Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 1196/2013

In the matter between:

BONNITA GRETCHEN MULLER **Applicant**

and

THE SPECIAL INVESTIGATING UNIT **First Respondent**

Adv V SONI **Second Respondent**

Heard: 29 November 2013

Delivered: 27 **June 2014**

Summary: Urgent application to give effect to settlement agreement reached between the employer (1st Respondent and employee (applicant). Rule *nisi* granted. On return date order confirmed

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JUDGMENT

GUSH J

[1] The applicant in this matter is an assistant project manager employed by the first respondent at its KwaZulu-Natal regional office in Durban.

[2] During September 2013, the applicant was served with a notice to attend a disciplinary enquiry that was due to take place from 25 to 27 September 2013.

The notice to attend the disciplinary enquiry alleged that the applicant was guilty of two main counts of misconduct and various alternative counts of misconduct. In response to the notice and after having engaged legal counsel, the applicant without prejudice, made an “offer to resolve the dispute”.

[3] This offer comprised a tender to plead guilty to count two of the charges and that the applicant would submit to an agreed sanction comprising a R5000 fine; a temporary demotion to the position of chief forensic investigator for a period of three months with a concomitant reduction in pay for the period (with effect from the date of acceptance of the offer); and that the applicant be banned from receiving any promotion within the respondent for a period of two years also with effect from the date of acceptance of the offer.

[4] It was a further term of the offer that on acceptance thereof the applicant would withdraw a grievance she had brought against the acting head of "the Unit".

[5] This offer was made conditional upon its acceptance being in full and final settlement of the matter, both parties agreeing not to take it any further in any forum.

[6] On Thursday September 2013, the then acting head of the first respondent provided the applicant with a document headed "Acceptance Of Respondents Plea And Sentence Offer" that read as follows:

> IN DISCIPLINARY PROCEEDINGS OF THE SPECIAL INVESTIGATION UNIT
>
> HELD AT DURBAN
>
> *In the matter against*
>
> BONNITA GRETCHEN MULLER
>
> RESPONDENT

ACCEPTANCE OF RESPONDENTS PLEA AND SENTENCE OFFER

_____

KINDLY TAKE NOTICE THAT:

WHEREAS: Disciplinary action has been instituted against the respondent as per the NOTICE OF INSTITUTIONAL DISCIPLINARY PROCEEDINGS IN TERMS OF PARAGRAPH 12.1 OF THE SI UNIT DISCIPLINARY POLICY and CHARGE SHEET (annexed hereto as Annexure 1 and Annexure A to Annexure 1 respectively); and

WHEREAS the Respondent has made a plea and sentence offer as per Memorandum dated 10 September 2013 addressed to Adv Ben Avenant (a copy which have been annexed hereto marked Annexure 2 – see paragraphs 4, 5 and 6 thereof in particular); and

WHEREAS I have consulted representatives of both parties and applied my mind to the matter,

I hereby direct that respondent's plea-and-sentence offer as proposed in annexure 2 be accepted.

Signed in Pretoria on this 30th day of September 2013

Adv N Mokhata

Acting Head: Special Investigating Unit[1]

[7] The first respondent commenced giving effect to the outcome settlement.

[8] However on 23 October 2013, the applicant received a letter from a Mr J Wells: "Acting Corporate Lawyer"(sic) for the first respondent. In this letter Wells advised the applicant:

> 'I wish to advise that the purported direction by the acting head of the unit and the disciplinary 2013 that the SIU acceptably and sentence offer made on your behalf and which is dated 10 September 2013 is invalid, unlawful and irregular.

[1] Annexure C to founding affidavit page 30.

> The HoU (Adv Soni SC) does not accept that any agreement has come into being pursuant to the direction issued by the acting HoU.
>
> I must inform you that the HoU is now exercises discretion, in terms of clause 6.1of the disciplinary policy, J Stewart disciplinary proceedings against you.
>
> Mr L Lekgetho has been appointed to attend to the institution of the disciplinary proceedings. ...'[2]

[9] The applicant responded through her trade union on 25 October 2013 advising Wells that the matter had been settled by agreement and that the agreement was valid. This letter also requested the first respondent to provide reasons why it contended that the agreement was "invalid and unlawful and irregular".

[10] On 28 October 2013, Lekgetho wrote to the applicant confirming that the first respondent intended proceeding with the disciplinary enquiry and on 30 October 2013 addressed a letter to the applicant's union advising that he was not at liberty to provide reasons why the first respondent was of the view that the plea and sentence agreement was invalid and unlawful and irregular.

[11] On 4 November 2013, the applicant's attorneys addressed a letter to Lekgetho advising him that the applicant had despite requesting reasons not received any reasons as to why the first respondent regarded the agreement to be of no force and effect. The applicant's attorneys in addition advised that unless the first respondent indicated that it would abide by the agreement, the applicant intended approaching this Court for an order interdicting the disciplinary action and seeking a declarator that the agreement concluded on 30 September 2013 was valid and binding.

[12] On 4 November 2011, Wells responded by advising the applicant:

> 'I confirm that the head of the unit is not prepared to give confirmation that no further action will be taken in this matter. The disciplinary proceedings will commence and 11 November 2013.'[3]

[2] Annexure E to the founding affidavit.
[3] Annexure J to the founding affidavit.

[13] The applicant proceeded to file an urgent application in which she sought the following relief:

> 1. (urgency)
>
> 2. Directing the rule nisi be issued calling upon the respondents to show cause ... why an order should not be made the following terms:
>
> 2.1 that the settlement agreement reached between the applicant and the respondent on Thursday September 2013 first gentoo the plea-bargain set out in that agreement is valid and binding and prohibits first respondent from proceeding against applicant in respect of the charges of misconduct covered by the settlement agreement.
>
> 2.2 That the respondent be interdicted and restrained from proceeding with the disciplinary action instituted against applicant which is been set down to commence and 11 November 2013 on that day to any other date.
>
> 4. Directing that paragraph 2.2 above operate as an interim interdict with immediate effect pending the return day and the final determination of this application.

[14] The application was heard on 8 November 2013 and an order was granted in terms of prayers 1, 2 and 4.

[15] The return date was on 29 November 2013 when the matter was heard. At the conclusion of the matter, judgment was reserved and the rule was extended.

[16] The application was opposed by the first and second respondents. The second respondent is the head of the first respondent and was appointed to this position on 1 October 2013.

[17] The second respondent sets out that the matter was brought to his attention on 17 October 2013 when he received a memorandum from a Mr Brian Chitwa, the head of the first respondent's internal integrity unit.

[18] Chitwa in his memorandum expressed his opinion that "the whole process was incorrect", firstly because he regarded the allegations as very serious and secondly as the chairperson was not part of the settlement of the matter

no disciplinary hearing took place. This, Chitwa, believed set a bad precedent and demoralised and demotivated staff.

[19] The essence of the misconduct was that the applicant had during a period of nine months been regularly absent from duty, had failed to complete and submit leave application forms in accordance with the first respondent's policy or failed to submit such forms within a reasonable time; failed to complete and submit timesheets or failed to submit such forms within a reasonable time. This conduct it was alleged constituted: fraud (count 1); dishonesty (first alternative to count 1); acting contrary to the interests of the first respondent and/or putting the interests of the first respondent at risk (second alternative to count 1); non-compliance with established procedures and/or instructions (count 2); absence from the workplace without permission (alternative count 2).

[20] The second respondent records in his answering affidavit that having carefully considered the matter he came to the conclusion that the so-called settlement agreement was unlawful and irregular and "not valid". As a result, he decided that the disciplinary proceedings had to be instituted again.

[21] The second respondent indicated that if his decision is to be challenged, it must be challenged before the officer presiding over the disciplinary enquiry.

[22] The second respondent refers to two factors that influenced his decision:

a. the first was that the disciplinary policy of the first respondent did not contemplate a "plea-bargain". In particular that it is not possible in disciplinary cases where the charges may go to the question of the applicants suitability to continue in office. (During argument Mr Olson who appeared for the first and second respondent abandoned this argument);

b. the second issue related to the second respondent's averment that there is a statutory imperative that employees of the first respondent are fit and proper persons and that they head of the unit must remove

person from offices if there are sound reasons for doing so.[4] The second respondent did not regard it as lawful or within the power of the then acting head of the first respondent to intervene once the investigation had been concluded without the enquiry taking place.

[23] The second respondent concluded his answering affidavit with the following submission:

> 'I do not know whether the applicant's conduct which forms the subject of the charges which have been put to her was established such as establishes that she is not a photo and proper person to hold her position. That remains to be elucidated in the hearing. Given that the result of the investigation into the applicants conduct was a decision that a charge of fraud was warranted, I am duty bound to consider the question as to whether in fact the applicant is a fit and proper person to hold her office. It is not clear how I am to discharge that duty if he agreed method for determining the object of facts on a fair basis is denied me.'[5]

[24] After the applicant had filed her replying affidavit, the second respondent filed a further answering affidavit. In this affidavit, the second respondent sets out his reasons for concluding that the "directive" (see para 6 above) was unlawful.

[25] These reasons are:

6.1. Section 3(2) of the SIU Act[6] states that if the unit may ... appoint as many other fit and proper persons to the SIU for its effective functioning.

6.2. As was stated expressly in the preamble to the charge sheet, in particular in the fifth and sixth bullet points, that consideration formed one of the reasons for instituting the disciplinary proceedings against the applicant.

[4] Section 3(2) of the SIU Act 74 of 1996
[5] Answering affidavit para 14 page 57/58.
[6] Act 74 of 1996.

6.3. Having regard to the provisions of section 3(1)(b) of the SIU Act, is was not lawful for the acting head of the first respondent to issue the directive, which in effect put an end to an enquiry that would determine whether in effect the applicant was a fit and proper person, as required by the SIU Act.

7 [the second respondent] was also of the view, ..., in terms of the governing disciplinary procedure, ... and in terms of the policy the then acting head was not entitled to interfere with the disciplinary proceedings once it had been instituted. Her [the acting head] directive was consequently also irregular.[7]

[26] In the final paragraph of his second answering affidavit, he sets out what Mr. Olsen argued was the basis upon which the second respondent concluded that the "plea bargain" was unlawful and irregular and entitled the respondents to disregard it and proceed afresh with the disciplinary enquiry in respect of the same charges. This paragraph reads:

> 'I must also point out that I do not know the applicant. I do not know whether or not she is guilty of the matters raised in count 1 of the charge sheet. But I am under a duty to ensure that the matters are enquired into as provided for in the disciplinary code. If that process has been unlawfully and/or irregularly retarded or terminated i am under a constitutional and/or statutory duty to ensure it runs its full course, whatever its outcome. Alternatively, I am entitled to take steps to ensure that that happens.'[8]

[27] It is common cause that only fit and proper persons may be employed by or appointed to the first respondent. It was submitted by the respondents that "when the charge relates to conduct which goes to the question as to whether you are a fit and proper person under the Act, then there can be no plea bargain if the facts can only be elucidated by the conduct of a disciplinary inquiry and by the cross-examination of witnesses"

[7] Paras 6 and 7 of the second answering affidavit pages 104-105.
[8] Para 10 of the second answering affidavit page 105.

[28] It is apparent from the charge sheet annexed to the applicant's papers that the misconduct of which the applicant was accused related to her failure to submit, timeously or at all, applications for leave when she was absent from work and her failure to submit timesheets timeously or at all. The averment the respondents levelled at the applicant was that this failure was fraud alternatively dishonesty alternatively constituted acting contrary to the interests of the first respondent and somewhat startlingly as a second count a failure to comply with the first respondent's procedures.

[29] What is clear from the pleadings is that in response to the charge sheet, the applicant made representations to the acting head of the first respondent and in response thereto and having received a detailed memorandum from the person appointed as a presenter of the evidence/prosecutor in response to the plea tendered by the applicant the acting head of the first respondent decided to accept the plea.

[30] Unlike the second respondent, the acting head of the first respondent at the time she decided to accept the applicant's plea had familiarised herself with the circumstances and details of the misconduct. In her notice of acceptance of the plea she says specifically:

> 'I have consulted representatives of both parties and applied my mind to the matter,
>
> I hereby direct that respondent's plea-and-sentence offer as proposed in annexure 2 be accepted.'[9]

[31] When averring that the only method of determining whether the applicant is a fit and proper person, which would presumably flow from the outcome of the disciplinary enquiry, is by cross-examination the respondents failed to distinguish between the authority relied on by Mr Olson,[10] where the judicial service commission dismissed the complaint and this matter where the applicant pleaded guilty to the misconduct, albeit a lesser count.

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[9] See para 6 above.
[10] *Freedom Under Law The Acting Chairperson of the Judicial Service Commission.(2011)(3) SA 549 (SCA)*

[32] It is difficult to comprehend on what basis, having applied her mind to the circumstances and facts of the matter, it can be alleged that the acting head of the first respondent acted unlawfully or irregularly and that her decision was not valid. There is no averment made that by accepting the plea-bargain the acting head of the first respondent did not take into account the nature of the applicant's misconduct and whether or not the conduct rendered her unfit and not a proper person as required by the SAIU Act.

[33] It is inconceivable that an employee is, on the logic of the respondents, precluded from validly tendering a plea of guilty to a lesser charge of misconduct and in so doing proposing a lesser sanction on the strength of the argument that the employer may not accept such tender.

[34] The fact that the first respondent is established by an Act of Parliament and is enjoined by that Act only to employ fit and proper persons does not nor did it preclude the acting head from accepting the plea. If it can be shown that she acted improperly or that her decision is invalid then the respondents' remedy is to have that decision set aside. That matter is not before me.

[35] In summary, the issue is this:

a. The applicant was accused of misconduct relating to the failure to timeously submit leave application forms, timesheets or to submit such documentation at all. This misconduct was variously categorised as fraud, dishonesty and not complying with the employer's systems and procedures.

b. In response, the applicants tended a "plea-bargain" that first respondent acting head at the time accepted. In the acceptance thereof the acting head records specifically that she had consulted "both parties", their representatives and had applied her mind to the matter. There is nothing to indicate, on the face of it, that the acceptance of the "plea-bargain" was in any way irregular or invalid.

c. The second respondent, who assumed duty as the head of the first respondent on 1 October 2013, on receipt of a memorandum from an

employee of the first respondent decided that the acceptance of the "plea-bargain" was irregular unlawful and invalid. The second respondent in the circumstances decided that the "plea-bargain" would not be honoured and the applicant should be once again charged with the same misconduct.

d. In essence, the basis of the second respondent's decision was that in the legislation creating the first respondent the head or acting head thereof is obliged to ensure that its employees are "fit and proper persons".

e. The second respondent does not aver that the applicant is guilty of the misconduct or that she is not a fit and proper person. The second respondent suggests that this can only be determined to cross-examination.

[36] I am not satisfied that the respondents have established that by accepting the plea-bargain the acting head of the first respondent acted in contravention of the SIU Act or that the policy governing the first respondent's disciplinary procedure did not entitle the acting head to act as she did. I am not of the view that her actions constituted interference with the disciplinary proceedings.

[37] Until the second respondent can establish that the acceptance of the applicant's "plea-bargain" was unlawful and has it set aside it remains in force. Whilst it is in force, the first respondent is precluded from simply disregarding it and proceeding with the disciplinary enquiry on the same charges. This is in accordance with the decision in the *Oudekraal*[11] case, bearing in mind that it was not in dispute that the decision of the acting head was an administrative decision, that even if unlawful it remains remained valid until set aside.

[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

[38] In the circumstances and for the reasons set out above, I confirm the interim order granted by the court on 8 November 2013 save for paragraph 2.2 which is unnecessary given the wording of paragraph 2.1.

[39] As far as costs are concerned, there is no reason in law or in fairness why costs should not follow the result.

[40] I accordingly make the following order:

a. The settlement agreement reached between the applicant and respondents on 30 September 2013 pursuant to the plea-bargain set out in the agreement is valid and binding and prohibits the first respondent from proceeding against applicant in respect of the charges of misconduct covered by the settlement agreement;

b. The first respondent is ordered to pay the applicant's costs

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D H Gush

Judge of the labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: Adv P Schumann

Instructed by Garlicke and Bousfield Inc

FOR THE FIRST RESPONDENT: Adv P Olsen SC

Assisted by Adv M Pillay

Instructed by the State Attorney Durban