IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO: 1991/2018

In the matter between:

PATISA DALASILE APPLICANT

AND

SOUTH AFRICAN SOCIAL SECURITY AGENCY 1ST RESPONDENT

MINISTER OF SCOIAL DEVELOPMENT 2ND RESPONDENT

JUDGMENT

DAWOOD, J:

1. The Applicant herein sought the following relief:

"1. That the Resolution 1 of 2003: Disciplinary Code and Procedures for the Public Service (the Resolution) be and is hereby declared unlawful and of no force and effect in so far as it applies to the first respondent.
2. That the disciplinary proceedings instituted by the first respondent against the applicant in terms of against the applicant in terms of Resolution from the 2nd of

September 2015 until the 22nd of June 2016 be and is hereby declared unlawful, null and void and of no force and effect.

3. That the dismissal of the applicant from her employment by the first respondent be and is hereby declared unlawful and in contravention of the South African Social Security Agency Act, 2004.

4. That any decision taken by the second respondent in the implementation of the resolution be and is hereby reviewed, set aside and declared unlawful and of no force and effect.

5. That the applicant be and is hereby reinstated to her position as the Grant Administrator with effect from the 31st of March 2018 on terms and conditions no less favourable than those which applied prior to her dismissal.

6. That the first respondent be and is hereby ordered to pay costs of this application on an attorney and client scale.

7. Granting such further and other relief as to this Honourable Court seems meet."

2. The Applicant alleged that the disciplinary proceedings were invalid due to the fact that the first respondent did not follow the procedure set out in the South African Social Security Agency Act 9 of 2004 (hereinafter referred to as the "SASSA Act") but instead elected to follow the procedure set out in Regulation 1 of 2003 – Amendments 10 Resolution 2 of 1999 Disciplinary Code and Procedures for the Public Service.
3. The Respondents did not pursue the point with regard to jurisdiction and accordingly it is not necessary to say anything further on the point suffice to say that the matter is being approached on the premise that this court does have jurisdiction.
4. The Respondents raised the issue of Non-Joinder of Chairperson of the Disciplinary Inquiry and non-compliance with Rule 53 since there was no request for the production of the record or for the reasons from the chairperson of the disciplinary tribunal, by the Applicant.
5. For present purposes I accept that it is not the decision per se that is being challenged but rather the disciplinary code that was utilised from the outset from the time of the suspension of the Applicant and that was followed by the Chairperson during the course of the hearing.

6. The Applicant is accordingly challenging the procedure not the substantive findings of fact.
7. The Respondents have further confirmed that the procedure followed was the Regulations.
8. However the Chairperson might well have wanted to explain why he followed the disciplinary code that he did, or to confirm which code he did in fact follow in arriving at his decision and effectively it is his decision and the procedure that he followed that is being challenged.
9. The Applicant accordingly ought to have nonetheless followed the procedure set out in Rule 53 and also joined the chairperson as a party to these proceedings. This point was correctly raised by the Respondents, and warrants a dismissal of the application for failure to comply with the correct procedure as well as a material non-joinder.
10. I shall nonetheless deal with the merits in the event that I am wrong in that regard.
11. The crisp point for determination on the merits is whether or not the correct disciplinary code was followed:
    a) The Applicant argued that she was employed directly by SASSA and is not a public servant.
    b) Her employment was governed by the SASSA Act.
    c) The Agency was accordingly obliged to institute proceedings against her in terms of that Act and not the Regulations.
    d) Section 7 (3) of the SASSA Act provides that **the Minister must after** consultation with the Chief Executive Officer **determine a code of conduct** applicable **to all members of staff of the Agency** and justiciable for purposes of disciplinary proceedings.
    e) According to the Respondents:
        i) This code of conduct has to date not been determined or implemented.

ii) The First Respondent attempted to implement a code replacing that embodied in the Resolution.

iii) The PSA was dissatisfied with the first respondent's decision to implement the new disciplinary code and the matter was taken for arbitration.

iv) The arbitrator made an award in favour of PSA against the first respondent on the 26 July 2013 in the following terms:

"The collective agreement contained in Resolution 1 of 2003 is still valid until terminated or amended ..."

v) The Arbitrator's award effectively set aside the new envisaged disciplinary code sought to be implemented by SASSA.

vi) There was accordingly no other code validly promulgated or gazetted by SASSA. The applicable code was the Resolution.

12. It is common cause that the Applicant belonged to the PSA Union.

13. The Applicant's letter of appointment indicates that the Public Services Act is applicable to her employment, annexure "A" headed conditions and requirements for her appointment inter alia reads as follows:

"Your appointment is ***subject to the provisions of the Public Service Act, 1994*** *as amended ... and any present or further amendments to the aforesaid Acts, Regulations and instructions."*

14. It was furthermore her union that took SASSA to the CCMA and the Arbitration award was made in its favour to the effect that the collective agreement contained in Resolution 1 of 2003 is still valid until terminated or amended by means of an agreement and did not allow the new disciplinary code to take effect.

15.The Applicant argued that this collective agreement and the arbitration award only applied to the transferred employees and not to employees like herself who had been directly employed by the agency.

16.It is abundantly clear that there was no disciplinary code by the agency as the PSA had challenged the code that SASSA had unilaterally implemented and it was set aside in terms of the arbitration award.

17.Her terms of employment is indicative of the fact that the Applicant was an employee of the Public services and bound her to the terms and conditions thereof.

18.SASSA itself is considered an organ of State and not a private entity in the true sense if one has regard inter alia to the dicta in **City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others[1]:**

"[22] Recently in AllPay 2,[2] the South African Social Security Agency (SASSA), an organ of state established in terms of the South African Social Security Agency Act (Agency Act),[3] issued a tender outsourcing its obligations to pay social grants to millions of qualifying South Africans to Cash Paymaster, a private company. The Court held that Cash Paymaster was also an organ of state for the purposes of the provision of the outsourced services. The Court stated:

> *"That SASSA is an organ of state is clear. But, for the purposes of the impugned contract, so too is Cash Paymaster.*
>
> *. . .*
>
> *In AAA Investments Yacoob J, writing for the majority of this Court, stated:*
>
> *'Our Constitution ensures . . . that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.*
>
> *It does so by a relatively broad definition of an organ of state. . . . An organ of state is, among other things, an entity that performs a public function in terms of national legislation. If [an entity] performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the privacy protection. In our constitutional structure, [the entity] does not have to be part of government or the government itself to be bound by the Constitution as a whole.'…*
>
> *In terms of the agreement between SASSA and Cash Paymaster the latter administers the payment of social grants on SASSA's behalf. In doing so, Cash Paymaster exercises a public power and performs a public function in terms the Agency Act, enacted to give effect to the right to social security….*
>
> *SASSA does not, by the conclusion of the contract, divest itself of its constitutional responsibility and public accountability for rendering the public services. It remains accountable to the people of South Africa for the performance of those functions by Cash*

[1] **(CCT133/14) [2015] ZACC 8**

[2] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay 2).*

[3] 9 of 2004.

Paymaster. . . . When Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs. This does not mean that its entire commercial operation suddenly becomes open to public scrutiny. But the commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects."[4] (Footnotes omitted).

19. In any event it would be absurd to suggest that the Applicant should be governed by a non-existent disciplinary code and that simply because there was none she could not be subject to a disciplinary hearing or dismissed.
20. There were in fact measures in place regarding what procedure would be adopted until the new code was put into place.
21. This Regulation would then apply to employees whether employed prior to or after the Act, that is, whether they were absorbed from the Public Sector or employed directly by SASSA, since it is explicitly stated in her contract of employment that her employment was made subject to the provisions of the Public Services Act.
22. The Applicant is not challenging her contract of employment or the terms and conditions thereof.
23. The First Respondent had no other code of disciplinary proceedings to rely upon save the Regulations that it did follow.
24. The Applicant has not put up a code of conduct that she says ought to have been followed, if one existed and was not followed, nor has she alleged that the Regulations were not properly followed.
25. I am satisfied that the First Respondent followed the proper and only procedure available to it and that the disciplinary proceedings were accordingly valid and binding.
26. In the circumstances the Application falls to be dismissed.
27. This clearly is a case where the Applicant was advancing her constitutional rights and should not be impeded in doing so. There is no mala fides demonstrated on her part. In the circumstances I am disposed

[4] *AllPay 2* above n 18 at paras 52-9.

to making no costs against the Applicant despite my dismissing the application.

28. I accordingly make the following order:

a) The application is dismissed

b) No order as to costs

F. B. A. DAWOOD

JUDGE OF THE HIGH COURT

Matter heard on	:	25 OCTOBER 2018
Judgment delivered on	:	31 JANUARY 2019

<u>Appearances</u>:

Counsel for the Applicant	:	Mr Maswazi
Attorneys for the Applicant	:	MBANANE & SOKUTU INC. No. 1 Stanley Nelson Drive Mthatha Ref: Mr Maswazi
Counsel for the First Respondent	:	Mr Hobbs
Attorneys for the Respondent	:	THE STATE ATTORNEY C/O POTELWA & CO 43 WESLEY STR MTHATHA Ref: ASP/sp/SASSA 00433