

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case number JR1790/08

In the matter between:

S ABRAHAMS

Applicant

And

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

1st Respondent

DEPARTMENT OF PUBLIC TRANSPORT

AND WORKS: GAUTENG PROVINCIAL

GOVERNMENT

2nd Respondent

ADVOCATE PH KIRSTEN

3rd Respondent

THE SECRETARY: GPSSBC

4th Respondent

JUDGMENT

Molahlehi J

Introduction

1]This is an application to review and set aside the ruling made by the first respondent under case number G/GP/39 dated 10th July 2008 in terms of which the first respondent ruled that the first respondent did

not have jurisdiction to determine the rescission application that the applicant had filed. The rescission application concerned an alleged arbitration award made in the absence of the applicant.

2]In the alternative the applicant seeks to review the decision of the third respondent made under case number D/GP/39 made on the 3rd December 2007. In terms of that decision the third respondent found the applicant guilty of bribery and or fraud and recommended that she be dismissed. This application is accompanied by an application for condonation for its late filing.

3]The reason for the late filing of the review application was because the applicant was pursuing the rescission of the dismissal decision which was made in her absence. I am of the opinion that for this reason alone the late filing of the review application should be condoned.

Background facts

4]The applicant who was formerly employed as deputy director of finance of the second respondent was charged with theft, bribery and fraud. The charges were based on the allegations that during April 2006 she authorised payment totalling R450 000, 00 to a certain Mahomed for service which were never rendered to the first respondent.

5]The disciplinary hearing was as per the agreement between the parties conducted in terms of the Disciplinary Code and Procedure of the Public Service Coordinating Bargaining Council (PSCBC), Resolution 1 of 2003 (resolution 1). In the heads of argument the applicant says that the relevant clause in this regard is clause 3.3 of that resolution. However in terms of Resolution 1 of 2003 as posted on the website of the PCSCBC, the relevant clause is 7.3 of that same resolution. The wording of the clause as quoted in the heads of argument is the same as that of clause 7.3 of resolution 1. Clause 7.3 reads as follows:

7.3 “ *Conducting the disciplinary hearing* ”

The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only open to review in terms of the Labour Relations Act, 1995. All provisions applicable to disciplinary hearings in terms of this Code will apply for purposes of these hearings. The employer will be responsible to pay the costs of the arbitrator.”

6]The disciplinary hearing which was chaired by the third respondent (the panellist) was scheduled for the 3rd December 2007. The notice of

set down was sent to both parties by the first respondent. It is common cause that the applicant did not attend and the hearing proceeded in her absence. She claims that she never received the notice of set down and it was for that reason that she applied to have the arbitration hearing rescinded. She in this respect contended that she was not in wilful default. The first respondent refused to entertain the rescission application on the ground that it did not have jurisdiction to do so.

Grounds for review

7] **Rescission ruling:** The applicant contends that the provisions of clause 3.3 of resolution 1 cannot be interpreted in the manner that deprives her rights arising from the provisions of s188A read with s144 of the LRA. The applicant further contends that the first respondent misconstrued its function and acted *ultra vires* in arriving at the conclusion that it did not have jurisdiction to entertain the rescission application. The decision of the first respondent is also criticised for being irrational because it is duly appointed to regulate disciplinary proceedings and matters related thereto.

8] **Dismissal ruling:** As concerning the review of the decision to dismiss her, the applicant set out the grounds for review in the founding affidavit as follows:

“38 I further submit that the ruling of the third respondent ought

*to be reviewed and set aside for the reasons set out in the
recession application;*

39 *I rely in this regard specifically on the averments set out in
paragraphs 17 to 33 of the recession application;*

40 *I reiterate that I did not receive notice of either the hearing
on merits/guilt or the hearing on sanction;*

41 *I submit that an award, having been made pursuant to
proceedings held without notice to me is a nullity;*

42 *In so far as the third respondents ruling on sanction denies
me the right to apply for rescission, it is ultra vires and
reviewable on the same grounds as the rescission ruling.”*

9]The other grounds upon which the applicant seeks to review the decision to dismiss her are those set out in the rescission application. The applicant denies ever authorising payments to Mahomed and states that she could not have paid Mohomed because in terms of s 45 of the Public Finance Act No 1 of 1999 (PFMA), her role is limited to authorising the transfer on the Basic Accounting System (BAS) after a decision has already been made. According to her, the decision to pay a service provider in terms of s 45 of the PFMA is made by the director of government garage motor transport. The applicant further

stated that once the decision has been made her role was to enter the details of the service provider into the computer system.

10]As concerning mitigation after being found guilty as charged the applicant says that the chairperson of the hearing said that she should make her submission within 7 (seven) days after the finding of guilty was made but however proceeded to make his determination in terms of the sanction without satisfying himself that the decision was served on her. She contended that she never received the decision on the finding that she was guilty after the decision on the sanction had already been made and therefore she was denied a hearing in as far as the sanction was concerned.

Evaluation

11]The first issue to deal with in this matter is whether or not the decision of the first respondent refusing to rescind the dismissal of the applicant should be reviewed. As indicated above the review application is based on the contention that the proceedings which were conducted by the third respondent were in the nature of arbitration proceedings as envisaged in terms of s 188A of the LRA. This court had the opportunity to consider the same issue in the case of *Lulama Lloyd Mayedwa v General Public Service Sectoral Bargaining*

Council & another

[2009] JOL 23713 (LC). In that case the court in dealing with the same issue held at paragraph [14] of the judgment that:

“[14] The approach adopted in Hairdressing & Cosmetology (supra), is the same as that which was adopted in Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & others [2002] 1 BLLR 56 (LC) [also reported at [2001] JOL 9045 (LC)]], where the court in dealing with the facts which are very similar to those in the present instance held that the bargaining council could not by way of an agreement, using the phrase “final and binding”, take away the jurisdiction of the court. In that case the disciplinary code provided that the outcome of an internal appeal would be “final and binding” and accordingly precluded the dismissed employee from referring dispute for statutory resolution after his appeal was unsuccessful.

[15] The use of the phrase “final and binding”, in a collective bargaining agreement does not necessarily or automatically turn a process envisaged therein into an arbitration process and thus giving the court jurisdiction to entertain a review arising from such a process.”

12]The argument that clause 7.3 or 3.3 as the case may be have resolution 1 should be interpreted to constitute a pre-dismissal arbitration as envisaged in s188A of the LRA was also rejected in *Lulama Lloyd Mayedwa* in that the requirements of s 188A were not satisfied by the agreement concluded in terms of clause 3.3. The court held in that case that the requirements of s 188A were *mandatory*. The court went further to say:

“The process that the parties in this matter embarked upon does not satisfy the requirements of section 188A of the Labour Relations Act, for it to be said to be a pre-arbitration dismissal process as envisaged by that section. Section 188A provides as follows:

“(1) An employer may, with the consent of the employee, request a council, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.

(2) The request must be in the prescribed form.

(3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of—

(a) Payment by the employer of the prescribed fee; and

(b) The employee's written consent to the inquiry.

(4) (a) Employee may only consent to pre-dismissal arbitration after the employee has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.

(b) Despite subparagraph (a), an employee earning more than the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, may consent to the holding of a pre-dismissal arbitration in a contract of employment.”

13]In the light of the above I do not agree that the proceedings which were conducted by the third respondent amounted to an arbitration hearing as envisaged in s188A and thus the proceedings were not conducted under the auspices of the first respondent. The first respondent was simply mandated to facilitate the disciplinary process.

Accordingly this court does not have jurisdiction to review the decision of the first respondent that it did not have jurisdiction to rescind the decision of the third respondent.

14]I now turn to the review of the decision to dismiss the applicant. The applicant contends that the decision to dismiss her was a nullity and rely in that respect relied on the authority of *Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA)*. The facts in that case are distinguishable from those of the present case in that, in that case the court was dealing with the arbitration proceedings held under the Arbitration Act 42 of 1965. In that case the notice was sent by registered mail and was only received by the applicant on the day of the hearing. In the present matter the notice of the disciplinary hearing was sent to the applicant at the fax number which she had provided and where other previous correspondences were sent to her. On the day of the hearing the chairperson proceeded with the hearing in the absence of the applicant after satisfying himself that the notice of the hearing was sent to the correct address of the applicant. It has not been disputed that the address used to notify the applicant was the correct one.

15]In as far as the merits of the matter are concerned the chairperson of the disciplinary hearing arrived at the decision as he did after listening

and considering the uncontested evidence which was put by the first respondent before him. It is trite in our law that as a general rule a trier of the facts need not in a default hearing interrogate with the uncontested evidence put before him or her. Thus an applicant challenging a decision granted by default has much heavier duty to show that such a decision is unreasonable.

16]In my view, the applicant has not shown that the third respondent acted unreasonably or irrationally as she was properly notified of the hearing. The applicant has also not shown that the decision of the third respondent based on the uncontested evidence of the first respondent was unreasonable. The applicant's application therefore stands to fail. As concerning the costs, I do not believe that it would be fair to award costs.

17] In the premises I make the following order:

1. The applicant's application to review the outcome of the disciplinary hearing is dismissed.
2. There is no order as to costs.

Molahlehi J

Date of Hearing : 28 October 2010

Date of Judgment : 2 February 2011

Appearances

For the Applicant: F. Boda

Instructed by : Dockrat Incorporated

For the Respondent: No appearance for the Respondents