IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J1334/11

In the matter between:

MIZERIA KITERIA NYATHI Applicant

and

THE SPECIAL INVESTIGATING UNIT Respondent

Date of judgment : 22 July 2011

Date of hearing : 19 July 2011

JUDGMENT

A.C BASSON J:

1] The applicant is Ms. Mizeria Kateria Nyathi. She is currently employed as the Head of Business Support for the respondent. The respondent is the Special Investigating Unit (hereinafter referred to as the ("SIU"). The SIU was established in terms of section 2 of the Special Investigating Units and Special Tribunals Act,[1] as amended and published in Government Gazette No.22531 dated 31 July 2001. The deponent to the answering

1 Act 74 of 1996

affidavit – Mr. Hofmeyr - is the Head of the SIU ("Hofmeyr").

2] This was an urgent application in terms of which the applicant sought a final order interdicting the respondent from firstly, terminating her employment contract unlawfully; secondly, declaring that the decision of the respondent to extend the applicant's suspension on 5 July 2011 to be invalid, unlawful and of no legal force or effect; and thirdly, that the applicant be permitted to resume her duties as Head of Business Support in terms of her contract of employment which was signed on 9 October 2009.

3] The respondent opposed the application (but not urgency) on the following grounds:

3.1 The applicant cannot establish that she has a *prima facie* right to stop the respondent from terminating her employment contract until it first follows a procedure prescribed in the Disciplinary Policy (POL044) because –

3.1.1 The applicant's refusal to submit to a polygraph examination constitutes a breach of a material term of her employment contract;

3.1.2 The respondent is entitled to pursue its right to accept such repudiation and terminate the employment contract;

3.1.3 In the absence of any representations by the

applicant as to why the respondent should not pursue its right as clearly provided for in the applicant's employment contract, the respondent is lawfully entitled to terminate the applicant's employment contract;

3.1.4 The Disciplinary Policy has no contractual force. It is merely a guide;

3.1.5 In the alternative, even if the Disciplinary Policy had contractual force, it does not require the respondent to follow the disciplinary procedure provided for in the Policy when terminating for a *breach of a material term* of the employment contract. The policy provides for a procedure to be followed in the case of an allegation of *misconduct* only;

3.2 The extension of the applicant's suspension is consistent with the provisions of the respondent's Disciplinary Policy and also expressly provided for in the Employment Contract concluded between the applicant and the respondent.

Brief background to the facts

[4] The applicant and the respondent entered into a written contract of employment on 9 October 2009. On 5 April 2011, the applicant was called to a meeting with Hofmeyr of the respondent. On arrival, she

received a letter containing an intention to suspend her. A summary of the allegations of misconduct was also attached to this letter. In terms of the allegations, the applicant allegedly made herself guilty of the following acts of misconduct:

1. Conflict of interest, breach of fiduciary duty and disclosure of the SIU's confidential or privileged information.
2. Irregular claims for special allowances.

[5] According to the respondent's papers, the applicant created a document on her daughter's computer on 2 February 2011 which was circulated by email under the name of hfunyufuniu@siu.org.za and headed "the Pretoria Concerns.doc". The properties of this e-mail reflect that this e-mail was created on the applicant's daughter's computer. The document was printed on the letterhead of the National Education and Health Allied Workers Union ("NEHAWU") and widely circulated within the national and regional offices and employees of the respondent. This document contains a wide range of allegations of racism within the respondent and accuses the respondent and the Head of the respondent of doing nothing to correct it. In this document the Head of the respondent is further accused of distorting facts and attempting to divide the members of the respondent and attempting to use black individuals in the respondent's executive committee ("EXCO") and in the Trade Union operating in the respondent ("NEHAWU"), to frustrate transformation efforts within the respondent. The document also calls on the Head of the respondent to step down and that its

EXCO be dissolved. According to the respondent, the contents of this document are inflammatory in that it incites all black employees of the respondent to disregard their reporting lines and incites them to call on the Head of the respondent to step down and for EXCO to be dissolved.

[6] The applicant is also invited, in this letter, to make representations as to why she should not be suspended as a precautionary measure pending an investigation into the allegations. (I will refer to this letter as the "5 April letter".)

Polygraph examination

[7] In the said letter of 5 April, the applicant was instructed to undergo a polygraph examination on 6 April 2011 ("the first polygraph examination") in order to verify whether there was any truth in the allegations against her. It was common cause that the applicant during the meeting (of 5 April 2011) indicated that she would not undergo the first polygraph examination. She also indicated that she needed more time to obtain advice. The respondent acceded to the applicant's request and changed the date and time for the applicant's polygraph examination by changing the date in the letter from 6 April 2011 to 7 April 2011 at 11h00 ("second polygraph examination"). Paragraph 12 of this letter reads as follows:

> "12. any failure on your part to comply strictly with the instruction would constitute, *inter alia*:

> 12.1 an act of insubordination which will not only constitute a serious breach of the trust relationship between you and the SIU, but would also make you susceptible to charges of misconduct; and/or
> 12.2 a material breach of the conditions of your employment contract that would entitle the SIU to terminate the contract of your employment under the law."

[8] On 6 April 2011, the respondent sent a letter to the applicant in which the applicant was informed that she was formally suspended. In paragraph 7.3 of the 6 April letter, the applicant was again instructed to undergo a polygraph examination on 11 April at the time to be advised by the respondent ("the third polygraph test").

[9] On 6 April 2011, the respondent received a fax from the applicant with a copy of a medical certificate attached thereto that informed the respondent that the applicant was being treated for anxiety and depression and that the medication that was prescribed to her might result in an inaccurate result been obtained in the polygraph examination. The respondent thereafter again rescheduled the polygraph examination.

[10] The applicant had in the interim referred a dispute about an unfair labour practice to the CCMA. The conciliation meeting was scheduled for 16 May 2011. The respondent consequently decided that, since the applicant would be at the CCMA to attend the conciliation, 16 of May would be a convenient date to have the applicant undergoes the

required polygraph examination. On 12 May 2011, the respondent again instructed the applicant to undergo a polygraph examination on 16 May 2011 immediately after the conciliation meeting ("the fourth polygraph examination"). In this letter, the applicant was again informed that any refusal to comply strictly with the instructions will constitute, *inter alia,* insubordination and/or material breach of her employment contract that would entitle the SIU to terminate her contract of employment under law.

[11] On 12 May 2011 the applicant's attorney sent to the respondent an e-mail informing the respondent that the applicant refuses to undergo the polygraph examination. This was despite the fact she was informed by the respondent that her failure to do so would constitute a material breach of the employment contract that would entitle the respondent to terminate her contract of employment.

[12] The applicant remained on suspension for 90 days until 5 July 2011, having been suspended on 6 April 2011. The union wrote a letter to the respondent and demanded that she return to her work in terms of point 9.2 of the SIU's Disciplinary Policy. (I will refer to this clause in more detail herein below). The union also informed the respondent that the applicant will report for duty on 6 July 2011. On 8 July 2011, the applicant was informed of the written complaints by one Peter Le Roux. In the said complaints the allegations raised in the summary as set out in the letter of 5 April 2011 were repeated. The applicant was also

advised that her suspension was extended *pending the finalisation of the disciplinary procedure*. As already pointed out, at issue before this Court is whether or not the respondent is entitled to *lawfully* extend the suspension. I will return to this point in more detail herein below. In the letter of 8 July 2011, the respondent advised the applicant that it was furnishing her with a copy of the said complaints, related affidavits and information in terms of paragraph 10.6 of the Disciplinary Policy. The applicant was then invited to furnish the respondent with a written response on affidavit together with any supporting affidavit/s or document/s to the contents of the said complaints, related affidavits and information within 48 hours of receipt of this notice. In the following paragraph of the 8 July 2011 letter, the applicant was advised that her suspension "has been extended pending the finalisation of the disciplinary proceedings against you". The applicant was further advised that, as a member of the SIU, she was required to give her full co-corporation to the persons investigating the complaints in accordance with the Policy as well as the terms of conditions of her employment contract. The applicant was also informed that the SIU may require her to undergo one or more polygraph, lie detector, voice stress analysis and or voice analysis tests.

Material terms of the applicant's contract of employment

[13] The applicant's employment contract[2] with the respondent obliges her to undergo a Lie Detective and/or Voice Stress Analysis test at the discretion of the Head of the respondent, for the purpose of –

2 Clause 9A.2.(h)

13.1 the verification of any information furnished by the applicant in the respondent's pro-forma security clearance form;

13.2 the verification of any details contained in any disclosures made by the applicant (e.g. personal business, financial interests, bank accounts, credit cards. Credit accounts, hire-purchase agreements, vehicle finance schemes, mortgages, loan accounts, disclosure in policies, trust and other businesses);

13.3 any matter falling within the course and scope of the applicant's employment with the respondent, as well as any matter reasonably incidental to such employment of having any relevant bearing thereon;

13.4 any matter relating to whether or not the applicant continues to be a fit and proper to attend tot the performance of the functions of the respondent, as envisaged in section 3(2) of Act 74 of 1996;

13.5 the applicant's adherence to or compliance with any material term of his/her contract of employment with the respondent, as well as the respondent's policies and procedures;

13.6 the applicant's involvement in any activity, relationship, conduct or circumstances which may, reasonably considered, prejudice the good name and reputation, functions or legitimate interests of the respondent, or which

> may compromise or weaken the applicant's will or ability to resist temptation or desist from any conduct which may prejudice the respondent, or compromise the security of the respondent's records and its operation.

[14] The requirement to consent to a lie detector test for purposes referred to above is one of the many provisions that require an employee of the respondent to consent to measures that are intrusive. The answering affidavit sets out the rationale for these measures and states that such measures are necessary to ensure the maintenance of security and integrity in the respondent in light of its core business. A failure to make a full financial disclosure as well as providing any false statement or false information may result in disciplinary action be taken. The respondent submitted that these provisions, although extraordinary, are not unreasonable in the context of an organisation such as the respondent in light of the fact that the respondent is responsible for investigating corruption and maladministration in government departments and state institutions. It is therefore vital for the effective functioning of the respondent that its members conduct themselves with the utmost integrity.

[15] It therefore appears from the answering affidavit that security, integrity and discipline are at the heart of the employment contract between the respondent and its members (including the applicant). In order to join the respondent, members (including the applicant) are required to acknowledge that they submit to and accept those clauses in

the employment contract that deal with security, discipline and integrity.[3] Pertinently at issue is the provisions that require members of the SIU to undergo a polygraph examination.

Legal issues

[16] In this application two legal issues fall to be decided:

(i) Is the respondent entitled to extend a suspension beyond the 90-day period provided for in clause 9.2 of the respondent's Disciplinary Policy? Put differently, can the respondent lawfully extend the suspension indefinitely?

(ii) Is the respondent entitled to terminate the contract of employment for alleged repudiation using the procedure it evoked by requesting the applicant to submit a written representation. Put differently, is the respondent entitled to treat the applicant's refusal to undergo a polygraph examination as repudiation of a material provision of her employment contract (and not as misconduct) and to accept the applicant's repudiation and terminate the applicant's employment contract?

3 Clauses 8 and 9A, especially clause 9A.2

The lawfulness of the extension of the suspension.

[17] I have already pointed out that it is common cause that on 6 April 2011, the respondent placed the applicant on suspension and in doing so relied on clause 9 of the Disciplinary Policy with heading "Suspension Pending Conclusion of Misconduct and/or Disciplinary Proceedings". In terms of paragraph 9.1 of the Disciplinary Policy, an employee may be suspended with or without pay prior to the conclusion of disciplinary proceedings where the member has been charged with or is on reasonable grounds suspected of having committed misconduct that is serious and as such pose a risk to the safety of any members of the SIU or the confidentiality of any of the SIU's information, or poses a well sounded risk of interfering in the investigation undertaken or lodged against a member. Clause 9.2 of the Disciplinary Policy reads as follows:

> "9.2. If formal disciplinary proceedings are not instituted against a suspended member *within ninety (90) days* from the date of his/her suspension, the *suspension shall lapse* and the member shall be reinstated to his/her post and the benefits with retrospective effect."[4]

[18] It must again be emphasised that the applicant is not challenging the *fairness* of the suspension in these proceedings. It is trite that the CCMA is vested with the jurisdiction to decide that issue. The applicant has also already referred a dispute about the alleged unfair suspension

4 The Court's emphasis.

to the CCMA. The lawfulness or fairness of the suspension of 6 April 2011 is therefore *not* at issue in these proceedings. What is in issue in these proceedings is the *lawfulness* of the subsequent decision taken on 5 July 2011 to *extend* the suspension.

[19] On behalf of the applicant it was submitted that the provisions of this clause are peremptory and that it is clear from this clause that no provision is made for an extension, once the 90 days have expired. In *casu,* the 90 days had expired on 5 July 2011 whereafter the respondent extended the period of the suspension. On behalf of the applicant, it was submitted that she had to be reinstated in her position.

[20] On behalf of the respondent, it was submitted that the Disciplinary Policy is merely intended to serve as a guide for the establishment and maintenance of reasonable and equitable standards of conduct consistent with the mission, functions, goals, profile and objectives of the SIU. It was therefore submitted that the management of the SIU is entitled to adjust and adapt the disciplinary policy from time to time. More fundamental is the respondent's argument that the SIU has a *contractual right* to suspend the applicant and that it may do so indefinitely. In respect of the second point to be decided, the respondent submitted that the procedure set out in the Disciplinary Policy does not apply to breaches of specific provisions of the employment contract and that the Policy only applied to instances of misconduct. According to the respondent, there exists no provision in

the employment contract that prescribes a procedure that the respondent must follow before terminating the contract for breach. The procedure that was followed by the respondent in this case namely to require of the applicant to submit written representation is not provided for in the contract but was adopted according to the respondent merely to be fair towards the applicant. I will return in more detail to this argument when I discuss, the second issue to be decided by this Court.

[21] It is clear from the papers and the submissions that the applicant and the respondent approached the two legal questions before this Court fundamentally differently. What is, however, common cause is the fact that the Disciplinary Policy forms part of the contract of employment. This much is also clear from the Integration Clause, 15 read with clause 12 of the employment contract.

Does the respondent have the right to lawfully extend the applicant's suspension?

[22] I have already referred to the fact that the Disciplinary Policy provides, in clause 9.2, that the suspension of an employee "*shall lapse*" after 90 days and that the applicant submitted that this clause is peremptory. The respondent as already pointed out, submitted that the Policy is merely a guide. In addition thereto, the respondent relied on clause 11.4 of the contract of employment to argue that the respondent also has a *contractual right* to suspend the applicant which contractual right is not limited to the 90 days period given as "a guide" in the Disciplinary Policy:

> "11.4 The Unit has the right to suspend the Employee from his/her office, with or without pay pending the outcome of an enquiry into:
>
> 11.4.1 any alleged failure of the Employee to meet standards of work:
>
> 11.4.2 any criminal offence allegedly committed by the Employee, and/or
>
> 11.4.3 any alleged breach of this agreement."

[23] Mr. Moshoana persuasively argued that it is clear from the facts before this Court that the respondent had *elected* to invoke the provisions of the Disciplinary Policy and more in particular clause 9 thereof when it decided to suspend the applicant. Consequently the respondent cannot midway through this procedure change its stance and now rely on a contractual provision to substantiate the argument that it has a contractual right to suspend an employee indefinitely.

[24] I am in agreement with the argument presented on behalf of the applicant by Mr. Moshoana that it cannot be argued that the SIU's Disciplinary Policy is merely a guideline that can be ignored. I have already referred to the fact that it was common cause that the Disciplinary Policy forms part of the contractual terms and conditions of the applicant's contract of employment as a result of the fact that the Policy was specifically integrated into the contract. The clause is furthermore framed in peremptory terms and unequivocally states that

the suspension lapses after 90 day.

[25] There is a further compelling reason as to why the employer in this matter should not be allowed to treat the provisions of the Disciplinary Policy in respect of the expiry of the suspension merely as a guideline. The purpose of a clause providing for the expiry of a suspension is to protect the employee from a protracted suspension. In this regard, I am in agreement with the sentiments expressed by my Learned Brother Molahlehi, J in *Lekabe v Minister: Department of Justice and Constitutional Development*[5] where he held in the context of a similar provision contained in the Senior Management Services Handbook ("SMS") that the purpose of such a clause was to restrain an employer to abuse protracted suspension as a method of marginalising and prejudicing an employee.

[26] In the present case it was also common cause that no disciplinary proceedings have, up until the institution of these proceedings, been instituted against the applicant. To allow the respondent in these circumstances to simply ignore the peremptory wording used in clause 9.2 and continue to extend the suspension indefinitely, is not only unlawful in my view but goes against the purpose of the inclusion of such a clause namely to protect an employee against a protracted suspension.

[27] I am therefore persuaded by the argument that the suspension of

5 (2009) 30 ILJ 2444 (LC)

the applicant expired after 90 days and that the extension thereafter is unlawful.

[28] I must also point out (and in this regard I am once again in agreement with my Learned Brother Molahlehi J in the *Lekabe case*[6] that the fact that the suspension falls away after the prescribed period does not mean that the employer no longer retains the right to discipline the employee. The employer may still proceed with disciplinary action against the employee.

[29] Lastly, I must briefly deal with the argument submitted on behalf of the respondent; namely, that nothing prevents the respondent from deciding to invoke a clause in the contract (in this case clause 11.4[7]) which provides for an unlimited suspension of the applicant. I have several difficulties with this submission.

> (i) Firstly, it could not have been the intention of the drafters of the contract to provide for two conflicting suspensions clauses.
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> (ii) Secondly, even if it was, it is clear from the facts that the respondent had *elected* to invoke clause 9 of the Disciplinary Policy in suspending the applicant. I am therefore in agreement with the submission that once the election was made, the respondent is bound by it.

6 Above n2 at para [16]. See also Mogothle v Premier of the North West province and Another (2009) 30 ILJ 605 (LC)
7 Clause 11.4.

> Consequently, the respondent cannot therefore halfway through the suspension process decide to abandon the process provided for in the Disciplinary Policy and proceed with another suspension process provided for in the contract. Even if this was possible, I do not accept that it could have been the intention to have two suspension clauses: the one with a limited duration and the other providing for an unlimited period of a suspension.

[30] I am therefore persuaded that the extension of the suspension period was unlawful. The applicant therefore succeeds on this point and an order is made in the following terms:

1. The decision to extend the applicant's suspension on 5 July 2011 is invalid, unlawful and of no legal effect and is therefore set aside.
2. The respondent is ordered to permit the applicant to resume her duties as Head: Business Support in the respondent.

Can the respondent terminate the applicant's employment contract lawfully?

[31] I will now turn to the next question namely whether the respondent is entitled to terminate the contract *lawfully*. I have already referred to the fact that the respondent is of the view that because the applicant repudiated a material provision of the employment contract by

refusing to submit to a polygraph examination, as she is contractually obliged to do, the respondent is entitled to accept her repudiation of her employment contract and terminate her contract employment. The applicant's case is that the respondent may only terminate the contract by following the procedure as contained in the Disciplinary Policy.

[32] Before I turn to the merits of the argument, it is relevant to point out that, although the applicant has been informed that the respondent accepts what they regard as a repudiation of her contract of employment, the respondent has yet to terminated her contract of employment. What is, however, clear from the papers that the respondent is intending to terminate the contract on the basis of the breach and not to do so by following procedures as set out in the Disciplinary Policy. As already pointed out, the applicant is seeking a (final) order from this Court interdicting the respondent from terminating the applicant's employment contract *unlawfully*. The respondent argued that it is entitled to elect to deal with the refusal of the applicant to submit to a polygraph examination as a breach of a material term of the contract and terminate the contract in terms of the provisions of the contract and not to deal with it as a form of misconduct which would then have to be dealt with in terms of the Disciplinary Policy. Mr. Bruinders accepted, and correctly so, that a breach of a material term usually also constitutes misconduct. He was, however, of the view that where an employee is contractually (specifically) obliged to obey certain instructions, the refusal or failure to do so may be dealt with in

contractual terms as a breach of the contract and not as misconduct (which must be dealt with in terms of the Disciplinary Policy). In this case, as already stated, the applicant is contractually obliged to submit to a polygraph examination.

[33] I do not intend dwelling on the issue of the requirement of a polygraph examination. Suffice to point out that the Court accepts that the respondent has sound reasons for including such an obligation, to submit to, *inter alia*, a polygraph, in light of the core business and functions of the SIU which is to investigate corruption and maladministration in government departments and state institutions. The Court also accepts that, although some of the measures such as having to submit to a polygraph examination, having to provide urine and blood samples may seem to be intrusive, these measures are reasonable in the context of an organisation such as the respondent (provided, of course, that these measures are applied fairly and only when reasonably necessary to do so).

The law of contract and the law of unfair dismissal in terms of the LRA

[34] In order to decide this issue, it is necessary to give a brief overview of the status of the contract of employment and the rights that a contracting party has in terms of the law of contract *vis à vis* the right not to be unfairly dismissed. I do not intend giving a detailed exposition of the jurisdictional issues that arise when an employee decides to proceed with a claim on the basis of contract as opposed to proceeding with a claim based on a breach of the provisions contained in the

Labour Relations Act 66 of 1995 ("the LRA"). This issue has been debated in various cases particularly in the context of a claim based on the right not to be unfairly dismissed (which flows from the LRA) as opposed to a claim for breach of contract.[8] For purposes of this judgment, it is accepted that the employment relationship has a contractual character although labour legislation has supplemented the deficiencies of the common law principles particularly in respect of the *termination* of a contract of employment with the import of the requirement of *fairness.* The contract of employment and the principles of the law of contract therefore remains intact in respect of the question whether a contract is lawful and whether the contract of employment was lawfully, as opposed to fairly, terminated. The act of terminating the employment contract contemplates both the termination of the contract through a right in terms of the contract (or where one party breached the contract or by repudiating a material term of the contract or by repudiating the whole of the contract) as well as the termination of the contract by following the guidelines encapsulating the requirement of fairness as contained in the LRA (and more in particular in the Code of Good Practice: Dismissals in Schedule 8 of the LRA). A distinction must therefore be made between the lawfulness and the fairness of the termination of the contract of employment. The requirement of a "*fair*" termination does not, therefore, suggest that employers need not adhere to the requirements in respect of the *lawful* termination of the contract of employment. It cannot therefore, in my view, be said that the LRA has

8 See, *inter alia*, Chirwa *v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC); *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* (2002) 23 ILJ 81 (CC): *Nakin v MEC, Department of Education, Eastern Cape Province and Another* (2008) 29 ILJ 1426 (E) and *SA Maritime Safety Authority v McKensie* [2010] 5 BLLR 488 (SCA) and *Fedlife Assurance Ltd v Wolfaart* (2001) 22 ILJ 2407 (SCA).

completely overtaken the common law principles relating to the cancellation and repudiation of the contact.[9] The fact that a contract of employment contemplates both a lawful and a fair termination was described as follows by the Appellate Division (as it then was) in *National Union of Mineworkers of SA v Vetsak Co-operative Ltd and Others,*[10] where the Court held as follows:

> "The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair – and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair."

[35] It is further accepted that an employee has rights both in terms of the common law and in terms of the LRA in the event of a premature

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9 See, *inter alia*, *Amazulu Football Club and Hellenic Football Club* (2002) ILJ 2357 (ARB) at 2364G-H.
10 1996 (4) SA 577 (A)

termination of a fixed term contract,[11] or in the event of other dismissals,[12] and that the employee has a choice whether or not to pursue his common law rights to enforce a claim for contractual damages in the event of a termination of the contract or claiming on the basis of an unfair dismissal because of a lack of substantive and/or procedural fairness. In this regard the Labour Court in *Jonker v Okhahlamba Municipality* and Others[13] stated as follows:

> "A breach of the common law contract of employment, in so far it has not been supplanted by legislation, may also be actionable under the Constitution. Remedies for such breaches must be derived from the LRA itself … The interface between the Constitution, labour legislation

11 *Fedlife supra* ad paragraph [18]: "… By enacting s 186(b) the legislature intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide, in addition to the full performance of the employer's contractual obligations, compensation (albeit of an arbitrary amount) if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur. That being so, it would be strange indeed, and bereft of any rationality, for the legislature to deny to the employee whose fixed-term contract of five years has been unlawfully terminated within days of appointment the benefit of either specific performance of the contract or damages for its premature termination and to confine the employee to the limited and entirely arbitrary compensation yielded by the application of the formula in s 194 of the 1995 Act. It is manifest that the result would be that the former employee, although in far less need than the latter of a remedy, will have received more than is due at common law, but that the latter may not recover as of right even that which was payable at common law and instead must rest content with 'compensation' which may be ludicrously small in comparison with the true loss. The absurdity does not end there. If it were so that a plaintiff such as this is confined to a claim for 'compensation' in terms of s 194, where the employer proves that 'the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements' and 'that the dismissal was effected in accordance with a fair procedure' the plaintiff would not be entitled to any compensation. That would be the combined effect of s 188(1)(a) and (b) ; s 192; s 193 and s 194. Such a result could never have been the intention of the legislature."

12 See *Denel* (supra). In this matter the employee contended that his dismissal for misconduct constituted a breach of his employment contract because the disciplinary hearing did not comply with the exact disciplinary procedures that formed part of his employment contract. The employee claimed damages. The SCA concluded that the Constitution does not deprive contractual terms of their effect and that the employee can claim on the basis of a breach of contract as opposed to claiming on the basis of an unfair dismissal because of the lack of procedural fairness: See 318H – I.

13 (2005) 6 BLLR 565 (LC) at 569A.

> and the common law depends on the right claimed and how it is pleaded."

[36] It is therefore for the employee to choose whether or not she wishes to base her claim on contract or on the principles embodied in the LRA and to make out a case for the relief sought in the pleadings.[14]

[37] In principle therefore, an employer has the right contractually to terminate the contract. Whether the termination will also be fair is an entirely different question and not relevant in these proceedings. Where a contract is terminated unlawfully it will usually also constitute an unfair termination. The reverse is, however, not always true.

[38] The only remaining question is whether there are facts before this Court to indicate that the respondent is intending the interdict the contract *unlawfully*.

[39] I am firstly persuaded on the papers that it is a material term of the contract to submit to a polygraph test and that the applicant, by refusing to do so has repudiated a material term of the contract entitling the respondent to terminate the contract. As already pointed out, it is not at issue here whether or not the termination would be *fair*. I am therefore not persuaded by the submissions advanced on behalf

14 See in general *Transman (Pty) Ltd v Dick and Another* [2009] 7 NLLR 629 (SCA) where the SCA held that dismissed employees may still rely on contractual breaches.

of the applicant that this refusal does not go to the root of the agreement and therefore not material. I am persuaded in light of the facts contained in the answering affidavit that it is not unreasonable nor unlawful - taking into account the nature of the business of the respondent and the high premium placed on integrity in light of the SIU's functions - for the respondent to require of an employee to submit to a polygraph test. She had, after all, contractually agreed to do so. The refusal to undergo a polygraph test may also constitute misconduct and may even be a ground for dismissal. However, as already pointed out, it is not at issue here whether or not the respondent can charge the applicant with misconduct in that she had refused to submit to a polygraph test. At issue here is whether or not the respondent can lawfully terminate the contract because the applicant had repudiated a material term of her contract and whether or not certain procedures as contained in the Disciplinary Policy must be followed.

[40] The applicant argued that the respondent elected to hold an inquiry (in terms of the Disciplinary Code) and therefore elected to deal with the refusal as misconduct. Accordingly the respondent cannot follow the procedure it followed namely to require the applicant to make representations as to why the contract should not be terminated. The Court was also referred to the fact that a complaint was filed in terms of clause 10 of the Disciplinary code with the result that the respondent thereafter had to follow the procedures set out in

the Disciplinary Policy (clause 10.9). In essence the applicant argued that the applicant elected to follow the misconduct route and is therefore bound by this election.

[41] I am not persuaded by this argument. I have already indicated that the termination of a contract of employment envisages two acts: one in terms of the contract and one in terms of the circumstances provided for in the LRA. Where the employer treats the repudiation as misconduct, it must follow the procedures contained in the Disciplinary Code. The contract in this case is silent on the procedures that must be followed when terminating the contract. It does not provide for a contractual right to a hearing before termination (for breach of a material term of her contract). What she does have is a contractual right to a fair procedure as contained in the Disciplinary Policy where the employee is seeking to terminate the contract on the basis of misconduct. Put differently, the Disciplinary Policy provides for a hearing in the event of misconduct. It does not provide for a hearing before termination for breach of the employment contract.

[42] At issue here is whether the Court should interdict the respondent from lawfully terminating the contract. I am not persuaded that the applicant has made out a case for the relief sought in circumstances where it appears from the facts that the applicant has breached a material term of her contract and where it appears that the respondent is terminating the contract in terms of the provisions of the contract. What remain, however, intact are the applicant's remedies

under the LRA and should the contract of the applicant be terminated lawfully, she may still refer the dispute pertaining to an alleged unfair dismissal to the appropriate forum, should she wish to do so. By refusing to grant an interdict to prevent the respondent from terminating the contract lawfully, the applicant is therefore not prevented in any way from exercising any rights she may have under the law of unfair dismissal.

[43] In order to succeed, the applicant had to show that she has a right to a disciplinary hearing as set out in the Disciplinary Policy before her employment contract is terminated for breach of a material term in terms of the contract. I am not persuaded that the applicant has made out such a case.

Costs

[44] In light of the fact that both parties were partially successful, I make no order as to costs.

ORDER

[45] Having read the papers and having considered the matter the following order is made:

1. The decision to extend the applicant's suspension on 5 July 2011 is invalid, unlawful and of no legal effect and is set aside.

2. The respondent is ordered to permit the applicant to resume her duties as Head: Business Support in the respondent.
3. The application to interdict the respondent from terminating the applicant's employment in terms of the contract on the grounds that she has breached a material term of her contract is dismissed.
4. No order as to costs.

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AC BASSON, J

For the applicant : Mr GN Moshoana of Mohlaba & Moshoana Inc

For the respondent: Advocate T Bruinders SC and Advocate K Millard

Instructed by : The State Attorney