THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR1367/2014

In the application between:

MEC DEPARTMENT OF EDUCATION:

FREE STATE PROVINCIAL GOVERNMENT **Applicant**

and

CS VAN DER WALT **First Respondent**

EDUCATION LABOUR RELATIONS COUNCIL **Second Respondent**

JEROME MTHEMBU *N.O.* **Third Respondent**

Heard: **07 January 2016**

Delivered: **21 June 2016**

Summary: **Review Application – Whether an application for condonation is necessary for Review application in terms of section 158 of LRA filed outside 6 week period prescribed by section 145 of LRA – Condonation application for the late filing of the replying affidavit is dismissed – Whether arbitrators can declare disciplinary action unlawful or invalid – Labour Court can declare disciplinary action unlawful or invalid - Review Application dismissed with costs.**

JUDGMENT

LOUW, AJ

Introduction

[1] This is an application for review brought by the Applicant to review and set aside a ruling made by the Third Respondent, under the auspices of the Second Respondent, in terms whereof the First Respondent was reinstated.

Preliminary issues

[2] Prior to dealing with the review application, it is necessary to deal with two issues. Firstly, whether it is necessary for the Applicant to have brought an application for condonation for the purported late service and filing of the review application. Secondly, whether condonation should be granted for the late service and filing of the replying affidavit.

[3] On the first issue; the application is for the review of a ruling in terms of section 158 of the Labour Relations Act 66 of 1995 ("the LRA"). The six week time period, therefore, does not apply to this application. In any event, the application is brought a mere five days after the six week period, which is applicable to review applications brought in terms of section 145 of the LRA, lapsed. In the circumstances, it was not necessary for the Applicant to have brought an application for condonation.

[4] On the second issue; the replying affidavit had to be served and filed on or before 2 October 2014. It was agreed between the parties to extend this date to 17 October 2014. The Applicant, however, only served and filed its replying affidavit on 27 November 2014. Given that the Court rules provide for five days to serve and file a replying affidavit, this delay is excessive. The explanation for the delay is severely lacking. The Applicant cites the busy schedule of its Counsel as the sole reason for

the delay. In the circumstances, condonation for the late service and filing of the replying affidavit is not granted. The application for review will, therefore, be determined without taking the content of the replying affidavit into account.

Facts

[5] The First Respondent was the principal of Fauna Primary School.

[6] The Applicant levelled numerous charges against the First Respondent. The charge sheet has not been provided to the Court but it appears from the papers before the Court that there were 30 charges levelled against the First Respondent. It further appears that some of these charges were withdrawn or not dealt with at the disciplinary enquiry.

[7] The Applicant ultimately dismissed the First Respondent for charges relating to alleged misconduct in the management of school funds.

[8] The First Respondent referred an unfair dismissal dispute to the Second Respondent and the Third Respondent presided over the arbitration of this dispute.

[9] The Applicant and the First Respondent entered into a pre-arbitration conference minute. The facts in dispute are clearly set out in the pre-arbitration minute and the two issues the Third Respondent were required to determine are recorded as follows in the pre-arbitration conference minute:

> '(e)
>
> (i) The Panelist will be required to decide whether the employee is accountable towards the employer for the management of school funds in the circumstances and/or whether he is accountable towards the School Governing Body (as per the current case law).
>
> (ii) The Panelist will also be required to decide on whether the School Governing Body has actually mandated the employer to proceed with disciplinary action against the employee.'

[10] The Third Respondent found that it is not the First Respondent but the School Governing Body, which is responsible for the finances of the school, and that the Applicant could not hold the First Respondent responsible for any mismanagement of school funds. The Third Respondent therefore found that the Applicant could not

take disciplinary action against the First Respondent in absence of such a mandate received by the School Governing Body. The Third Respondent ordered the reinstatement of the First Respondent.

[11] The Applicant launched an application for the review of the Third Respondent's ruling.

Ground of review

[12] The ground for review the Applicant relies on is very narrow. The Applicant contends that the Third Respondent did not have the authority to decide on the points raised by the First Respondent at arbitration as recorded in the pre-arbitration conference minute set out above. This ground for review is worded in various forms in the founding affidavit and in the Applicant's heads of argument, for example that the Third Respondent acted *ultra vires*, that he abdicated his statutory duty, conversely that he exceeded his statutory duty and that he issued a ruling instead of an award. It is important to note that only the authority of the Third Respondent to have made the ruling is the subject of the application for review and not the correctness or otherwise of the Third Respondent's findings.

Analysis

[13] The application for review cannot succeed for two reasons:

13.1. The parties entered into a binding pre-arbitration minute.

13.2. It is a legal impossibility for the Second Respondent to determine the fairness or otherwise of the dismissal of the First Respondent in circumstances where the Applicant did not hold the authority to discipline and dismiss the First Respondent in the first instance.

[14] Prior to the arbitration, the parties entered into a pre-arbitration minute where the issues that the Third Respondent had to decide were agreed. These issues are set out above. These are the exact issues the Third Respondent went on to decide in the ruling he issued.

[15] In *NUMSA v Driveline Technologies (Pty) Ltd and Another*,[1] after analysing a long line of authority, the LAC held that where a litigant is a party to a pre-trial minute

[1] [2000] 1 BLLR 20 (LAC) at para 83.

reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to those issues. This approach was followed in various judgments of this Court.[2]

[16] This brings me to the second reason why the application for review cannot succeed. Even in circumstances where the reasoning above (that the parties are bound by the pre-arbitration minute) is abandoned, it is impossible to remit the matter to the Second Respondent for a hearing *de novo* in circumstances where the Applicant did not have the requisite authority to take disciplinary action and dismiss the First Respondent. The Applicant contends that, notwithstanding the content of the pre-arbitration minute, the Third Respondent did not have the power to make the declaratory ruling it did, as it does not have the power to decide on issues of law. In this regard, I am mindful of the unreported judgment by Rabkin-Naicker J in *Tsengwa v Knysna Municipality and Others,*[3] where it was found that arbitrators cannot declare disciplinary action unlawful or invalid because such task falls to the Courts:

> '[15] Perhaps the clearest way to debunk the notion that arbitrators and commissioners can set aside irregular proceedings as unlawful is to remind ourselves that they exercise an administrative function. As O-Reagan J put it in *Sidumo*:
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> "[139] The CCMA is an organ of state exercising public power. Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of s 23 of the Constitution. Section 23(1) of the Constitution provides that workers and employers are entitled to fair labour practices. The adjudicative task performed by the CCMA involves the determination of disputes often involving the question of fair labour practices that are of importance to the litigants before the CCMA. It is not an institution for private, agreed arbitration, but a state institution established for the resolution of disputes. The procedures provided for in the Labour Relations Act make plain that the disputes are to be speedily and cheaply resolved by the CCMA. No appeal lies from the CCMA, but the Labour Relations Act expressly requires that the Labour Courts are to scrutinize the decisions of the CCMA.

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[2] *Transnet Ltd v Transnet Bargaining Council and Others* (JR 187/10) [2013] ZALCJHB 153 at para 21and *Minister of Safety and Security v Maseho and Others* [2003] JOL 10932 (LC) at para 19.
[3] (2015) 36 *ILJ* 2392 (LC) at paras 15-16.

[140] It is clear that the CCMA has been established to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs associated with dispute resolution in the ordinary courts. In this sense, the CCMA is properly understood as an administrative tribunal. Our Constitution recognizes the need for the conduct of administrative agencies to be scrutinized, to ensure that they act lawfully, reasonably and procedurally fairly. As the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the constitutional standards established in s 33. So the need for speedy and cheap resolution of disputes does not mean that the CCMA should not be held accountable for its decisions, not that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and procedurally fairly. Indeed, as Sachs J has reasoned, it is entirely consistent with our constitutional order that the procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair and that this should be ensured by appropriate scrutiny by the labour courts.

[141] For these reasons then, and for the additional reasons given by Navsa, AJ at paras 81-88 of his judgment, I agree with him that arbitrations by commissioners in the CCMA constitute administrative action within the contemplation of s 33 of the Constitution. I also concur with the rest of his judgment."

[16] The above applies equally to arbitrators performing functions in a bargaining council such as second respondent in this case – they perform administrative functions and their decisions are monitored by this court in terms of the LRA. The case for the applicant proposes that an administrative functionary such as the arbitrator in this matter, can declare proceedings presided over by another administrative functionary (i.e. the chairperson of the disciplinary hearing appointed by an organ of state, the municipality) to be unlawful and invalid. The definitive feature of our model of administrative law is that administrative bodies are subject to the supervision of ordinary courts of law. The task of reviewing the legality of administrative decisions has always fallen on the courts. This principle goes to the heart of the separation of powers entrenched in our Constitution.'

[17] This Court, as the review Court, however, does have the authority to decide on issues of law. In this regard, there is ample authority which pronounces on the legal issue in this case, e.g. whether the Applicant had the necessary authority to take disciplinary action and dismiss the First Respondent.

[18] In terms of section 20(1)(g) read with section 37(1) of the South African Schools Act No. 84 of 1996 ("SASA"), a principal of a public school, in exercising any functions relating to school funds, is accountable to the school governing body and not to the Department of Education.

[19] Section 16 of SASA deals with the governance and professional management of public schools and distinguishes between the governance requirement and the professional management requirement of public schools. It places the governance of the public school at the door of the school governing body and the professional management of the school at the door of the principal. Section 16 of SASA reads as follows:

> '16. Governance and professional management of public schools
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> (1) Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act.
>
> (2) A governing body stands in a position of trust towards the school.
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> (3) Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department.'

[20] The distinction between the governance of a public school and the professional management thereof have been pronounced upon by our Courts as set out below.

[21] In *Minister of Education, Western Cape, and Others v Governing Body Mikro Primary School, and Another*:[4]

> '[5] In terms of s 12 of the Act, the Member of the Executive Council of the province which is responsible for education in that province must provide public schools for the education of learners out of funds appropriated for this

[4] [2006] (1) SA 1 (SCA) at para 5.

purpose by the provincial legislature. Every public school so provided is a juristic person, with legal capacity to perform its functions in terms of the Act (s 15). The governance of every such public school is vested, subject to the Act, in its governing body, which may perform only such functions and obligations and exercise only such rights as are prescribed by the Act (s 16(1)). The professional management of such a public school, on the other hand, must be undertaken, subject to the provisions off the Act, by the principal of the school under the authority of the head of the education department concerned. It is therefore clear that, subject to the limitations contained in the Act, the governance of a public school, as opposed to the professional management of such a school, is the responsibility of the governing body of the school.'

[22] In *Schoonbee and Others v The MEC for Education: Mpumalanga Province and Another*,[5]

'Section 16 provides for the management of a public school. The Ermelo High School is a public school. The section provides in the first subsection thereof that, subject to the provisions of the Act –

"... the governance of every public school is vested in its governing body."

Subsection (2) then provides that a governing body 'stands in a position of trust towards the school'.

Subsection (3) provides for the position of the principal of the school. It provides that, subject to the Act and any applicable provincial law:

"The professional management of the public school must be undertaken by the principal under the authority of the head of the department."

One sees immediately that according to the Act there is a difference between the professional management of a public school which is done by the principal, and the 'governance' of a public school. The one falls within the domain of the SGB; the other within the domain of the principal. It stands to reason why that is so. The principal, being an educator, is the person who would be able to manage the school

[5] Case no: 33750/01, Transvaal Provincial Division (as it was then), unreported (24 April 2002) per Mynhardt, J. See also *Head of Department: Department of Education, Free State Province v Welkom High School and Harmony High School*, 2012 (6) SA 525 (SCA) and the subsequent Constitutional Court case *Head of Department: Department of Education, Free State Province v Welkom High School and Harmony High School* 2014 (2) SA 228 (CC).

professionally. He would be the person who would be able to decide whether it is better for the school and the learners to utilise a particular educator in a particular position and that is something which cannot be expected in the normal course of events from a governing body which consists, according to the applicable sections of the Act, a variety of people, including learners from the school. One can therefore quite understand the division made in section 16 between the governance of the school on the one hand and the professional management thereof on the other hand.

In my view this immediately demarcates the position of each of these entities vis-à-vis each other. It is true that the principal, according to the relevant provision of the Act, is an *ex officio* member of the governing body, *non constat* that he is now vested with authority and powers to administer the financial affairs of the school. To some extent he might be able to make an input because he is a member of the SGB, *non constat* that his views will carry the day if there is a difference of opinion. If the SGB differs from his views and passes a resolution, then, of course, the views of the SGB will carry the day and it is then those views, and the policy laid down by the SGB, which will have to be implemented, *inter alia*, also by the principal to the extent that the principal is required by the SGB to implement its policy and its resolutions.

...

> "I do not agree with those submissions of Mr Ellis. In my view it is quite clear from the provisions of the Schools Act to which I have referred, that in case, of which the present one is an example, where there is a SGB in existence, the financial management of school funds and monies falls within the domain of the SGB. Only if one approaches it on that basis and from that perspective, then one can quite easily deal with situations where there might be a difference of opinion between the various functionaries, namely the SGB and the principal, in the management of the school funds or the school property.
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> Mr Ellis' submission, which he made in paragraph 8.10 of his written heads of argument and which he also repeated in his oral argument this morning, reads as follows:
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> > "From a practical perspective the position of a principal is clearly that of an accounting officer or 'rekenpligtige amptenaar'. He is the chief executor (sic) member of the SGB and in charge of the day to day running of the school, including financial matters."

> One of the consequences, for instance, of that submission is – and that was also debated with Mr Ellis – that in the event of the principal doing something which was prohibited by the SGB, or which was specifically permitted by the SGB, the principal would then have to face a disciplinary inquiry in terms of the provisions of Act 76 of 1998. In my view this consequence which Mr Ellis did not disavow and for which he contended, shows conclusively that the contention that the principal should be held accountable as the accounting officer of a public school and its funds, is an absurd proposition.
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> I do not find any justification in either the Schools Act of 1996or the Employment of Educators Act of 1998 for this untenable situation in which a principal might find himself if I were to accept Mr Ellis' submissions. On a daily basis the principal wold find him in a situation where he would have to face disciplinary inquiries and be held accountable by the head of the department for what he had done in furtherance of and in implementing the policies and resolutions of the SGB.
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> In my view, the provisions of the Schools Act of 1996 to which I have referred, exclude such a proposition and I therefore find myself in agreement with the conclusion reached by Moseneke, J that the second respondent in this instance had barked up the wrong tree when he tried to hold the principal, the eleventh applicant in this matter, accountable for what was alleged to be financial mismanagement by the Auditor-General.'

[23] It is evident from the above that the matter cannot be remitted to the Second Respondent for it to decide whether or not the dismissal of the First Respondent by the Applicant was fair as the Applicant in the first place was never clothed with the authority to discipline and subsequently dismiss the First Respondent.

[24] In the circumstances, the following order is made:

24.1 The application for review is dismissed with costs.

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Louw, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate W R Mokhari SC
Instructed by:	State Attorney Bloemfontein
For the First Respondent:	Advocate M Louw
Instructed by:	Horn & Van Resnburg