REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: **C719/2010**

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

(obo C KING & A SOLOMONS) Applicant

and

THEEWATERSKLOOF MUNICIPALITY First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL Second Respondent

CARLTON JOHNSON N.O Third Respondent

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no**: C951/2010**

In the matter between:

THEEWATERSKLOOF MUNICIPALITY Applicant

and

M GILIOMEE N.O First Respondent

SOUTH AFRICAN MUNICIPAL WORKERS

UNION (obo C KING & A SOLOMONS) Second Respondent

Heard: 21 May 2013

Delivered: 28 August 2013

Summary: Review and cross-review of arbitration award and application in terms of section 158(1) (h) by Municipality to review disciplinary appeal chairperson's decision; *PSA of SA obo De Bruyn v Minister of Safety and Security [2012] 9 BLLR 888 (LAC)* applied and court declining to entertain section 158(1) (h) application

---

JUDGMENT

RABKIN-NAICKER J

Introduction

[1] In this consolidated matter the court was presented with two review applications and a counter-application for adjudication as follows:

1.1 A review application under case number C719/2010 in which the applicant (SAMWU) seeks to review, set aside and correct part of an arbitration award by the third respondent (the arbitrator) sitting as panelist of the second respondent (the SALGBC) on 4 July 2010.

1.2 A counter application for cross-review under case number C719/2010 in which the first respondent (the Municipality) seeks to challenge the entire award and for this court to replace it with an award dismissing the dispute referred by SAMWU to the SALBC concerning the alleged unfair dismissal of its members (King and Solomons). Condonation for the late filing of this application was granted.

1.3 A review application brought by the Municipality in terms of section 158 (1) (h) of the LRA under case number C951/2010 in which it seeks to have the disciplinary appeal findings made by the first respondent in that application (the appeal chairperson) reviewed and set aside, and remitted back to be reconsidered by another appointee.

Background to the applications

[2] On 18 November 2008, King and Solomons(the employees) were charged with and found guilty of theft and resale of scrap metal belonging to the Municipality. They were subsequently summarily dismissed by the Municipality on 16 February 2009.

[3] They lodged an appeal in respect of the findings of guilty and sanction.

[4] The appeal hearing took place on 13 July 2009 in terms of the provisions of the Disciplinary Procedure Collective Agreement (the DPCA) and which regulates disciplinary matters within local government.

[5] On 10 August 2009, the appeal chairperson made a finding that:

5.1 The employees were guilty of dishonest conduct in wrongful removing and then re-selling for their own benefit scrap metal belonging to the Municipality: and

5.2 As a consequence of inconsistent discipline, the sanction of dismissal was too severe and that the employees should thus be reinstated with effect from 12 August 2009 subject to final written warning. This in essence meant that the employees received a sanction of a six-month period of unpaid suspension and a final written warning effective until 12 August 2010.

[6] The Municipality did not accept the outcome of the appeal and proceeded to confirm the employees' dismissal on 11 August 2009. As a consequence, SAMWU referred an alleged unfair dismissal dispute to the SALGBC.

[7] The dispute was set down on 23 March 2010 for an initial *in limine* hearing before the arbitrator concerning the Municipality's failure to implement the outcome of the appeal. SAMWU contended that the Municipality was bound by the findings of the chairperson in terms of the collective agreement and

was not entitled to substitute those findings with its own. It argued that the confirmation of the employees' dismissal was thus null and void.

[8] On 28 April 2010, the arbitrator issued an *in limine* Ruling finding as follows:

8.1 The DCPA was applicable to the consideration of the appeal and the act of dismissal that took place on 13 July and 11 August 2009.

8.2 The appeal chairperson was obliged to make a finding without any interference from the Municipality.

8.3 The finding of the appeal chairperson was final and binding upon the Municipality.

8.4 The decision of this court in SAMWU obo Abrahams & others v City of Cape Town (2008) 7 BLLR 700 (LC) ought to be followed and applied with effect that the Municipality could not deviate from the provisions of the DPCA which were peremptory, binding and part of the employees' condition of service.

8.5 The Municipality was thus bound to the finding of the appeal chairperson and its decision to substitute the final written warning with the sanction of dismissal was " null and void and no legal force".

[9] The arbitrator concluded his ruling by directing the SALGBC to "set the matter down for continuation of the arbitration proceedings in order to determine the fairness of the [employees'] dismissal pursuant to the above ruling."

[10] The proceedings were reconvened before the arbitrator on 11 June 2010 and evidence was presented.

[11] The arbitrator then issued an award in which he found as follows:

11.1 The Municipality was required to have a "valid reason" to dismiss the employees and was required to follow a fair procedure.

11.2 The Municipality's refusal or failure to "comply with the provisions of its own collective agreement" rendered the dismissal of the employees "substantively unfair".

11.3 The Municipality " did not have a valid reason for dismissal when it terminated the [employees'] employment on 11 August 2009. This together with the [Municipality] refusal to reinstate the [employees] in accordance with the findings of the appeal chairperson renders their dismissals substantively unfair"

11.4 The employees' dismissals was also procedurally unfair.

11.5 There was a "clear nexus" between the employees' dishonest conduct and their dismissal.

11.6 It was not appropriate to reinstate the employees as it would be an "intolerable situation" and that arbitrators could not be seen to condone dishonest conduct.

[12] In consequence of these findings the arbitrator declined to reinstate the employees and ordered the Municipality to compensate them in an amount equivalent to four months' remuneration.

Challenges to the award

[13] In its review application, SAMWU contends that the arbitrator made an award that is reviewable and ought to be set aside. It submits that in failing to reinstate the employees with retrospective effect, the arbitrator committed a gross error of law, exceeded his powers as defined by, in particular, the constitution of the SALGBC and its collective agreements, and otherwise made an award that no arbitrator, acting reasonably could make.

[14] While submitting that the arbitrator correctly found that the Municipality had breached the terms of the DPCA by choosing to depart from the finding the appeal chairperson, it is argued on behalf of SAMWU that the arbitrator was not entitled to order relief in any such terms as deviated from the appeal chairperson's ruling. In support of this proposition it submits that the

arbitrator's powers were exclusively derived from the SALBC constitution and its collective agreements in the exercise of his duties as an arbitrator panelist.

[15] The second point made on behalf of SAMWU is that having found the dismissals of no force and effect the arbitrator could not consider the issue of fairness and " all he could do was to restore the status quo having already struck down the Municipality's conduct as contrary to law."

[16] For the Municipality, it was submitted that the Arbitrator's finding that the Municipality's decision to substitute the final written warning with the sanction of dismissal was null and void, was wrong in law. Further his finding that the dismissal was substantively unfair stands to be reviewed on the same grounds.

Evaluation

[17] I must agree that the arbitrator was not clothed with the power to declare conduct unlawful and of no force and effect and thus exceeded his powers. His powers are confined to making requisite findings in disputes referred to him in terms of specific provisions of the LRA and as provided for in the Bargaining Council's collective agreements. In any event if the arbitrator had such power i.e. to declare dismissals null and void, his decision would in its own terms, have removed his jurisdiction to hear the dispute. He ordered the continuance of the arbitration proceedings, despite having found that there were no dismissals in law and he records as much in the award. His reasoning was clearly irrational and not within the bounds of reasonableness. His award thus stands to be reviewed and set aside. It is not necessary for the court to deal with the other grounds of review submitted by the parties.

[18] Having decided to set aside the award, I must consider whether the court can entertain the application in terms of section 158 (1) (h). The dismissal of the employees by the Municipality has given rise to an unfair dismissal dispute. The LRA requires that such a dispute be referred to arbitration. I am mindful in this regard of the authority of **PSA of SA obo DeBruyn v Minister of safety**

and Security[1] in which the LAC per Mlambo JP (as he then was) had this to say:

> " The supposition that public servants had an extra string to their bow in the form of judicial review of administrative action, i.e. acts and omissions by the state vis-à-vis servants, evaporated when the Constitutional Court in *Chirwa vTransnet Ltd & others,* held that the dismissal of a public servant was not an administrative act' as defined in PAJA and therefore not capable of judicial review in terms of that Act. Any uncertainty regarding the interpretation of the *Chirwa* judgment (supra) was removed in the subsequent decision in *Gcaba vMinister for Safety & Security & others*. The result is that a public servant is confined to the other remedies available to him or her.
>
> One of the effects of *Chirwa* is that a dismissal is not to be regarded as an 'administrative act' by the state but merely as the act of the state in its capacity as an employer. This decision brought us to the situation where the pre-*Chirwa* substratum of section 158 (1)(h) fell away, although there may conceivably still be employer acts which are almost indistinguishable from administrative acts. The post-*Chirwa* meaning of section 158 (1)(h) has received the attention of the Labour Court in *De Villiers v Head ofDepartment: Education, Western Cape Province, SA Revenue Service V Commission for Conciliation, Mediation & Arbitration & others, and National Commissioner of Police & another V Harri NO & others.*
>
> But it does not follow that because the remedy of judicial review may still exist for public servants that the Labour Court will entertain an application to review 'any act performed by the State in its capacity as employer' as a matter of course".
>
> Recourse to review proceedings, in terms of section 158 (1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place and also other applicable statutes.
>
> One limitation or restriction is relevant to the case at hand. The LRA may oust the section 158(1) (h) review jurisdiction of the Labour Court. Section 157 (5) of the LRA , as the Court *a quo* appreciated, provides that if the LRA requires

[1] [2012] 9 BLLR 888 (LAC)

> an unresolved dispute to be resolved through arbitration, the Labour Court does not have jurisdiction to adjudicate the dispute. Notwithstanding this, the Labour Court could acquire jurisdiction in terms of section 158 (2) of the LRA but such situation does not arise in this case.[2] (my emphasis)

[19] The section 158 (2) scenario does not apply in this case either. In my judgment, the Municipality's action indisregarding the decision of the functionary it appointed, and its subsequent confirmation of the dismissal of the employees was exercised *qua* employer, and such dismissal requires to be arbitrated under the dispute resolution provisions of the LRA. The jurisdiction of this court to hear the 158 (1)(h) application is, following **De Bruyn**,ousted on the facts and circumstances of this case. The award stands to be set aside and remitted back to the Council or substituted. Given that the arbitration proceedings were clouded by errors of law, it is in the interests of justice that both parties are given the opportunity to fully testify anew. I therefore make the following order:

1. The arbitration award under case number WCP 080910 is hereby reviewed and set aside;
2. The unfair dismissal dispute under case number WCP 080910 is to be referred back to the Second Respondent for hearing before an arbitrator other than Third Respondent;
3. The application in terms of section 158 (1)(h) is dismissed;
4. There is no order as to costs.

_____

H.Rabkin-Naicker

Judge of the Labour Court

[2] At paragraphs 26 -29

APPEARANCES

For SAMWU: J Whyte Instructed by Cheadle Thompson &Haysom Attorneys

For the Municipality: Adv. A.C. Oosthizen S.C. instructed by HeroldGie Attorneys

.