



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: D 449/2011

In the matter between:

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION

ME BULENI

DD JALI

and

MSC DEPOTS (PTY) LTD

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

BD NAYAGER NO

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

Date of application: 10 July 2012

Date of judgment: 16 July 2012

Summary: Application to set aside dismissals effected after internal disciplinary hearing in circumstances where the parties had agreed to submit allegations of misconduct to arbitration in terms of s 188A. Award that employees not guilty of misconduct subsequently reviewed and set aside; CCMA ordered to convene fresh hearing before another commissioner.

Employer thereafter convened internal disciplinary hearing, after which employees dismissed.

Held that court's order in review application directing CCMA to convene fresh arbitration hearing had affirmed agreement between the parties. By agreeing to refer allegations of misconduct to arbitration in terms of s 188A, an employer abandons any rights conferred by internal processes and policies and allegations of misconduct are accelerated to arbitration hearing that is ordinarily an element of post-dismissal phase of dispute resolution process. In the present instance, the commissioner's inept award had frustrated statutory purpose of expeditious determination of allegations of misconduct. Court granted order setting aside dismissals as a breach of agreement to refer allegations of misconduct to arbitration. CCMA ordered to convene expedited hearing before senior commissioner.

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an urgent application for a declaratory order in the following terms:
- (a) that the dismissal of the second and third applicants is in breach of an agreement concluded between the applicants and the first respondent in terms of which the first respondent undertook not to dismiss the second and third applicants without there being a pre-dismissal arbitration as contemplated by section 188 A of the Labour Relations Act; and
 - (b) that the dismissal of the second and third applicants is a contravention of the order granted by this court on 22 May 2012 under case number 449/11.
- [2] The applicants initially sought an interim order to the above effect. However, at the hearing of the application, Mr Maeso, who represented the respondent and Adv. Crampton, who represented the applicants, agreed that all of the legal and factual issues relevant to the application had been canvassed, and that the application be treated as an application for a final order.

Factual background

- [3] The relevant material facts are the following. The second and third applicants were employed by the first respondent. Both of them were shop stewards. During July 2010, the second and third applicants addressed a letter to the Department of Labour making certain allegations regarding health and safety standards at the first respondent's premises.
- [4] An inspection was duly conducted by the Department of Labour. The investigation revealed that the allegations were wholly unfounded. The second and third applicants were then suspended and charged with misconduct. The first respondent and the first applicant (the union) agreed that the second respondent in these proceedings (the CCMA) be requested in terms of section 188A of the LRA to appoint an arbitrator to conduct what is referred to as a pre-dismissal arbitration. The third respondent in these proceedings (the arbitrator) was appointed to conduct the arbitration. On 27 April 2011 the arbitrator issued an award in terms of which he found the second and third applicants not guilty of the charges brought against them. He ordered that they be reinstated.
- [5] The first respondent applied to review and set aside the arbitration award. On 22 May 2012, Gush J made the following order:
- 'The applicant's application to review and set aside the award of the fourth respondent is granted;
- The first respondent is ordered to appoint a Commissioner other than the fourth respondent to conduct a pre-dismissal arbitration in accordance with the provisions of section 188 of the Labour Relations Act and the agreement between the parties; and the first, second and fourth respondent is ordered to pay the applicants costs the one to pay the others to be absolved. '
- [6] It is common cause that the terms of the order contained typographical errors, *inter alia* to the extent that the CCMA was the fifth respondent in the application for review, and not the first respondent as indicated. To the extent necessary, the parties agreed that the order should be varied to reflect that the CCMA is ordered to appoint a commissioner other than commissioner

Nayager to conduct a pre-dismissal arbitration, and it is so ordered.

- [7] After the order was granted, on or about 30 May 2012, the second and third applicants were given notice to attend a disciplinary enquiry to be held on 5 June 2012. It is clear from the terms of this notice that the first respondent intended to conduct an internal disciplinary enquiry in respect of the charges set out in the notice. These charges relate to the same misconduct that was the subject of the pre-dismissal arbitration hearing before the arbitrator.
- [8] On 5 June 2012, a union official addressed a letter to the first respondent contending that the first and second respondent were bound, by the terms of the court order, to conduct a pre-dismissal arbitration in accordance with section 188A of the LRA. The first respondent nonetheless conducted a disciplinary enquiry, chaired by a member of its management. The second and third applicants did not participate in the hearing and in their absence, they were found guilty of the misconduct alleged.
- [9] The second and third applicants were advised by way of letters dated 18 June 2012 that they had been dismissed with immediate effect.

The applicable legal principles

- [10] Section 188A reads *inter alia* 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 made 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 employees written consent to the enquiry...
 - (6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section...

- (8) The provisions of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.
- (9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the employee.

[11] Section 188A (despite its unfortunate title which on the face of it, assumes the outcome of the arbitration hearing) has as its purpose a means of expediting dispute resolution by avoiding duplication between internal and external hearings. In effect, in terms of a tripartite agreement between the employee, the employer and the CCMA, an arbitrator steps into the shoes of the employer and assumes the right normally considered a sacrosanct element of the managerial prerogative - the right to exercise discipline, including the right to dismiss. The benefit for all is the elimination of the duplication that inevitably occurs when court-like in-house hearings are inevitably followed by an arbitration hearing conducted on a *de novo* basis.

Analysis

[12] The first issue to be determined is that of agency. The respondent contends that any urgency is self-created. This contention is made against the factual background where as early as 28 May 2012 the first respondent first indicated to the union that it was withdrawing its agreement to proceed with a pre-dismissal arbitration and asserted that the process would be conducted internally. There was no response to this intimation. On 30 May 2012 the first respondent contacted the union to assist it in having disciplinary charges in respect of the second and third applicants. No response was received from the union. Copies of the charges were handed to the second and third applicants and 31 May 2012. As I noted above, the applicants did not attend the disciplinary hearing that took place on 5 June 2012. At that stage, there was no challenge to the enquiry. On 7 June 2012, the union was invited to make further representations prior to any final decision being made in regard to the disciplinary sanction. No response was received. The communication was repeated through the parties legal representatives, and it was only on 23

June 2012 that the second and third applicants were dismissed. The present application was transmitted to the first respondent by e-mail on 5 July 2012.

[13] While the union may be criticised for its failure to respond to the correspondence addressed to it during early June 2012, and in particular, to the clear notice of the first respondent's intention to conduct an internal disciplinary hearing, as advocate Crampton submitted, it is the dismissal of the second and third applicants that triggered the present application since it is the dismissals that are contended to constitute the breach of the agreement concluded in terms of s 188A of the LRA, and the process contemplated by the court order granted on 22 May 2012. Given that the papers in the present application were filed within 10 days or so of receipt of the notice of dismissal, in my view, the applicants acted sufficiently promptly to assert their rights. Further, it seems to me that it is the interests of all concerned that this matter be resolved without further delay. I am satisfied that the application ought to be dealt with on an urgent basis.

[14] The central issue in these proceedings is whether the first respondent was bound, both by the parties' agreement to invoke s 188A and the court order of 22 May, to have the allegations of misconduct against the second third applicants determined only by way of an arbitration hearing. The applicants submit that the first respondent was not entitled unilaterally to revoke its agreement to that process, and that even if the first respondent had been entitled to terminate the agreement, there is no case made out on the papers of any lawful termination, either summarily or on reasonable notice. The first respondent's case is that after the arbitrator's award was set aside, it was not bound by its initial agreement to have the allegations of misconduct against the second and third applicants tested by way of an arbitration hearing.

[15] It seems to me from the wording of s 188A that once an employer and an employee consent to refer the determination of allegations of misconduct or incapacity to an arbitration hearing in terms of s 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its internal disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable

in a post-dismissal phase. That being so, and since the consent of the affected employee and the CCMA is necessary to achieve that result, it is not open to the employer to abandon the process on a unilateral basis.

[16] In the present instance, I need not decide whether any agreement reached in terms of s 188A is capable of termination at common law, nor is it necessary for me to decide whether such an agreement constitutes a collective agreement capable of termination on reasonable notice as contemplated by s 23(4) of the Act. As I have indicated, that is not the case that the first respondent has made. But in so far as the first respondent submits that its consent may be withdrawn unilaterally at any stage in the process, that contention flies in the face of the system of compulsory arbitration that is established by Part C of chapter VII of the Act, the material parts of which are specifically made applicable to an arbitration hearing in terms of section 188A.

[17] Secondly, in so far as the first respondent submits that there was an 'initial dispute' referred to an arbitration hearing and that the process was completed by the setting aside of the arbitration award, that submission has no merit. It is not for the first respondent to agree or not to agree to a second round of arbitration. The arbitration hearing contemplated by the order granted on 22 May is not a discrete process – it is an integral element of the same process initiated by the parties' agreement to submit the allegations of misconduct against the second and third applicants to arbitration. As I have indicated above, the charges of misconduct relate to the same events that were the subject of the hearing before the arbitrator. The only intervening factor is the setting aside of the award, and an order directing the CCMA to convene a fresh hearing before a different commissioner. I fail to appreciate the basis on which these developments afford the first respondent a right to abandon the agreement to submit the allegations of misconduct against the second and third applicants to arbitration, and to revert to an internal disciplinary hearing.

[18] In the absence of any right by the first respondent unilaterally to withdraw from an agreement to refer the allegations of misconduct against the second and third applicants to an arbitration hearing, the applicants are entitled to the relief they seek. Their rights are affirmed by the terms of the order of this court

granted on 22 May 2012. In these circumstances, the dismissals of the second and third applicant stand to be set aside, and the first respondent ordered to comply with its obligations in terms of the agreement concluded in terms of s 188A.

[19] This leaves the matter of the arbitration hearing into the allegations of misconduct made against the second and third applicants. Section 188A holds the promise of the expeditious resolution of disputes about employee conduct and the swift imposition of a fair sanction for any proven misconduct. Regrettably, in this instance, the CCMA has failed the parties, and frustrated the statutory purpose that underlies the section. The ineptitude with which the pre-dismissal arbitration was conducted resulted in a successful review, and an order that the matter be remitted to the CCMA for re-hearing. The parties have been prejudiced, the respondent more so since it has had in the interim to carry the cost of the applicants' wages. But that is a risk that an employer must run when it decides to place the function of workplace discipline in the hands of an unknown third party. Ordinarily that risk may be worth running. I have referred to the significant cost savings to be had by avoiding the duplication occasioned by elaborate in-house disciplinary enquiries and an inevitable arbitration hearing at which the same allegations are tested in a *de novo* hearing. But the integrity of the system depends on the expertise of the arbitrator, and that is where the first respondent's initial confidence in the system was betrayed. It is the interest of all parties that this matter be resolved without further delay. I intend therefore to make an order to the effect that the arbitration hearing be conducted before a senior commissioner on an expedited basis.

[20] Finally, in relation to costs, both parties' representatives submitted that costs ought appropriately to follow the result.

I accordingly make the following order:

1. The first respondent's dismissal of second and third applicants:
 - a) is in breach of an agreement concluded between first respondent and applicants in terms of which it was agreed that the first respondent

would not dismiss the said applicants for the misconduct in question without conducting a pre-dismissal arbitration as contemplated in section 188A of the Labour Relations Act, No. 66 of 1995; and

b) is in contravention of the order granted by the Court in its judgment delivered on 22 May 2012 in case no. D 449/11.

2. The dismissals are set aside.
3. In the event that the first respondent elects to pursue an enquiry into the alleged misconduct by the second and third respondent, it is directed to conduct a pre-dismissal arbitration as contemplated in section 188A.
4. The National Director of the second respondent or a person delegated by her is directed, after consulting with the parties' representatives, to appoint a senior commissioner to conduct the pre-dismissal arbitration on an expedited basis.
5. The first respondent is ordered to pay the costs of this application.

A van Niekerk

Judge

APPEARANCES

APPLICANTS: Adv D Crampton, instructed by PKX Attorneys

FIRST RESPONDENT: Mr M Maeso, Shepstone and Wylie Attorneys