IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NR JR575/06

In the matter between

THE PREMIER OF THE NORTH WEST

PROVINCIAL GOVERNMENT **First Applicant**

THE MEC FOR THE DEPARTMENT OF AGRICULTURE

CONSERVATION & ENVIRONMENT (NORTH WEST

PROVINCE) **Second Applicant**

And

DR EMILY M MOGAJANE **First Respondent**

ADVOCATE PG SELEKA **Second Respondent**

JUDGEMENT

BASSON, J

NATURE OF THE APPLICATION

(1) This is an application for an order reviewing and setting aside rulings made by the Second Respondent who acted in the capacity of a Chairperson of a disciplinary hearing in terms of which it was held --

(i) *Firstly,* that no disciplinary enquiry could competently be held on charges arising out of the alleged misconduct of the First Respondent if convened more than sixty days after she was charged with such misconduct. This ground for review became moot in view of the fact that the First Respondent has resigned prior to these proceedings. On behalf of the Applicants it was, however, pertinently emphasized that the Applicants were not conceding this point, this Court is merely required not decide this point simply because it has become academic in light of the said resignation.

(ii) *Secondly*, that the First Respondent was entitled to costs of suit. In view of the fact that the first ground for the review became moot, this was the only issued that remained to be decided.

PARTIES

(2) The First Applicant is the Premier of the North West Provincial Government (hereinafter referred to as the "Premier") and the Second Applicant is the MEC for the Department of Agriculture Conservation & Environment (North West Province – hereinafter referred to as the "Department"). I will also refer to the First and Second Applicants collectively as the "Applicants". The First Respondent, Dr Emily M Mogajane (hereinafter referred to as "Mogajane"), is a former employee of the Department. The Second Respondent is Adv PG Seleka (hereinafter also referred to as the "Chairman") who chaired a disciplinary enquiry convened to enquire into the conduct of Mogajane.

BRIEF BACKGROUND

(3) Mogajane commenced her employment as the Deputy Director General in the Department of Agriculture and Environment (the Department) on 1 March 2005. She was suspended on 26 August of the same year by the office of the Premier. A disciplinary hearing was convened on 6 - 10 February 2006 to enquire into the conduct of Mogajane. The Second Respondent was appointed as the Chairperson of the enquiry.

(4) At the commencement of the hearing on 6 February 2005, Mogajane raised a point *in limine* in terms of which it was argued that the Department had failed to comply with the sixty day period as set out in Resolution 1 of 2003 of the Public Service Coordinating Bargaining Council (hereinafter referred to as "the Bargaining Council")

(5) The Chairperson ruled that he will decide the point *in limine* together with the merits of the matter. The hearing then proceeded for five days.

(6) The Chairperson handed down two rulings: The first ruling (hereinafter referred to as "the *main ruling*") was handed down on 22 February 2006. In terms of the main ruling, the Chairperson ruled that the Department had been debarred from holding a disciplinary hearing where the period prescribed within which a disciplinary hearing should be held, had expired. I have already stated that this point became moot when Mogajane resigned from the Department. On 23 February 2006, which is the very next day, the Chairperson handed down a second ruling (hereinafter referred to as the "*ruling on costs"*). In terms of this ruling on costs, the Chairperson granted an order for costs in favour of Mogajane for the full five days for which the hearing was set down including the costs of preparation after 27 October 2005 to date

of hearing. As already pointed out, this ruling on costs forms the subject matter of this review application and the only issue that remains to be decided is whether this ruling on costs should be reviewed and set aside.

THE RULING ON COSTS

(7) In deciding the issue of costs, the Chairperson relied on his terms of reference as recorded in the pre-trail minutes dated 25 January 2006. The parties agreed as follows:

> *"**4. ISSUES THE CHAIRPERSON IS REQUIRED TO DECIDE ON***
>
> *4.1 The parties agreed that the chairperson is required to decide on the following issues:*
>
> *4.1.1 The guilt of the employee in relation to the charges set out in the charge sheet.*
>
> *4.1.2 The appropriate sanction that is to be imposed on the employee should she be found guilty of any charges.*
>
> ***4.1.3 Whether the employer should be ordered to pay the legal costs of the employee."*** (Own emphasis.)

(8) The Chairman explains why he did not make a ruling on costs in the main ruling and states that he had "*inadvertently omitted to decide on this issue [namely costs] in the main ruling*". In respect of costs, the Chairperson states that the general rule on costs, namely that costs follow the event, is not an immutable rule and that there may be a departure from this principle on good grounds. After taking into account various factors the Chairperson came to the conclusion that costs should be awarded.

(9) On behalf of the Applicants it was argued that the decision to award costs constitutes a reviewable and material irregularity and that the proper way to cure the irregularity was to set aside the decision on costs in its entirety:

(i) Firstly, the Chairperson should first have considered whether he was jurisdictionally competent to make an award of costs and secondly, if so, whether the award should be made against the Department (the employer). It was submitted that the Chairperson wholly failed to consider the first issue and thus prevented himself from concluding, as in law he should have, that there was no provision empowering him to make such an award and in consequence that it was jurisdictionally

incompetent for him to do so. In this regard it should be pointed out that the Applicants did not deny that, in terms of paragraph 4.1.3 of the pre-trail minutes, the Chairperson was charged with determining "*whether the employer should be ordered to pay the legal costs of the employee*". What is denied by the Applicants is that fact that, in making this order, the Chairperson acted within the ambit of the terms of reference. It was argued that the pre-trail minutes did not entitle the Chairperson to make an order of costs. It only entitled the Chairperson to determine whether or not it would be competent to make a cost order against the employer.

(ii) Secondly, the decision to award costs was made without inviting the parties to make submissions on the issue of costs. The Chairperson should have afforded the Department an opportunity to made submissions in light of the fact that the original hearing was solely devoted to the points *in limine* and the merits.

(iii) Thirdly, when the Chairperson made the ruling in respect of costs, he was already *functus officio*. He therefore did not have the power to re-open the proceedings in order to make the

award in respect of costs. The Applicants abandoned this point during argument.

(iv) Fourthly, the Chairperson should not have awarded costs for the full five days.

(10) On behalf of Mogajane it was argued that because the Chairperson who presided over the disciplinary enquiry was appointed by the Applicants, the ruling made by him was essentially a ruling by the Applicants. Consequently the Applicants cannot in law review themselves. The review brought by the Applicants is therefore legally impermissible. The Applicants disputed that they were in fact reviewing themselves by bringing the present application and argued that the disciplinary proceedings instituted against Mogajane were not proceedings launched pursuant to an internal disciplinary process, the Chairperson was appointed as an arbitrator in accordance with the provisions of clause 7.3(c) of the disciplinary codes and procedures (contained in Schedule 1 of Resolution 1 of 2003). It was argued that because the Chairperson was an independent arbitrator who was appointed in accordance with clause 7.3(c), his decisions "*will be final and binding and only open to review in terms of the Labour Relations Act, 1995*". I will return to this argument.

(11) In respect of the ruling of cost, it was argued on behalf of Mogajane that the Applicants were likewise not entitled to review the Chairperson's ruling to award costs since the Chairperson was acting in his capacity as an appointee of the Applicants when he made the said ruling.

JURISDICTIONAL POINT

(12) The first question to be decided relates to the jurisdictional competence of the Applicants to refer the present review to this Court. I have already briefly referred to the submission advanced on behalf of Mogajane namely that it is not competent for an employer (the Applicants) to launch a review application in terms of the LRA to review a ruling made by its own chairman. On behalf of the Applicants it was submitted that the Chairman was appointed to act as an "*arbitrator*" and not as a "*chairperson*" of an internal disciplinary enquiry. If it is found that the Second Respondent was appointed as an arbitrator and not as a Chairperson of the disciplinary enquiry, I agree with the Applicants that it would be legal competent for this Court to review[1] the decisions by the arbitrator.

THE BARGANING COUNCIL AGREEMENT

[1] See section 145 of the Labour Relations Act 66 of 1995. Hereinafter referred to as "the LRA".

(13) *Internal* disciplinary enquiries are dealt with under clause 7.3 of Schedule 1 of Resolution 1 of 2003. This clause provides that the disciplinary hearing must be held within ten working days after the notice referred to in paragraph 7.1(a) was delivered to the employer. The chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer.

(14) *External* enquiries are dealt with under clause 7.3(c) and reads as follows:

> *"The employer and the employee charged with misconduct may agree that the disciplinary enquiry will be chaired by an* ***independent arbitrator*** *from the* ***relevant sectoral bargaining*** *council. The decision of the arbitrator will be final and binding and only open to* ***review*** *in terms of the Labour Relations Act. 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.*" (Own emphasis.)

(15) It appears from the contents of clause 7.3(c) *supra* that it is applicable to situations where both the employer and the employee agree to

dispense with the internal procedures for the conducting of an internal disciplinary enquiry and opt for arbitration instead.

(16) Mogajane states in the answering affidavit that she did not have any say in the appointment of the Second Respondent nor did she participate in his appointment. She further states that it was her understanding that the Second Respondent presided over a disciplinary hearing on behalf of the Applicants. I have perused the Applicants' replying affidavit and, apart from a bold denial, can find no express allegation or statement to the effect that there was such an agreement. I can also find no reference to such an agreement in any of the documents attached to the papers nor was I referred to such an agreement. In fact, if the papers are perused it appears that there are ample indications that the Second Respondent was in fact appointed as a "*chairperson*" of a disciplinary enquiry and not as an "*independent arbitrator*" from the relevant sectoral bargaining council as alleged by the Applicants. I have also perused the Applicants' papers and can find no allegation that the Second Respondent was appointed from the ranks of the Bargaining Council. The following does, however, appear from the papers:

(a) A pre-trail conference was held on 3 November 2005. It appears from clause 9 thereof that a request was made by

Mogajane that the parties submit to an arbitrated process in terms of Resolution 1 of 2003 (*supra*). The minutes further confirm that the employer's representatives will take further instructions from their principal. In a letter dated 7 November 2005 Mogajane's legal representative specifically refers to the concern raised by Mogajane namely that both parties should submit to an arbitration process in terms of the said resolution. The letter further advises the Department that it (the Department) must submit a response within five working days whether the employer party would agree to the matter being resolved through the Bargaining Council. The response received from the Office of the Premier on 9 November 2005 is instructive. This letter does not state that the employer agrees to a process of arbitration. Quite the contrary, it states that the process of arbitration is not under the control of the parties and can take too long to dispose of the matter. This, in my view, supports the submission that there was in fact no agreement to a process of arbitration and that the appointment of the Second Respondent was not in the capacity of an "*arbitrator*" but in the capacity of a "*chairman*" of a disciplinary enquiry. The relevant portion of the letter reads as follows:

"We have canvassed the proposal of an arbitration process to the MEC and he has instructed us as follows:

(a) *The MEC has confidence in the abilities of the Presiding Officer and does not have any doubt that he will handle himself in a professional manner and without prejudice to the employee and the Department.*

(b) *It is in the best interest to both the employer and employee that this matter should be dealt with and resolved speedily. You will note and agree that it is not ideal to have an employee of the status of your client out of the Department pending finalization of an enquiry for a long time.*

(c) ***The process of arbitration is not under the control of any of the parties and can therefore take too long to dispose of the matter****."* (Own emphasis.)

(ii) It appears from the pre-trail minutes that a one Adv Malindi was appointed as the "*chairperson*" of a "*disciplinary enquiry*". His designation is clearly described as being a member of the Johannesburg Bar. No reference is made to

the fact that he has been appointed as an arbitrator from the ranks of the Bargaining Council.

(iii) It also appears from the record of the disciplinary enquiry that the Second Respondent (who was appointed as the Chairperson after Malindi had recused himself) introduced himself as the "*chairperson*" of the inquiry and not as an arbitrator presiding over a process of arbitration.

(iv) The notification to attend the disciplinary hearing contains no reference to the fact that the hearing will be one as contemplated by clause 7.3(c) of the Resolution. The fact that an external person chaired the disciplinary hearing is in itself not extraordinary and does not in any event transform the proceedings into proceedings akin to an arbitration process.

(17) In light of the aforegoing I am satisfied that the proceedings were in the nature of an internal disciplinary hearing and not in the nature of an arbitration as contemplated by clause 7(3)(c) which may be reviewed. Consequently this Court does not have jurisdiction to review the ruling on costs. Accordingly the application is dismissed.

COSTS RULING

(18) Even if I am wrong in dismissing the application on a jurisdictional point, I am nonetheless also of the view that, in respect of the merits of the application, the application falls to be dismissed.

(19) It is, in my view, clear from the minutes as well as the typed record of the proceedings that all the parties present at the disciplinary hearing were aware of the powers that were conferred upon the Chairperson and that such powers included the power to award costs. At the commencement of the inquiry, the representative on behalf of the Department also read out into the record the terms of reference as contained in item 4 of the pre-trail minutes. The Chairperson also specifically referred to item 4.1.3 of the pre-trail minutes which refers to the issue of costs. It was not the case for the Applicants that this agreement was not binding on them and it should therefore be accepted that where parties enter into an agreement willfully, they would be bound by the terms thereof. I do not accept the argument that the Chairperson should first have considered whether he has the legal competence to award costs. It is, in my view, clear that he did have such a competence in terms of the pre-trail minutes.

(20) It further appears from the record that it was specifically agreed upon between the parties through their legal representatives that certain preliminary points would be raised on behalf of Mogajane and that the disciplinary hearing would continue on the preliminary points *as well as* the merits and that, should the Chairperson find against Mogajane's on the preliminary point, the Chairperson will continue and consider the merits. The decision to award costs for the full five days is well motivated and I can find no reason to interfere with the decision.

(21) I am also not persuaded by the argument that the ruling on costs falls to be reviewed because the Chairperson had made the ruling without having afforded the parties an opportunity to make submissions in respect of costs. Both parties submitted their closing arguments in writing to the Chairperson. It is clear from the closing arguments submitted on behalf of Mogajane that the issue of costs was pertinently raised. The closing arguments were sent to the Applicants' legal representative at the same time when it was submitted to the Chairperson. The Applicants therefore had an opportunity to respond to the submissions made on behalf of Mogajane in respect of costs but chose not to do so. I also agree with the submission that this omission cannot now be blamed on the Chairperson.

(22) In the event, I am of the view that this application must fail. As far as costs are concerned, I am of the view it accords with the requirements of law and fairness that the Applicants should pay the costs.

(1) In the result the following order is made:

(i) The Application is dismissed.

(ii) The Applicants to pay the costs jointly and severally, the one paying the other to be absolved.

……..

BASSON, J

DATE OF JUDGEMENT: 22 August 2007

DATE OF HEARING: 19 June 2007

FOR THE APPLICANT:

BRASSEY, SC

INSTRUCTING ATTORNEY: BOWMAN GILFILLAN INC

FOR THE RESPONDENT:

ADV WR MOKHARE

INSTRUCTING ATTORNEY: MOKHATLA ATTORNEYS