



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JOHANNESBURG

Not reportable

Case No: JR1046/07

In the matter between:

MATHLODI GLORIA LEREFOLLO

Applicant

and

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

**COMMISSIONER JOYCE TOHLANG
SOLUTIONS CC**

Second Respondent

**SECRETARIAT FOR SAFETY AND
SECURITY**

Third Respondent

Heard: 18 August 2014

Delivered: 26 March 2015

Summary: A review application brought in terms of section 145 of the Labour Relations Act 66 of 1995. Question as to whether the labour court has jurisdiction bearing in mind that the matter emanates from the public sector, and particularly a public sector disciplinary hearing in terms of an applicable collective agreement. Action constituting administrative action and accordingly the labour court has jurisdiction. Application however dismissed on the facts.

JUDGMENT

SNIDER AJ

- [1] This is an application in terms of which the applicant seeks to review and set aside a finding of a disciplinary enquiry (“the finding”) dated 13 March 2007 issued by the second respondent.

Point *in limine*

- [2] Before dealing with the merits of the matter, there is a legal issue which requires determination.
- [3] The third respondent wishes this point to be heard as a point *in limine* however, it has not been properly raised as such.
- [4] The point, as set out below, goes to the jurisdiction of this Court to adjudicate the matter as a whole and accordingly, regardless of the manner in which the third respondent has conducted itself, the point has to be decided.
- [5] In terms of a resolution of the Public Service Co-ordinating Bargaining Council, being resolution number one of 2003, (“the resolution”)¹, which the parties are *ad idem* applies to both the applicant and the third respondent, the following provision is made –

‘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 the 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] In broad terms, the point raised by the third respondent, which was of concern to me upon perusal of the papers, is, whether, in terms of such an agreement,

¹ Page 34 of the paginated papers

the parties, specifically the applicant and third respondent can clothe this Court with jurisdiction to hear a review of the arbitrator's decision without the matter following the usual course through conciliation, mediation and arbitration.

- [7] This question is the source of a plethora of jurisprudence in our law and has been pronounced upon by the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court.
- [8] A useful point of departure which sets out, with respect, succinctly the argument in favour of this Court not having jurisdiction to hear the matter is the judgment of the Honourable Judge Molahlehi in *Mayedwa v General Public Services Sectoral Bargaining Council and Another*.² This decision is for the purposes of deciding the point, indistinguishable, factually, from the current matter.
- [9] As in the current situation, the disciplinary enquiry was conducted under the auspices of the Bargaining Council in terms of resolution 1 of 2003 of the Public Service Co-ordinating Bargaining Council. The second respondent, in that matter, raised a point *in limine* concerning the jurisdiction of the court, the essence of which was that the court did not have jurisdiction because of the jurisdictional factors envisaged in section 157(4)(a) of the Labour Relations Act³ ("the LRA").
- [10] The second respondent in that matter further contended that by relying on the provisions of resolution 1 of 2003, the applicant was seeking to impose jurisdiction on the court by consensus between the parties. In this regard reliance was placed on *Bargaining Council for Hairdressing and Cosmetology Trade (Pretoria) v Smit t/a Hair Mistique*.⁴ The Learned Judge followed the Cosmetology decision (*supra*) as well as the decision in *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others*.⁵

² (2009) 30 ILJ 2946 (LC).

³ Act 66 of 1995 as amended.

⁴ (2002) 23 ILJ 388 (LC) at para 2.

⁵ (2001) 22 ILJ 2684 LC

- [11] All of these decisions are to the effect that parties cannot confer jurisdiction on a court of law by agreement.
- [12] However, the matter does not end here. These cases are simply authority for the proposition above, that parties cannot, by way of agreement, confer jurisdiction on this court. They go no further.
- [13] There is a different aspect of this question which was raised on behalf of the applicant and must be considered in determining whether this Court has jurisdiction to consider the review.
- [14] This line of argument is premised on the proposition that the decision of the second respondent constituted administrative action as the decision of a disciplinary tribunal in the public sector constitutes administrative action and is accordingly subject to review.
- [15] Again there are a number of decisions on this point including *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others*; *Booyesen v Minister of Safety and Security and Others*; *Provisional Commissioner Petros NO v Director Joubert NO and Another*⁶, *Ntshangase v MEC: Finance, Kwa Zulu Natal and Another*,⁷ *Chirwa v Transnet Limited and Others*⁸, and *Gcaba v Minister of Safety and Security and Others*.⁹
- [16] The most apposite analysis of the relevant jurisprudence, for the purposes for this matter, appears, with respect, from the judgment of his Lordship Judge Steenkamp in *Booyesen (supra)*.
- [17] The decision in *Booyesen (supra)* is based on a very similar term in a collective agreement between the SAPS and the various unions which bound, *inter alia*, the individual employee.

⁶ [2012] 5 BLLR 446,

⁷ [2009] 12 BLLR 1170 (SCA)

⁸ [2008] 2 BLLR 97

⁹ [2009] 12 BLLR 1145 (CC) also reported at 2010 (1) SA 238 (CC).

- [18] The ultimate conclusion reached in *Booyesen (Supra)* was that since the actions of the officials concerned in that case constituted administrative action, the court was bound by the decision in *Ntshangase (supra)* and that being so, such decisions must be lawful, reasonable and procedurally fair. They were, therefore reviewable in terms of section 158(1)(h) of the LRA.
- [19] Whilst this matter is not phrased as a review in terms of section 158(1)(h) of the LRA, in fact, it is explicitly described by the applicant as a review in terms of section 145 of the LRA, I do not believe that the label which the applicant attaches to it is necessarily determinative of its nature.
- [20] There can be no question that the action of the second respondent, as per *Ntshangase (supra)* constituted administrative action in the sense of the nature of the power exercised, its subject matter, and that it entailed the exercise of a public duty.
- [21] *Ntshangase (supra)* is direct authority for the proposition that decisions of a disciplinary tribunal in the public sector constitute administrative action and are accordingly subject to review. The test, per *Booyesen (supra)* remains that set out in *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others*.¹⁰ In *Ntshangase (supra)* the Learned Acting Judge of Appeal Bosielo, writing the unanimous judgment of the Court, analyses the position with section 33(1) of the Constitution of the Republic of South Africa 1996 as his point of departure. Section 33(1) provides that –
- ‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair’.
- [22] The Learned Judge then analyses the meaning of the concept “administrative law” and cites, *inter alia*, *President of the Republic of RSA and Others v South Africa Rugby Football Union and Others*¹¹ and comes to the conclusion, which is factually and legally on all fours with the current facts, that the decision of the

¹⁰ [2007] 12 BLLR 1097 (CC) referred to in *Booyesen* at paragraph 32 on page 454.

¹¹ 1992 (2) SA 14 (CC)

disciplinary tribunal in the Public Sector constitutes administrative action. The Learned Judge follows this conclusion with a reference to section 158(1)(h) of the LRA which provides that –

‘ the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law’.

[23] Accordingly, it is found that such a decision, which is indistinguishable from the one in this matter, can be reviewed by this Court.

[24] I accordingly, find that this Court has jurisdiction to entertain the applicant's review application and consider same hereunder.

[25] I then turn to the merits of the review application itself.

[26] I must at this juncture, state that the manner in which this application has been dealt with by the applicant is far less than satisfactory.

[27] The references in both the affidavit and in the applicant's heads of argument are not annotated and, to the extent that there is one, it is extremely difficult to follow the case for the applicant.

[28] The grounds of review are set out in the founding affidavit¹² a perusal of the said grounds swiftly reveals that there is nothing upon which a review application can be based without, at the very least, drawing a proper connection between the grounds referred to, the evidence, the award of the finding and any conduct on the part of the second respondent which may render the award reviewable.

[29] Briefly the supposed grounds relied upon by the applicant are the following that –

29.1 the arbitrator failed to apply the cautionary rule;

¹² Page 9 paragraph [9]

- 29.2 failed to accept evidence of the applicant as reasonably and possibly true;
- 29.3 curtailed proceedings and denied the applicant the right to a postponement so as to secure the attendance of her witnesses;
- 29.4 paralysed the proceedings in that she did not realise the effect of proceeding with an unrepresented applicant facing allegations of this nature;
- 29.5 over exercised her power by imposing the maximum sanction of dismissal; and
- 29.6 disregarding the fact the applicant is a first offender and not taking into account mitigation.

[30] In respect of the cautionary rule it is clear that the witness on behalf of the third respondent, one Meshack Mogotusi gave comprehensive and cogent evidence in relation to the charges against the applicant; the evidence surrounding her absenteeism was thorough and complete. There is no reason to interfere with the finding in this regard.

[31] The cautionary rule is, in any event, a concept which applies to the criminal law and not to evidence in civil cases.¹³

[32] The ground that the arbitrator failed to accept evidence of the applicant as reasonably and possibly true is simply far too broad and non-specific upon which to find that the award should be reviewed.

[33] It is clear from the award itself that as far as postponements and the calling of witnesses are concerned, the arbitrator was accommodating up to a point, but then did not allow the applicant to delay the proceedings any further. The

¹³ Law of South Africa, volume 9 second addition; evidence sufficiency corroboration and cautionary rules, para [830]

arbitrator clearly had a discretion in this regard and, from what one can observe from the award, exercised same in a judicial manner.¹⁴

[34] The same goes for the applicant's dismissing her legal representative which the second respondent, once again, in her discretion, regarded as a delaying tactic and proceeded with the arbitration.

[35] In the exercise of her powers, the arbitrator dismissed the applicant. This cannot be regarded as unreasonable within the meaning of that phrase as set out in *Sidumo (supra)* which, as set out above, is the test to be applied.

[36] The fact that the applicant was a first offender would not necessarily, and certainly not in this case, prevent the arbitrator from imposing the sanction of dismissal. Once again, the decision is not an unreasonable one.

[37] The applicant filed a supplementary affidavit however, no discernible new grounds of review are raised in the supplementary affidavit.

[38] In the premises I make the following order –

38.1 The application is dismissed;

38.2 There is no order as to costs.

Snider, AJ

Acting Judge of the Labour Court of South Africa

¹⁴ Pages 19 and 20

APPEARANCES

For the Applicant: M A Mototusi

Instructed by: Phehello Modise Attorneys

For the Third Respondent: Advocate A Laka SC

Instructed by: Attorney Mr Letagen (State Attorney Pretoria)

LABOUR COURT