THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 13/2003

In the matter between :

DENEL (PTY) LIMITED Appellant

-and -

D P G VORSTER Respondent

Before:	**HARMS, FARLAM, NUGENT, CONRADIE JJA & VAN HEERDEN AJA**
Heard:	**19 FEBRUARY 2004**
Delivered:	**5 MARCH 2004**
Summary:	**Employment contract incorporating disciplinary code – whether breached by employer**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] For many years the respondent was employed by the appellant. On 9 September 1996 he was summarily dismissed. Aggrieved at his dismissal the respondent sought redress in the Industrial Court in terms of s 46(9) of the now repealed Labour Relations Act 28 of 1956 but those proceedings were abandoned before they reached their conclusion. The respondent then sued the appellant in the Pretoria High Court for damages for breach of his employment contract and for damages for *injuria*.

[2] Before the trial commenced the parties agreed that the 'merits' of the claims should first be tried and that the 'quantum' should be held over for later decision. The trial judge (Shongwe J) made no formal ruling to that effect but the trial nevertheless proceeded in accordance with the agreement and ultimately the respondent's claims were dismissed. On appeal to the Full Court (Van der Walt J, Mynhardt and De Vos JJ concurring) the trial court's decision in relation to the first claim was reversed and its order was substituted with an order declaring that the plaintiff 'succeeded on the merits'. The appeal relating to the claim for damages for *injuria* was dismissed. This appeal is confined to the claim for damages for breach of contract and it comes before us with the special leave of this court.

[3] Before turning to the substance of the appeal it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. And even where the issues are discrete the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial but in my experience it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders a trial court

should ensure that the issues are circumscribed with clarity and precision. It is a matter to which I shall return later in this judgment.

[4] There was no dispute in the present case that the appellant had proper substantive grounds for summarily terminating the respondent's employment. The respondent's complaint is confined to the process that was adopted.

[5] The procedures that had to be followed when disciplinary action was taken against an employee, and the identities of the persons who were authorised to take such disciplinary action, were circumscribed in the appellant's disciplinary code. The terms of the disciplinary code were expressly incorporated in the conditions of employment of each employee with the result that they assumed contractual effect.

[6] Clause 7 of the disciplinary code deals with the various forms of disciplinary action that might be taken against an employee in progressive order of severity commencing with a verbal warning and culminating with dismissal. For each progressive step provision is made for a greater degree of formality and oversight.

[7] Thus a verbal warning may be given to an employee by a supervisor on a stipulated level of seniority with no formality required at all. A written warning may only be given after the supervisor has held a formal disciplinary enquiry. At the next level of disciplinary action – a 'serious written warning' – and all the levels that follow, the code purports to

introduce two stages into the disciplinary process. A serious written warning may be issued only by a senior manager on job level 5 on the recommendation of a disciplinary committee. Similarly a final written warning may only be given to an employee by a senior manager on job level 6 on the recommendation of a disciplinary committee.

[8] When it comes to the dismissal of an employee that two-stage process is repeated and in addition the person who is authorised to approve the recommendation is required to consult with the Assistant General Manager: Human Resources. Clause 7.9 – the clause that is relevant to this appeal – provides as follows:

> 'Dismissal is the most severe punishment that can be imposed on an employee. An Employee on job level 5 and lower may on the recommendation of the Disciplinary Committee be dismissed by an assistant general manager in consultation with the Assistant General Manager: Human Resources in the case of a very serious infringement in terms of the code . . . .'

[9] The disciplinary code does not have express requirements for the composition of a disciplinary committee. Whatever the position might be in relation to the composition of a disciplinary committee in other cases the table in clause 9.2 – which reflects 'the disciplinary actions that may be used as well as the handling and decision making powers' – seems to contemplate that in the case of dismissal the person who approves the recommendation (an assistant general manager) will not be a member of

the disciplinary committee for he is not 'involved in the disciplinary enquiry'.

[10] Thus on an ordinary reading of clause 7.9 of the code together with the table to clause 9.2 an employee who faces dismissal can expect to attend an enquiry before a disciplinary committee comprising at least a senior manager on job level 6. (That is provided for in the table in clause 9.2.) The table, and clause 8.3.5.2, provide for the enquiry to be attended by a member of the human resources department (whose function, it seems, is to act in an advisory capacity). After investigating the matter the disciplinary committee must decide whether the employee should be dismissed. If so, it must recommend that course of action to an assistant general manager. The assistant general manager, in consultation with the Assistant General Manager: Human Resources, must decide whether to approve the recommendation. Two quite independent decisions are thus required in order to effect a dismissal.

[11] That is not what occurred in the present case. The disciplinary enquiry was conducted by Mr Schutte who was himself an assistant general manager. Amongst those who attended the enquiry was Mr Matela from the human resources department. Mr de Wet, the Assistant General Manager: Human Resources, acted as the pro forma prosecutor. After Mr de Wet had presented the case against the respondent and the respondent had replied all the participants except Schutte and Matela left the room. Schutte discussed

the matter with Matela to satisfy himself that he had acted correctly and Schutte then decided that the respondent was guilty of the conduct that had been alleged against him. Those involved in the enquiry then reassembled and Schutte announced his conclusion – and gave his reasons – and asked the respondent if there was anything further he wished to say. The respondent had nothing further to say. According to Schutte all the participants, except Schutte and Matela, again left the room. (The respondent disputed that the enquiry was divided into two parts but the dispute is not material). Schutte and Matela discussed an appropriate sanction and both were of the view that the respondent should be dismissed. Once more the participants assembled and Schutte announced the decision to terminate the respondent's employment. (The disciplinary code allowed for an appeal against that decision – which was exercised by the respondent without success – but that is not relevant to the present enquiry.)

[12] Whether Matela ought to have participated in Schutte's decisions is not material to the outcome of this appeal for in two other respects the process is said by the respondent to have been flawed. First, Schutte was himself the 'disciplinary committee' with the result that he did not purport to approve a recommendation made by a separate body. Secondly, Schutte did not consult with De Wet before making his decision. (Indeed, De Wet

probably precluded himself from being consulted by adopting the role of pro forma prosecutor.)

[13] It was submitted on behalf of the appellant that, on a proper construction of clause 7.9, a recommendation from a disciplinary committee was required only if an assistant general manager did not conduct the disciplinary enquiry himself, and that the Assistant General Manager: Human Resources was entitled to delegate a person to be consulted in his stead (the suggestion being that Matela had fulfilled that function) or that such a construction is properly to be arrived at with the assistance of appropriate tacit terms.

[14] The language of clause 7.9 does not allow for that construction. The language expressly requires a recommendation by a disciplinary committee, approved by an assistant general manager, which contemplates two decisions arrived at independently. That construction is also supported by the table in clause 9.2, which contemplates that the assistant general manager will not participate in the enquiry. Moreover, the final decision is expressly required to be taken in consultation with the specified person in the human resources department.

[15] Nor is the appellant's construction capable of being achieved by resorting to tacit terms. As pointed out by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H-533A:

'The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'

There is nothing in the disciplinary code, when read in that way, to indicate that the appellant (who caused the document to be drafted) intended clause 7.9 to be qualified in the manner suggested. On the contrary, the language of clause 7.9, when seen in its context, and in the context of the table in clause 9.2, indicates that the qualifications contended for were not intended: to read such qualifying terms into the document would be in conflict with its unambiguous express terms (cf *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) 615D-E). It might be that the construction advanced by the appellant would create a disciplinary regime that was equally acceptable (whether that is so is by no means certain) but that is not the test: through its disciplinary code, as incorporated in the conditions of employment, the appellant undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the appellant unilaterally to substitute something else.

[16] The real thrust of the appellant's argument, however, went in another direction. Section 27(1) of the Interim Constitution – which was in force at

the time that is relevant to this appeal – guaranteed to everyone the right to fair labour practices and that has been perpetuated by s 23(1) of the present Constitution. Moreover, s 39(2) of the present Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. In the appellant's heads of argument it was submitted that the procedure that was adopted by the appellant was one that respected the respondent's constitutional right to fair labour practices with the result that it would be an infringement of the appellant's right to fair labour practices if the dismissal were to be regarded as unlawful. The effect of that submission, as it was developed in argument, and as I understand it, was that the relationship between employer and employee is governed by only a reciprocal duty upon the parties to act fairly towards one another, with the result that contractual terms requiring anything more must necessarily give way. I do not think that is correct and it is also in conflict with what was recently said by this court in *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) para 15. If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect. The procedure provided for in the disciplinary code was

clearly a fair one – it would hardly be open to the appellant to suggest that it was not – and the respondent was entitled to insist that the appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the appellant was just as good.

[17] In the course of developing his submissions the appellant's counsel also submitted that to apply the ordinary principles relating to the assessment of contractual damages would lead to an unfair result in the present case and that those common law principles need to be adapted so as to accord to the appellant the 'fair labour practices' to which it is entitled in terms of the Bill of Rights. It is by no means certain that the application of the ordinary principles for assessing contractual damages will produce an unfair result but it is in any event premature to consider that submission. Earlier in this judgment I drew attention to the fact that the trial was confined to the 'merits' of the claim and the parties accepted before us that the trial was thus confined to determining whether the respondent's employment was terminated in breach of his employment contract. It remains to be determined whether the respondent's position would have been different if the appellant had fulfilled its contractual obligations – which is the usual basis for determining contractual damages: see for example *Trotman & Another v Edwick* 1951 (1) SA 443 (A) 449B-C – and if so what value to place upon the loss. Only after that enquiry has been

undertaken can it be determined whether the result is unfair (if that is relevant at all).

[18] There is a further matter relating to the costs. The material facts in this matter were limited and they were never in dispute. This was pre-eminently a matter in which Rule 8 of the rules of this court could have been used in order to contain the costs, particularly bearing in mind the observation by the court *a quo* that the appeal to it could have been dealt with as a stated case. That observation, and the provisions of Rule 8, seem to have gone quite unnoticed when the eight volume record – most of which is irrelevant – was filed in this court. This is an appropriate case in which a special order for costs ought to be made as provided for in Rule 8(c) for the failure to utilise the rule to the financial advantage of the litigants. In my view the appropriate order is to deprive both attorneys of a portion of the fees to which they would otherwise have been entitled for perusing the record.

[19] Finally, when setting aside the order of the trial court, the court *a quo* substituted an order to the effect that the plaintiff 'succeeds on the merits'. It is desirable to circumscribe with precision the issues that have been disposed of by this appeal in order to avoid later misunderstanding (cf *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) 792B-E) and I intend to amend the order of the court *a quo* accordingly. The

respondent is nevertheless the successful party and is entitled to the costs of this appeal.

The following orders are made:

1. Paragraph 2 of the order made by the court *a quo* is set aside and the following is substituted:

   'The order of the trial court is set aside and the following orders are substituted:

   "(a) It is declared that the defendant terminated the plaintiff's employment in breach of the terms of his contract of employment.

   (b) Claim 2 is dismissed.

   (c) The defendant is to pay the costs associated with determining the issue referred to in (a)."'

2. Save as aforesaid the appeal is dismissed with costs. It is ordered that the attorneys for the appellant and the attorneys for the respondent shall not be entitled to recover (whether from their clients or from the opposing party) 60% and 40% respectively of the fees to which they might otherwise have been entitled for perusing the record in this appeal.

NUGENT JA

HARMS JA)
FARLAM JA)
CONRADIE JA) **CONCUR**
VAN HEERDEN AJA)