IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case Number: C573/2014

In the matter between:

THE CITY OF CAPE TOWN	**Applicant**
And	
THE SOUTH AFRICAN LOCAL GOVERNEMENT BARGAINING COUNCIL	**First Respondent**
C DE KOCK N.O.	**Second Respondent**
BLAMO BROOKS	**Third Respondent**

Date heard: 29 November 2015

Delivered: 22 April 2016

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number no: WCM021411. The Award handed down by the First Respondent (the Arbitrator) reads as follows:

"14.1 The disciplinary hearing held in respect of the applicant, as well as the sanction of demotion that followed such hearing, is invalid and of no force and effect.

14.2 The respondent is ordered to reinstate the applicant into the position he held as Area Manager before his demotion with retrospective effect and with no loss of benefits.

14.3 The respondent must comply with this award within two weeks from the date that this award has been served on it."

[2] In summary the applicant submitted before me that:

2.1 The question before the arbitrator was whether the third respondent's demotion amounted to an unfair labour practice and was referred to the CCMA in terms of section 191 of the LRA. The arbitrator failed to understand the nature of the enquiry before him and/or exceeded his powers by failing to resolve the dispute about an alleged unfair labour practice that had been placed before him and, instead, confining his inquiry to the issue of non-compliance with clause 6.3. of the Council's Disciplinary Procedure and Code Collective Agreement;

2.2 The arbitrator exceeded his powers by issuing an award to the effect that the City had breached the Code, for which no legal basis existed in that the Code was of no force and effect at the time when the award was issued.

2.3 Evidence was essential to establish the existence or extent of unfair conduct on the part of the City but the arbitrator declined to hear evidence. This precluded him from arriving at a reasonable decision on the issue and amounts to a gross irregularity.

[3] The main body of the award was short and bears recording as follows:

"This matter was scheduled for and to be heard as an arbitration process on 22 April 2014. The Applicant appeared in person and Mr MJ Stopka represented the respondent.
I was advised by the applicant from the onset of the arbitration proceedings that the respondent failed to comply with clause 6.3 of the SALGBC – Disciplinary Procedure and Code Collective Agreement and the applicant will raise this alleged non-compliance as a procedural irregularity.
I raised my concerns regarding the consequences of such alleged non-compliance and whether it is correct to raise such alleged non-compliance in the absence of condonation being applied for and granted, as procedural unfairness. I advised the parties of the decision handed down by the Labour Appeal Court in Revan Civil Engineering Contractors & others v National Union of Mineworkers & others (2012) 33 ILJ 1846 (LAC) ***and indicated to them that I need to determine the issue of lawfulness/validity of the disciplinary process and the subsequent findings and sanction before I can deal with*** **whether the respondent committed an unfair labour practice regarding demotion (disciplinary sanction short of dismissal).**[1] *I advised the parties that I am bound by the decisions of the Labour Appeal court and it was therefore imperative that I satisfy myself first whether the disciplinary action, findings and sanction were lawful and/or valid*
I therefore made the following order:

> *"The parties are required to submit written submissions to the SALGBC, on or before 12 May 2014, wherein they are required to:*
>
> *(a) Address the issue as to whether there was non-compliance with clause 6.3 of the Code;*
>
> *(b) If so, whether the disciplinary action taken against the applicant was lawful and/or valid;*
>
> *(c) Whether I have the power to determine whether the respondent committed an unfair labour practice in the event of the disciplinary action, findings and sanction being unlawful and/or invalid;*
>
> *(d) What relief, if any, must be awarded if the disciplinary action taken was unlawful and/or invalid?*
>
> *The parties will reply to each other's written submissions, if required, by no later than 15 May 2014 where after an award will be issued within 14 days".*

Both parties filed their respective submissions in line with the order I made and I am required to issue an award based on the issues as raised in my order as outlined above.

I must perhaps state that just prior to me considering the submissions made and writing this award the SALGBC offices provided me with a judgement issued by the Honourable Justice Steenkamp on 26 May 2014 in the matter between ***SAMWU obo T Jacobs v City of Cape Town & others*** *(Case No: C701/13). The judgement concerns an application for the review of an*

[1] Emphasis my own

arbitration award issued by myself where I found that I did not have the power to make a decision that the disciplinary hearing was null and void. The facts of the matter were similar to the facts in this matter in that it concerned the failure by the City of Cape Town to comply with clause 6.3 of the Disciplinary Code and Procedure.

Judge Steenkamp considered the application for review and found, in essence, that because the Disciplinary Code and Procedure forms part of a collective agreement and as such gives rise to contractual rights, the arbitrator had the power and in fact was obliged to issue a declaratory award to the effect that the disciplinary hearing was null and void due to the employer's non-compliance with clause 6.3. The judge reviewed the award and found that the disciplinary hearing was invalid and of no force and effect. The employer was ordered to reinstate the employee in her position retrospectively with no loss of benefits.

The issues in the matter currently before me are similarly based on the respondent's alleged non-compliance with clause 6.3 with no application for condonation having been applied for. The respondent in this matter however disputes that they failed to comply with clause 6.3. I am as such required to first make a decision on this issue before I proceed to deal with the consequences of a failure to comply with clause 6.3.

Did the respondent comply with clause 6.3 of the Code?

The respondent concedes in its written submissions that the allegations of mismanagement at the Mannenberg Sports Field was brought to the respondent's attention by Arthur Adams, a Professional Officer in the Sports and Recreations Department, to Mr Robert Richards, the investigating officer during June 2012.Whilst in the process of investigating the allegations of mismanagement at Mannenberg Sports Field, a second allegation of mismanagement by the applicant was reported to Mr Robert Richards when he set up an interview with Mr Jan Fourie, the District Manager, on 2 November 2012.

Both investigations were concluded during February 2013 and the reports were submitted to the Director: Sports and Recreation and Amenities for consideration. The disciplinary charges were formulated and served on the applicant on 10 April 2013, which the respondent claimed was within the three month period given the fact that the report was submitted on 18 February 2013.

I do not intend to analyse the submissions any further. I am satisfied that the three month period in terms of clause 6.3 started running as from June 2012 and on 2 November 2012 respectively and that, since the respondent only charged the applicant on 10 April 2013, clause 6.3 has not been complied with.

The respondent was obliged to seek condonation, which they failed to do.

Effect on non-compliance with clause 6.3

I am bound by the decisions of the Labour Court and based on the judgement issued by Judge Steenkamp where he reviewed a previous award issued by myself, I have no option but to find that the disciplinary hearing and the sanction of demotion is invalid and of no force and effect."

[4] It is not necessary for me to deal with the vexed questions raised in this review relating to the applicability of the collective agreement in question, or the correctness or otherwise of ***SAMWU obo T Jacobs v City of Cape Town & others*** *(Case No: C701/13).* The LAC will be seized with deciding whether the latter matter was correctly decided, or whether the judgment in **Tsengwa v Knysna Municipality and Others** (Case number C457/14) which took a different approach stands to be upheld. In addition, this court's order in **City of Cape Town v Independent Municipal and Allied Trade Union** (case number C884/2014) which declared the said collective agreement not binding upon the City, is set to be heard in the Labour Appeal Court.

[5] These questions are not necessary to address because the award stands to be reviewed on the basis that the arbitrator failed to understand the nature of the enquiry before him and/or exceeded his powers by failing to resolve the dispute about an alleged unfair labour practice that had been placed before him and, instead, confined his inquiry to the issue of non-compliance with clause 6.3. of the Council's Disciplinary Code, i.e. the collective agreement.

[6] In **Hospera obo TS Tshambi and Department of Health, KwaZulu-Natal** (delivered on 24 March 2016), the LAC stated a follows:

> "An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This Court in *Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw),*[2] addressed directly the question of whether the employees' characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought,

[2] (2007) 28 ILJ 1042 (LAC).

this Court held that the latter should prevail. As a result, in *Wardlaw,* an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The Constitutional Court disposed of this issue in *CUSA v Tao Ying Industries and Others*[3]

> 'A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'"

[6] In this matter, the arbitrator did not scrutinise what the dispute before him was in a situation in which it had been referred to him under section 191 of the LRA. Having been told that there may have been a breach of the collective agreement in question, he simply turned his attention to that issue, and misconstrued the nature of the enquiry before him i.e. the unfair labour practice dispute relating to demotion referred to the first respondent. He failed to take account of facts which the City wished to lead in evidence in relation to its' alleged unfair conduct. In all the circumstances the award stands to be set aside. I do not consider it apposite to make a costs order in this matter.

[7] I make the following order:

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[3] (2008) 29 ILJ 2461 (CC) at para 66.

Order:

1. The award under case number WCM 021411 is reviewed and set aside;

2. The dispute is remitted back to the first respondent for arbitration anew before an arbitrator other than second respondent.

3. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: A.C Freund SC instructed by Bradley Conradie Halton Cheadle

Third Respondent: Guy and Associates