

## Is an agreement to refer a matter to an inquiry by an arbitrator in terms of section 188A of the LRA a straightjacket?

### 1 Introduction

At first sight, *SATAWU v MSC Depots (Pty) Ltd* 2013 34 ILJ 706 (LC) (*MSC Depots*) and the more recent case of *Mchuba v Passenger Rail Agency of SA* [2016] ZALCJHB 73 (*Mchuba*) appear to add nothing to the evolving labour dispute resolution jurisprudence. However, a closer reading of *MSC Depots* and *Mchuba* reveal that the two cases bring to light novel questions concerning section 188A of the Labour Relations Act (66 of 1995; hereafter the LRA) – pre-dismissal arbitration. Simply put, can an employer unilaterally withdraw from pre-dismissal arbitration and convene an internal disciplinary hearing after which errant employees are

dismissed? Does the fact that the relevant dispute settlement agency lack jurisdiction to conduct a section 188A process – due to lack of accreditation – provide the employer with discretion to conduct an internal disciplinary hearing? Also surfacing is the question whether the Labour Court can grant an urgent application for a declaratory relief setting aside dismissal effected after an internal disciplinary hearing – in circumstances where the parties had agreed to submit misconduct allegations to arbitration in terms of section 188A? The pertinent aspects of the two judgments merit scrutiny.

## 2 Section 188A Pre-dismissal Arbitration

The answer to the question whether a pre-dismissal arbitration agreement is a straightjacket depends on the interpretation of section 188A of the LRA. The relevant parts of section 188A read as follows:

- (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.
- ...
- (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.

Three points emerge from this section namely, (a) it introduces a tripartite agreement between the employee, the employer and the Commission for Conciliation, Mediation and Arbitration (CCMA) or any other accredited dispute settlement agency; (b) the arbitrator tasked with the section 188A process, exercises the employer's disciplinary jurisdiction, including the right to dismiss; and (c) the written consent of the employee to the pre-dismissal arbitration must be obtained. The peg on which the pre-dismissal procedures contemplated in terms of section 188A hang, is the written consent of the employee. There are compelling reasons for this. An employee who consents to the section 188A process, surrenders the right to have the same allegations of misconduct against him/her determined in terms of the employer's internal disciplinary process. The benefit to the employee is that when allegations of dismissals are pursued in terms of the internal processes, the employer may not challenge the presiding officer's determination in favour of the employee, whereas it may review the decision of the arbitrator who conducted the pre-dismissal arbitration.

The effect of a section 188A pre-dismissal arbitration on the employer's unfettered managerial prerogative can hardly be overstated. It should be apparent that the section 188A procedure divests the employer of its disciplinary jurisdiction over the transgressing employee and vests it in the arbitrator. The right to exercise discipline and – in

appropriate circumstances – to dismiss, is a defining feature of the managerial prerogative (for extensive engagement see Strydom *The Employer Prerogative from A Labour Law Perspective* (LLD thesis UNISA 1997).

### **3 SATAWU v MSC Depots (Pty) Ltd**

#### **3 1 The Facts**

The facts of the matter may be summarised as follows. The second and third applicants, who were employees and shop stewards, had levelled allegations regarding health and safety standards at the respondent's premises with the Department of Labour. The outcome of the investigation conducted by the Department of Labour established that the allegations were without substance. The respondent employer then suspended and instituted misconduct charges against the two employees. The first respondent and the first applicant (the union) agreed that the second respondent (the CCMA) be requested, in terms of section 188A of the LRA, to appoint an arbitrator (the third respondent) to conduct a pre-dismissal arbitration. The arbitrator handed down an award in terms of which he found the employees not guilty of the charges proffered against them and ordered that they be reinstated.

Aggrieved by the award, the employer took the matter on review and prevailed. Gush J reviewed and set aside the award and ordered the CCMA to convene a fresh hearing before a different commissioner. Rather than wait for the CCMA to have a 'second bite at the cherry' by referring the matter for hearing afresh before another arbitrator in terms of the order granted on 22 May 2012, the employer decided to hold a disciplinary inquiry. The applicants were duly notified to attend the internal disciplinary enquiry. The essence of the charges related to the same misconduct allegations that were submitted to the pre-dismissal arbitration hearing before the arbitrator.

Alarmed by the resumption of internal disciplinary proceedings, the union addressed a letter to the employer asserting that the parties were bound by the terms of the court order – to conduct a pre-dismissal arbitration in line with section 188A of the LRA. The employer was unpersuaded and proceeded with the internal disciplinary hearing presided over by a member of its management. The employees refused to be subjected to a disciplinary hearing and in their absence they were found guilty of the alleged misconduct. Subsequently, the employees were informed that they were dismissed with immediate effect.

The crisp issue for determination before Van Niekerk J, was whether the respondent was bound by the parties' agreement to invoke section 188A and the court order granted by Gush J, to have the allegations of misconduct against the second and third applicants remitted to the CCMA for a fresh hearing before another commissioner.

## 3 2 The Court's Decision

The principal argument raised by the applicants was that the first respondent was not entitled to unilaterally revoke the pre-dismissal agreement or withdraw from the section 188A process. It was also submitted that even if the respondent had been entitled to terminate the agreement, there was no case made out on the papers of any lawful termination, either summarily or on reasonable notice. The applicant, for its part, contended that since the arbitrator's award was set aside, it was no longer bound by its initial agreement to have the allegations of misconduct against the employees dealt with by way of an arbitration hearing.

In answering the overarching question, whether an employer can unilaterally revoke a pre-dismissal arbitration agreement, Van Niekerk J observed:

It seems to me from the wording of s188A that once an employee consents to refer the determination of misconduct or incapacity to an arbitration hearing in terms of 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. That being so, and since the consent of the affected employee and the CCMA is necessary to achieve the result, it is not open to the employer to abandon the process on a unilateral basis (par15).

The court found it unnecessary to settle the ancillary issue as to whether any agreement concluded under section 188A was amenable to termination at common law. By the same token, it declined to decide whether that pre-dismissal agreement constituted a collective agreement capable of termination on reasonable notice as envisaged by section 23(4) of the LRA. The respondent's submission that its consent may be withdrawn unilaterally at any stage in the process, was untenable as 'it flies in the face of the system of compulsory arbitration that is established by Part C of chapter VII of the Act, the material parts of which are specifically made applicable to an arbitration hearing in terms of section 188A' (par 16).

A further contention by the first respondent to the effect that there was an 'initial dispute' referred to arbitration hearing and that the process was completed by the setting aside of the arbitration award was found to be patently flawed. The arbitration hearing envisaged by the order granted by Gush J, was not a discrete process but flowed from the same process initiated by the parties' agreement to have the allegations of misconduct against the applicants tested by way of an arbitration hearing. The allegations of misconduct remained the same – the only intervening factor was the setting aside of the award, and an order directing the CCMA to convene a fresh hearing before another commissioner. Having regard to the factual context and the mandatory provisions of section 188A, the first respondent had no leeway to

abandon the agreement and to subject the allegations of misconduct to a pre-dismissal arbitration hearing. The learned judge explained his conclusion in the following words:

In the absence of any right by the first respondent to unilaterally withdraw from an agreement to refer the allegations of misconduct against the second and third applicants to an arbitration hearing, the applicants are entitled to the relief they seek. Their rights are affirmed by the terms of the order of this court granted on 22 May 2012. In these circumstances, the dismissals of the second and third applicants stand to be set aside, and the first respondent ordered to comply with its obligations in terms of the agreement concluded in terms of s 188A (par 18).

A related issue that the court had to deliberate upon, was the ineptitude with which the pre-dismissal arbitration was conducted which resulted in a successful review and an order that the matter be remitted to the CCMA for re-hearing. The prejudice suffered by the parties, especially the respondent which had to continue paying the employees, can hardly be overstated. A pertinent question that arises in this context is: does the risk of placing the function of workplace discipline in the hands of an unknown third party, justify the employer abandoning the process midway? The straightforward answer is in the negative – having regard ‘to significant cost savings to be had by avoiding the duplication occasioned by elaborate in-house disciplinary enquiries and an inevitable arbitration hearing at which the same allegations are tested in a *de novo* hearing’ (par 19). In the present case, it is respectfully submitted that the benefit of simple and expeditious dispute resolution had been subverted by the arbitrator as was the confidence of the parties in the integrity of the system. To mitigate the prejudice suffered by the parties, the court directed that the arbitration hearing be conducted before a senior commissioner on an expedited basis (par 20).

Consequently, the dismissal of the second and third applicants was set aside as it was in breach of the pre-arbitration agreement concluded by the parties, and in contravention of the order granted by Gush J on 22 May 2012. The first respondent was directed to refer the matter to a pre-dismissal arbitration as contemplated in section 188A.

## **4 *Mchuba v Passenger Rail Agency of SA***

### **4 1 The Facts**

The background to *Mchuba* was the following. The applicant was suspended from duty pending investigation into allegations of misconduct against him. He was issued with a notice to attend a pre-dismissal arbitration hearing. In the notice, the respondent employer informed the applicant, *inter alia*, that it had elected to refer the matter to a pre-dismissal arbitration hearing in terms of clause 5.3 of its disciplinary code which formed part of the employee’s contract of employment. Clause 5.3 provided that for purposes of disciplining employees for allegations of misconduct, the employer may hold either

a disciplinary enquiry or section 188A arbitration. Tokiso Dispute Settlement Services (Tokiso) was appointed to conduct the section 188A process.

At the onset of the pre-dismissal arbitration, the applicant's representative raised an objection to the process being conducted under the auspices of Tokiso since it was not an accredited agency and therefore lacked the necessary jurisdiction. In response to the objection, the arbitrator ruled and directed the parties, *inter alia*, to verify with the CCMA if Tokiso was accredited. If the CCMA confirmed that accreditation in writing, the parties were to resume the pre-dismissal arbitration in compliance with the structures of section 188A. In the event that the CCMA informed the parties in writing that Tokiso was not accredited, the employer must approach the CCMA or any accredited agency to conduct the section 188A process.

Shortly after, it transpired that at the time of the abortive pre-dismissal hearing, Tokiso was a non-accredited agency. However, the respondent nevertheless informed the applicant that it was going ahead with an internal disciplinary inquiry against him through written representations. The applicant was invited to make his full written representations in answer to misconduct allegations which were similar to those that featured in his pre-dismissal arbitration notice. He was called upon to provide written reasons, before the expiration of a deadline, detailing why disciplinary steps should not be taken against him in light of the serious allegations. The applicant declined to take part in the internal disciplinary proceedings but insisted that the pre-dismissal arbitration be pursued under the auspices of the CCMA or any other accredited agency. Subsequently, the applicant was informed that his employment contract was being terminated with immediate effect.

The applicant then approached the Labour Court seeking an order declaring that the termination of his contract of employment constituted a breach of a contractual obligation to address the allegations of misconduct by way of a pre-dismissal arbitration. The applicant also sought an order setting aside the termination of his employment and retrospective reinstatement. In addition, he sought an order that, in the event the respondent elected to pursue an inquiry into the alleged misconduct by the applicant, it be directed to do so by way of pre-dismissal arbitration.

## 4 2 The Court's Decision

The thrust of the respondent's case, apart from denying it had a contractual obligation to pursue the section 188A pre-dismissal arbitration, was directed at the courts lack of jurisdiction, and the posture displayed by the applicant during the initial pre-dismissal arbitration. Regarding the issue of lack of jurisdiction, the court found that the respondent's submission was based on a misreading of the case of *Gcaba*

*v Minister of Safety & Security* (2010 (1) SA 238 (CC)). Lallie J put the matter thus:

In *Gcaba*, it was held that the court's jurisdiction is determined by the applicant's pleadings. The applicant's pleaded case is based on the breach of his contract of employment. Section 77(3) of the Basic Conditions of Employment Act 75 of 1997, grants the Labour Court jurisdiction over any matter concerning a contract of employment. It is common cause that the right the applicant seeks to assert which is the determination of allegations of misconduct against him by means a pre-dismissal arbitration is based on his contract of employment. The respondent conceded that it initially chose the option of dealing with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration. The court therefore has the necessary jurisdiction to adjudicate the matter at hand (par 6).

While the respondent conceded having initially opted to conduct pre-dismissal arbitration, it expressed misgivings about the applicant's lack of co-operation with the process. It was contended that the employer could not be faulted for reconsidering the decision to pursue the pre-dismissal arbitration given that the applicant's requests for unnecessary, irrelevant and unavailable documents. The logical inference is that 'had the applicant co-operated with the process and adopted an attitude acceptable to the respondent, the latter would not have reconsidered its decision to pursue the pre-dismissal arbitration' (par 12). Furthermore, it was submitted that the respondent was entitled to conduct the disciplinary enquiry by way of written representations.

On the question of *MSC Depots*, the respondent strenuously contended that the applicant's reliance on the judgement was misplaced as there was no agreement between the parties and Tokiso to hold a pre-dismissal arbitration. A further argument advanced to demonstrate that there was no obligation on the respondent to be party to the section 188A process, concerned the absence of the requisite tripartite agreement between the employee, the employer and Tokiso as outlined in *MSC Depots*. This contention found no favour with the court as it noted that while the decision in *MSC Depots* was based on different facts, its interpretation of section 188A rested on sound footing. On the contrary, the court took the view that the respondent raised the defence of the applicant's lack of written consent as an opportunistic attempt to justify its cavalier conduct. Put in another language, the respondent cannot be allowed to blow hot and cold and thereby 'have the best of both worlds'. In particular:

The respondent's disciplinary code provides that the respondent may appoint Tokiso or any other labour dispute settlement services. When Tokiso's jurisdiction was challenged, there was a duty on the respondent to appoint an alternative body to conduct section 188A arbitration. In addition, the respondent disclosed the real reason for abandoning the pre-dismissal arbitration. It had nothing to do with the absence of the applicant's written consent to the pre-dismissal arbitration... The reality is that it was punishing the applicant for requesting documents he needed to prepare his defence because it was of the view that they were irrelevant and unnecessary. By referring the matter to pre-dismissal arbitration, the respondent lost the right

to take decisions on the relevance of documents the applicant requested as it had handed it over to Tokiso. When the tripartite agreement was reached, the respondent had no residual power to take any step against the applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration agreement unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration, the respondent acted in breach of the applicant's contract of employment (par 16).

In the circumstances, the court held that the termination of the applicant's contract of employment by the respondent constituted a breach of the respondent's contractual obligation to deal with the misconduct allegation by way of a pre-dismissal arbitration in terms of section 188A. It followed that the applicant was entitled to the relief sought. To recapitulate the terms of the order: (a) the termination of the contract of employment was set aside; (b) the employer was ordered to reinstate the employee with retrospective effect; and (c) if the respondent elected to pursue an enquiry into the alleged misconduct by the applicant, it was directed to conduct a pre-dismissal arbitration as contemplated in section 188A of the LRA.

## 7 Analysis

The critical aspects of the judgments of the Labour Court in *MSC Depots* and *Mchuba* addressed the vexed question whether the employer can unilaterally resile from a section 188A process. If the employee has given a written consent to pre-dismissal arbitration, then a tripartite agreement between the employee, the employer and the CCMA, or any other disputes resolution settlement agency, arises and irrevocably binds the parties to a section 188A process. A pre-dismissal arbitration agreement in terms of section 188A has the same tenor as the now famous non-variation clause in the law of contracts in that it entrenches itself so that no party can escape from its shackles (see *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) 760 (A) 766B-767B & 766B-H; *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) par 42-50).

Irrespective of whether the employer has what could be considered as genuine misgivings about the conduct of the pre-dismissal arbitration, or the reality that the dispute settlement agency seized with the matter is non-accredited – thereby rendering the process a nullity by reason of lack of jurisdiction or merely because the employee made frivolous requests for documents during the course of the pre-dismissal hearing – the employer cannot decide to withdraw from the process by electing to deal with the misconduct allegations via an internal disciplinary inquiry. According to *MSC Depots* and *Mchuba*, there are no modes of escaping the shackles of a section 188A process. It must be borne in mind that once the CCMA or any other dispute settlement agency is seized with a section 188A process, there is no question of the employer backtracking by reverting to its internal procedures. The appointment of the arbitrator



means that the employer has no residual power to take any steps against the alleged misconduct of the employee.

The strict enforcement of the section 188A pre-dismissal arbitration agreement by the courts, is based on sound legal and judicial policy. It is also consonant with the purpose-built dispute resolution system in the LRA – which takes precedence over non-purpose-built processes and forums. The section 188A procedure accelerates the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. To permit employers to unilaterally revoke pre-dismissal arbitration agreements would effectively undermine the statutory dispute resolution system and frustrate the objective of expeditious resolution of labour disputes (*CUSA v Tao Ying Metals Industries* 2008 29 ILJ 2451 (CC) par 65; see also Steenkamp & Bosch 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' 2012 *Acta Juridica* 120).

*MSC Depots* also stands out as one of those rare exceptions in which the court showed that it will not shrink from granting urgent declaratory relief setting aside dismissals effected following internal disciplinary proceedings conducted in breach of a pre-dismissal arbitration agreement under section 188A. Quite apart from affirming a statutory dispute resolution mechanism, the court's appreciation of the inherently asymmetrical employment relationship is more manifest in this regard (for an extended analysis, see Vettori *Alternative Means to Regulation Employment Relationship in the Changing World of Work* (LLD thesis UP 2005)). It is worth reminding ourselves that the point at which the employment relationship breaks down, is the time when the employee is most vulnerable and hence, most in need of protection. The vulnerability of employees is underscored by the fact that dismissal has been aptly called 'the labour relations equivalent of capital punishment' (Landman 'Unfair dismissal: The new rules for capital punishment in the workplace (part one)' 1995 *Contemporary Labour Law* 41; and Landman 'Unfair dismissal: The new rules for capital punishment in the workplace (part two)' 1996 *Contemporary Labour Law* 51).

## 8 Conclusion

The message in *Mchuba* is loud and clear. Resiling from a section 188A process cannot be countenanced. The approach of the Labour Court corresponds fairly well with the concern that employers, unilaterally withdrawing from the pre-dismissal arbitration process, are effectively bypassing the statutory dispute resolution institutions and undermining their role in a carefully crafted scheme that gives primacy to the value of self-regulation (*NUMSA v Bader Bop (Pty) Ltd* 2003 24 ILJ 305 (CC) par 26 & 65; *Kim-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) par 17-18; *SA Breweries v CCMA* 2002 23 ILJ 1467 (LC) par 2). Additionally, it is surely not unfair to the employers who have full control over the decision to refer matters to an 'inquiry by arbitrator' in terms of section 188A in the first place.

The rationale of our dispute resolution system is fairly obvious: neither employers nor employees can afford delays. The pivotal role of labour dispute resolution institutions in sustaining an appropriate balance between the rights and interests of employers and employees, while at the same time preserving relatively healthy industrial relations with minimal resort to self-help cannot be gainsaid.

**TC MALOKA**

*University of Fort Harare*

**V PEACH**

*University of South Africa*