REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C457/14

In the matter between:

AUBREY TSENGWA	Applicant
And	
KNYSNA MUNICIPALITY	First Respondent
SOUTH AFRICA LOCAL GOVERNMENT BARGAINING COUNCIL	Second Respondent
ZOLA MADOTYENI N.O.	Third Respondent

Date heard: 18 February 2015

Delivered: 16 April 2015

Summary: Application to review an arbitration award; consideration of whether arbitrators have the power to declare disciplinary proceedings null and void with regard to Clause 6.3 of the Disciplinary Procedure and Code Collective Agreement; SAMWU obo T Jacobs v City of Cape Town and others [2014] 10 BLLR 1011 (LC) held to have been incorrectly decided.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside an arbitration award under case number WCP041314. The third respondent (the arbitrator) found that the dismissal of the applicant was substantively and procedurally fair.

[2] The applicant, a law enforcement officer of 8 years standing was dismissed on 27 March 2013, following a disputed disciplinary process. The charges related to his alleged involvement in a violent fracas that took place in an ANC meeting that was held at the library hall of the municipality on 3 August 2012.

[3] For the purposes of this application the phrase "a disputed disciplinary process" is important. This is because the parties are bound by a collective agreement, called the Disciplinary Procedure and Code Collective Agreement (the DPCCA) which applies to the exercise of disciplinary action in local government. In terms of Clause 6.3 of the DPCCA, (which is incorporated into the conditions of service of each employee), after charges have been duly brought against an employee:

> "The Employer shall proceed forthwith or as soon as reasonably possible with a Disciplinary Hearing but in any event not later than three (3) months from the date upon which the Employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALBC."

[4] It is submitted on behalf of the applicant that non-compliance with Clause 6.3 renders non-compliant disciplinary hearings null and void. The applicant and his union SAMWU raised an objection in the disciplinary hearing in that condonation had not been sought in terms of the clause. During an adjournment of that hearing, it referred a dispute to the SALGBC, regarding the interpretation and application of the collective agreement. The dispute was referred at national level as the SALGBC constitution requires that disputes concerning the interpretation of collective agreements are conducted at this level. When the disciplinary hearing reconvened, the chairperson refused to postpone the proceedings pending the outcome of the interpretation dispute, and found that the applicant should be dismissed on 27 March 2013.

[5] Following the interpretation arbitration, in an award dated 23 April 2013, the national level pannelist found as follows:

> 5.1 The municipality had become aware of the misconduct on 10 August 2012 at the latest.
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> 5.2 The three-month time period was interrupted once the respective parties and their representatives attended a meeting on 19 November 2012.
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> 5.3 The time limit set by section 6.3 is peremptory.
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> 5.4 The municipality was not within the three month time limit, it was nine days out of it.
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> 5.5 The municipality ought to have first sought condonation before proceeding with the disciplinary hearing.

[6] On 23 April 2013, SAMWU referred applicant's dismissal dispute to the SALBGC for conciliation. In that referral, the union raised the complaint that the municipality had not complied with Clause 6.3. It did so again on 26 June 2013, when the dispute was referred to arbitration.

[7] It is submitted that the award stands to be reviewed because the arbitrator did not consider the effect that non-compliance with Clause 6.3 would have on the disciplinary proceedings and, in particular, whether such non-compliance rendered the proceedings null and void as contended by SAMWU.

[8] It is therefore submitted on behalf of the applicant that a fatal defect in the arbitration proceedings occurred which renders them susceptible review. It led to the arbitrator failing to properly exercise his powers as derived from the SALGBC Constitution, Main Agreement and the DPCCA.

[9] The principal submission made on behalf of the applicant (who is supported by his union SAMWU in these proceedings) is the following: where an arbitrator is acting under the SALGBC's jurisdiction and is faced with the circumstances that confronted the arbitrator *in casu*, that arbitrator must determine whether the employer party complied with its obligations under Clause 6(3), and if not, he or she is empowered to issue a declaratory order,

the effect of which would be to nullify the disciplinary action taken against the employee.

[10] The above submission is premised on an argument as follows:

10.1 The arbitrator had the power to determine, on any set of given facts, whether a local government employee's dismissal was fair or not, and whether a party to the SALGBC had applied the SALBGC's collective agreements correctly. These determinations could proceed in tandem.

10.2 Clause 19.1 of the SALGBC Constitution provides that: "Despite any other provision in the [LRA], the Council shall monitor and enforce compliance of collective agreements in terms of section 33A of the [LRA]".

10.3 Section 33(A) of the LRA provides: "… a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council".

10.4 Section 33A(4)(a) provides that an arbitrator may be appointed by a bargaining council to resolve the dispute concerning the compliance by a party with a collective agreement and that such an arbitrator may determine such a dispute by way of issuing an "appropriate award" in terms of section 33A (8).

10.5 Section 33A(8) provides that such an appropriate award may include any award contemplated by section 138(9) of the LRA.

10.6 Section 138(9) of the LRA provides that an arbitrator may make an award:

"(a) that gives effect to any collective agreement;

(b) that gives to the provisions and primary objects of this Act;

(c) that includes, or is in the form of, declaratory order."

[11] The applicant relies on the judgment of **SAMWU obo T Jacobs v City of Cape Town and others**[1] in which my brother, Steenkamp J accepted and applied the above submissions finding that :

[1][2014] 10 BLLR 1011 (LC)

"[18] SAMWU argued that the city had acted in breach of the collective agreement. It is common cause that the City did not comply with the three-month time stipulation; that it did not apply for condonation; that the provisions of the Code are peremptory; and that they form part of the employee's conditions of service. In deciding that he did not have the power to issue a declaratory to the effect that the disciplinary hearing was null and void, the arbitrator failed to deal with the dispute before him. He also exceeded his powers. This had the effect that the conclusion he reached was so unreasonable that no reasonable arbitrator could have reached the same conclusion."

[12] Mr Whyte for the applicant submitted that this Court should follow the judgment in **Jacobs**. Mr Bosch for the municipality argued that the question to be determined in this matter relates to whether the arbitrator committed a reviewable defect in failing to make a finding and declaring that the municipality failed to comply with the DPCCA, and that the disciplinary proceedings against the applicant were null and void. Further he submitted that the arbitrator who was appointed at regional level in terms of the SALGGBC Constitution, had no jurisdiction to deal with the validity of the disciplinary proceedings or whether the municipality was in breach of the DPCCA.

[13] Mr Bosch submitted that in terms of SALGBC Constitution, only the Central Council has jurisdiction to arbitrate disputes relating to the interpretation and application of collective agreements concluded at national level. The arbitrator was appointed at divisional level to deal with an unfair dismissal dispute. In his view the matter was in any event *re judicata* – the national panelist had ordered that the municipality ought to have applied for condonation, but did not declare the disciplinary proceedings null and void. Further, that a consideration of the record of the proceedings reveals that in any event, SAMWU itself treated the question of the continuation of the disciplinary proceedings as a procedural fairness issue before the arbitrator, although it also used the word 'unlawful'.

[14] There is a further important issue at stake in this matter – the notion that because section 138(9) of the LRA provides that a commissioner may make a

declaratory order that this means that it is within the power of commissioners to declare disciplinary proceedings null and void, and of no force and effect. There appears to be a misconception that the power to issue a declaratory order equates with the jurisdiction to declare acts to be unlawful and invalid. This is not the case – a tribunal or court which does not have inherent powers is limited as to the type of declaration of rights it may make. For example, a commissioner or an arbitrator's power to make a declaratory order is limited by the ambit of disputes they are permitted to preside over by virtue of the LRA and other employment statutes.

[15] Perhaps the clearest way to debunk the notion that arbitrators and commissioners can set aside irregular proceedings as unlawful is to remind ourselves that they exercise an administrative function.[2] As O'Reagan J put it in **Sidumo** :

> [139] …. The CCMA is an organ of state exercising public power. Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of s 23 of the Constitution. Section 23(1) of the Constitution provides that workers and employers are entitled to fair labour practices. The adjudicative task performed by the CCMA involves the determination of disputes often involving the question of fair labour practices that are of importance to the litigants before the CCMA. It is not an institution for private, agreed arbitration but a state institution established for the resolution of disputes. The procedures provided for in the Labour Relations Act make plain that the disputes are to be speedily and cheaply resolved by the CCMA. No appeal lies from the CCMA, but the Labour Relations Act expressly requires that the Labour Courts are to scrutinize the decisions of the CCMA.
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> [140] It is clear that the CCMA has been established to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs

[2] Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at paragraph 88

associated with dispute resolution in the ordinary courts. In this sense, the CCMA is properly understood as an administrative tribunal. Our Constitution recognizes the need for the conduct of administrative agencies to be scrutinized, to ensure that they act lawfully, reasonably and procedurally fairly. As the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the constitutional standards established in s 33. So the need for speedy and cheap resolution of disputes does not mean that the CCMA should not be held accountable for its decisions, nor that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and procedurally fairly. Indeed, as Sachs J has reasoned, it is entirely consistent with our constitutional order that the procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair and that this should be ensured by appropriate scrutiny by the labour courts.

[141] For these reasons then, and for the additional reasons given by Navsa AJ at paras 81-88 of his judgment, I agree with him that arbitrations by commissioners in the CCMA constitute administrative action within the contemplation of s 33 of the Constitution. I also concur with the rest of his judgment."

[16] The above applies equally to arbitrators performing functions in a bargaining council such as second respondent in this case - they perform administrative functions and their decisions are monitored by this court in terms of the LRA. The case for the applicant proposes that an administrative functionary such as the arbitrator in this matter, can declare proceedings presided over by another administrative functionary (i.e. the chairperson of the disciplinary hearing appointed by an organ of state, the municipality) to be unlawful and invalid. The definitive feature of our model of administrative law is that administrative bodies are subject to the supervision of ordinary courts of law. The task of reviewing the legality of administrative decisions has always fallen on the

courts. [3] This principle goes to the heart of the separation of powers entrenched in our Constitution.

[17] For the above reasons I find, with respect, that the **Jacobs** matter was wrongly decided and the review cannot succeed for the reasons that were relied upon in that judgment, and repeated in this court. I further agree with Mr Bosch that the application for review cannot succeed on another basis (also not taken into consideration in the **Jacobs** judgment) i.e. that in terms of the SALGCB Constitution, the arbitrator could only deal with the issue of the fairness of the dismissal in the proceedings before him.

[18] Although not cited as a party, the court was informed that this application was supported by SAMWU. I am not disposed to make a costs order given the ongoing relationship between the parties.

[19] In all the circumstances, I make the following order:

Order

1. The application is dismissed.

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H.Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Mr Jason Whyte of Cheadle Thompson & Haysom Inc

First Respondent: Mr C. Bosch instructed by Lizelle Baronique Harker Attorney

[3] See Ian Currie ed 'The New Constitutional and Administrative Law';Juta 2002 at pages 35 -37.