CASE NO. J5646/00

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

HEARING DATE: 6 June 2001

In the matter between:

URITY Applicant

and

First to Tenth

Respondents

REASONS FOR JUDGMENT DELIVERED ON 4 JULY 2001.

REVELAS J:

1. The applicant sought to review and set aside three arbitration awards. In each of the arbitration awards the respective arbitrators found that they had the necessary jurisdiction to arbitrate a dispute about the dismissal of employees who had been dismissed by the South African Police Services, ("SAPS"), such as the individual employees in question, had been.

2. The applicant also sought a declator , (which the respondents say, for want of legal certainty on this aspect, they do not appose) to the effect that:

2.1 **An employee who had been dismissed by the SAPS pursuant to an enquiry and who intends to challenge the findings of the enquiry, is obliged to lodge an appeal in terms of Section 24(1)(g) of the South African Police Service Act No. 68 of 1995 to the appeal authority**

established in terms of Regulation 7(1) of regulations of the regulations for the SAPS.

2.2 **The decision of such appeals authority is final and binding upon the parties in accordance with the provisions of Regulation 7(4)(a) of the Regulations for the South African Police Service.**

2.3 **Such affected employee is precluded from referring, after a decision of the appeal, the dispute tot he Commission for Conciliation, Mediation and Arbitration ("CCMA") or the Safety and Security Sectoral Bargaining Council for Arbitration. ("SSSBCA")**

2.4 **The remedy available to such affected employee who seeks to challenge the decision of the appeal authority is to review the decision of the appeal authority in the Labour Court.**

3. The respective arbitrators found that if an employee who had been dismissed by the SAPS, chose to refer a dismissal dispute to the appeals authority, the appeals authority's decision was not "**final and binding**" and that the employee was entitled to refer the dispute to the CCMA or the SSSBCA, after and irrespective of the findngs of the appeals authority.

4. The question which I ultimately have to decide is whether Regulation 7(1) read together with Regulation 7(4)(a) of the Regulations for the SAPS, precludes an employee dismissed by the SAPS from referring a dismissal dispute to the CCMA before exhausting the internal procedures available, such as lodging an appeal.

5. In terms of section 158(a)(iv) of the Labour Relations Act, 66 of 1995 ("the LRA"),the Labour Court is entitled to make any approprite order including a declaratory order. (*See: SACWU v Engen Petroleum Limited and*

Another (1998) 19 ILJ 1568 (LC))

6. In terms of section 157(3) of the LRA the Labour Court is empowered to review arbitration awards made under the auspices of the SSSBCA (or Council). Accordingly, the determination of the dispute in question falls within the jurisdiction of the Labour Court.

7. The appeals authority in question is created by an agreement concluded between the applicant and the second to third respondents, and in which the SAPS Disciplinary Regulations are adopted. Members of the appeals authority are designated to be persons who have practiced as attorneys, advocates or who have served as judges, magistrates or arbitrators for at least five years, or who have other substantial experience in legal matters.

8. In terms of clause 13(11) of the regulations **"any decision of the appeals authority shall be final and binding"** The disciplinary regulations have not been repealed.

9. The constitution of the SSSBCA encourages the Council to conciliate and arbitrate dismissal disputes. The applicant argued that the constitution is merely empowering and does not override the regulations. It further contended that the constitution, and specifically the agreement implementing it, is subject to clause 4 of the Regulations.

10. The respondents argued that an employee is entitled to bypass the appeal procedure, and if he of she chooses to make use of the appeal procedure, the dispute is still open to be conciliated and arbitrated.

11. In *P.P.C. Cement (Beestekraal) v Khunounal (2000) 2 BLLR 153 (L.A.C.)* the Labour Appeal Court had to determine the meaning of the words "**final and binding**" contained in a private arbitration agreement. The court held as follows at 159 G:

"**In my view the phrase "final and binding' when used by the parties in an agreement where they appoint a third party to make a decision to put an end to their dispute, as was done by the parties in this case, means that one such third party has decided the dispute, the dispute comes to an end and none of the parties can initiate litigation of unhappy with that decision except, where applicable, by way of review proceedings. I hold that this is what the phrase "final and binding" meant and was intended to mean in the agreement of the parties in this case.**"

The applicant submitted that the interpretation placed on those words by the Labour Appeal Court is equally applicable to the Regulations and no other interpretation is possible.

12. The applicant argued that there is no conflict between the SAPS Regulations and the principles enunciated in the LRA. Both promote the expeditious and just resolution of labour disputes.

13. The applicant also made another point, and correctly so, that the LRA encourages voluntarism and that collective agreements are given primary over the provision of the LRA. In this regard reference was made to *Free State Buying Association Limited t/a Alpha Farm v SACCAWU and Another (1999) 3 BLLR 223 (LC)*.

14. In support of its case, the applicant also contended that its interpretation of the Regulations, (that the latter permits only a review of the appeal tribunal's decision as a remedy in terms of the

LRA), provides for a quick cheap and effective dispute resolution mechanism to resolve dismissal disputes. By contrast, so it was argued, the respondents' suggestion of resolving such disputes is costly, uncertain and may lead to labour unrest. This submission is not without merit but it is may also be that the review of a appeal tribunal's decision by the Labour Court may be just as costly as the review of an award of the SSSBCA or CCMA.

15. The arguments advanced by the applicant are explored more closely.

16. When parties to a collective agreement, agree to resolve their dismissal disputes by way of private arbitration, they clearly seek to regulate their own affairs without having recourse to the LRA. (Save of course when an award emanating from the private arbitration is sought to be reviewed in terms of section 158(1)(g) of the LRA).

17. The question of arbitration only arises once the employee refers a dismissal dispute. In the normal course, employees refer dismissal disputes only once they have been dismissed. This may or may not be, after the dismissal had been confirmed at an appeal hearing.

18. In terms of Schedule 8 of the LRA, an employer is not obliged to afford an employee the opportunity of an appeal hearing. There is therefore no general principle, in terms of the LRA, or otherwise, providing that, before an employee may refer a dismissal dispute, all internal proceedings such as appeals, (if provided for) are to be exhausted first, even though it may be disadvantageous and undesirable to do so in some circumstances.

19. When an employee elects not to make use of an appeal procedure provided for, but proceeds to refer a dispute to the CCMA for example, the absence of a appeal hearing could not render the award ultimately obtained from the CCMA, a nullity. At best, the employee may be faced with the criticism that had he or she lodged an appeal, the dismissal may have been set aside and referral of the dispute could have been avoided. Failing to lodge an appeal before declaring a dispute, may in certain circumstances substantially diminish the employee's prospects of a successful complaint about the procedural unfairness of a dismissal. Yet, as demonstrated, no general principle exists which precludes an employee form persuing a dismissal dispute at the CCMA, if he or she elects not to lodge an appeal.

20. Where provision is made for an appeal procedure in a collective agreement, the same considerations should apply, unless the agreement expressly precludes the invocation of the dispute mechanisms provided for in the LRA or Regulations. It must next be considered whether or not the words **"final and binding"** in respect of the appeal procedure provided for in the agreement, has that effect. I am not convinced that the word **"final and binding"** in clause 13(11) of the Regulations, establishes such a principle, *in casu*. In my view, the words mean little more than that there are no further internal procedures available.

21. An arbitration hearing arising from a dismissal dispute, is a hearing *de novo*. It is not simply a review of the employer's disciplinary proceedings and decisions. (*See: County Fair Foods (Pty) Ltd v CCMA and Others (1999) 11 BLLR 1117 (LAC) per Kroon JA at paragraph 20 at 1125.*)

22. An appeal hearing is not a hearing *de novo*, and in fact a more limited

procedure from the employees perspective.

23.Under the previous Labour Relations Act, Act 28 of 1956 (or "the old Act"), police officers were precluded from its protection in that they were specifically excluded from the definition of "employee" in that Act. That exclusion was not followed by the subsequent LRA, and accordingly, in the absence of an express clause tot the contrary, employees dismissed by the SAPS may invoke the dispute mechanisms provided for in the LRA.

24.In my view, where it is intended to limit an employees rights to such an extent that the only remedy available to him or her, is to review the appeal tribunal's decision, such an intention must be expressly stated in the Regulations. It is not.

25.The constitution of the SSSBCA also makes provision for dispute resolution mechanisms such as conciliation and arbitration by the SSSBCA and CCMA.

26.These recommendations would be of little value if an appeal decision which is described as **"final and binding"** had the same status and effect as an award by a private arbitrator, i.e. that it may be reviewed but excludes further arbitration.

27.In my view, the applicant's construction of the words **"final and binding"** in the context of a disciplinary appeal, has the effect of rendering the dispute resolution procedures referred to in the Council's Constitution superfluous and to revoke a previously existing right conferred by the LRA. This could not have been attended.

28. In the circumstances the application was dismissed with costs.

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