REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 1744/12

In the matter between:

BASANI BALOYI	Applicant
And	
MINISTER OF COMMUNICATIONS	1st Respondent
DIRECTOR GENERAL COMMUNICATIONS	2nd Respondent
MEC FOR SPORTS ARTS AND CULTURE: LIMPOPO	3rd Respondent
DIRECTOR GENERAL, SPORTS ARTS AND CULTURE: LIMPOPO	4th Respondent
PREMIER OF LIMPOPO PROVINCE	5th Respondent
GPSSBC	6th Respondent

ADV P H KIRSTEIN (*N.O.*) 7th Respondent

Heard: **17 July 2012**

Delivered: **20 July 2012**

Summary: (Urgent - interdict).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter sought to prevent the continuation of pre-dismissal arbitration proceedings against him, which were due to resume on 18 and 19 July 2012. The matter was heard on an urgent basis on 17 July and the judgment handed down on 20 July 2012. By agreement the continuation of proceedings on 18 and 19 July were postponed while judgement was pending. The order is reproduced at the end of the judgment. My brief reasons are set out below.

Factual background

[2] The applicant was previously employed by the National Department of Communications ('the Department of Communications') and is currently employed by the Sports, Arts and Culture Department of Limpopo province ('the provincial SACD'). She resigned from the Department of Communications with effect from 15 November 2011. Prior to her resignation the applicant and her employer had agreed to a pre-dismissal arbitration process arising from serious charges of corruption involving tenders being levelled against her. For reasons which are unknown, the fact that she was facing this enquiry at the time of her resignation did not hamper her employment by the provincial SACD. The pre-dismissal arbitration actually commenced prior to her resignation but was postponed several times.

[3] The Department of Communications clearly felt that the applicant should not be allowed to escape having to answer to the serious charge of misconduct against him by resigning and joining another State Department. Consequently, towards the end of February 2012 the MEC of the provincial SACD requesting the latter department to continue with the incomplete pre-dismissal arbitration proceedings it had been unable to finalise before the applicant resigned. However, the MEC explained that he was unable to pursue the matter being unfamiliar with all the factors surrounding the case and recommended that the Department of Communications pursue the matter as it deems fit. Later, the director-general of the provincial SACD conveyed to the Minister that the executive authority of the provincial Department had "decided" that the Department of Communications should continue with the enquiry, citing reasons of convenience and familiarity with the case as reasons for its view. The Minister was clearly of the same view that it would be best if the Department of Communications managed the process itself and proceeded to request the resumption of the pre-arbitration hearing.

[4] The matter was set down by the bargaining Council on 30 May 2012. The applicant did not attend and when her attorney of record was contacted he expressed the view that the pre-dismissal arbitration could not continue because his client had resigned from the Department of Communications. The respondents presented argument why the matter should proceed in the absence of the applicant. The chairperson decided that the Minister of Communications had complied with section 16 (B) (4) of the Public Service Act (Proclamation 103 of 1994), and had the necessary jurisdiction to proceed with the disciplinary action against the applicant.

[5] Section16 B of the Public Service Act ('the PSA'), states:

> *"16B Discipline*
>
> *(1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:*

(a) In the case of a head of department, the relevant executive authority; and

(b) in the case of any other employee, the relevant head of department.

(2) Where an employee may lodge an internal appeal provided for in a collective agreement or in a determination in terms of section 3 (5), a sanction referred to in subsection (1) may only be given effect to-

(a) if an internal appeal is lodged, after the appeal authority has confirmed the sanction pronounced by the chairperson of a disciplinary hearing; or

(b) if no internal appeal is lodged, after the expiry of the period within which the appeal must have been lodged.

(3) The Minister shall by regulation make provision for-

(a) a power for chairpersons of disciplinary hearings to summon employees and other persons as witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and other objects; and

(b) travel, subsistence and other costs and other fees for witnesses at disciplinary hearings.

(4) If an employee of a department (in this subsection referred to as 'the new department'), is alleged to have committed misconduct in a department <u>by whom he or she was employed previously</u> (in paragraph (b) referred to as 'the former department'), <u>the head of the new department</u>-

(a) may institute or continue disciplinary steps against that employee; and

(b) <u>shall institute or continue such steps if so requested</u>-

(i) by the former executive authority if the relevant employee is a head of department; or

(ii) <u>by the head of the former department, in the case of any other employee</u>.

(5) <u>In order to give effect to subsection (4), the two relevant departments shall co-operate, which may include exchanging documents and furnishing such written and oral evidence as may be necessary</u>.

(6) If notice of a disciplinary hearing was given to an employee, the relevant executive authority shall not agree to a period of notice of resignation which is shorter than the prescribed period of notice of resignation applicable to that employee."

(Emphasis added)

[6] In effect, the applicant is asking the court to reconsider this jurisdictional question on an urgent basis before the pre-dismissal hearing continues.

<u>Merits</u>

[7] The parties agreed that the matter could be dealt with on the basis that it was urgent. Although the relief sought had been cast in the form of an interim rule, in effect it was a request for a final order to stop the first and second respondents continuing with the pre-arbitration proceedings.

[8] The applicant contended that the MEC for SACD had no authority to authorise the continuation of proceedings as the MEC is not the head of the provincial department who is the functionary empowered to institute or continue proceedings in terms of 16B (4) (a) or (b). Secondly, the applicant said that the power of the head of the provincial SACD was not one that could be delegated to anyone else in terms of those provisions. Therefore, the director-general of the provincial Department could not hand back the responsibility for continuing or instituting the proceedings to the Department of Communications.

[9] Lastly, the applicant argued that the agreement between the applicant and the Department of Communications to a pre-dismissal arbitration was not an agreement that the provincial SACD could invoke and act on because that agreement only applied to the applicant and her former employer, the

Department of Communications. The applicant disputed the notion that because both departments were part of the state, the identity of the employer remained unchanged.

[10] For their part, the first and second respondents argued that the consent to the pre-dismissal arbitration process was binding on both parties and the applicant could not resile from it without their consent. As in any private arbitration, the seventh respondent was seized with the matter and was obliged to render a final and binding ruling.

[11] Contrary to the applicants submissions, the respondents contend that the MEC's decision to "authorise" them to continue with the pre-dismissal arbitration process was perfectly legitimate because the State was a single employer and the MEC was entitled to make this decision on behalf of the state. Moreover, as the applicant had not sought to set aside that decision, it had to be accepted as valid and binding.

[12] In addition, section 16 B (4) was merely permissive and not mandatory, and did not prohibit the Department of Communications from continuing with the enquiry itself merely because the provision did not spell this out. In any event, the respondents argued, the section does not apply to pre-arbitration hearings but only to disciplinary hearings.

The relevance of the applicant's employment status

[13] The respondents relied on the case of ***Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele*** **[2004] 12 BLLR 1238 (LAC)** as support for their argument that the fact that the applicant had resigned from one department and been employed by another was irrelevant because the two departments was simply separate components of the state which constituted a unitary employer. In *Jele, the employee in question had been refused promotion into provincial Department that was different from the one he was employed in.* The cardinal question on appeal was whether the employee could bring an unfair labour practices claim for unfair promotion against a department in which she was not employed. Zondo, JP, as he then was, concluded:

> *From the definition of the word "employee" in <u>section 213</u> of the Act, there can be no doubt that the State is an employer. The*

respondent was employed in a provincial government department. A provincial government is part of the State. Accordingly, unless there is a statutory provision which suggests strongly that there is another entity other than the State which was the respondent's employer, it should be accepted, on the basis of the definition of "employee" in section 213 of the Act and the fact that it is common cause that the respondent worked in a provincial government department, that his employer was the State and that, if he had been appointed to the post, his employer would have continued to be the State. Accordingly, the definition of the word "employee" does not assist counsel for the first and second appellants."[1]

[14] The same logic would apply in the present matter. However, if that was the determinative question in deciding whether the provincial MEC could reconvene the pre-arbitration hearing, then the provisions of section 16 B (4) would appear to be redundant. In this regard, it is noteworthy that the section was only promulgated in 2007, some three years after the judgement in *Jele's* case was reported.

[15] I believe the answer to this apparent conundrum lies not in identifying the true employer, which clearly is the state, but in identifying who exercises the state's rights as employer vis-a-vis the applicant. Even though employees engaged by various provincial and national departments are all employees of the State, the state exercises its rights in relation to each of those employees through the mechanism of executive powers allocated to executive authorities in those different departments whose remit does not ordinarily extend beyond the Department in question. Thus, for example, the decision to employ someone as a public servant made by the executive authority of a particular department.[2] Similarly, it is the executive

---

[1] At 1238,[17]

[2] S 9 of the PSA reads:

"**9 Appointments in public service**

An executive authority may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed."

authority or the head of department who is given the power to impose disciplinary sanctions on a head of department or other employee respectively.[3] It is for this reason that a provision like 16B(4) was enacted, because the limited remit of an executive authority or head of department in relation to employees employed in other departments, means that once an employee of the state no longer works in a particular department, the executive authority or head of that department has no authority over the employee.

[16] How does section 16B(4) alter matters? It does not extend the power of an executive authority in one department to take disciplinary steps against an employee employed on the authority of an executive authority in a different department. Rather, it permits the employee's current executive authority or head of Department, as the case may be, to initiate or continue disciplinary measures arising against the employee in the former department which employed her. In the case of 16B(4)(a), it permits the head of Department to continue or Institute disciplinary steps against the employee for misconduct allegedly committed in the employee's former department. Section 16B(4)(b), obliges the employee's current head of Department to institute or continue disciplinary proceedings if requested by the appropriate functionary in the employee's former department. In essence, it expands the powers of the departmental head in relation to someone engaged by them to take disciplinary action against that person for conduct arising in a prior employment under different authorities and public service. Although it expands the power of an employee's current head of Department, it does not go so far as giving that head of Department the power to direct another head of Department to continue disciplinary proceedings in respect of a person over whom she no longer exercises the power to impose disciplinary sanctions.

[17] Mr Bhoda suggested in argument that the obligation placed on the two departments under s 16B(5) to cooperate in order to give effect to the provisions of s16B(4) includes an implied power to make an arrangement under which the former department can by arrangement assume the

[3] S 16B(1)(a) and (b) of the PSA

responsibilities of the applicant's current Department under subsection (4). However, the cooperation envisaged is for the purposes of “giving effect to subsection (4)”. That sub-section provides for the current Department to continue with disciplinary measures and not for the former department to do so. Of course that does not mean that the former department would not be able to render substantial assistance to the current Department so that the latter can conduct the disciplinary proceedings but it is the current Department which has the non-delagable responsibility to continue or institute those proceedings.

[18] The applicant relied on the recently reported decision of ***Hlabangwane v MEC for Public Works, Roads & Transport, Mpumulanga Provincial Government & others*** **(2012) 33 ILJ 1195 (LC)**. In that case the employee’s former department instituted disciplinary measures against him after he had been transferred to a different department. As Molahlehi, J put it there:

> *“[22] It is clear from a reading of s 16B(4) of the PSA that the power of the former department to institute or even to proceed with the disciplinary hearing after the transfer has taken place is taken away. In other words, the former department loses the right to continue with disciplinary proceedings when the transfer takes effect.*
>
> *[23] In my view the first respondent, in seeking to continue the disciplinary hearing after the transfer of the applicant, is exercising a power he or she does not have and is thus acting ultra vires his or her powers.”*[4]

[19] The respondent argued that the finding at paragraph [22] was obiter and the facts in that matter were distinguishable from this case, in particular because no pre-dismissal arbitration agreement was involved. Be that as it may, the learned judge’s reasoning on the powers of the former head of

[4] At 1202

department in relation to the disciplining of an employee now working in another department is correct in my view.

[20] I appreciate that practical difficulties can arise if the employee's current department is reluctant to deal with the disciplinary baggage of the employee from other departments, but under s16B(4)(b) the current department must continue with such action, or initiate it, if requested to do so by the relevant authority in the employee's previous department. Accordingly, the first and second respondent's are not without a remedy.

[21] However, in terms of s 16B(4) they cannot step into the shoes of the provincial DCSA and initiate or continue the proceedings themselves, where the latter department has no authority to delegate the same.

Order

[22] Accordingly, I handed down the order below:

22.1 The first and second respondents are not empowered to institute or continue with disciplinary steps against the Applicant.

22.2 The jurisdictional ruling issued by the seventh respondent on 30 May 2012 is a nullity and is unenforceable.

22.3 The sixth and seventh respondents are prohibited from proceeding with the pre-dismissal arbitration scheduled originally for 18 to 19 July 2012 and stayed pending the outcome of this application.

22.4 The first and second respondents are jointly and severally liable for the applicant's costs, the one paying the other to be absolved.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	G Moshoana of Mhlaba Mashoana Inc.
FIRST AND SECOND	
RESPONDENTS:	F A Bhoda instructed by Verveen Attorneys