REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 392/14

In the matter between

KHULULEKILE LAWRENCE MCHUBA **Applicant**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Respondent**

Heard: **16 June 2015**

Delivered: **4 February 2016**

Summary: When an employer and employee have agreed that a pre-dismissal arbitration be held into allegations of misconduct against the employee as envisaged in section 188A of the Labour Relations Act 66 of 1995, the employer may not withdraw unilaterally from the agreement.

JUDGMENT

LALLIE, J

[1] The applicant approaches this Court for an order in the following terms:

> '1. Declaring that the termination of the contract of employment of the Applicant by the Respondent constituted a breach of its contractual

obligation to address allegations of misconduct against the Applicant by way of a pre-dismissal arbitration in terms of section 188A of the Labour Relations Act 66 of 1995;

2. Ordering that the termination of the contract of employment of the Applicant by the Respondent is set aside.

3. Ordering that the Applicant is to be reinstated in his employment with the Respondent with retrospective effect from December 2013 without loss of remuneration or benefits.

4. Ordering that in the event that the Respondent elects to pursue an enquiry into the alleged misconduct by the Applicant, it is directed to do so by way of a pre-dismissal arbitration as contemplated in section 188A of the Labour Relations Act 66 of 1995".

[2] The application is opposed by the respondent. The facts of this matter are that the applicant was employed by the respondent's predecessor, the South African Rail Commuter Corporation Ltd ("SARCC") as the Head: Procurement & Tender Administration on 29 April 2005. In January 2011, the applicant's contract of employment was transferred to the respondent on the same terms and conditions. The respondent's disciplinary code and procedure was incorporated into the applicant's contract of employment. The following clauses of the disciplinary code are relevant to the application at hand:

'5.3.1 Where the contract of employment does not clearly state, for the purpose of disciplining employees for allegations of misconduct or incapacity SARCC and Employee/Representative a recognised Trade Union for which the alleged offender is a fully paid-up member will be entitled, to decide whether or not to hold any internal disciplinary enquiry, or to proceed instead via the pre-dismissal arbitration procedures contemplated in Section 188A of the Labour Relations Act.

5.3.2 In the event that SARCC elects to proceed via the pre-dismissal arbitration procedure in the circumstances outlined above SARCC will bear the cost of an arbitrator from Tokiso Dispute settlement Services or any other Labour Dispute Settlement Services appointed by SARCC. The arbitration would be final and binding on both the employee and SARCC.'

[3] On 16 March 2011, the applicant was suspended from duty pending investigation into allegations of misconduct against him. On 1 July 2013, the respondent issued the applicant with a notice to attend a pre-dismissal arbitration hearing on 10 July 2013. In the notice, the respondent informed the applicant *inter alia*, that it had elected to refer the matter to a pre-dismissal arbitration hearing in terms clause 5.3 of its disciplinary code. After correspondence was exchanged between the legal representatives of the parties and Mr Masango ("Masango") of Tokiso Dispute Settlement Services ("Tokiso"), the pre-dismissal arbitration was scheduled for 28 October 2013. At the commencement of the pre-dismissal arbitration, the applicant's legal representative objected to the pre-dismissal arbitration being held under the auspices of Tokiso as it was not an accredited agency and therefore lacked the necessary jurisdiction. Mr Williams ("Williams"), the Tokiso arbitrator who conducted the pre-dismissal arbitration issued the following ruling in response to the objection:

> 'I hereby order that:
>
> 3.1 The parties must verify with the CCMA if Tokiso is accredited;
>
> 3.2 In the event that the CCMA confirms that accreditation in writing, the following must be done:
>
> 3.2.1 The request for a disciplinary arbitration in terms of section 188A must be in the prescribed form;
>
> 3.2.2 The employee may consent to the section 188A pre-dismissal arbitration in writing;
>
> 3.2.3 The employer must pay the prescribed fee; and
>
> 3.3 In the event CCMA informs the parties in writing that Tokiso is not accredited, the employer must approach the CCMA or any accredited agency to conduct the section 188A process".

[4] Tokiso was accredited to conduct conciliation and arbitration (including pre-dismissal arbitrations) for the period 01 December 2013 to 30 November 2014 in Government Gazette number 36963 of 23 October 2013. At the time the

parties appeared before Williams, Tokiso was not an accredited agency and therefore lacked jurisdiction to conduct the pre-dismissal arbitration as envisaged in section 188A of the Labour Relations Act 66 of 1995 (the section 188A arbitration). On 4 December 2013, the applicant received a letter from the respondent in which he was informed that the respondent had exercised its discretion to conduct a disciplinary hearing against him through written representations. He was afforded an opportunity to make his full written representation in answer to the same allegations of misconduct which appeared in his pre-dismissal arbitration notice. He was invited to give written reasons by 11 December 2013, why disciplinary action should not be taken against him for the acts of misconduct referred to in the invitation. The applicant refused to be subjected to a disciplinary enquiry but insisted that the pre-dismissal arbitration be pursued under the auspices of the CCMA or any accredited agency. On 18 December 2013, the applicant received a letter from the respondent dated 13 December 2013, informing him that his employment contract with the respondent was being terminated with immediate effect.

[5] The applicant submitted that the respondent breached the contract of employment by changing its decision to conduct a pre-dismissal arbitration into the allegations of misconduct against him and decided to follow a disciplinary process based on representation and terminated the contract of employment pursuant to such process. The respondent denied having breached the contract of employment. It submitted that the applicant sought incompetent prayers for which there is no basis either in contract or statute. It further denied deviating from its employee relations policy and submitted that it had no contractual obligation to pursue a pre-dismissal arbitration. In terms of its policy, formal disciplinary proceedings do not have to be invoked whenever a standard of conduct is breached. The respondent expressed the view that the applicant's real dispute is the procedural unfairness of his dismissal which he should have challenged at the CCMA not the Labour Court which lacks jurisdiction to adjudicate the matter.

[6] The respondent's argument that this Court lacks jurisdiction to adjudicate this matter is untenable. It is not supported by the decision in *Gcaba v Minister of Safety & Security (Gcaba)*[1] the respondent sought to rely on. In *Gcaba* (*supra*), it was held that the court's jurisdiction is determined by the applicant's pleadings. The applicant's pleaded case is based on the beach of his contract of employment. Section 77(3) of the Basic Conditions of Employment Act 75 of 1997, grants the Labour Court jurisdiction over any matter concerning a contract of employment. It is common cause that the right the applicant seeks to asset which is the determination of allegations of misconduct against him by means of a pre-dismissal arbitration is based on his contract of employment. The respondent conceded that it initially chose the option of dealing with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration. This Court therefore has the necessary jurisdiction to adjudicate the matter at hand.

[7] The respondent admitted having initially elected to conduct the section 188A arbitration. It further submitted that instead of cooperating with the process, the applicant requested unnecessary and irrelevant documents, which he knew, were not in the respondent's possession. The respondent considered the decision to pursue the pre-dismissal arbitration in light of the applicant's attitude. The respondent also submitted that its election to conduct the enquiry in an informal basis is provided for in clause 1.3 of its disciplinary code. The respondent lastly submitted that it was well with its rights to conduct the disciplinary enquiry by way of written representations.

[8] The applicant's case is based on the breach of his contract of employment by the respondent. Clause 5.3 of the respondent's disciplinary code, which forms part of the applicant's contract of employment, provides that for purposes of disciplining employees for allegations of misconduct, the respondent may hold either a disciplinary enquiry or a section 188A arbitration. In the event of the respondent electing to proceed *via* the dismissal arbitration procedure, it will bear the costs of an arbitrator from Tokiso or any other labour dispute settlement services appointed by the respondent. It is common cause that the

[1] [2009] 12 BLLR 1145 (CC).

respondent initially elected to proceed *via* the pre-dismissal arbitration procedure. The applicant submitted that in circumstances where the respondent had elected to deal with the allegations of misconduct against him by way of a pre-dismissal arbitration in terms of section 188A of the LRA, that would be the route that would be followed to address the allegations of misconduct. In this case, he submitted that parties would be bound to utilise such a process and to adhere to the its outcome. The respondent denied that it had a contractual obligation to pursue the section 188A pre-dismissal arbitration.

[9] The following portion of section 188A of the LRA is apposite:

> '(1) An employer may, with the consent of the employee request a *council*, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.
>
> (2) The request must be in the prescribed form.
>
> (3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of-
>
> (a) payment by the employer of the prescribed fee; and
>
> (b) the employee's written consent to the inquiry.
>
> (4) (a) An employee may only consent to a pre-dismissal arbitration after the employee has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.
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> (b) Despite subparagraph (a), an employee earning more than the amount determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*, may consent to the holding of a pre-dismissal arbitration in a contract of employment".

[10] The applicant submitted that he consented and agreed to the process taking the form of a pre-dismissal arbitration in terms of section 188A of the LRA in his contract of employment which incorporates the respondent's disciplinary code, and by participating in the process that ensued pursuant to the notice to attend the pre-dismissal arbitration. The respondent argued that the applicant

did not consent to the pre-arbitration dismissal in his contract of employment. The disciplinary code provides that the respondent will deal with misconduct either by holding a disciplinary enquiry or a pre-dismissal arbitration. When the respondent took a decision that a pre-dismissal arbitration would be held into the allegations of misconduct against the applicant, it had to comply with the provisions of section 188A of the LRA. In terms of section 188A (1) of the LRA, the respondent needed the applicant's consent when requesting Tokiso to conduct the pre-dismissal arbitration. At the time the respondent requested Tokiso to conduct the pre-dismissal arbitration, the applicant had not given his consent. The disciplinary code provides that the pre-dismissal arbitration was one of the options open to the respondent in dealing with misconduct. Nowhere, in the disciplinary code or the contract of employment did the applicant consent to the pre-dismissal arbitration. He could only consent to it after the respondent had informed him of its election.

[11] The applicant submitted that he also consented to the pre-dismissal arbitration by participating in the process that ensued pursuant to the notice to attend the pre-dismissal arbitration. Correspondence was exchanged between the legal representatives of the parties and Mr Masango (Masango) of Tokiso to arrange a date for the pre-dismissal arbitration. The applicant and the respondent attended the pre-dismissal arbitration. The pre-dismissal arbitration commenced. An objection was raised on behalf of the respondent to the effect that Tokiso was not an accredited agency and therefore lacked jurisdiction to conduct the pre-dismissal arbitration. The arbitrator appointed by Tokiso made a ruling that the parties should verify with the CCMA whether Tokiso was accredited. If it was, he required that the request for the pre-dismissal arbitration be in the prescribed form; the applicant could consent to the pre-dismissal arbitration in writing and the respondent was required to pay the prescribed fee. If Tokiso was not accredited, he directed the respondent to approach the CCMA or any accredited agency to conduct the pre-dismissal arbitration.

[12] In response to the above consent by conduct pleaded by the applicant, the respondent admitted having initially elected to hold a pre-dismissal arbitration.

In addition, it pleaded that instead of cooperating with the process, the applicant requested unnecessary and irrelevant documents, which he knew, were not in possession of the respondent. In light of his attitude, the respondent reconsidered its decision to pursue the pre-dismissal arbitration and elected to conduct the enquiry on an informal basis as provided for in clause 1.3 of its disciplinary code. The real reason the respondent reconsidered its decision to pursue the pre-dismissal arbitration was the applicant's attitude of not cooperating with the process but demanding unnecessary, irrelevant and unavailable documents. By implication, had the applicant co-operated with the process and adopted an attitude acceptable to the respondent, the respondent would not have reconsider its decision to pursue the pre-dismissal arbitration.

[13] Both parties sought to rely on *SA Transport & Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others*[2] (*MSC*). The respondent argued that the applicant's reliance on the MSC judgment is misplaced as there was no agreement between the parties and Tokiso to have the pre-dismissal arbitration held. Interpreting section 188A of the LRA, the court, in the *MSC* judgment, made the following observation: "In effect, in terms of a tripartite agreement between the employee, the employer and the CCMA, the arbitrator steps into the shoes of the employer and assumes the right considered a sacrosanct element of the managerial prerogative-the right to exercise discipline, including the right to dismiss. The benefit for all is the elimination of the duplication that inevitably occurs when court-like in-house hearings inevitably followed by an arbitration hearing conducted on a *de novo* basis".[3] The respondent argued that the applicant became aware that there was no contract as contemplated in section 188A in the absence of his written consent and that Tokiso was not accredited agency at the time that the purported contract was concluded. In an attempt to cure the fatal defect, the applicant advised the respondent in a letter dated 12 March 2014 that Tokiso became an accredited agency on 1 December 2013 and that he did consent to the pre-dismissal arbitration. Notwithstanding the attempt, the defect was

[2] (2013) 34 ILJ 706 (LC).
[3] At para 11.

not cure as it was fatal. It further argued that in the absence of the tripartite agreement, there was no obligation on the respondent to be party to the pre-dismissal arbitration.

[14] The applicant argued that he consented to the pre-dismissal arbitration and there was therefore an agreement that the process be utilised. The pre-dismissal arbitration was initialled by agreement between the parties and Tokiso was seized with the matter. The respondent could not unilaterally decide to abandon the pre-dismissal arbitration and require the applicant to submit written submissions with regard to the allegations of misconduct against him and take a decision to dismiss him. He sought to rely on the following dictum of MSC (*supra)*:

> '[15] It seems to me from the wording of s 188A that once an employer and an employee consent to refer the determination of allegations of misconduct or incapacity to an arbitration hearing in terms of s 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its internal disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. That being so, and since the consent of the affected employee and the CCMA is necessary to achieve that result it is not open to the employer to abandon the process on a unilateral basis'.

[15] The MSC decision is based on different facts but its interpretation of section 188A is correct. The respondent approached Tokiso for a pre-dismissal arbitration to be held into allegations of misconduct against the applicant in terms of its disciplinary code, which was incorporated into the applicant's contract of employment. Section 188A should be given a purposive interpretation. It requires the employee's consent to the pre-dismissal arbitration to be in writing. The purpose of requiring an employee's written consent is to ensure that an employee participate in the pre-dismissal arbitration knowingly as the process may prejudice the employee. An employee who consents to the pre-dismissal arbitration forfeits the right to have the allegations of misconduct against him or her determined in terms of the employer's disciplinary code. The employee's advantage when allegations of dismissal are dealt with in terms of the disciplinary code is that the

employer may not challenge the chairperson's decision in favour of the employee while it may challenge the decision of the arbitrator who conducts the pre-dismissal arbitration. The conduct of the parties and Tokiso confirms their agreement to the pre-dismissal arbitration. The respondent approached Tokiso to have the process held and the legal representatives of both parties and Masango, of Tokiso arranged a date for the pre-dismissal arbitration. Both parties appeared on the date before an arbitrator acting under the auspices of Tokiso. Both parties were ready to proceed with the pre-dismissal arbitration but the respondent raised the issue of Tokiso's accreditation because without the accreditation any decision reached by Tokiso would be a nullity owing to lack of jurisdiction. The respondent did not raise the issue of the absence of the applicant's written consent. In the circumstances, the applicant consented to the pre-dismissal arbitration albeit by conduct. A tripartite agreement between the parties and Tokiso for the pre-dismissal arbitration to be held existed.

[16] The respondent may not rely on Tokiso's non-accreditation as its disciplinary code allowed it to approach any other labour dispute settlement services. On 28 October 2013, Tokiso issued the ruling that the parties head to verify whether Tokiso was accredited and there was a duty on the respondent to comply with the ruling promptly. The respondent's disciplinary code provides that the respondent may appoint Tokiso or any other labour dispute settlement services. When Tokiso's jurisdiction was challenged, there was a duty on the respondent to appoint an alternative body to conduct the section 188A arbitration. In addition, the respondent disclosed the real reason for abandoning the pre-dismissal arbitration. It had nothing to do with the absence of the applicant's written consent in to the pre-dismissal arbitration. The respondent raises the defence of the applicant's lack of written consent as an opportunistic attempt to justify its unacceptable conduct. The reality is that it was punishing the applicant for requesting documents he needed to prepare his defence because it was of the view that they were irrelevant and unnecessary. By referring the matter to pre-dismissal arbitration, the respondent lost the right to take decisions on the relevance of documents the applicant requested as it had handed it over to Tokiso. When the tripartite

agreement was reached, the respondent had no residual power to take any step against the applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration, the applicant acted in breach of the applicant's contract of employment. The applicant is therefore entitled to the relief he is seeking.

[17] I could find no reason in both law and fairness for costs not to follow the result.

[18] In the premises, the following order is made:

18.1 The termination of the applicant's contract of employment by the respondent constituted a breach of the respondent's contractual obligation to address allegations of misconduct against the applicant by way of a pre-dismissal arbitration in terms of section 188A of the Labour Relations Act 66 of 1995.

18.2 The termination of the applicant's contract of employment by the respondent is set aside.

18.3 The applicant is reinstated in his employment with the respondent with retrospective effect from December 2013, without loss of remuneration and benefits.

18.4 In the event that the respondent elects to pursue an enquiry into the alleged misconduct by the applicant, it is directed to conduct a pre-dismissal arbitration as contemplated in section 188A of the Labour Relations Act 66 of 1995.

18.5 The respondent is ordered to pay the costs of this application.

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Lallie J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate Mosam

Instructed by Mchunu Attorneys

For the Respondent: Advocate Seegals

Instructed by Makhubela Attorneys