REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 817/2014

In the matter between:

CLEMENT ROLAND DU PLESSIS Applicant

and

DR PRINS NEVHUTALU OBO

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY First respondent

ARTHI SINGH-BOOPCHAND N.O.

obo IR CHANGE Second respondent

Heard: **14 November 2014**

Delivered: **18 November 2014**

Summary: Review – pre-dismissal arbitration – jurisdictional ruling.

JURISDICTIONAL RULING

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STEENKAMP J

Introduction

[1] The applicant, Mr Clement du Plessis, was a lecturer in the media and journalism department of the Cape Peninsula University of Technology (CPUT). He was dismissed after it was found that he had sexually harassed students.

[2] The applicant launched an application for review on the basis that his dismissal arose from an award by the second respondent, Arthi Singh-Boopchand, sitting as an arbitrator in a pre-dismissal arbitration as contemplated in section 188A of the Labour Relations Act.[1] He alleges that the arbitrator committed a gross irregularity in the proceedings.

[3] The respondents did not deliver a record as contemplated in rule 7A. The applicant brought an application to compel them to do so. That application was set down for hearing on Friday, 14 November 2014. The respondents oppose the application and raised a preliminary point that this court does not have jurisdiction, as the applicant was dismissed pursuant to a disciplinary hearing and not a pre-dismissal arbitration.

Point *in limine*

[4] The respondents say that CPUT initiated an internal disciplinary hearing, albeit chaired by an independent chairperson (the second respondent). The University then dismissed the applicant on the recommendation of the chairperson. The applicant's recourse, if any, in terms of s 191(1) read with s 136(1) of the LRA lies with the CCMA and not with this Court. This Court, they argue, does not have jurisdiction to hear an application for review in this context.

Evaluation

[5] Section 188A provides for the following procedure:

[1] Act 66 of 1995.

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"**188A. Agreement for pre-dismissal arbitration**

(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.

(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.

(5) In any arbitration in terms of this section a party to the dispute may appear in person or be represented only by –

(a) a co-employee

(b) a director or employee, if the party is a juristic person

(c) any member, officer bearer or official of that party's registered trade union or registered employers' organisation; or

(d) a legal practitioner, o agreement between the parties.

(6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.

(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142(1)(a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the director for the purpose of this section, must be read as a reference to –

(a) the secretary of the council, it the arbitration is held under the auspices of the council;

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(b) the director of the accredited agency, if the arbitration is held under the auspices of an accredited agency.

(8) The provision of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.

(9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the employee.

(10) (a) A private agency may only conduct an arbitration in terms of this section if it is accredited for this purpose by the Commission.

(b) A council may only conduct an arbitration in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for this purpose by the Commission."

[6] A number of points are immediately apparent from the wording of this section. Firstly, the employee must consent to the process. Secondly, the employer must request the CCMA, a bargaining council or an accredited agency in the prescribed form to appoint an arbitrator. Thirdly, that agency must appoint an arbitrator on receipt of a prescribed fee and the employee's written consent to the enquiry. Fourthly, an employee may only consent to the process after he has been advised of the allegation against him and in respect of a specific arbitration.

[7] None of these prerequisites are met in the current instance. The employee did not consent to a pre-dismissal arbitration in respect of the specific allegations against him and in respect of a specific arbitration. The reasons may be understandable given the context that I will address shortly, but that remains the situation as a matter of fact. And although the second respondent is a panellist of an entity called IRChange, it is not clear whether that is an accredited agency; and in any event the University did not pay that entity a prescribed fee; nor did it present IRChange with the employees written consent to the enquiry or pay it the prescribed fee.

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[8] It is perhaps significant that this section was amended with the promulgation of the Labour Relations Amendment Act[2] on 18 August 2014. However, the amendments have not yet come into effect. The amended section 188A provides for an enquiry by an arbitrator in accordance with a collective agreement. That makes it clear that the section as it stands does not permit the introduction of such a process by collective agreement. The amended subsection 4(b) also removes the prerequisite that an employee may only agree to this process in respect of a specific arbitration. Again, that makes it abundantly clear that, as the law stands, the employee may only agree to a pre-dismissal arbitration in respect of a specific allegation of misconduct and in respect of a specific arbitration. In terms of the amended subsection 4(c), an employee earning more than the threshold in s 6(3) of the Basic Conditions of Employment Act[3] may also agree in a contract of employment to the holding of an enquiry in terms of the amended s188A; but that is not yet the case at present.

[9] It is so that, in this case, the applicant agreed in his contract of employment that he "will be subject to the disciplinary and grievance procedure and code of the CPUT as determined from time to time." And in terms of that code, under the heading "guidelines for disciplinary hearings" it is envisaged that "all disciplinary hearings shall take the form of pre-dismissal arbitration". That guideline also provides that, after hearing all the facts, "the chairperson shall convey his/her decision and the reasons therefor to the parties concerned." It notes that "once the pre-arbitration dismissal process is completed, the decision is final and binding on both parties". And perhaps most importantly for the applicant, it notes that the decision is not subject to appeal or CCMA proceedings, "but may be taken on review". But that agreement does not meet the prerequisites contained in s 188A as it stands.

[10] The university says the code was amended by agreement with the relevant trade unions. But the minutes of the meeting on 7 September

[2] Act 6 of 2014.

[3] Act 75 of 1997.

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2012 where the so-called amendment was adopted, are far from clear. It reads:

> "The chairperson informed the meeting that the pre-dismissal arbitration is currently in the ER policy and has been applied since the policy was implemented in 2007. The outcome of the process is binding on both parties and recourse for the parties is to the Labour Court. Further informed the meeting that the institution is currently dealing with a number of cases and that unhappiness was raised around the pre-dismissal arbitration process. Informed the meeting that the pre-dismissal arbitration process will still be in place at that the employee can now refer the matter to the CCMA instead of the Labour Court. There will further be no internal appeal. The chairperson informed the meeting that this will be an interim amendment and that a broader framework will be discussed at a later stage. The union is indicated that they were happy with the amendment."

[11] It is far from clear that it was intended to do away with the pre-dismissal arbitration process altogether. The minute could be read to reflect a position that the employee could have an election to refer a dispute to the CCMA instead of this court following a pre-dismissal arbitration. But that would not make logical sense. Following an arbitration, an employee's only recourse would be a review application to this court; a referral to the CCMA would only be permissible after a dismissal as contemplated in section 191 of the LRA.

[12] The applicant has a number of further difficulties. Firstly, he was notified of a "disciplinary hearing" and not a pre-dismissal arbitration. Secondly, when the second respondent made her "enquiry findings" she only recommended the sanction of dismissal. She did not see her function as being that of an arbitrator whose finding is final and binding upon the parties. She also reiterates that under oath. And the applicant's attorneys were alive to the fact that the decision to dismiss was made by the Vice Chancellor, as is apparent from their email to the University on 24 April 2014. That email was a written response to an email from a Mr Mikhail Mabuza referring to the outcome of the applicant's "disciplinary enquiry".

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[13] Insofar as the applicant relied on the decision of the High Court in *Hendricks v CPUT & ors*[4], that case is distinguishable from the present case. In that case, the applicant relied on breach of contract. In this case, the applicant seeks to have a pre-dismissal arbitration award reviewed and set aside.

Conclusion

[14] Having regard to the context outlined above and to the provisions of section 188A as they currently stand, I cannot agree with the applicant that the procedure leading to his dismissal was a pre-dismissal arbitration as contemplated in section 188A of the LRA. It was, instead, a disciplinary enquiry chaired by an independent external chairperson. The respondents should perhaps have made it clearer to the applicant that that was the nature of the process, despite the earlier guidelines contained in the disciplinary code envisaging a form of pre-dismissal arbitration. The fact remains, though, that in law the process adopted did not conform to the provisions of section 188A.

[15] With regard to costs, I take into account that the applicant may justifiably have been confused by the nature of the proceedings. I accept that he was *bona fide* in bringing an application for review to this court rather than referring an unfair dismissal dispute to the CCMA. For that reason, I do not consider a cost award to be appropriate in law and fairness.

Order

The application for review is dismissed for lack of jurisdiction.

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Anton Steenkamp

Judge

[4] Unreported, Case no 12761/2006, 19 Feb 2009.

APPEARANCES

APPLICANT:	Shaun Hangone of Von Lieres, Cooper, Barlow and Hangone.
RESPONDENTS:	Jose Jorge of Norton Rose Fulbright.

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