THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO: J 492/2017

Reportable

In the matter between:

MSAGALA, HERBERT Applicant

and

TRANSNET SOC LTD First Respondent

NAGDEE, YUSUF *N.O* Second Respondent

TRANSNET BARGAINING COUNCIL Third Respondent

Application heard: 6 October 2017

Judgment delivered: 9 October 2017

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks an order in terms of s 158 (1) (h), seeking to review and set aside an interlocutory ruling made by the second respondent (the arbitrator). In his ruling, the arbitrator refused to direct that the first respondent discover two forensic reports. The proceedings during which the ruling under review was made are being conducted in terms of s 188A of the Labour Relations Act (LRA).

[2] Section 158 (1) (h) empowers this Court to review any decision taken by the state in its capacity as employer, on any grounds that are permissible in law. In the present instance, the applicant invokes the principle of legality as the basis for review. In particular, the applicant contend that the ruling is arbitrary, fails to account for material facts and is directly at odds with the applicable legal principles, does not provide proper reasons for the decision taken and was arrived at other than by way of a fair procedure.

[3] The applicant's contract of employment provides for the appointment of an arbitrator into any allegations of misconduct in accordance with s188A.The applicant has been charged with various acts of misconduct, and the arbitrator appointed to conduct an inquiry into those allegations. When the enquiry reconvened on 5 September 2017, the applicant's representative contended that not all documents previously and formally requested by the applicant had been provided by the first respondent. At issue were two forensic reports prepared by third party agencies. After written submissions were made to the arbitrator, he issued a ruling on 28 September in which he determined that the first respondent need not discover the reports at issue.

[4] The merits of the review aside, there are two preliminary issues. The first relates to the capacity in which the arbitrator acted when he made the ruling under review or more specifically, whether an arbitrator appointed under s188A as a representative of the employer and that what he does must be considered to

have been done by the first respondent or whether, as the first respondent contends, the arbitration is conducted under the auspices of the bargaining council, independently of the employer. If the arbitrator is found to have acted as a representative of the first respondent, the question that then arises is whether provisions of s 158 (1) (h) extend to the first respondent; in other words, whether the arbitrator can be said to have exercised as public power subject to review on the basis of the principle of legality.

[5] The relevant parts of s 188A reads as follows:

> Section 188A. Inquiry by arbitrator.
>
> (1) An employer may, with the consent of the *employee* or in accordance with a collective agreement, request a *council,* an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry 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 an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1).(*b*) Despite any other provision in *this Act*, an *employee* earning more than the amount determined by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act* at the time, may agree in a contract of employment to the holding of an inquiry in terms of this section.
>
> (5) In any inquiry 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) an office bearer or official of that party's registered trade union or registered employers' organisation; or

(d) a legal practitioner, on agreement between the parties or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the Commission.

(6) Section 138, read with the changes required by the context, applies to any inquiry 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, if the inquiry is held under the auspices of the council;

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

(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any such ruling.

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

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

> (b) A council may only appoint an arbitrator to conduct an inquiry 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 arbitration by the Commission.

[6] In *SA Transport & Allied Workers Union & others v MSC Depots (Pty) Ltd* (2013) 34 ILJ 706 (LC), the court said the following:

> [11]Section 188A… has as its purpose and means of expediting dispute resolution by avoiding duplication between internal and external hearings. In effect, in terms of the tripartite agreement between the employee, the employer and the CCMA, and arbitrator steps into the shoes of the employer and assumes the right normally considered 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 are inevitably followed by an arbitration hearing conducted on a *de novo* basis….
>
> [15] It seems to me from the wording of s 188 A 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.

[7] What is this formulation suggests is that an agreement concluded in terms of s188A is one that abandons any workplace disciplinary process in favour of an arbitration hearing which would ordinarily have been conducted post dismissal by the employer. An arbitrator appointed in terms of the section must consider the evidence presented and decide what sanction, if any, is to be issued against the employee.Of some significance use the fact that the arbitrator is subject provisions of s 138, and he or she enjoys all the powers conferred on commissioners in those provisions of s 142 referred to in s 188A (7). The

arbitrator is not bound by the employer's disciplinary code and procedure, nor obliged to give effect to it either in terms of the prescribed process all any recommended or prescribed penalties. The arbitrator must decide on a balance of probabilities without the misconduct alleged was committed, and if so, exercise a value judgement as to an appropriate sanction. That judgement is reviewable in terms of s 145. All of these provisions indicate that the arbitrator does not sit as the employer's agent or representative he or she is expected to discharge a statutory function by the exercise of statutory powers subject to the statutory criteria of fairness.

[8] For these brief reasons, in my view, when he made the ruling under review, the arbitrator discharge the statutory function under the auspices of the bargaining council in circumstances which cannot be said he acted as a representative of all for and on behalf of the first respondent. It follows that it cannot be said that the ruling under review was made by the third respondent. Mr Snyman, who represented the applicant, correctly conceded that in these circumstances, the application stands to fail. It is thus not necessary for me to consider whether the arbitrator's ruling constituted the exercise of the public power for the purposes of s 158 (1) (h), or whether the ruling infringed the principle of legality.

[9] Finally, there is no reason why costs should not follow the result.

I make the following order:

1. The application is dismissed, with costs.

_____

Andre van Niekerk

Judge

REPRESENTATION

For the applicant: Mr S Snyman, Snyman Attorneys

For the first respondent: Mr P Maserumule, Maserumule Attorneys