept that the subject-matter of the interim order was Ms S, and no body else. Once she was out of the way, there was no obstacle preventing the municipality from acting in the manner it did. Moreover, the court in the earlier matter had made it clear that the municipality was at liberty to appoint a new presiding officer without giving the applicant an opportunity to comment on such appointment. The court found that there was nothing in the relevant disciplinary code which could be interpreted to mean that the applicant had a right to participate in the selection and appointment of the presiding officer. It remained the sole prerogative of the municipality to appoint a suitably qualified presiding officer in disciplinary matters. Regarding the applicant's alleged legitimate expectation to be heard on the appointment of a presiding officer, the court noted that the municipal manager had denied making the statement attributed to him in the press. A requirement for legitimacy of an expectation is that the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification. The applicant ought, therefore, to have investigated the source of the press release. He sought to place reliance on the press statement as giving rise to a legitimate expectation, but he omitted to seek clarification and therefore acted at his peril. The applicant's reliance on the press statement was, accordingly, untenable.

The court found further that it was not the correct forum to address the question of the furnishing of statements to the applicant. The correct forum was the disciplinary enquiry at which the applicant could make a formal request for the furnishing of any relevant statements. The court accordingly dismissed the application with costs.

Senior Attorney: Lodewikus van Rensburg, B. Proc, MA in Conflict and Conflict Resolution

Attorney: Julius B Pauw, LLB

Candidate Attorneys: J Forbes, LLB; D Gondoza, LLB, LLM in Labour Law

Consultant: Martinus Jacobs, ND: HRM

Office Manager: Amy Stone