IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR723/05

In the matter between:

MINISTER OF LABOUR Applicant

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL First Respondent
ZODWA MDLADLA (ARBITRATOR) Second Respondent

DU BRINK Third Respondent

JUDGMENT

Introduction

1. This is an application to review an arbitration award in terms of which it was found that the third respondent's suspension by the applicant for more than 60 days is an unfair labour practice. The applicant was ordered to uplift with immediate effect the third respondent's suspension.

2. The application was opposed by the third respondent.

The background facts

3. The third respondent, Du Brink is an employee of the applicant - the Department of Labour. He is an Assistant Director: Information Technology. He reports to the Chief Information Officer within the applicant's department. He was suspended for two years from 2002 to 2004 for alleged nepotism, sexual harassment and self enrichment. He then

resumed his duties on 30 June 2004 after his suspension was uplifted. On 30 August 2004 he was again suspended from his duties because of allegations of fraud and corruption.

4. The third respondent declared a dispute and referred it to the first respondent, the General Public Service Sectoral Bargaining Council (the GPSSBC) for conciliation and arbitration. He challenged his suspension on the basis that it was an unfair labour practice because it was indefinite. The arbitration hearing took place on 25 January 2005 before the second respondent (the arbitrator). No evidence was led at the arbitration hearing but submissions were made and a number of documents were placed before the arbitrator. The issue that had to be determined by the arbitrator was whether the applicant had suspended the third respondent for more than the period stipulated in Resolution 1 of 2003 (the Resolution) of the Public Service Coordinating Bargaining Council (PSCBC), and if so, whether the suspension amounted to an unfair labour practice.

5. The arbitrator in an award dated 15 February 2005 found that no evidence showed that before the third respondent was suspended that he was given an opportunity to make representations on why he should not be suspended or why the suspension should not be extended. The arbitrator found that in terms of clause 7.2(c) of the Resolution an employee had to be brought into a hearing within 60 days and if the investigation was not yet completed, the parties had to go to the hearing and request a postponement for a further investigation. Any delay that exceeded 60 days without the employee being brought into a hearing was unfair. The arbitrator found that no evidence was placed before her that suggested the exceptional circumstances that warranted more than 60 days

of suspension. The arbitrator found that the applicant had committed an unfair labour practice by suspending the third respondent for more than 60 days and ordered the applicant to uplift the suspension with immediate effect.

6. The applicant felt aggrieved with the award and brought a review application on 30 March 2005. It appears that the grounds for review are as follows:

6.1 Since the dispute before the arbitrator was one of interpretation of clause 7.2(c) of the Resolution which is a collective agreement, the arbitrator did not have the jurisdiction to interpret it and the dispute should have been dealt with in terms of section 24(2) of the Labour Relations Act 66 of 1995 (the Act). The first respondent could not deal with the dispute. The arbitrator misdirected herself by proceeding to adjudicate the dispute although the dispute should have been referred to the Commission for adjudication.

6.2 Even if the arbitrator had the authority to adjudicate the dispute, she misdirected herself in the following respects:

6.2.1 she erred by not finding that the allegations against the third respondent were so serious as to warrant the suspension;

6.2.2 she erred in not considering that the suspension of the third respondent was taken as a precautionary suspension under clause 7.2(b) of the Resolution;

6.2.3 she misdirected herself by not considering that the third respondent was always on full pay and therefore did not suffer any serious prejudice. Furthermore, the outcome of the investigation would always be given to

him;

6.2.4 she erred by not considering that the presence of the third respondent at the work place during the investigations of the Scorpions, might jeopardise such investigations and/or endangered the well-being and/or even the safety of any other employees within the department;

6.2.5 she misdirected herself by over emphasising the importance of finalising the criminal investigations quickly, without due regard to the special circumstances of the case;

6.2.6 she lost side of the objectives of the department and the Government generally to eliminate corruption in Government departments;

6.2.7 she misdirected herself by interpreting clause 7.2(c) of the Resolution to mean that the prescribed 60 days, refers to the maximum period within which a disciplinary hearing must be held.

6.3 The applicant contended that by adjudicating the dispute the arbitrator exceeded her jurisdiction. Her finding was improper.

Analysis of the evidence and arguments raised

7. In the matter of *Rustenburg Platinum Mines Ltd (Rustenburg Section) vs CCMA and two others Case No: 598/05* the Supreme Court of Appeal restated what the requirement for an application for a review is which is whether the commissioner's decision was rationally connected to the information before him and to the reasons he gave for it. There must be a rational objective basis justifying the connection the commissioner made between the material before him and the conclusion he reached. The court also found that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies. The

following was said at paragraphs 31 and 32 of the aforesaid judgment:

"In a review, the question is not whether the decision is capable of being justified (or, as the LAC thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him to her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion. This is not to lose sight of the fact that the line between review and appeal is notoriously difficult to draw. This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision.

But this does not mean that PAJA obliterates the distinction between review and appeal.....

In Carephone, Froneman DJP explained that in determining whether administrative action is justifiable in terms of the reasons given for it (or, in PAJA's formulation, whether the connection made is 'rational') -

'value judgments will have to be made which will, almost inevitable, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

8. It is common cause that the third respondent was suspended on 30 August 2004. He then

referred a dispute to the first respondent for conciliation and arbitration. It is common cause that no evidence was led at the arbitration proceedings. Certain documents were handed in and the parties made certain submissions. None of the documents handed up at the arbitration hearing were placed before this Court. On 15 February 2005 the arbitrator found that the suspension was unfair and ordered the applicant immediately to uplift the suspension. The applicant has failed to do so.

9. On 15 March 2005 that the applicant charged the third respondent with misconduct and was called upon to attend a disciplinary hearing in terms of clause 6 and 7 of the PSCBC Resolution. At the hearing of 29 March 2005 the applicant asked to be legally represented and after hearing argument the presiding officer granted the request. The matter did not proceed. All of this happened after the arbitrator had issued the award.

10. Before dealing with the grounds of review I deem it necessary to refer to clause 7.2(c) of the Resolution which provides as follows:

"If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement".

11. It is clear from clause 7.2(c) of the Resolution that after an employee has been suspended that a disciplinary hearing must be held within a month or 60 days. If the matter is complex, the disciplinary hearing must be held within 60 days and the chairperson of the hearing must then decide on any further postponements. The suspension can therefore

not exceed more than 60 days without a disciplinary hearing being held. Facts can be placed before the chairperson to grant a further postponement due to the complexities of the matter.

12. At the commencement of the review proceedings, Ms Makhubela who appeared for the applicant conceded that there is no substance in the applicant's first grounds of review relating to the interpretation of the Resolution. The concession was well made since the arbitrator in determining the issue that she was called upon to decide had to interpret clause 7.2(c) of the Resolution. The dispute referred to the first respondent was not one involving an interpretation of clause 7.2(c) but whether or not the suspension exceeded the period mentioned in it and if it were an unfair labour practice. In deciding the issue an arbitrator should interpret the specific clause.

13. It is clear from the facts placed before the arbitrator that the suspension of the third respondent exceeded 60 days. He was only charged after an award was issued by the arbitrator. The disciplinary hearing did not proceed thereafter. The arbitrator correctly found that the applicant committed an unfair labour practice. In this regard see *Ngwenya vs Premier of Kwa-Zulu Natal* (2001) 22 ILJ 1667 (LC). The second ground of review is also baseless. The fact is that the applicant did not attempt to comply with clause 7.2(c) of the Resolution. The arbitrator did not commit any reviewable irregularity. She understood what the issues were that she was required to determine. She correctly applied the law to the facts. There is a rational objective basis justifying the connection she made between the material placed before her and the conclusion she reached.

14. The application stands to be dismissed.

15. All that remains to be considered is the issue of costs. Mr Kruger who appeared for the third respondent urged me to grant costs on an attorney and clients scale. This was so on the basis that the applicant had previously suspended the third respondent for a period of two years, brought a review application and thereafter withdrew the application. The suspension was uplifted. The third respondent was again suspended. The third respondent did not give any notice either in its answering affidavit or heads of argument that it would be seeking an order for costs on an attorney and client scale. This is clearly not permissible. I have taken into account that the third respondent is still an employee of the applicant and that because no such prior notice was given to the applicant about punitive costs that the applicant pay the third respondent's costs on a party and party scale.

16. In the circumstances I make the following order:

    16.1 The application is dismissed with costs on a party and party scale.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	MS MAKHUBELA INSTRUCTED BY STATE ATTORNEY
FOR THIRD RESPONDENT	:	T P KRUGER INSTRUCTED BY HEIDI BARNARD ATTORNEYS
DATE OF HEARING	:	29 SEPTEMBER 2006
DATE OF JUDGMENT	:	17 OCTOBER 2006