IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: J 4300/00

In the matter between:

MPUMALANGA PROVINCIAL LEGISLATURE	**Applicant**
and	
PROFESSOR JOSEPH MASEKO N.O.	**First Respondent**
COMMISSION FOR CONCILIATON, MEDIATION & ARBITRATION	**Second Respondent**
THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	**Third Respondent**
NATIONAL EDUCATION HEALTH & ALLIED WORKERS UNION	**Fourth Respondent**
THEKLA THEMBANI BANDA	**Fifth Respondent**

JUDGMENT

TIP AJ :

The fifth respondent was employed by the applicant until her dismissal on or about 22 October 1999 pursuant to a disciplinary hearing and a consequential letter of that date. She brought an urgent application to this court which was resolved by agreement *inter* alia to the effect that she would pursue an appeal in terms of the provisions of resolution 2/1999 of the third respondent (which is a disciplinary code of no especial significance to this review). There followed a conciliation board appointed by the applicant. Conciliation was unsuccessful and the dispute was then referred by the fourth and fifth respondents to the CCMA. That referral resulted in the appointment of the first respondent as arbitrator. He concluded that the dismissal of the fifth respondent had been substantively unfair and ordered her reinstatement.

The applicant now seeks to have that award reviewed and set aside. It contends firstly that the CCMA lacked jurisdiction to hear the matter, since the third respondent had come on stream as a dispute resolution forum with effect from 1 June 2000, being before the referral to the CCMA. The applicant contended secondly that the award should in any case be set aside on the merits, on various grounds.

I am not satisfied that all relevant factors in relation to the jurisdiction question have been sufficiently argued before this court for me to determine this matter on that basis. Jurisdictional boundaries are a matter of general importance to the various dispute resolution bodies that are in operation within the public sector. Delineations of jurisdiction should be determined only where there is certainty as to the relevant facts and where pertinent statutory provisions have been fully considered in relation to those facts. That is not the position in this case.

For instance, Mr Laka on behalf of the fifth respondent relied variously on section 147(2)(a) of the Labour Relations Act 66 of 1995 ("the Act") and on section 147(3)(a) and, for good measure, also on section 147(5)(a). Which one of them is the applicable one has not been clarified. Each of those provisions contemplates a different underlying factual constellation and may or may not require a deliberate election on the part of the CCMA to exercise jurisdiction either through the appointment of a commissioner or, where one has already been appointed, to confirm that appointment. Nothing has been placed before this court in relation to these factual questions. It is therefore entirely unclear to me whether or not the CCMA gave any consideration to the sections of the Act that Mr Laka now cites in defence of the award. *Prima facie* it did not and it would therefore be inappropriate, in my view, for this court to hand down a decision on jurisdiction that *inter alia* traverses the provisions of section 174. The submissions of Mr Vally, on behalf of the applicant, did not advance the position. In addition, the transcript of the proceedings in the CCMA before the first respondent is of a very poor quality. It is liberally sprinkled with the inscription "inaudible". This occurs to the extent that it is impossible to determine with any reasonable degree of certainty what was said before the first respondent or what facts were placed before him in relation to the jurisdiction question.

In the circumstances, I intend to depart from the usual sequence, which would be to resolve the jurisdiction issue first, and to thereafter examine the merits of the matter, should that be necessary. I do so because it appears to me that the first respondent misdirected himself fundamentally in relation to an important issue before him and that the award in any event should be reviewed and set aside. It is my view, further, that the matter should then be remitted to the second respondent in order that it can properly consider the dispute in relation *inter* alia to the provisions of section 147, since that section in various combinations affords the second respondent an election in relation to the resolution

of a certain class of disputes.

Before turning to the terms of the award, it is necessary to set out briefly some aspects of the history of the disciplinary proceedings against the fifth respondent:-

1 On 25 January 1999 she was charged with various counts formulated in terms of section 20 of the Public Service Act, 1994, as it then read. These charges were:-

"**CHARGE ONE**

That you are guilty of misconduct in terms of section 20(o) of the Act in that on 2 April 1998 and at or near the Offices of the Provincial Legislature, you misappropriated or made improper use of any property of the State under circumstances not amounting to an offence, to wit, you prepared a government order without authorisation, to Arkansas Spur Steak Ranch for meals under the pretext that the said meals will be for the conference.

ALTERNATIVE TO CHARGE ONE

That you are guilty of misconduct in terms of section 20(b) of the Act, in that on 2 April 1998 and at or near the Offices of the Provincial Legislature, you performed or caused or permitted to be performed or connived at any act which is to the prejudice of the administration, discipline or efficiency of any department, office or institution of the State, to wit, you prepared a government order without authorisation, to Arkansas Spur Steak Ranch for meals under the pretext that the said meals will be used in a conference.

CHARGE TWO

That you are guilty of misconduct in terms of section 20(d) of the Act in that on or about 3 April 1998 at the Offices of the Provincial Legislature, you were negligent or indolent in the carrying out of your duties to wit, you signed out a government order for buying groceries at Metro without being duly authorised to do so.

ALTERNATIVE TO CHARGE TWO

That you are guilty of misconduct in terms of section 20(b) of the Act in that on 27 May 1998 at the Offices of the Provincial Legislature, you performed or caused or permitted to be performed or connived at any act which is to the prejudice of the administration of the State, to wit, you signed out a government order for buying groceries at Metro without being duly authorised to do so.

CHARGE THREE

That you are guilty of misconduct in terms of section 20(d) of the Act in that on or about 3 April 1998 at or near the Offices of the Provincial Legislature, you omitted to inform members of the Ngobeni Commission about the groceries bought and kept at Mrs Mokoena's office by yourself despite their several requests.

ALTERNATIVE TO CHARGE THREE

That you are guilty of misconduct in terms of section 20(b) of the Act in that on 27 May 1998 at the Offices of the Provincial Legislature, you performed or caused or permitted to performed or connived at any act which is to the prejudice of the administration of the State, to wit, you omitted to inform members of the Ngobeni Commission about the groceries bought and kept at Mrs Mokoena's office by yourself despite their several requests."

2 These charges were tried in a disciplinary hearing conducted by Mr B A Ndou. He delivered his finding on 18 March 1999, acquitting the fifth respondent on all charges. He records that at the beginning of the proceedings the alternative charges to charge 2 and to charge 3 were withdrawn. In relation to charges 1 and 2, Mr Ndou found that the fifth respondent had been acting in terms of lawful instructions from her superior. In respect of the third charge, the issues before him were summarised by Mr Ndou in the following way:-

"I turn now to decide the issue of the employee's alleged failure to appear before the Commission. The employee's own version is that she appeared before the Commission after being subpoenaed to so. Indeed this version has not been disputed. It appears that the employer is not satisfied with the employee's conduct to appear before the Commission only after being subpoenaed to do so. Mr Ngomane argued that the employee should have appeared before the Commission when the Commission issued the general invitation to employees to come forward. Mr Ngomane argued that it is even more so in that the employee had information about the groceries that were being probed by the Ngobeni Commission and should not have waited until she was subpoenaed by the Commission."

3 Mr Ndou concluded on the basis of that review of the evidence and submissions before

him that the fifth respondent was to be acquitted on charge 3 also. Significantly, it appears to have formed no part of the employer's evidence in relation to charge 3 that the charge was really concerned with answers that the fifth respondent did or did not give to the Ngobeni Commission when she appeared before it. The sole complaint was that she should not have required a subpoena before she presented herself. In this regard it is relevant to point out also that section 20(d), in terms of which charge 3 was framed, provides that an employee is guilty of misconduct if he or she "is negligent or indolent in the carrying out of his or her duties".

4 On 24 May 1999, the fifth respondent was served with fresh charges. Charge 1 was founded on section 20(b) of the Act and alleged that she had "knowingly purchased at the Metro Cash and Carry, items which are not used by the legislature". Charge 2 was brought in terms of section 20(d) of the Act and alleged that, in her position as assistant director in the legislature she "should have correctly exercised [her] discretion when purchasing the guest house groceries but purchased items not in use at the legislature." Charge 3 is the one that is directly germane to the present proceedings. I will cite it in full:-

"You are guilty of misconduct in terms of section 20(r) of the Act, which reads: an officer shall be guilty of misconduct if he or she makes a false or incorrect statement, knowing it to be false or incorrect, with a view to obtaining any privilege or advantage in relation to his or her official position or his or her duties, or to causing prejudice or injury to the State or a department or the public service or a member in terms of the regulations, or fails to comply therewith, in that you made a false statement knowing it to be false, before the commission with regard to your role in unlawfully purchasing groceries."

5 These fresh charges were brought before a newly constituted disciplinary panel

consisting of Messrs Modise and Legodi. Their written findings make no mention of the charges that were previously considered and disposed of by Mr Ndou. In any event, they found the fifth respondent not guilty in respect of charges 1 and 2. However, they found her guilty in respect of charge 3 on the basis that she had "made a false statement knowing it to be false before the Commission with regard to her role in having the groceries purchased". They recommended her dismissal for this.

6 At this disciplinary hearing, Mr Cuthill who was the secretary of the Ngobeni Commission was among the witnesses called on behalf of the applicant. The full Commission report was also tabled at the hearing. The panel concluded that the fifth respondent was evasive and that she had contradicted certain evidence that she had given before the Commission. They concluded that the fifth respondent had "lied" to the Commission.

Prima facie both the character and substance of the charges that were leveled against the fifth respondent on 24 May 1999 as charge 3 differed in material respects from those formulated and presented on 25 January 1999. The one was based on negligence or indolence and in fact related to the alleged recalcitrance of the fifth respondent to appear expeditiously before the Ngobeni Commission. The second related to allegations of deliberate falsehood and dealt directly with what the fifth respondent is alleged to have testified to before that Commission. The mere fact that both charges relate to an appearance before the Commission does not mean that they are legally indistinct. I should make it clear that this is a *prima facie* conclusion only. It is based solely upon the findings of the respective disciplinary presiding officers. I have had no sight of any transcript in respect of either of the disciplinary processes, nor of the proceedings before the Ngobeni Commission or, even, its report. Likewise, as already indicated, it is not possible for me to discern

what may or may not have been placed before the first respondent in this regard. I should add that my references to the provisions of section 20 of the Public Service Act of 1994 similarly imply no conclusion by this court that the charges against the fifth respondent were correctly formulated in terms of that Act. I deal with them solely because of the manner of the treatment of these charges by the first respondent.

The first respondent's approach to these different charge sheets and their associated disciplinary processes was cavalier and superficial in the extreme. He recited in full the content of the charges brought on 25 January 1999. In relation to those brought on 24 May 1999, the first respondent simply declared:-

"Complainant received a new charge sheet with the same counts of misconduct relating again to the evidence adduced in the Ngobeni Commission of Enquiry."

He did not recite these new charges and did not in any way compare the precise nature of the charges or the proceedings concerning them in the two distinct disciplinary events. I set out *verbatim* the conclusions reached by the first respondent:-

"I agree with applicant that it was un-procedural and irregular for the respondent employer to institute the second Disciplinary hearing to adjudicate over a matter flowing from the same cause of action that was litigated and settled;

I also agree with applicant that the laying on of the same charge twice, upon the same person, is illegal and amounts to a '*double jeopardy*';

I note with concern that the alleged offences were also made in both the hearings, based on alleged violations of the Public Service Act (Supra), which applicant are even contesting. And applicant in its assertions that the Respondent is not part of the Public Service, in legal terms, persuades me, Sociologically, perhaps, but the Public Service Act is a statute that speaks for itself, and does not include any of the legislatures in general and nor the Mpumalanga Legislature in particular;

I also agree with applicant's further submissions that the Complainant was never afforded the opportunity to test such evidence during this hearing or at any other stage; and

Elements of the alleged misconduct were, indeed, never proven, but the joint chairmen of the last disciplinary hearing, took it for granted that something that was a finding of another court or forum, was necessarily binding in their own hearing and went on to dismiss solely, on the basis of that. This I find quite embarrassing and strange, to say the least."

The only aspects of these conclusions that are pertinent to the first respondent's finding that the dismissal had been substantively unfair are those relating to the issue of double jeopardy. As I have already set out, that conclusion was arrived at without any meaningful appraisal of the different charge sheets and their allied processes. The first respondent simply remarked that the new charges contained the "same counts of misconduct" as had constituted the first charge sheet. As is apparent from the analysis set out above, that summary verdict on the part of the first respondent is not sustainable. It follows that the further conclusions reached by the first respondent and his consequential award were not justifiable. There is no apparent rational connection between the material before him and his conclusions. His award therefore falls well within the zone of reviewability as set out in *Carephone (Pty) Limited v Marcus N.O. & Others* (1998) 19 ILJ 1425 (LAC) and *Shoprite Checkers (Pty) Limited v Ramdaw N.O. & Others* (2001) 21 ILJ (LAC).

Although the applicant has been successful in that the award has been set aside, it does not follow that an order of costs in its favour should be made. Its primary prayer for relief was grounded upon the question of jurisdiction. As is apparent from the award of the first respondent, the applicant devoted its efforts before him towards the same question. Notwithstanding that, the applicant has failed to place this court in a position to make a proper finding in relation to that issue. It is ultimately the responsibility of an applicant to ensure that a record on review is complete and comprehensible.

In this case, it has fallen well short and it is appropriate that this court should mark its displeasure through a fitting order in respect of costs.

In the result I make the following order:-

1 The award made by the first respondent under CCMA case number MP 17454 dated 13 August 200 is hereby reviewed and set aside.

2 The matter is remitted to the Convening Senior Commissioner of the CCMA for Mpumalanga, for the purpose of a formal decision as to the jurisdiction of the CCMA to determine this dispute having regard *inter alia* to section 147 of the Labour Relations Act, No. 66 of 1995.

3 All parties are given leave to place facts and/or submissions before the said Convening Senior Commissioner for the purpose of the decision referred to in paragraph 2 hereof, provided that such facts and/or submissions must be delivered by 26 October 2001.

4 No order is made as to costs.

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K S TIP
Acting Judge of the Labour Court

Date of hearing : 28 September 2001

Date of judgment : 12 October 2001

For applicant : Adv B Vally
Instructed by : The State Attorney

For fifth respondent : Adv A P Laka
Instructed by : Mokabane & Partners