REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 697/12

In the matter between:

SALDANHA BAY MUNICIPALITY	**Applicant**
and	
SAMWU OBO M WILSCHUT	**First Respondent**
T MDZOMBANE N.O.	**Second Respondent**
SALGBC	**Third Respondent**
JAMES FORTUIN	**Fourth Respondent**

Heard: 14 October 2015

Delivered: 17 November 2015

Summary: Review – Systems Act s 59 – whether municipal manager was empowered to settle dispute while disciplinary hearing was ongoing. Application of *Turquand* rule and estoppel to *ultra vires* act by municipal manager.

JUDGMENT

STEENKAMP J

Introduction

[1] The municipal manager of the applicant, Saldanha Bay Municipality, entered into a settlement agreement with an employee, Mr M Wilschut (the first respondent, represented by the South African Municipal Workers' Union). This happened while the employee was in the midst of a disciplinary hearing. The Municipality contends that the municipal manager was not empowered to do so, given the provisions of the Municipal Systems Act.[1] It dismissed him, despite the purported agreement. He referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the third respondent). An arbitrator acting under its auspices, Mr T Mdzombane (the second respondent) found that the dispute had been resolved by agreement; that the agreement was valid and binding; hence, the dismissal was unfair; and he ordered the Municipality to reinstate the employee. The Municipality seeks to have that award reviewed and set aside.

[2] This judgment raises issues on the powers of a municipal manager in terms of the Systems Act; the disciplinary process prescribed by the relevant collective agreement in the local government sphere; and the application of the *Turquand* rule and the principle of estoppel.

Background facts

[3] The employee was called to a disciplinary hearing to face eight allegations of misconduct relating to dishonesty. This included deliberately falsifying receipts in respect of cash payments he had received from the public. He had misappropriated R2 100, 00. He admitted the misconduct.[2] Before the chairperson of the hearing could decide on sanction, the employee reached an agreement with the outgoing municipal manager, Mr James

[1] The Local Government: Municipal Systems Act, Act 32 of 2000 ("the Systems Act").

[2] In the parlance of the presiding officer and the arbitrator, he "pleaded guilty to all charges".

Fortuin (the fourth respondent), who purported to act on behalf of the Municipality. The agreement reads:[3]

> "The applicant hereby pleads guilty on the charges listed as from 1 to 8 respectively. Further apologises and is deeply remorsed for bringing the municipality into disrepute.
>
> The following is therefore agreed:
>
> 1. Final warning
> 2. Repayment of the amount equal to R2000, 00 in terms of our collective agreement.
> 3. Relocation to enquiries at Finance Department.
>
> This constitutes a full & final settlement of this matter which shall remain confidential to the parties concerned."

[4] The chairperson (or "presiding officer") adopted the view that he was not precluded from continuing with the disciplinary hearing. He did so. He imposed a sanction of dismissal. The employee lodged an internal appeal. He was unsuccessful. He then referred an unfair dismissal dispute to the Bargaining Council.

The award

[5] The arbitrator considered the employee's argument that the dispute had been settled. He applied the principle of estoppel and the rule in *Turquand*[4] that an outsider contracting with a legal entity in good faith is entitled to assume that internal requirements and procedures had been complied with. He found that the municipal manager had the authority to enter into agreements on behalf of the Municipality; that he had entered into a full and final settlement agreement with the employee; and that, in continuing with the disciplinary hearing, the presiding officer acted *ultra vires*. He decided that the resultant dismissal was unfair and ordered the Municipality to reinstate the employee.

[3] Language and grammar as in original.

[4] *Royal British Bank v Turquand* (1856) 6 El & Bl 327; 119 ER 886.

Review grounds

[6] Mr *Oosthuizen*, for the Municipality, based its review application on the test set out in *Herholdt v Nedbank Ltd*[5], i.e. that the arbitrator's decision was so unreasonable that a reasonable arbitrator could not reach it on the evidence before him.

[7] He argued that the arbitrator's application of the doctrine of estoppel and of the *Turquand* rule to the facts of this case had no basis in law, and that the resultant conclusion was unreasonable. He also argued that the presiding officer in the disciplinary hearing was not bound by the agreement between the employee and the municipal manager and that the arbitrator's finding to the contrary was unreasonable.

Evaluation / Analysis

[8] In order to evaluate the Municipality's argument properly, one has to consider the legislative framework.

The Systems Act

[9] Section 59(1) of the Systems Act provides that a municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances. Section 59(2) then sets out the following limitations:

> "(2) A delegation or instruction in terms of subsection (1) -
>
> (a) must not conflict with the Constitution, this Act or the Municipal Structures Act;
>
> (b) must be in writing;
>
> (c) is subject to any limitations, conditions and directions the municipal council may impose;
>
> (d) may include the power to sub-delegate a delegated power;
>
> (e) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and

[5] [2013] 11 BLLR 1074 (SCA) para [25].

(f) must be reviewed when a new council is elected or, if it is a district council, elected and appointed."

[10] The responsibilities of municipal managers are set out in s 55 of the Systems Act. As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for, amongst other things, the maintenance of discipline of staff.[6]

[11] These two sections must be read in context and in conjunction with one another. The context means the language of the rest of the statute as well as its apparent scope and purpose and, within limits, its background.[i]

[12] Read together and in context, the effect of these two sections appears to be this:

12.1 A municipality may authorise one of its staff members to conduct disciplinary hearings in terms of the system of delegations in s 59(1).

12.2 Although the municipal manager remains responsible and accountable for the maintenance of discipline of staff, his actions are "subject to the policy directions of the municipal council", including the powers that the council had delegated.

12.3 The power to develop and adopt disciplinary procedures is specifically entrusted to the municipal council itself in terms of s 67(1)(g) of the Systems Act.

The SALGA agreement

[13] The Municipality and SAMWU are bound by a collective agreement setting out its disciplinary procedures ("the SALGA agreement"). It states in the agreement itself that it is the product of collective bargaining, that its application is peremptory and that it is deemed to be a condition of service. It defines the disciplinary process and the rights and obligations of management and employees.

[14] The SALGA agreement sets out the powers of the presiding officer, who has the power to:

[6] Systems Act s 55(1)(g).

> "with the consent of the parties, propose compromise settlement agreements in disposal of the whole or a portion of the issues".

[15] In terms of the agreement, "the determination of the presiding officer cannot be altered by the Municipal Manager or any other governing structure of a municipality".

The disciplinary hearing

[16] The Municipality has developed a system of delegations in terms of s 59 of the Systems Act. The power to appoint chairpersons of disciplinary hearings was devolved to director level. It appointed a Mr Magerman to chair the enquiry. After the employee had admitted the misconduct, but before he had decided on sanction, the employee presented him with the settlement agreement signed by the municipal manager. Magerman nevertheless continued, made a finding on sanction, and the Municipality dismissed the employee.

[17] The question on review is whether the arbitrator reasonably found that the Municipality was bound by the settlement agreement.

The municipal manager's power to settle

[18] Taking into account the language of the Systems Act, its context and its purpose, it does not appear to me that the municipal manager had the power to usurp the function of the chairperson by entering into a settlement agreement with the employee and bypassing the disciplinary procedure.

[19] The context includes the provisions of the SALGA agreement. In terms of that agreement, the chairperson may propose a compromise agreement. It is not clear from that agreement who is empowered to bind the Municipality. But in terms of the Systems Act, that power appears to have been delegated to the chairperson.

[20] There is nothing in either the collective agreement or the Systems Act to suggest that the power to enter into a settlement agreement, bypassing the disciplinary process, was delegated to the municipal manager. If that is

so, the municipal manager exceeded his powers and the settlement agreement is invalid.

Estoppel and the Turquand rule

[21] The arbitrator relied on the principles of estoppel and the Turquand rule to find that the municipality was estopped from denying the validity of the settlement agreement; or that the employee was contracting with a legal entity (i.e. the municipality, represented by the municipal manager) in good faith and that he was entitled to assume that internal requirements and procedures had been complied with.

[22] I agree with Mr *Oosthuizen* that the arbitrator's application of the principle of estoppel on these facts and no basis in law. That led to an unreasonable result.

[23] Firstly, the doctrine of estoppel cannot be invoked to circumvent the mandatory provisions of a duly promulgated statute.[7] In this case, the parties were bound by the provisions of the collective agreement entered into in terms of section 23 of the LRA.[8] That must be read together with the system of delegations established under the Systems Act. The employee could not, by relying on the doctrine of estoppel, bypass those provisions. Neither could the arbitrator.

[24] Secondly, a person raising a plea of estoppel must prove that, by acting on the representation made to him, he acted to his detriment.[9] In this case, far from acting to his detriment, the employee benefited from the agreement.

[25] Thirdly, the person relying on estoppel has to show that he acted reasonably in relying on the representation.[10] A person who knows what the true position is cannot say that he was induced to act to his prejudice

[7] *Strydom v Die Land en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 815B-816B; *Mgoqi v City of Cape Town* 2006 (4) SA 355 (C) at 396 D-E; *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at 148E-H.

[8] Labour Relations Act 66 of 1995.

[9] *Baumann v Thomas* 1920 AD 428 at *436-7; Poort Sugar Planters (Pty) Ltd v Minister of Land* 1963 (3) SA 352 (A) at 363D.

[10] *Monzali v Smith* 1929 AD 382 at 389-391.

on the face of the representation.[11] In this case, the applicants – the employee and his trade union, SAMWU – cannot be heard to say that they were unaware of the SALGA agreement. It is a collective agreement signed by SAMWU and containing the disciplinary procedure that is applicable to all local government employees.

[26] With regard to the *Turquand* rule, Mr *Bosch* quite properly conceded that the arbitrator incorrectly found that the *Turquand* rule could be used as a mechanism to validate the settlement agreement signed by the employee and municipal manager under circumstances where the municipal manager did not have the power to into the agreement on behalf of the municipality. He did so without accepting that the municipal manager acted unlawfully or outside of his powers as prescribed by the Systems Act; and even if it did, and the arbitrator erred in applying estoppel and the *Turquand* rule, Mr *Bosch* argued that the error was not sufficiently material to warrant the setting aside of the award.

[27] Mr *Bosch* properly referred the Court to a recent decision of the Supreme Court of Appeal in *TEB Properties*[12] where that court found that the *Turquand* rule ought to be treated no differently from the position relating to estoppel, namely that the claim of an innocent contracting party to enforcement of a contract could not make an *ultra vires* act by a state official *intra vires*. And in an earlier judgement of *Mbana v Mnquma Municipality*[13] it was held that:

> "The *Turquand* rule can never be used as a mechanism whereby a court could or would bind an authority such as the defendant municipality to enact which is *ultra vires*."

[28] By applying the doctrine of estoppel and the *Turquand* rule to the facts of this case, the arbitrator committed an error of law. And that error led directly to an unreasonable result.

---

[11] *Bird v Summerville* 1961 (3) SA 194 (A) at 204E; *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79G; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 849G.

[12] *TEB Properties cc v MEC, Department of Health and Social Development, North West* [2012] JOL 28203 (SCA) paras [32] – [33].

[13] [2003] JOL 12106 (Tk) paras [26] – [27].

Inchoate agreement?

[29] Not only did the municipal manager act outside of his powers when he entered into the agreement with the employee, but the agreement itself is an inchoate agreement. It was clearly envisaged to be signed by the "prosecutor" appointed in terms of the disciplinary provisions contained in the binding collective agreement. The settlement agreement leaves a space for him to do so. He did not. Given the role played by the initiator (or "prosecutor") in the disciplinary proceedings in terms of the binding SALGA collective agreement, it appears to me that the settlement agreement is incomplete.

[30] Christie describes the principles relating to partial agreements in *The Law of Contract in South Africa.*[14] The learned authors cite the following test from *GGEE Alsthom*:[15]

> "Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances."

[31] In the context of this case, the agreement itself provided for the initiator to sign it, and he did not; the power to conduct the disciplinary hearing and propose a compromise settlement was delegated to the chairperson, who did not accept the agreement; and the Council did not consider itself bound by it. All of these considerations point to an incomplete and invalid agreement.

The chairperson's finding

[32] In any event, the chairperson's finding in the disciplinary hearing – overruling the ostensible settlement agreement – was a fair and reasonable one. In this regard, Mr *Oosthuizen* referred to the decisions of this Court and the Labour Appeal Court in *Overstrand Municipality.*[16] As

[14] RH Christie & GB Bradfield, *The Law of Contract in South Africa* ^ ed LexisNexis) pp 37-39.

[15] *CGEE Alsthom Equipments et Entereprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 92E.

[16] *Overstrand Municipality v Magerman NO* [2014] 2 BLLR 195 (LC); *Hendricks v Overstrand Municipality* [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC).

was the case in those judgements, the employee in this case committed gross misconduct of a dishonest nature. The municipality cannot be expected to keep him in its service. The municipal manager's decision to the contrary is grossly unreasonable, even if he had the authority to enter into a settlement agreement.

Conclusion

[33] the arbitrator committed an error of law by basing his finding that the settlement agreement was binding on the municipality on the doctrine of estoppel and the application of the Turquand rule. The resultant conclusion was so unreasonable that no reasonable arbitrator could have reached the same conclusion. The award must be reviewed and set aside.

[34] On the evidence before me, the finding on sanction by the presiding officer in the disciplinary hearing – given that the employee had admitted to the misconduct – is entirely reasonable and fair.

[35] With regard to costs, I take into account that the employee had an arbitration award in his favour. It was not unreasonable to oppose this application. In law and fairness, I do not consider a costs award to be appropriate.

Order

[36] I therefore make the following order:

36.1 The arbitration award of the second respondent under case number WCP 111111 of 12 July 2012 is reviewed and set aside.

36.2 The award is replaced with an award that the dismissal of the employee, Mr Wilschut, was substantively and procedurally fair.

_____

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	André Oosthuizen SC
	Instructed by Herold Gie.
FIRST RESPONDENT:	Craig Bosch
	Instructed by Cheadle Thompson & Haysom.

[i] *Jaga v Dönges NO* 1950 (4) SA 653 (A) at 662G; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (A) para [18]; *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA) paras [10] – [12].