REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 701/13

In the matter between:

SAMWU obo T JACOBS	**Applicant**
and	
CITY OF CAPE TOWN	**First Respondent**
SALGBC	**Second Respondent**
ADV C DE KOCK N.O.	**Third Respondent**

Heard: **8 May 2014**

Delivered: **26 May 2014**

Summary: Review – disciplinary hearing in breach of collective agreement – LRA s 33A --- proceedings null and void.

JUDGMENT

STEENKAMP J

Introduction

[1] A disciplinary hearing is held outside the time limits prescribed by collective agreement. Does that make it null and void?

Background facts

[2] The applicant[1], Ms T Jacobs, was dismissed by the City of Cape Town. She referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the second respondent). The arbitrator, Adv Coen de Kock (the third respondent) found that her dismissal was substantively fair but procedurally unfair. He did not award any compensation.

[3] Jacobs seeks to have the award reviewed and set aside. She argues that the disciplinary hearing is null and void because it was held outside of a peremptory time period.

[4] It is common cause that SAMWU (along with the other trade union in local government, IMATU) and the City (as a member of the South African Local Government Association, SALGA) are bound to a Disciplinary Procedure and Code Collective Agreement (the Code). The purpose of the Code is to "establish a fair, common and uniform procedure for the management of employee discipline". The Code records that it is the product of collective bargaining concluded in the Bargaining Council and that its application is peremptory and deemed to be a condition of service.

[5] Clause 6 of the Code reads as follows:

> "6.1 An accusation of misconduct against an employee shall be brought in writing before the municipal manager or his authorised representative for investigation.
>
> 6.2 If the municipal manager or his authorised representative is satisfied that there is prima facie cause to believe that an act of misconduct has been committed, he may institute disciplinary proceedings against the employee concerned.
>
> 6.3 The employer shall proceed forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated

[1] Ms Jacobs was represented by her trade union, the South African Municipal Workers Union (SAMWU), in these proceedings and at her arbitration.

> above and still wish to pursue the matter, it shall apply for condonation to the relevant division of the SALGBC."

[6] It is common cause that, in this case, the City did not start the disciplinary hearing within three months and did not apply for condonation.

[7] SAMWU and Jacobs argued at arbitration that the disciplinary hearing was therefore null and void. The arbitrator found that he did not have the power to make such an order. Instead, he found that the dismissal was procedurally unfair for that reason; but that Jacobs had not suffered any prejudice. Therefore he did not grant any compensation.

Grounds of review

[8] Mr *Whyte* argued on behalf of SAMWU and Jacobs that the arbitrator exceeded his powers in terms of s 145(2)(iii) of the Labour Relations Act[2]; and that, in any event, the award is one that no reasonable arbitrator could make.[3] He also argued that, in failing to identify and determine the questions put before him in SAMWU's referral, the award is reviewable as it fails the test set out in *Herholdt.*[4]

Evaluation / Analysis

[9] The arbitrator's powers are defined by the LRA, read with the SALGBC's main agreement and constitution and the Code.

[10] Clause 19.1 of the SALGBC constitution provides that:

> "Despite any other provision in the [LRA], the Council shall monitor and enforce compliance of collective agreements in terms of s 33A of the Act."

[11] Section 33A of the LRA reads:

> "(1) Despite any other provision in this Act, the bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council.
>
> ...

[2] Act 66 of 1995 (the LRA).

[3] *Sidumo & ano v Rustenburg Platinum Mines Ltd & ors* [2007] 12 BLLR 1097 (CC).

[4] *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

> (4)(a) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council.
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> ...
>
> (8) An arbitrator conducting an arbitration in terms of this section may make an appropriate award, including –
>
> ...
>
> (f) any award contemplated in section 138(9)."

[12] Section 138(9) provides that an arbitrator may make any appropriate arbitration award in terms of the LRA, including, but not limited to, an award –

> "(a) that gives effect to any collective agreement;
>
> (b) that gives effect to the provisions and primary objects of this Act;
>
> (c) that includes, or is in the form of, a declaratory order."

[13] It seems clear from these provisions that an arbitrator acting under the auspices of the Bargaining Council does have the power to determine whether the City had complied with its obligations under clause 6 of the collective agreement. And if it hasn't, that arbitrator has the power to issue a declaratory order that the City is in breach of the collective agreement. And if that is the case, the effect of it is that the disciplinary hearing is invalid and of no force and effect.

[14] In this case, the arbitrator mistakenly ruled that he did not have the power to issue a declaratory order, even though he correctly accepted that the City had not complied with the three month period and did not seek condonation. He thus failed to determine the dispute that SAMWU had referred to the Council. That is a reviewable irregularity.

[15] SAMWU had raised this issue squarely upfront. In its referral to conciliation, it alleged that "the chairperson did not have jurisdiction" to conduct a disciplinary hearing. The parties also had the foresight to conduct a pre-arbitration meeting. Under the heading, "Issues that [the arbitrator] is required to decide", the parties noted:

> "1. Whether the [City] has complied with the provisions of clause 6.3 of the disciplinary procedure collective agreement.
>
> 2. In the event of non-compliance with clause 6.3 by the [City], whether the chairperson of the hearing had jurisdiction to proceed with the hearing, in the absence of condonation application with the SALGBC Metro division."

[16] The arbitrator also issued a preliminary ruling on 18 February 2013 in which he requested both parties to present him with written submissions on the following two questions:

> "1. Whether clause 6.3 has been complied with or not.
>
> 2. If not, what the effect and or impact of such non-compliance on the current arbitration proceedings and the applicant's dismissal are concerned [*sic*]. More specifically, whether such non-compliance has the effect that the dismissal is null and void; whether the non-compliance can be raised as a procedural issue; whether the non-compliance can be referred to the SALGBC for a condonation ruling and if granted, whether such a ruling would have cured the non-compliance with retrospective effect."

[17] The question whether the City's non-compliance with the collective agreement led to the invalidity of the disciplinary hearing was thus squarely before the arbitrator. And in any event, he was required to determine the real issue in dispute are in the parties. As Ngcobo J pointed out in *CUSA v Tao Ying Metal Industries*[5]:

> "Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. This requires commissioners to deal with the substance of the dispute between the parties. They must cut through all the claims and counterclaims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions… Commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

[5] (2008) 29 *ILJ* 2461 (CC) para [65].

> 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 the 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 at the arbitration… 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 and the parties may only emerge once all the evidence is in."

[18] SAMWU argued that the City had acted in breach of the collective agreement. It is common cause that the City did not comply with the three-month time stipulation; that it did not apply for condonation; that the provisions of the Code are peremptory; and that they form part of the employee's conditions of service. In deciding that he did not have the power to issue a declaratory to the effect that the disciplinary hearing was null and void, the arbitrator failed to deal with the dispute before him. He also exceeded his powers. This had the effect that the conclusion he reached was so unreasonable that no reasonable arbitrator could have reached the same conclusion.

[19] Mr *Rautenbach* argued for the City, with reference to *Leonard Dingler (Pty) Ltd v Ngwenya*[6]*,* that disciplinary codes are guidelines that can be applied in a flexible manner. And indeed, that approach is generally in line with the purpose of the LRA. But in *Leonard Dingler* the court dealt with the application of an internal disciplinary code. In the case before me, the Code is in the form of a collective agreement that explicitly gives rise to contractual rights. The same distinction applies to the other authority cited by Mr *Rautenbach* in support of his argument, namely *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd,*[7] dealing with the Code of Good Practice in Schedule 8 to the LRA.

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[6] (1999) 20 *ILJ* 1171 (LAC) paras 44-45.

[7] [1997] 10 BLLR 1320 (LC) 1325 H-I.

Conclusion

[20] The arbitrator failed to deal with the dispute before him. Because of that, he reached a conclusion that was so unreasonable that no reasonable arbitrator could have come to the same conclusion. The award must be reviewed and set aside.

[21] It would serve no purpose to remit this dispute to the Bargaining Council. From my reasoning above, it is clear that the Council did have the jurisdiction and the powers to deal with the dispute referred to it. It is also clear that the City breached the collective agreement and that had the effect of nullifying the disciplinary hearing. This court is in as good a position as the Council to issue such a declaratory order. But that is not the end of the matter. Nothing prevents the City from applying to the Council for condonation and then reinstituting disciplinary proceedings against Jacobs.

[22] With regard to costs, I take into account that there is an ongoing relationship between the parties. I also take into account that this judgment may impact on similar disputes between them. In law and fairness, I do not consider a costs order to be appropriate.

[23] I feel constrained to make one further *obiter* comment. I agree with the City's counsel that the effect of these strict time requirements is not in line with the purpose and objects of the LRA. It may have been designed to expedite disciplinary hearings, but because of its peremptory nature and its embodiment in contracts of employment, it will often – as in this case – have the opposite effect. But that is the deal that the parties brokered through collective bargaining. They may have to reconsider their deal. But that can only be done through a process of collective bargaining.

Order

[24] I therefore make the following order:

24.1 The arbitration award of 29 July 2013 under case number WCM 071216 is reviewed and set aside.

24.2 The award is replaced with the following award:

"1. It is declared that, by proceeding with Jacobs's disciplinary hearing outside of the peremptory three-month period in clause 6.3 of the Disciplinary Procedure and Code Collective Agreement, and without having obtained condonation, the City was in breach of the Code.

2. The disciplinary hearing in respect of Jacobs is therefore invalid and of no force and effect.

3. The City is ordered to reinstate Jacobs into her position retrospectively to 3 July 2012 with no loss of benefits.

4. The City must comply with this award within two weeks of today's date."

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	J Whyte of Cheadle Thompson & Haysom.
FIRST RESPONDENT:	A C Oosthuizen SC Instructed by Cliffe Dekker Hofmeyr Inc.