IN THE LABOUR APPEAL COURT OF SOUTH AFRICA JOHANNESBURG

Reportable

Case no: JA98/2018

In the matter between:

GERHARD POTGIETER MAINTENANCE SERVICES

(WITBANK) (PTY) LIMITED t/a MR CLEAN **Appellant**

and

THE CONTRACT CLEANING NATIONAL

PROVIDENT FUND **First Respondent**

TREVOR ACKERMAN N.O.

AND OTHERS **Second to Eighteenth Respondents**

THE MINISTER OF LABOUR **Nineteenth Respondent**

Heard: **19 November 2019**

Delivered: **22 May 2020**

Coram: Tlaletsi, Sutherland JJA and Murphy AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The sole issue on appeal is whether a decision of the Minister of Labour (the Minister), is to be set aside because it is unlawful. The grounds of unlawfulness alleged are that the decision exhibits arbitrariness and, as such, is irrational in relation to the purpose for which the power to make the class of decision was conferred on the Minister.

[2] The Basic Conditions of Employment Act 75 of 1997 (BECA) confers on the Minister the power to make Determinations for the various sectors of the economy. Section 55 lists these powers.[1] The decision in question was made

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[1] 55 Making of sectoral determination:
(1) After considering the report and recommendations of the Commission contemplated in section 54 (4), the Minister may make a sectoral determination for one or more sector and area or as contemplated by subsection (8).
[Sub-s. (1) substituted by s. 8 *(a)* of Act 20 of 2013 (wef 1 September 2014).]
(2) If the Minister does not accept a recommendation of the Commission made in terms of section 54 (4), the Minister must refer the matter to the Commission for its reconsideration indicating the matters on which the Minister disagrees with the Commission.
(3) After considering the further report and recommendations of the Commission, the Minister may make a sectoral determination.
(4) A sectoral determination may in respect to the sector and area concerned-
(a) set minimum terms and conditions of employment, including minimum rates of remuneration;
(b) provide for the adjustment of remuneration by way of-
(i) minimum rates; or
(ii) minimum increases;
[Para. *(b)* substituted by s. 8 *(b)* of Act 20 of 2013 (wef 1 September 2014).]
(c) regulate the manner, timing and other conditions of payment of remuneration;
(d) prohibit or regulate payment of remuneration in kind;
(e) require employers to keep employment records;
(f) require employers to provide records to their employees;
(g) prohibit or regulate task-based work, piecework, home work, sub-contracting and contract work;
[Para. *(g)* substituted by s. 8 *(c)* of Act 20 of 2013 (wef 1 September 2014).]
(h) set minimum standards for housing and sanitation for employees who reside on their employers' premises;
(i) regulate payment of travelling and other work-related allowances;
(j) specify minimum conditions of employment for trainees;
(k) specify minimum conditions of employment for persons other than employees;
(l) regulate training and education schemes;
(m) regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds;
(n) regulate any other matter concerning remuneration or other terms or conditions of employment;
(o) taking into account the provisions of section 21 (8) of the Labour Relations Act, 1995, set a threshold of representativeness at which a trade union will automatically have the organisational rights contemplated in sections 12 and 13 of the Labour Relations Act, 1995, in respect of all workplaces covered by the sectoral determination; and
[Para. *(o)* added by s. 8 *(d)* of Act 20 of 2013 (wef 1 September 2014).]
(p) establish one or more methods for determining the conditions of service for labour tenants who has [sic] a right to occupy and to use a part of a farm as contemplated in section 3 of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), for the purpose of section 4 (3).

pursuant to section 55(4)(m) in respect of regulating a provident Fund, namely the first respondent.

[3] The Minister, in the Determination for the Contract Cleaning Sector, provided for the creation of a provident fund in respect of which membership was to be compulsory. Having done so, the Minister thereupon provided for an exemption option. The relevant text reads thus:

> '31.3.1 Employer Participation
>
> (a) …
>
> (b) An employer who, in respect of all his/her employees as at the date of the publication of this amendment already participates in a retirement fund that: -
>
> (i) Complies with the requirements of the Act;
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> (ii) Has been approved by the Commissioner for the South African Revenue Service; and
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> (iii) Provides benefits equal to or better in all respect to those provided by the Fund; may, with the agreement of a majority of his/her employees, apply in writing to the Board for exemption

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[Para. *(p)* added by s. 8 *(d)* of Act 20 of 2013 (wef 1 September 2014).]
(5) Any provisions of a sectoral determination may apply to all or some of the employers and employees in the sector and area concerned.
(6) A sectoral determination in terms of subsection (1):
(a) May not be made in respect of section 7, 43 (2), 44 or 48;
(b) may only be made in respect of section 43 (1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities;
(c) may not reduce the protection afforded to employees by sections 17 (3) and (4) and 25 or a regulation made in terms of section 13; and
(d) may vary the basic conditions of employment in section 9 in the circumstances contemplated by section 50 (2A).
[Sub-s. (6) substituted by s. 11 of Act 11 of 2002 (wef 1 August 2002).]
(7) The Minister may not publish a sectoral determination-
(a) covering employees and employers who are bound by a collective agreement concluded at a bargaining council;
(b) covering employees covered by a collective agreement concluded in a statutory council regulating any matter in respect of which that statutory council has concluded a collective agreement;
[Para. *(b)* substituted by s. 8 *(e)* of Act 20 of 2013 (wef 1 September 2014).]
(c) regulating any matter regulated by a sectoral determination for a sector and area which has been in effect for less than 12 months.
(8) Subject to the provisions of subsection (7), the Minister may publish a sectoral determination that applies to employers and employees who are not covered by any other sectoral determination.
[Sub-s. (8) added by s. 8 *(f)* of Act 20 of 2013 (wef 1 September 2014).]
[Date of commencement of s. 55: 21 March 1998.]
(underlining to S55(4)(m) supplied.)

> from contributing to the Fund in accordance with the Rules, provided that …”

(Underlining supplied)

[4] Therefore, as part of the provision for the newly created Fund, in recognition of the fact that some employers and their employees were already members of other funds, provision was made that they could opt out of the new fund, subject to various conditions. Importantly, the class of employers who were eligible had to have been in established funds *before a specified date* which served as a cut-off. The controversy, in this case, is centred on the underlined text determining that cut-off date.

[5] The appellant initially sought to establish that, on the facts, it was an eligible employer who was participating in another fund prior to the critical date. That case was dismissed. That finding is not the subject of the appeal.

[6] Trapped by the strait jacket of this clause, the alternative argument proffered by the appellant is that the very fact of a cut-off date is unlawful. The foundation of the edifice of the appellant’s case depends on whether the decision to determine a cut-off is arbitrary. If it cannot be found that the decision was arbitrary then the appellant’s case fails.

<u>The case advanced for arbitrariness</u>

[7] The proposition advanced by the appellant, in essence, is as follows:

7.1 The Constitution protects freedom of association and fair labour rights.[2]

7.2 The BCEA is enacted to give flesh to those values.

7.3 The Minister is, in terms of the BCEA, vested with powers which must be used to achieve the objects of the BCEA.

7.4 Among the objectives of the BCEA is to create a floor of minimum conditions of employment;

[2] Sections 18 and 23 of the Constitution of the Republic of South Africa,1996 (Constitution).

7.5 The decision to create a provident fund for the Contract Cleaning Sector in respect of which membership was compulsory was an appropriate decision by the Minister.

7.6 As a fact, and accepted by all as such, at the time of the creation of the Contract Cleaning Provident Fund, some employers and their employees were already members of other established funds.

7.7 The Minister, properly, decided that these employers could apply for exemption if they in general, offered a superior set of benefits.

7.8 However, the right to apply for an exemption was tied to whether or not any given employer was "already" a member of another fund as at the critical date. This decision had deleterious consequences for employers in the position of the appellant. If an employer offered its employees a superior set of benefits under another fund after that cut-off date, it would not be entitled to rely thereon to apply for an exemption; the employer would be compelled, with its employees, to contribute towards the Contract Cleaning National Fund.

7.9 This consequence is intolerable because the result is:

7.9.1 to violate the employer's and its employees' rights of free association.

7.9.2 to create a maximum set of benefits not a minimum, which is inconsistent with the objectives of the BCEA;

7.10 Accordingly, the decision is arbitrary and unlawful.

<u>The Judgment *a quo*</u>

[8] Prinsloo J dealt with this thesis and dismissed it. The judgment addressed the maximum benefits idea and reasoned that there was no bar to the employer and its employees belonging to another fund in addition to the respondent.[3] Of the violation of freedom of association argument, the judgment considered the

[3] There is no bar in law to multiple memberships.

compulsory nature of the membership of the first respondent and adjudged it to be a limitation that was justifiable in terms of section 36 of the Constitution. On the determination of the date *per se*, it was held that the review grounds did not raise it and it was therefore not an issue before the court.

Evaluation

[9] There are several discrete ancillary issues raised on the papers but because of the view we have taken on the central issue, it is unnecessary to address them, save one. That issue is the absence of an answering affidavit by the Minister. The contention is that the cut-off date decision is therefore unexplained by the decision-maker and therefore, if the argument of the appellant is correctly understood, there is no rebuttal on the facts of the critique of the decision. In our view, this is not the correct approach. An administrative decision must be respected, and validity is presumed until that presumption is disturbed. Before the Minister can be embarrassed by not answering a claim of unlawful conduct, the aggrieved accuser must establish at least a *prima facie* case that demands a rebuttal. In our view, the appellant has not done so and the absence of an affidavit is inconsequential. As is demonstrated by the analysis that follows, the text of the Determination speaks for itself and the inherent structure of the scheme of the fund and the intrinsic policy choices made are self-evident. Accordingly, the circumstances, in this case, are unlike those illustrated in *Minister of Justice v Saripa* 2018 (5) SA 349 (CC) in which case the minister had not offered a rebuttal to a *prima facie* case of blatant discrimination and a finding was made of arbitrariness against the minister.

[10] As to the notion of a violation of the right to freedom of association; it is correct, as held *a quo*, that an employer and its employees may be members of other provident funds. The compulsion to be a member of this fund does not ban anyone from joining others. The freedom of association problem does not exist. The fact that multiple memberships may give rise to some degree of inconvenience or be commercially bothersome does not establish the cogency of the critique.

[11] The compulsory nature of membership of the fund, which is itself not challenged, serves a rational purpose, ie to secure a critical mass of contributors in one pool. Indeed, the pooling of risk is the fundamental element of any provident fund, a commonplace example of collective sharing of risk. If a member could join and leave at will for better schemes the risk that the residue would be diminished to a point where the scheme would be unviable is plain. Imposing a compulsion to belong serves to eliminate that risk. It serves the interests of the most vulnerable employees.

[12] The exemption option recognised vested interests by those employers who had voluntarily provided for their employees in a scheme, which qualitatively assessed, could afford a better set of benefits. The opportunity to obtain an exemption was limited to this class of employer who had vested interests prior to the creation of the fund.

[13] The selection of a date was a mechanical exercise. Once it is accepted that a compulsory scheme with a limited right of exemption on the grounds of prior commitments is the model chosen, the selection of a cut-off date is inevitable. One date as is good as another, the exact argument advanced by the first respondent. There is no argument about lack of notice or inadequate notice or the like. The selection of the date is not, therefore, subject to criticism.

[14] The notion that the existence of a cut-off date causes a result that employees have to endure a "maximum" set of benefits which outcome would be inimical to the purpose of the BCEA, which is to craft a set of minimum conditions, is misplaced. What the regulation achieves is that it is a minimum condition of employment that an *employee belongs to a fund*, if not the first respondent fund, then another offering benefits no less generous. The minimum floor is indeed created. The policy trade-off between trapping employers in a scheme that offered minimum benefits and allowing a free for all and risk compromising the viability of the fund is plain. The Minister's choice was rational.

<u>Conclusions</u>

[15] There is no merit in the appeal.

[16] As to costs, the effect of the review and the appeal has been to burden the first respondent with expenses that could have been spent on benefits for members. It would be unfair to allow that burden to fall on the first respondent, and in effect, on the employees and employers who contribute.[4] The review court saw fit to make no costs order. That discretion will be respected. In respect of the appeal, the appellant shall bear the costs, including the costs of two counsel, in the light of the importance of the matter to the future administration of the fund.

The Order

The appeal is dismissed with costs, to include the costs of two counsel.

Sutherland JA

Tlaletsi JA

Murphy AJA

[4] See *Zungu v Premier, Kwazulu-Natal* (2019) 39 ILJ 523 (CC) at [23] – [26] where the approach to costs is addressed.

APPEARANCES:

FOR THE APPELLANT:	Adv P Buirski
	Instructed by Fairbridges Wertheim Becker Inc
FOR THE RESPONDENTS:	Adv C Watt-Pringle SC, with him, Adv K Premhid,
	Instructed by Tabacks Attorneys