IN THE LABOUR COURT OF SOUTH AFRICA
BRAAMFONTEIN

CASE NO: J1067/08
DATE: 2008-11-10

REPORTABLE

In the matter between:

ANN NGUTSHANE Applicant

And

ARIVIAKOM (PTY) LTD t/a ARIVIA.KOM First Respondent

CHAIRPERSON OF THE BOARD (ARIVIA.KOM) Second Respondent

CHAIRPERSON OF THE SUB-COMMITTEE OF THE BOARD Third Respondent

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J U D G M E N T

PILLAY D, J:

1. Anne Ngutshane, the applicant, sought to review the decision of the third respondent to dismiss her. The third respondent was the chairperson of the sub-committee of the board of Arivia.kom, which was the first respondent. The facts leading to her dismissal were as follows: Ngutshane worked for Arivia.kom as its human resources executive from 14 June 2004. Eskom and Transnet were the shareholders of Arivia.kom. When Zeth Malele, the Chief Executive

Officer, left in October 2006, Eskom seconded Kiruben Pillay to act as Arrivia.kom's CEO. Ngutshane did not get along with Pillay. She lodged a grievance against him for being racist and for humiliating, undermining, harassing and victimising her. Pillay responded to the board that Ngutshane was a non-performer.

2. On 17 August 2007, the chairman of the board of Arivia.kom, the second respondent, offered Ngutshane a separation package. Ngutshane declined the package. Her relationship with Pillay deteriorated. Eventually, in mid-February 2007 Ngutshane agreed to submit to facilitation before Thandi Orleyn, an independent facilitator. Ngutshane subsequently objected to Orleyn's appointment because she represented Ngutshane's previous employer in a dispute against Ngutshane. On 12 March 2008, the board withdrew its offer of independent facilitation and directed that the grievance be processed according to Arivia.kom's normal procedure.

3. Following a forensic accounting investigation into allegations of irregularities and fraud, the board resolved to suspend Ngutshane pending further investigation. On 21 April 2008, Pillay suspended Ngutshane and instructed her to leave the premises immediately.

4. The investigation was to take about four weeks. On 26 May 2008 Ngutshane's attorneys asked Arivia.kom's attorneys, Cliffe Dekker Inc, for a copy of the board's resolution to engage forensic

investigators and a copy of their report.

5. On 23 April 2008, Cliffe Dekker Inc denied that Ngutshane was suspended unlawfully. It undertook to give her further particulars once the forensic investigation was completed and to consider her grievance.

6. On the basis of three letters and an IT Web article, the remuneration sub-committee of the board informed Ngutshane on 23 May 2008 as follows: It believed that Ngutshane was incompatible with Arivia.kom's aims and direction and that no purpose would be served by submitting a finding on her grievance. The board had delegated the sub-committee to deal with her matter. The sub-committee was to convene on 9 June 2008 to decide whether, on the common cause facts, Ngutshane irreparably damaged the employment relationship and whether it should terminate her employment. The sub-committee invited Ngutshane to make representations to it by 6 June 2008.

7. On 30 May 2008, Ngutshane's attorneys informed Arivia.kom that she considered the procedure to be an attempt to dismiss her without following a lawful and fair process before a properly constituted disciplinary enquiry. Ngutshane declined the invitation to submit representations to avoid her dismissal.

8. On 26 June 2008 the sub-committee informed Ngutshane that it decided to terminate her employment summarily for the following reasons:

> "6.1 the breakdown of the trust relationship as a result of your conduct;
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> 6.2 that we have no confidence that you will be able to honour your fiduciary duties associated with the trust which the Shareholders and Board invested in you;
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> 6.3 that you placed yourself in direct conflict with the interests of the organisation; and
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> 6.4 that we believe that you are incompatible with the organization, its aims and direction." (*sic*)

9. The procedure adopted in making that decision is the subject of this review. The first question is whether the Labour Court has jurisdiction to review the decision of a public employer to dismiss its employee. Initially, Mr Mokare who appeared with Mr Seleka for the employee had relied on section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). During argument, he abandoned his reliance on PAJA. He continued to rely on section 158 (1) (h) of the Labour Relations Act No 66 of 1995 (LRA) as the source of the jurisdiction of the Labour Court.

10. He also relied on this Court's decision in *Maada v The Member of the Executive Council of the Northern Province for Finance and Expenditure and Another*, 2003 24 ILJ 937 (LAC). In that case, this

court had to decide whether it had jurisdiction because the dispute had not been conciliated. This Court found that as section 157 (4) (a) of the LRA gave the Labour Court a discretion to determine a dispute that had not been conciliated, it could dispense with conciliation in that case. Whether conciliation is dispensable depends on the facts of each case.

11. In this case, the question arises in a context broader than whether conciliation is a jurisdictional prerequisite for arbitration. The jurisdictional question is whether public employees can choose to challenge their dismissal either in the Labour Court by way of review or in the CCMA or Bargaining Council through conciliation and arbitration.

12. Mr Mokare submitted that the answer is "yes." Because the procedure that the employer applied to dismiss the employee was not only unfair but also unlawful, the employee had recourse to the Labour Court. (*Fedlife Assurance Limited v Wolfaardt* 2001 22 ILJ 2407 SCA para 27; *Boxer Superstores Mthatha and Another v Mbenya 2007 28 ILJ 2209 (SCA))*

13. Counsel for the respondents, Mr Cassim who appeared with Mr Boda, submitted that the Labour Court had no jurisdiction, firstly because substantively, the nature of the dispute was dismissal. As such, it should be conciliated and arbitrated. The Labour Court

should not, as a court of first instance, hear dismissal disputes. (*Chirwa v Transnet Ltd and Others*, 2008 2 BLLR 97 (CC) 65-66; *Ngcobo v KZN Health Service (*1999) 2 BLLR 148 (LC); *Mashego v Multi Hire (Pty) Ltd* (1999) 12 BLLR 1328 LC, *PPWAWU & Others v Nasou-Via Afrika (A Division of the National Education Group (Pty) Ltd* (1999) 10 BLLR 1092 (LC), *NEHAWU v Pressing Metal Industries (1998) 10 BLLR 1035 (LC))*

14. Secondly, dismissal is not administrative action and is therefore not reviewable. It is contractual in the context of labour and employment. (*Chirwa v Transnet Ltd & Others* (2008) 2 BLLR 97 CC *per* Skweyiya paragraph 73, *per Ngcobo* 142; *Independent Municipal & Allied Trade Union v Northern Metropolitan Substructure and Others* 1999 (20) ILJ 1018 (T))

15. Thirdly, section 158 (1) (h) of the LRA and section 6 of PAJA do not apply to dismissal disputes. If they did, they would undermine the scheme of the LRA to divide responsibilities between the CCMA and Labour Court and to prescribe conciliation as the primary process in resolving dismissal disputes. (*Sidumo v Rustenburg Platinum Mines Limited* 2007 12 BLLR 1 (CC))

16. Fourthly, in *The Member of the Executive Council for Finance KwaZulu-Natal v Wentworth Dorkin NO* (2008) 29 ILJ 1707 (LAC) the LAC held that an employee of the State may review decisions

of a disciplinary committee in the Labour Court. The review in that case is distinguishable from this case because there were exceptional circumstances and it was in the public interest to grant the review.

17. Fifthly, to allow public employees the option to both review and to conciliate and arbitrate dismissal disputes will discriminate against private employees, who do not have that option, and against poor employees, who cannot afford the costs of litigating in the Labour Court. (*PSA on behalf of Haschke v MEC for Agriculture and Others*, 2004 8 BLLR 822 (LC)). So Mr Cassim submitted for the respondents.

18. *Chirwa* provides the answer to the jurisdictional question in this case. Section 158 (1) (8) of the LRA, which empowers the Labour Court to review any decision or act of the State in its capacity as employer, and section 157 of the LRA must be construed in the context of the primary objects of the LRA. (*Chirwa per Ngcobo* paragraph 108 to 110) One of the primary objects of the LRA is to resolve disputes effectively. (Section 3 (a) read with section 1 (d) (iv) of the LRA)

19. A termination of employment that is unlawful is also unfair. When the reason for the termination is misconduct, the termination is dismissal. In this case, the substance of the dispute is the fairness

and lawfulness of the dismissal. The effective resolution of a dismissal dispute is through conciliation and arbitration. *Chirwa* confirmed that disputes about procedural unfairness of a dismissal must be conciliated (*Chirwa per* Ngcobo, paragraph 108).

20. When this matter was enrolled initially as an urgent application, the Court seized with it doubted its urgency. Consequently, the parties agreed to adjourn it for hearing in the ordinary course. If this matter proceeded as an urgent application, it would also have had another defect: There was an alternative remedy, namely, conciliation and arbitration.

21. This Court agrees with Mr Cassim that to allow a review will discriminate against private employees and the poor who have only the option of conciliation and arbitration, either because the law does not accord them the option to litigate, or because they cannot afford to litigate in the Labour Court. An interpretation that avoids discrimination should be preferred.

22. Dismissed employees should also not be allowed to steal an advantage by launching urgent applications to review decisions to dismiss and thereby cut the queue of dismissal cases pending in the Labour Court. Every dismissed employee suffers a loss of employment and remuneration in varying degrees of hardship, irrespective of the job status of the employee.

23. After pleadings closed, Ngutshane referred her unfair dismissal for conciliation and arbitration. The arbitration was scheduled for 9 September 2008. Ngutshane had it adjourned pending the outcome of this application. In this application, she sought a declarator that her dismissal was unlawful. This relief is limited and temporary because her attack is only on the procedural fairness of the dismissal. If she had submitted to the arbitration, she would have had final relief two months earlier on both the procedural and substantive fairness of the dismissal. Ngutshane advanced no explanation as to why the arbitration was not the most effective form of resolving the dispute.

24. Accordingly, the Labour Court has no jurisdiction to review the decision of the respondents to dismiss Ngutshane. The provisions of section 158 (1) (h) may apply in circumstances where the LRA offers no other remedy, e.g. where employment terminates by operation of law. However, it is not for this Court to determine the circumstances when section 158 (1) (h) applies.

25. Insofar as the Court may be wrong in declining jurisdiction, it proceeds to consider the dispute on its merits. Arivia.kom was investigating charges of fraud and other irregularities against the employee. After her suspension the employee wrote to the Deputy

President on 10 April 2008 and to, amongst others, the Minister of Public Enterprises, Minister Alec Erwin, on 9 May 2008. In her letter to the Minister, she stated categorically that she had partnered with SATAWU to challenge Arivia.kom, that she was working with SATAWU to expose corruption within Arivia.kom and that she was not in favour of State assets being sold.

26. In her letter to the Deputy President, she again wrote against the sale of the shares. Relying on her political history and connectedness, she urged the Deputy Minister to dissolve the board and replace it with a new executive that had the blessings of the ANC.

27. As the shareholders of Arivia.kom were Eskom and Transnet, the Minister was politically responsible. Arivia.kom was in the process of selling all its shares in accordance with decisions of its shareholders and the board.

28. Ngutshane's resistance to the sale was in direct conflict with Arivia.kom's objectives. Likewise, her partnering with SATAWU also conflicted with Arivia.kom's interests. By invoking her political associations, Ngutshane obfuscated her role as an executive with her role as a political activist. As a bureaucrat, she had to follow the protocols Arivia.kom prescribed for all its employees.

29. Her conduct and the contents of the two letters contained common cause facts which founded Arivia.kom's decision to dismiss her. By resorting to these two communications alone, Ngutshane placed herself in the path of conflict with Arivia.kom. Arivia.kom was entitled to form a *prima facie* view that the employment relationship had broken down.

30. In circumstances where an employee's misconduct is manifest, common cause or not in dispute, a less formal process will suffice. In those circumstances an employer's invitation to an employee to make representations is eminently reasonable and fair. In conceiving the notion of effective dispute resolution, the LRA does not prescribe a painstaking process of convening an elaborate disciplinary hearing for every dismissal.

31. In this instance, an invitation to make representations satisfied the *audi alteram partem* rule. Ngutshane declined the invitation and cannot therefore complain about not being heard.

32. In the circumstances the application is dismissed with costs.

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PILLAY D, J

Judge of the Labour Court

Date of Hearing: 06 November 2008

Date of Judgment: 10 November 2008

Date of Editing: 26 December 2008

APPEARANCES

For the Applicant:	Adv W Mokare with Adv P G Seleka
Instructed by:	Mogaswa Attorneys
For the Respondent:	Adv N A Cassim SC with Adv F A Boda
Instructed by:	Cliffe Dekker Inc.