IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case no: J 2301/03

In the matter between:

BOTHA J S F **Applicant**

and

DEPARTMENT OF EDUCATION –
(LIMPOPO PROVINCE) **First Respondent**

THE MEMBER OF THE EXECUTIVE
COMMITTEE OF THE DEPARTMENT OF
EDUCATION - (LIMPOPO PROVINCE) **Second Respondent**

DR NKADIMENG **Third Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] There are two applications before court. The first application relates to contempt proceedings (The contempt application). The second application relates to declaration of the awards and the concomitant court order to be a nullity. (The nullity application)

[2] The two applications were heard on the same day. The two are interrelated. The applicant also brought an application to join the second and the third respondent in the proceedings. The application for joinder is unopposed. It was brought under the contempt application.

[3] Ordinarily, I should be granting the joinder application without hesitation. However given the view I intend taking at the end of this judgment such order would be academic. The nullity application is strictly speaking unopposed. However, given its relationship to the contempt application, I intend to treat it as if it is opposed.

[4] In its amended notice of motion, the applicant seeks the following payers:

1. That second and third respondent be joined as respondents in these proceedings.
2. Declaring that all 3 respondents are in contempt of the order of this Court in this matter dated 23 November 2003.

3. Ordering first and third respondent to promote applicant to the post of Deputy Principal and to pay to him the difference in salary he would have received in this post and that he actually received from 2003, being R 264 599.00 plus R 7 760.00 per month from 01 April 2006 until the said promotion has been effected.
4. Calling upon third respondent to show cause on a date and time determined by this Court why he should not be committed to prison for contempt of court.
5. That the respondents jointly pay applicant's costs of this application on an attorney and client scale.

[5] On the other hand, the first respondent (Department of Education – Limpopo Province) sought the following orders:

a) Staying the contempt proceedings instituted by Johan Samuel Fredericks Botha against the Department of Education and the Member of the Executive Committee of the Department of Education (Limpopo Province) under case number J 2301/03 pending the determination of this application.
b) Declaring the arbitration awards issue by Commissioner Nephale of ELRC dated 04 July 2003 and 08 September 2003 to be null and void.
c) Declaring the order handed down by his Lordship Mr Justice Ndlovu AJ on 26 November 2003 enforcing the arbitration award to be a nullity.

d) Insofar as is necessary condoning the late filing of this application.
e) Directing any respondents to pay the costs of this application who oppose this application
f) Further and or alternative relief.

Background facts

[6] On 10 January 2000 the applicant was served with charges of misconduct in terms of section 17 of the unamended Employment of Educators Act, 76 of 1998 (the EEA). At that time the applicant was a principal of Bosveld Primary School in Ellisras.

[7] The applicant was charged with five counts of misconduct as contemplated in section 17 of the EEA. The charges ranged from misappropriation of funds, receiving voluntary severance packages benefits of certain employees after forcing them to apply for such benefits, negligence and indolence by issuing salary cheques, behaving in an improper and disgraceful manner and failure to comply with the EEA.

[8] A disciplinary hearing was then conducted and as result of which, he was found guilty of apparently all the charges. The chairperson of the disciplinary decided to demote the applicant and transfer him to another school. (I shall later in my judgment demonstrate that the chairperson acted *ultra vires* in any event).

[9] On or about 11 March 2002, the Head of the department acting

in terms of section 24(2) (a) (iv) dismissed, the applicant with immediate effect.

[10] It is apparent that the applicant sought to challenge the fairness of his dismissal.

[11] The dispute came before Commissioner Nephale (the commissioner) for arbitration.

[12] On 04 July 2003 he issued an award (the first award) to the following effect:

1) The dismissal was unfair, the employer must implement the decision of the chairperson as it is.
2) The decision of the chairperson must take effect retrospectively to date of the irregular dismissal.
3) The award must be implemented within 30 days of the date of the award.
4) The applicant must be given all benefits that he would have been entitled to had the correct decision of the chairperson been implemented.

[13] As alleged by the applicant and not disputed by the respondents, the applicant then approached the ELRC through his union SADTU to have the first award clarified, since the award did not state what the decision of the chairperson was.

[14] Then the commissioner sought to issue what in his wisdom, he termed an advisory award (the second award). The second award was to the following effect:

"The applicant should have been demoted to the level of deputy principal as from the date of wrongful dismissal".

[15] Before he could issue the second award he recorded the following:

"The chairperson of the disciplinary hearing recommended that the applicant should be demoted and he did not indicate to what level".

[16] Similarly before he could issue the first award he recorded the following:

"The dismissal of the employer was procedurally unfair because the correct procedure was not adhered to in line with labour laws".

[17] It is apparent that the Department of Education did not wish to comply with the awards.

[18] The applicant then decided to bring an application in terms of section 158(1) (c). This he did on his own without assistance from his union and or legal representative. The said application was filed in this Court on 13 November 2003. For some reason, the application was not opposed.

[19] On 26 November 2003 (the hectic Wednesday unopposed motion day), this Court per Ndlovu AJ issued and order (the order) to the following effect:

1) The arbitration awards dated 04 July 2003 (Annexure A) and 08 September 2003 (Annexure B) issued by Commissioner Nephalela Enoch of the Commission for Conciliation, Mediation and Arbitration (CCMA) attached hereto marked annexure A and B is made an order of court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995.
2) The respondent is to pay the costs of this application.

[20] From the applicant's papers it appears that only on 12 October 2005, did the applicant through his attorney Ameer Mia demand compliance with the court order.

[21] On 31 March 2006, the applicant instituted the contempt proceedings. In its answering affidavit filed on 02 June 2006, the Department of Education foreshadowed the issues in the nullity application. The applicant dealt with these in his reply.

[22] On 18 September 2007, the Department sought to bring the nullity application. As pointed out earlier, this was not opposed, but issues raised therein were dealt with by the applicant in his reply in the

contempt application.

Issues raised by both applications

[23] This matter raises a number of issues. However central to this matter lies to questions:

1. Are the awards a nullity?
2. Is the order a nullity too?

[24] In the Court's view if the two questions are answered in the affirmative the contempt application should fail in its entirety. Accordingly I shall deal with the nullity application first for the purpose of this judgment.

The awards

[25] Before dealing with the awards themselves, the Court must pause and express its dismay about the quality of commissioners of the ELRC. The Court could not comprehend the body of the first award. To make matters worse, the commissioner refers to his second award as an advisory award. This type of an award is specifically provided for in section 135(3) (c) of the Act. The heading of that section is clear: "**Resolution of disputes through <u>conciliation</u>**".

[26] It really baffles me why the commissioner chose to label his second award an advisory award. Perhaps he just liked the term and

did not bother to refer to the provisions of section 135(3) (c). The last straw is that he issues what can be term a binding award, in a form of the second award.

[27] Adv Beaton for the applicant attempted to defend the second award and suggested that it was to clarify the first award. Even if Adv Beaton is right in his submission, the commissioner was not clarifying his first award as it were, within the contemplation of section 144 of the Act, but was supplementing and actually clarifying the decision of the chairperson of the hearing. Adv Beaton conceded to this proposition. It is unfortunate that the decision of the chairperson seem not to have been recorded as I was advised by Beaton from the bar.

[28] The first award is nothing but a nullity. According to Boda appearing for the first respondent, the nullity is brought about by lack of jurisdiction or power to make such an award. As pointed earlier in this judgment the commissioner found that the dismissal was procedurally unfair.

[29] There is no doubt in the Court's mind that at the time of issuing the award, the commissioner purported to act in terms of the Labour Relations Act. The said Act which he purported to act within its purview provides in section 193(2) (d) the following:

"*The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:-*

a) ……

b) ……

c) ……

d) *The dismissal is unfair only because the employer did not*

follow a fair procedure."

[30] The Act is clear that once, a dismissal is procedurally unfair it is incompetent for the court or the arbitrator to order reinstatement (**Volkswagen SA (Pty) Ltd v Brand NO and other (2001) 5 BLLR 558 (LC)** and **Mzeku and others v Volkwagen SA (Pty) Ltd and others (2001) 8 BLLR 857 (LAC)**).

[31] In an answer to this clear statement of the law, Adv Beaton argued that the pronouncement by the LAC on this issue in **Mzeku** matter was *obiter* and accordingly not binding. This contention is rejected.

[32] He further argued that even if it is not *obiter*, the judgment is clearly wrong because in his submission the court or arbitrator has a discretion to reinstate even if it is procedurally unfair. He submitted that the usage of "or" before paragraph (d) supports his submission. This submission is equally rejected.

[33] He further argued that although the commissioner states that the dismissal is procedurally unfair in essence he meant that the sanction of dismissal is inappropriate and that renders the dismissal unfair substantively (schedule 8 item 7(b)(iv)).

[34] There is one answer to that submission, the commissioner, expecting of course that he is fully trained would have been aware of item 7(b) (iv) and would have mentioned that in his first award. He

should also have mentioned the following in his award:

"The dismissal of the applicant is inappropriate for the contravention of the rule, therefore his dismissal is substantively unfair".

[35] In any event I do not see how he would have justified his finding that dismissal for misappropriation of funds is inappropriate (see schedule 8 item 3(4)).

[36] Accordingly that submission is equally rejected.

[37] In an attempt to defend the decision of the chairperson which has been endorsed by the commissioner in a sense, Adv Beaton referred to the provisions of schedule 2 of the EEA in particular item 8. In his submission item 8 properly interpreted leaves the issue of the sanction in the province of the chairperson and nobody else. I do not wish to decide this issue, but I doubt that the item could be interpreted in that manner.

[38] What defeats his submission though is the fact that schedule 2 was added by section 15 of Education laws Amendment Act no 53 of 2000 which only commenced on 22 November 2000. The notice to charge the applicant is dated 10 January 2000. No details have been provided in any of the parties' papers as to when was the hearing concluded in particular when did the chairperson deliver his sanction. However, I doubt that the hearing was not concluded at the time Act 53 of 2000 commenced. In a letter of dismissal by the Head of

Department reference is made to charge of misconduct on 17 February 2000. it is more probable that the hearing was concluded around February 2000.

[39] This being so and regard being heard to the fact that charges against the applicant was brought in terms of the old section 17 provisions, it then follows that the hearing should have been conducted in terms of the unamended EEA.

[40] Section 24 of the EEA then, provided as follows:

> *(1) After the conclusion of the inquiry into a charge of misconduct, the chairperson of the disciplinary tribunal shall:*
>
> (a) *Within seven days after the making of the finding, report to the employer on the result of the inquiry, and*
>
> (b) *If the disciplinary tribunal has found that the educator concerned is guilty of the misconduct with which the educator has been charged, submit to the employer:-*
>
> *(i) The record of the proceedings at the inquiry and any*

documentary evidence admitted thereat,

(ii)A written exposition of the finding of the disciplinary tribunal and the reasons therefore,

(iii)Any remarks which the disciplinary tribunal wishes to make in connection with the inquiry, and

(iv)*The recommendation of the disciplinary tribunal regarding any steps which may be taken under this section.*

2 (a) If the disciplinary tribunal has found that the educator concerned is guilty of the misconduct with which the educator has been charged, or if the educator concerned admits the charge, the employer may, after having considered the documents relating to the inquiry, where applicable:-

i) Caution or reprimand the educator concerned,

ii) Impose upon the educator a fine not exceeding R 6 000.00,

iii) Reduce the educator's salary to such an extent as

the employer may determine,

iv) *Discharge the educator from service with effect from such date as the employer may determine,*

2(b)……

3……

[41] Section 1 defines employer as:

"In relation to any provisions of chapter 4, 5 (misconduct) or 7 which applies to or is connected with-

(a)……

(b) An educator in the service of the Provincial Department of Education means the Head of Department."

[42] If that is the law as it stood at the time, clearly the chairperson acted outside his powers (whoever he or she was).

[43] Section 24 clearly leaves the issue of sanction as it rightly should in the hands of the employer. This point was argued by the department at arbitration but was rejected by the commissioner. In rejecting this rather valid point the commissioner said:

"The employer's version regarding EEA no 76 of 1998, section 24(1) and (2) was misunderstood. In this because the chairperson's mandate was never limited in that content. (Whatever this means)…… Furthermore it must be understood that of the Act has warranted the said interpretation as alleged there was no need to appoint the chairperson to all the misconduct cases, the employer cold (sic) just

automatically pronounce the sanction without going through the process of appointing the impartial person."

[44] The underlined portions clearly are revealing of the state of confusion in which the commissioner seem to have been. (See **PSA obo Venter v Laka NO (2006) 1 BLLR 20 (LC) para 24 and 25**). All the above begs the question, can an arbitrator purporting to act in terms of the provisions of the LRA enforce that which was done *ultra vires*? There is no doubt in my mind that the chairperson acted *ultra vires* by imposing demotion albeit not stating the level. Demotion was not even contemplated in section 24(2) (a) of EEA.

[45] The fact that the commissioner sought to enforce an act taken *ultra vires*, makes her award a nullity. This Court and other courts had refused to enforce agreements which are concluded *ultra vires* simply because same is null and void *ab initio* (see **SAMWU and others v Ethekweni Municipality and others D 428/07, yet unreported and the authorities cited therein**).

[46] If one carefully reads the first award one can easily come to the conclusion that the commissioner did not in fact determine the dispute about the fairness of the dismissal. All he did was to give a blessing to a nullity.

[47] Over and above the fact that the commissioner ordered reinstatement when he ought not to have, the first award is a nullity because it sought to enforce a nullity.

[48] The second award truly leaves me cold. It seeks to add strength to a nullity.

[49] The question is where does the commissioner source powers to decide for the employer?

[50] The chairperson deemed it necessary not to mention the position to which the applicant is demoted. Why then does it take the commissioner to clarify operational issues for the department? The commissioner simply had no powers. He then acted *ultra vires*. Therefore his award is unenforceable. It is a nullity. He sought in his view to clarify his first award. Since the first award is a nullity there exists no reason why the second award should not be. I shall return to this principle when I deal with the order. I now turn to the order.

The order

[51] Adv Beaton argued that much as the court may declare the awards a nullity, this Court is not empowered to declare the order a nullity because it was issued by the court of equal status.

[52] That argument is oblivious of at least one central issue and that is if a judgment sought to enforce a nullity it is equally a nullity. I am not called upon to appeal the order. That this Court cannot do. It is a fact that this Court may rescind an order in terms of section 165 of the Act.

[53] The Court is aware that the nullity application was not brought in terms of section 165, but what the department seeks has the same effect. Accordingly I do not see how the Court is barred from deciding that.

[54] I am certain that the declaratory powers which the court possesses in terms of section 158(1) (a) (iv) are not by any means limited. It cannot be argued that this Court cannot declare an order of this Court a nullity. When one has regard to the doctrine of effectiveness, I do not see how an order that adopts a nullity to be that of its own would remain effective. Section 163 for instance can only be referring to valid orders of court and not a nullity.

[55] In **Eskom v Marshall and others (2003) 1 BLLR 12 (LC)**, the following was said:

"The authorities are trite that a court of law or a tribunal that issues an order where it has no jurisdiction to do so acts ultra vires. The result is that the order is a nullity. See ***Immelman v Keller 1903 20 SC 63*** *and* ***Visser v Van Der Heever 1934 CPD 315.****"*

[56] This is a true statement of the law. This Court lacks jurisdiction to make a nullity its order.

[57] Section 158(1) (c) powers were meant to be exercised in instances where the award to be made an order is a proper award. To that extent, this Court may refuse to make an award its order if not

satisfied that it is a proper award.

[58] In **Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 2000 (SCA)**, the court concluded thus:

"The court a quo was thus correct in refusing the application to have the award made an order of court".

[59] The fact that what this Court sought to make an order was a nullity is without doubt in my mind.

[60] In **North West Star (Pty) Ltd (under judicial management) v Serobatsane and another (2005) 2 BLLR 125 (LAC)**, the LAC said at para 18:

" In the light of all of this I conclude that the respondents' failure to first obtain the leave of the High Court did not invalidate the CCMA proceedings not did it invalidate the proceedings before the Labour Court or its order".

[61] Clearly this statement reflect that the LAC is not averse to the proposition that in a proper case, an invalidation may visit the CCMA order and the order of the Labour Court.

[62] In that matter, the LAC was not satisfied that failure to obtain leave of the High Court would invalidate the award. One is almost certain that if the court was satisfied, there would have been no basis why the invalidation should not follow. (see **Trade Fairs and Promotion (Pty) Ltd v Thomson and another 1984 (4) SA 177 (W) at 183 D-F**, **Suid Afrikaanse Sentrale Ko-operatiewe Graan**

Maatskappy Bpk v Shifren and others and the Taxing Master 1964 (1) SA 162 (O) at 164 G - H).

[63] Accordingly in my view a declarator can issue to the effect that the order is a nullity as it was issued without powers in a sense that the awards made an order of court were a nullity.

[64] In the light of the views expressed, it will be purely academic to deal with the other applications. However, I shall briefly deal with the other applications just to illustrate certain points.

The contempt application

[65] I had misgivings with prayer 3 of the contempt application. I doubt that the court would have jurisdiction to order a promotion and payment of salary difference. I am not certain where would this be emanating from. The second award only referred to a demotion to the position of deputy principal. This prayer seeks a promotion to the post of the deputy principal.

[66] Section 186(2) (a) makes provision for promotion issues to be seen as unfair labour practices. Promotion being one of the aspects for unfair labour practice, then such disputes has to be determined with reference to section 191(1) (b) (iv) of the Act.

[67] In my view, the court lacks jurisdiction anyway to order the promotion sought. In the papers no right to promotion has been spelled out. Accordingly even if I was inclined to entertain the

contempt application which I do not do given the views expressed above, I would have refused prayer 3.

[68] In terms of prayer 2 and 4, I would have refused the prayers simply on the basis of the principles set out in the decision of **Fakie No v CCII Systems (Pty) Ltd 2006 (2) SA 326 (SCA)**.

Order

[69] In the result I make the following order:

1. The second and third respondents are joined to these proceedings.
2. The first and second award are declared to be a nullity.
3. The order is equally declared a nullity.
4. the contempt application is dismissed.
5. No order as to costs.

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G N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 26 September 2007

Date of Judgement: 04 October 2007

APPEARANCES:

For the Applicant:	Adv Beaton
Instructed by	Erasmus Incorporated
For the 1st - 3rd Respondent:	Adv F A Boda
Instructed by	The State Attorneys