IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR1109/05

2006.03.09

In the matter between

MUNICIPAL EMPLOYEES PENSION FUND First Applicant

AKA RETIREMENT SERVICES (PTY) LIMITED Second Applicant

and

PHILDA MAGAZI NTOZAKHE First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

MAGAZI Third Respondent

J U D G M E N T

REVELAS J

[1] In this matter, which I heard on Friday the 3rd, I now give judgment as follows.

[2] The applicant ("the Fund" or "Aka") seeks to review an award made in favour of the third respondent ("Magazi") in terms whereof she was to receive R651 034,20 as compensation for an alleged unfair dismissal. Magazi was dismissed following

charges of alleged fraud, where she allegedly used employees of the first applicant to do private work regarding her hair salon, and that labour was then invoiced for the account of the applicant as overtime work.

[3] Ten serious charges were brought against Magazi relating to insubordination and making use of overtime work when she was not supposed to. The ninth charge, at the behest of the arbitrator, was withdrawn after the chairperson of the enquiry had heard evidence in this regard. It was also withdrawn at the chairperson's behest.

[4] Magazi's dismissal followed a disciplinary hearing where evidence of the aforesaid counts of misconduct was led. Magazi had been employed as a senior operations manager, a position just below the chief executive officer when she was dismissed. She referred the disputes about the unfair dismissal to the second respondent ("the CCMA"), where the matter was eventually arbitrated by the first respondent, ("the arbitrator"), whose award is sought to be set aside in this application.

[5] The arbitration hearing took place on 7 April 2005. The first applicant (whom I shall refer to as "the fund") was cited as the employer party in those proceedings as they were Magazi's former employers against whom she had referred the matter to the CCMA. Advocate Tholoe was there to represent the Fund. Advocate Lyseth represented Magazi. Advocate Tholoe also represented the Fund at the pre-arbitration meetings held prior to the proceedings. His entitlement or authority to act on behalf of the first respondent was not placed in dispute at these proceedings, but all parties agreed that they must provide proof

of *locus standi* on the date of argument of the matter.

[6] On the day of the hearing the applicant raised a point *in limine* through Lyseth, that Tholoe had no *locus standi* in that the company who appointed him was AKA Financial Services (Pty) Limited (also the "second applicant") and that company was not entitled to employ him since the employer party, which is the Pension Fund, was a trust and Tholoe had to be appointed in terms of a resolution of the trustees.

[7] Tholoe produced a certified extract of the minutes of the first applicant's management committee meeting held on 23 April 2004. The relevant paragraph in that document (paragraph 2.3) reflects that AKA Financial Services, who is the second applicant, and who had appointed Tholoe, had been appointed as the first applicant's administrator with effect from 1 March 2003.

[8] In terms of an administration agreement entered into by the same two parties, the fund (first applicant) delegated certain powers and functions to the administrator (AKA Financial Services (Pty) Ltd, or AKA or the second applicant). The chairperson of the meeting, Mr M I Mhlangu signed the document on 6 April 2005, which is long after the meeting had been held. In this regard the arbitrator held as follows (p.22 of the record):

> **"The most glaring problem with this document is that it seeks to make respective appointments. Secondly it was only filed on 6 April 2005 whereas the meeting was supposedly held about eleven months ago. There should be a signed copy closer to that date. On its own the document does not say anything about the**

> **right of AKA to act on behalf of the respondent. It was therefore my ruling that indeed AKA does not have *locus standi*, and as a result Adv Tholoe cannot represent the fund. Effectively there was no appearance for the respondent."**

The matter was then proceeded by default since the first applicant was not permitted to participate in the proceedings, represented by Adv Tholoe.

[9] The applicants seek to review these arbitration proceedings and have the award set aside on the following basis:

1. The matter was never conciliated because there was no certificate of non-resolution issued.

2. The arbitrator had committed a gross irregularity in the proceedings by excluding the applicant from the arbitration process, and consequently ignoring the fundamental *audi alteram partem* rule.

[10] The first point is bad in law, since the process was not conducted by first conciliating the dispute and then when that process was finalised, an arbitration hearing would follow if the conciliation failed. The procedure followed in this case was the so-called "Conarb", which is essentially a conciliation and arbitration process consolidated into one process, the one evolving into the other. By the very nature of conciliation-arbitration a certificate of non-resolution would not be a prerequisite for jurisdiction of the arbitrator who is conciliating the matter as well.

[11] I will now deal with the second point, and that is the authority

point. I believe counsel on behalf of the applicant was correct when he pointed out to me that there were five sources of authority which was placed before the commissioner. The first was the word of Adv Tholoe. Secondly, the very instruction of the person *de facto* and in law managing the business of the employer, namely Mr Letjane, who is also the chief executive officer of the fund, was present and there present to instruct the lawyers, who had been given the go ahead by the arbitrator to act, and by this I mean that she permitted legal representation.

[12] The final minutes of the meeting were before the arbitrator. The fact that it was signed long after the meeting was held, that does not render it null and void, because authority can be obtained retrospectively. Then there was the administration agreement and the evidence of the management meeting which was held on 25 April 2004.

[13] On the face of it, arbitrator decided the matter on submissions made, and not by evidence under oath. Was there anything fraudulent or irregular about the minutes of the meeting or the authority sought to be gained therefrom? The arbitrator still found that there was a need for a meeting or a minute from the trustees.

[14] In my view, the minutes of the decision taken by the administrators of the fund (first applicant) would surely suffice as authority. There was no rational basis upon which the arbitrator could have found that the advocate in question did not have the necessary authority to act for, and on behalf of the first applicant, as he had been duly appointed by an agent of the first applicant charged with administering the first applicant.

There was also no basis upon which the arbitrator should have, as at the date of the arbitration, which preceded the signing of the minutes by the chairman, ignored that minute in the absence of the proof of fraud. In law there is no requirement, (and in this regard I refer to the Pension Funds Act), that minutes have to be kept within a stipulated time for pension funds.

[15] In my view, the arbitrator also committed an irregularity by not taking evidence under oath. She simply went on the say-so of the various advocates at the time. This was also a serious matter. The charges levelled against Magazi are very serious. I am also concerned that the arbitrator had found that all the charges were "unsubstantiated", when she heard only one side.

[16] Her findings do not accord with the minutes of the disciplinary hearing. They show a different picture. It is also of significance that Magazi and Mr Letjane had an affair, which was subsequently found out by Magazi's husband. Thereafter it would appear, on Magazi's evidence at the disciplinary hearing, that practices which would be regarded as fraudulent or unethical by most people were common practice at the fund, but when the affair was ended, and the thieves fell out, then Magazi's deeds became sins.

[17] In such a serious case with two conflicting versions, it would seem that an injustice could occur if the matter were to be decided by default, without hearing the parties merely because the absence of authority for one party to appear, which was not strictly speaking, not even necessary.

[18] I therefore believe that the ruling of the arbitrator with regard to

the authority should be set aside. This is definitely not a matter where I can substitute my own findings for that of the arbitrator, and the matter should be remitted to the second respondent (the CCMA) to be arbitrated by a different arbitrator.

[19] I make the following order:

1. The award of the first respondent is hereby set aside.

2. The dispute is remitted to the CCMA, to be arbitrated by a different arbitrator.

3. There is no order as to costs.

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Elna Revelas
Judge of the Labour Court

Date of hearing: 3 March 2006
Date of judgment: 6 March 2006

On behalf of the applicant:
Adv N.A Cassim
Instructed by: KNRP Attorneys

On behalf of the respondent:

Adv Lyseth