



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Not Reportable

Case No: JR1648/10

In the matter between:

**PUBLIC SERVANTS ASSOCIATION
obo S HARTLEY**

Applicant

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY

Respondent

In re: the matter between:

SOUTH AFRICAN SOCIAL SECURITY AGENCY

Applicant

and

SURAY HARTLEY

First Respondent

MARGARET SMITH N.O

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 13 July 2017

Delivered: 02 March 2018

JUDGMENT

JULY. AJ

Introduction

[1] This application is brought in terms of Rule 11 of the Rules of the Labour Court. Rule 11 reads –

"(1) The following applications must be brought on notice, supported by affidavit:

- (a) interlocutory applications
- (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
- (c) any other applications for directions that may be sought from the court."

[2] Since Rule 11 is a catch-all Rule, a respondent to an application may rely on Rule 11 to have a review application dismissed. It is such an application that this Court is called to decide.

- [3] The review application against the arbitration award made on 19 May 2010, was instituted by the respondent on 30 July 2010. The application to dismiss the respondent's review application was filed with this Court on 16 May 2012. The notice of intention to oppose the review application was filed on 27 August 2010. The Commission for Conciliation, Mediation and Arbitration (CCMA) filed its notice to abide in September 2010. No answering affidavit was filed on behalf of Ms. Hartley, who is the first respondent in the review application.

Background

- [4] Although I am not required to decide the review application, it is significant to refer briefly to the facts which are relevant to the review application.
- [5] Ms. Hartley was employed by the respondent as a systems administrator. Her duties included the performance, management and training of users on all functions including 1090 on the SOCPEN computer system. The 1090 function system allows the user to link or unlink identity numbers and information from a beneficiary.
- [6] It is alleged that the unlinking function is used in highly exceptional cases. This 1090 function is only allocated to three employees of the respondent, namely; Christa Momberg, Van der Berg and Ms. Hartley.
- [7] A certain McKenzie visited the offices of the respondent with the aim to register as a beneficiary in respect of her five children. She was, however, told that she was already a beneficiary and past payments were made to her. She disputed this information, as she had never received payments in this regard. Ms. Els, an employee of the respondent, reported the issue to her deputy director and an investigation ensued.
- [8] The investigation uncovered that from 15 November 2004, a 1080 function was performed in the SCOPEN system by a certain Hughes who was an

employee of the respondent. At the same time a 1090 function was used by Ms. Hartley.

[9] Subsequently, McKenzie's information disappeared from the system. The effect of function 1080 in relation to McKenzie was that McKenzie's identity number changed to another identity number, as though she had never been registered. Although McKenzie was registered on the system she was not receiving the money and someone else was being paid. However, function 1090 was used to erase McKenzie's identity number from the system; the effect was that the information in relation to this transaction was obliterated. Disciplinary proceedings were instituted, and Ms. Hartley was found guilty of misconduct and dismissed as a result.

[10] Ms. Hartley referred an unfair dismissal to the CCMA. The arbitrator found that the respondent had failed to prove that there was a link and/or connection between the applicant and Hughes, other than a collegial one. The applicant agreed that she knew Hughes, but denied that there was any other connection between herself and Hughes. They were not friends, nor did they work together on a daily basis as they were not employed in the same office.

[11] The commissioner states that –

"The respondent conceded that there was no indication that the applicant received any financial contributions and/or benefit from Hughes and that there was nothing else linking her to Hughes other than the visit to the applicant's office on 15 November 2004. I fail to see why the applicant would possibly jeopardize herself if she had nothing to gain from the exercise".

[12] The Commissioner further states that –

"5.10 It is not in dispute that she verified the identity numbers with the Department of Labour, before performing the said function. I am of the view that the applicant would not have followed the correct procedure, i.e. verifying the I.D numbers with the department of

Labour, if there was a collusion to defraud. A simple phone call by Hughes requesting the applicant to perform on unlinking, could have been sufficient if they were in cahoots with one another. This in my view confirms that she acted bona fide in the circumstances and in performing her duties.

5.7.11 The applicant was not charged with negligence and/or failure to follow company procedures, but with misconduct in order to commit fraud. I am of the view that there is no evidence of any pre-meditated fraudulent action and that the applicant's explanation of events is highly probable in the circumstance. The applicant gave clear and precise evidence and did not deviate from her testimony during cross-examination.

5.7.12 The respondent's case is based on circumstantial evidence. It is, however, not disputed that Hughes was in the applicant's office nor that the 1080 and 1090 functions were performed on the applicant's computer. The applicant however, gave undisputed testimony that computers are shared between work colleges (sic). Therefore every employee received an individual password and login identification. It is also not in dispute that the applicant left Hughes in her office when she went to the bathroom. The applicant gave undisputed testimony that the linking/unlinking and/or function 1080 only takes about 30 seconds to perform.

5.7.13 From the evidence submitted it is my view that the applicant did perform 1090 function. I am of the view that the applicant acted bona fide in performing the 1090 function and that the said function was part of her normal duties. The respondent failed to produce evidence to the contrary."

[13] From a reading of the CCMA award, the Commissioner's reasoning appears to be contradictory and therefore irrational. The Commissioner also appears to have applied the '*beyond reasonable doubt*' test in the circumstances, as opposed to the '*balance of probabilities*' test. Having said that, the issue before me relates to the dismissal of the review application and not its merits,

as such, the irrationality of the Commissioner's reasoning is merely my observation. It is the court before which the review application sits that will make a final determination on the merits.

Litigation History

[14] The review application was brought on 30 July 2010 and to date the application has not been prosecuted. On 14 December 2011 the respondent brought an application to compel the CCMA to attend to a reconstruction of the record, which was incomplete. This application was brought by the respondent after attempts to inform the CCMA of the incompleteness of the record were unsuccessful. It is difficult to ascertain what happened to the application but a notice of compliance was filed with this court on 16 January 2012. Attached to the notice are nine pages of the hand written notes of the Commissioner.

[15] It appears to be common cause between the parties that the date of the reconstruction of the record was to be 29 February 2012. A letter dated 17 February 2012 was addressed to the State Attorney advising it that *"Commissioner Margaret Smith is no longer available on 29 February 2012 for reconstruction, the date has been utilized for other matters. She will be available on 27th, 28th and 30th March 2012."*

[16] Paragraph 15 of the applicant's founding affidavit is therefore incorrect in that-

"The reconstruction meeting was scheduled for 29th February and the first respondent duly attended. The reconstruction meeting could unfortunately not proceed as the State Attorney had asked for postponement."

[17] In response to a letter from the applicant's representative dated 10 April 2012, the State Attorney addressed a letter dated 18 April 2012 denying that the respondent was responsible for the delay.

[18] On 26 April 2012 the CCMA issued a notice setting the matter down on 20 June 2012 for the reconstruction of the record. Before a meeting could take place on 16 May 2012, the applicant instituted this application to have the review dismissed. In this application, there is mention of a notice of set down dated 20 June 2012. I could not locate an amended notice or supplementary affidavit seeking to explain the delay for the period after May 2012.

[19] I cannot understand how the respondent can be said to have delayed the prosecution of the review application, as alleged by the applicant. Whatever may have occurred after the launching of this application is not before me, however, the applicant cannot allege a delay prior to the launching of this application.

Locus standi of the Public Servants Association (PSA)

[20] This application is brought by the PSA on behalf of Ms. Hartley in terms of section 200 of the Labour Relations Act¹ (LRA). Section 200 states that –

"(1) A registered trade union or registered employer's organization may act in any one or more of the following capacities in any dispute to which any of its members is a party –

- (a) in its own interest;
- (b) on behalf of its members;
- (c) in the interest of any of its members."

¹ Act 66 of 1995 as amended.

- [21] Therefore, there is no doubt as to the applicant's right to act on behalf of its member, Ms. Hartley. However, the PSA is not cited as a party to the review application (i.e. the main application), and thus it cannot bring this application on behalf of Ms. Hartley as this is an interlocutory application directly relating to the review application.
- [22] Section 200 of the LRA cannot be understood to confer joinder in circumstances where an association is not a party to the litigation, either by instituting the proceedings on behalf of its member or by way of application to be joined into the proceedings at a later stage (as would be required in the present circumstances).
- [23] In my view, Rule 11 is not intended to consider non-joinder of a party as a basis to dismiss an application. In other words, if I were to find that there was non-joinder, such a finding will definitely not result in the dismissal of the review application.
- [24] In light of the above and the fact that the applicant, when the review application was set down in 2013 before Bhoda AJ, agreed to have the review application postponed and has not made further strides to have the review application prosecuted until 2017, indicates the applicant's contribution to the delay in this matter
- [25] I am not sure about the right of the PSA to bring this application under the case number of a matter to which they are not a party. I do not have to determine that issue. However, my observation is that it is only once a party has been joined to a matter that they acquire a right to be heard. This should not be conflated with section 200 of the LRA
- [26] In *CWIU v Plascon Decorative (Pty) Ltd*² the court held that-

² [1998] 12 BLLR 1191(LAC).

"[12] This submission mistook the nature not only of the union's legal rights but also of its entitlements in approaching this Court for relief, and failed to take account of either the formal or the substantive aspects of the issues still before the court. Formally, the union and the employees it represents became entitled, when joinder of issue took place, to a hearing in respect of the entire ambit of the relief they claimed. Joinder of issue (*litis contestatio*) occurred when the union filed its reply to Plascon's answering affidavit, and the matter was set down for hearing. (compare *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358FG; and *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd and another* 1978 (1) SA 671 (A) 676CH). Plascon's answering affidavit placed on record its opposition not only to the grant of an interdict restraining it from implementing discipline, but to the declarator which encapsulated the legal basis of the union's claim to relief. Once issue was joined on both these questions, the union became formally entitled to their adjudication".

[27] Since I am not seized with the review application, I am not in a position to interrogate the issue of prescription of the arbitration award.

[28] In the circumstances, I make an order as follows-

Order

1. The application, brought in terms of Rule 11 of the Rules of this Court to dismiss the application for review instituted by the respondent, is dismissed.
2. The Registrar is directed to set down the application to review the award made by Commissioner Margaret Smith under the auspices of the CCMA be set down on the unopposed roll on notice to both parties.
3. There is no order as to costs.

S. July

Acting Judge of the Labour Court

Appearances

For the Applicant:

H Pretorius

Instructed by:

MacGregor Erasmus Attorneys

For the Respondent:

Advocate D Skosana SC

Instructed by:

State Attorney