REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PA6/13

Reportable

In the matter between:

C ARENDS & OTHERS	**Appellants**
and	
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
MARTIN LE ROUX KOORTS N.O.	**Second Respondent**
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	**Third Respondent**

Heard: **28 August 2014**

Delivered: **06 November 2014**

Summary: Review of jurisdictional ruling- parties agreeing to proceed without leading of any evidence or agreed statement of case Such failure unacceptable. - jurisdictional issue raised in one party's heads of argument- arbitrator ruling on jurisdiction without affording the other party opportunity to reply- such conduct irregular- arbitrator committing a reviewable irregularity – Labour Court order and award set aside.

JUDGMENT

MURPHY AJA

[1] This is an appeal against a decision of the Labour Court (Moshoana AJ) in which, it dismissed an application by the appellants to review and set aside a decision of the second respondent ("the arbitrator") in which he declined on jurisdictional grounds to arbitrate a dispute referred to the first respondent, the South African Local Government Bargaining Council ("the SALGBC").

[2] As will appear more fully in the discussion which follows, no evidence was presented at the arbitration hearing. It is nonetheless possible to state the basic facts by having regard to those stated to be common cause in the heads of argument and the findings of the Labour Court.

[3] The third respondent is the Nelson Mandela Bay Metropolitan Municipality ("the NMBMM") which was formed as a consequence of the amalgamation of the erstwhile municipalities of Port Elizabeth, Uitenhage and Despatch. The formation of the NMBMM resulted in salary disparities between employees performing the same or similar duties. In April 2005, the council of the NMBMM adopted a resolution that transitional allowances would be paid to qualifying employees as an interim measure pending a permanent resolution of the problem. The remuneration of employees who benefited from the transitional allowances consisted of their old salary rates with their municipalities of origin, plus their transitional allowances.

[4] The transitional allowance scheme was intended to be a short-term solution pending the outcome of a national process, "the Task process", intended to provide a new uniform post evaluation and grading scheme for local government. The Task process took longer than anticipated and the relevant parties then sought to substitute the transitional allowance arrangement through the conclusion of a collective agreement, signed by NMBMM and the two trade unions, IMATU and SAMWU on 11 December 2009. The collective agreement comprises two substantive clauses, which provide as follows:

'**3. <u>GUIDING PRINCIPLES</u>**

3.1 Where employees are currently outside of a confirmed Grade (interim Grading being the primary source), they will continue to remain so until TASK is implemented, as such cases are considered to be anomalies. Employees within the same post will not be migrated outside of a formal Grade (interim grade) even if those employees who are above the Grade are in the majority.

3.2 All employees receiving Transitional Allowance will cease to receive such with implementation of this agreement.

4. <u>THE TERMS</u>

4.1 That a process of achieving parity outside of the Task process as an interim arrangement be adopted;

4.2 That one pay curve for all employees of the NMBM, aligned to the former PEM Grading System be implemented. This would be done by benchmarking all posts against the current PEM grading scheme or by means of interim grading in the case of newly advertised posts.

4.3 Former PEM employees who by virtue of their placement designations are earning less than their counterparts, will be migrated.

4.4 The measure that will be used to place this category of employees will be the signed job description.

4.5 Existing employees, who as of the date of the signing of the agreement are currently earning a salary that falls below the salary for the benchmark grade for their counterparts performing the same work, will be migrated to the notch where the highest earner is situated within that position on the structure.

4.6 Allowances, including long service bonus will be negotiated separately.

4.7 The implementation of this agreement shall be 1 July 2009 subject to further discussions.'

[5] The notable provisions of the agreement for present purposes are clause 3.2 which provides that the transitional allowance arrangement will cease with the

implementation of the collective agreement, and clause 4.2 which provides that one pay curve will be implemented for all employees and that such would be achieved by benchmarking all posts against the grading scheme applicable at the Port Elizabeth municipality ("PEM") or by means of interim grading in the case of newly advertised posts.

[6] Following the conclusion of the collective agreement, affected employees (including the appellants) were placed on specific grades with associated remuneration packages, and were advised accordingly in February 2010.

[7] In July 2010, it was established that the appellants may have been placed on incorrect grades and that their remuneration was higher than it should have been because their grades had been calculated according to the method used in calculating transitional allowances and pursuant to an unlawful instruction of the Municipal Manager. The NMBMM then sought to remedy the situation. Its position is encapsulated in a letter addressed to one of the appellants, Mr. J van Vuuren, dated 29 September 2010, the relevant part of which reads:

> 'Since the implementation of the TASK Job Evaluation System was delayed for reasons beyond Council's control, the Council decided to negotiate with SAMWU and IMATU on your behalf regarding a more beneficial remuneration system to replace the Transitional Allowance System. As a result of the above negotiations, the Pay Parity Collective Agreement was signed on 11 December 2009 and implemented with effect from 1 July 2009.
>
> In terms of this Agreement you should be remunerated in terms of the PEM Grading Scheme on Grade 14 with effect from 1 July 2009. This will further mean that your Transitional Allowance will also effectively cease as from 1 July 2009.
>
> As you are aware, the above was not implemented in your instance, and instead you were remunerated on grade 16 with effect from 1 July 2009.
>
> You are therefore hereby officially informed that you have been overpaid since 1 July 2009 and that the Municipality will have to correct this error by recovering monies as soon as possible.

You are however hereby offered an opportunity to submit written representation on:

1. Reasons should you not be in agreement with the above proposed grade.

2. Means on how the overpaid money can be repaid to the Municipality.'

[8] The appellants construed the conduct of NMBMM as an illegitimate attempt to rely on the provisions of the collective agreement to effect a reduction of their earnings. They contended that the collective agreement did not empower NMBMM to reduce their remuneration below their pre-agreement level of earnings. NMBMM took the view that the transitional allowance was based on the condition that should the salary grade to which an employee was benchmarked for transitional allowance purposes be lower than the grade determined by the Task process, the employee would be liable to pay back the difference. In other words, it maintained that no employee could hold NMBMM to the pay level brought about by the transitional allowance and that pay levels would be set ultimately by the grading process. The transitional allowance had been substituted by the grading process identified in the collective agreement, and, as far as NMBMM was concerned, the appellants had been incorrectly graded in the implementation of that process. The correction was aimed at the incorrect grading after the conclusion of the collective agreement, which specifically recorded that the interim transitional allowances would cease from the date of implementation of the collective agreement.

[9] The appellants did not take up the invitation to make written representations as proposed by NMBMM in its letter of 29 September 2010. They instead referred a dispute to the CCMA concerning an alleged unilateral change to terms and conditions of employment "purportedly in terms of a collective agreement". That referral was not pursued and a fresh dispute was referred to the SALGBC on 30 October 2011. The referral form indicated that the appellants regarded the nature of the dispute to be one regarding "the interpretation/application of a collective agreement" and the outcome sought was: "NMBM to desist from unilaterally reducing remuneration benefits".

[10] The arbitration proceedings convened before the arbitrator on 19 January 2012. Each of the parties presented the arbitrator with a bundle of documents and informed him that they were in agreement that the dispute essentially related to the proper interpretation of the collective agreement and that there was no need for any evidence. Both parties then made opening statements. The appellants' attorney summarised the factual background to which the representative of NMBMM added certain submissions. They then agreed that the parties would file written submissions within agreed timeframes and the arbitrator thereafter would issue his award. The appellants defined the dispute in their submissions narrowly to be whether the collective agreement allowed a reduction in salary. The parties did not prepare a pre-arbitration minute dealing with the common cause facts, evidentiary material or issues to be determined. Nor did they settle and agree upon a written stated case to be placed before the arbitrator. The appellants were unhappy with the written submissions filed on behalf of NMBMM subsequent to the arbitration hearing. They complained that the submissions included a wide range of documents that did not form part of the bundles that were handed up at the arbitration and that the submissions canvassed a range of justifications for the approach taken by the NMBMM that were never contemplated by the dispute referral and/or the parties' delineation of the issues to be determined in the course of their opening statements.

[11] The decision of the representatives of the parties to limit themselves to providing the arbitrator with a verbal account of the background relevant to the conclusion of the collective agreement, as a basis for the parties arguing the matter without leading oral testimony, was ill-advised. It appears from the transcript of the arbitration proceedings that the parties agreed to narrow the issue for determination to be whether the collective agreement permitted the employer to reduce the salaries of the appellants and that they would argue the point "on the face of the agreement" in written submissions to be filed after the hearing. As mentioned, the appellants argue that NMBMM's written submissions went beyond the appellants' view of the issues agreed for determination by raising contentious facts and issues going to jurisdiction. NMBMM also supplemented the bundle of documents discovered at the

arbitration with documents pertaining to the conclusion of the agreement, its implementation and an alleged unlawful instruction by the Acting Municipal Manager, which introduced a new defence that had not been raised before the arbitrator. It also appears that NMBMM's attorneys then addressed a letter on 14 February 2012 to the appellants' attorneys expressing the view that as there was not an agreed statement of facts, and now a dispute about what was common cause, the parties should agree to return to arbitration to fully present their cases.

[12] Before the parties could resolve their differences of opinion regarding what was properly before the arbitrator for consideration and determination, the arbitrator handed down his award on 15 February 2012. In it, he considered a point *in limine* in relation to jurisdiction, which had been raised for the first time in the written submissions of NMBMM, and concluded:

> 'I have carefully considered the arguments before me and it is my view that the Respondent (NMBMM) is correct in their assertion that the SALGBC do not have (sic) the required jurisdiction to determine the *enforceability or implementation* of a collective agreement.' (emphasis supplied)

He added:

> 'It is clear that nowhere in the Pay Parity Collective Agreement a right exists for a salary not to go down or to remain at a pegged constant as stated by the Respondent.
>
> It is my view that after *inter alia* an assessment of the facts of this matter, the true nature of the dispute, relevant case law presented that the dispute is not a dispute that can be arbitrated.'

[13] Earlier in his award, the arbitrator indicated that he considered that the dispute was one which required adjudication not arbitration. By that I assume he believed the dispute ought to be determined by the Labour Court. At another point of the award, the arbitrator indicated that the dispute might also have been a dispute of interest rather than a dispute of right.

[14] The appellants were aggrieved by the approach taken by the arbitrator, contending that the raising of the jurisdictional issue in this fashion was contrary to the process that had been agreed at the arbitration and fell out of the ambit of the dispute to be arbitrated. NMBMM predictably argued that the jurisdictional challenge could be raised at any stage during the proceedings and the arbitrator was in any event entitled *mero motu* to determine the true nature of a dispute.

[15] The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. Courts of law and arbitration tribunals dealing with disputes of right exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to give advice upon differing contentions about the meaning of an agreement. Where a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case a factual substratum which shows what has arisen and how it has arisen.[1] The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence.[2] An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results.

[16] Rule 20(1) of the Rules for the Conduct of Proceedings before the CCMA (which might be followed in proceedings before bargaining councils) allows for a pre-arbitration conference at which the parties must attempt to reach

[1] *National Union of Mineworkers and Others v Hartebeesfontein Gold Mining Co Ltd* 1986 (3) SA 53 (A) at 56G-57E.
[2] *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) para 7; and *Minister of Police v Mboweni* (657/2013) [2014] ZASCA 107 (5 September 2014).

consensus *inter alia* on the agreed facts, the issues to be decided, the precise relief claimed and the discovery and status of documentary evidence. The parties in this case did not engage in a proper pre-arbitration process with the aim of agreeing a stated case. Although the CCMA rules do not include provisions equivalent to the provisions of rules 33(1) and (2) of the rules of the High Court, parties who prefer to proceed by way of a stated case at the CCMA or before a bargaining council, in my view, should follow their prescriptions. These rules provide that the parties to any dispute may, after the institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court. Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties, their contentions thereon and shall be divided into consecutively numbered paragraphs. The parties must annex to the statement copies of documents necessary to enable the court to decide upon such questions.

[17] Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case. An arbitrator faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request.[3] In this instance, the arbitrator did not do that. He dismissed the claim for want of jurisdiction. The plea of jurisdiction was not raised in any pleading or supported by any evidence led before the arbitrator. Nor was it raised in oral argument before him. It came to light for the first time in heads of argument filed after the hearing. The appellants contend that the issue before the arbitrator by agreement was solely whether the collective agreement permitted the reduction of the remuneration of the employees and that at no point during or before the hearing was any indication given that NMBMM would seek to widen the factual or legal issues to include a plea of jurisdiction.

[18] The appellants also maintained that there was in any event a shared understanding between the parties at the hearing that the dispute related to the interpretation and application of the collective agreement and that the

[3] *Minister of Police v Mboweni* (657/2013) [2014] ZASCA 107 (5 September 2014) para 8.

arbitrator therefore did indeed have jurisdiction in terms of section 24(5) of the Labour Relations Act[4] ("the LRA").

[19] The manner in which the jurisdictional point was raised and the speed with which the arbitrator handed down his award meant that the appellants were not afforded an opportunity to address him on the point. To that extent the arbitration proceedings were not conducted fairly. The enquiry was undertaken in the wrong manner with the result that the appellants were denied their right to have their case fully and fairly determined. The principal cause of that denial or failure was the inept manner in which the case was put before the arbitrator. Be that as it may, the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of section 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair.[5]

[20] At the very least when the plea of jurisdiction was raised by NMBMM in its written submissions, the arbitrator ought to have invited the appellants to submit additional argument on the point before handing down his award. The attorneys for NMBMM understood that and thus suggested in their letter of 14 February 2012 that the arbitration be re-convened. Their proposal was overtaken by events. The wiser course for NMBMM at that point might have been to abandon the award and for the matter to have been argued on a proper statement of facts clearly delineating the issues.

[21] Counsel for NMBMM has put before us a cogent argument in support of the contention that the arbitrator lacks jurisdiction in terms of section 24 of the LRA because the dispute does not relate to the interpretation and application of a collective agreement. The dispute, he argued, has nothing to do with the interpretation or application of the collective agreement which merely provides in clause 4.2 that "one pay curve for all employees of the NMBM aligned to

[4] Act 66 of 1995.
[5] Section 33 of the Constitution. See *Goldfield Investments and Another v City Council of Johannesburg and another* 1938 TPD 551; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 267; and *Herholdt v Nedbank* 2013 (6) SA 224 (SCA) at para 21.

the former PEM Grading System be implemented". This was done by "benchmarking all posts against the current PEM grading scheme or by means of interim grading in the case of newly advertised posts". Thus, according to counsel, the dispute is about how the appellants should have been graded before they were migrated to the pay parity scheme. The collective agreement merely provides a framework within which to slot employees in grades predetermined by the relevant task team. The collective agreement does not include any prohibition on the reduction of employee remuneration, nor does it govern the situation where the implementation of the agreement results in the employees being incorrectly graded. The answers to the questions of whether the appellants were unlawfully placed on the incorrect grades and whether the municipality had the right to correct the grade and reduce the appellants' salaries, counsel argued, cannot be determined with reference to the collective agreement. The dispute, it was submitted, therefore has nothing to do with the interpretation and application of the collective agreement but is concerned with the manner in which the agreement was implemented and thus fell outside the scope of section 24 of the LRA. Hence, counsel concluded, the arbitrator got it right on jurisdiction and the appeal should be dismissed for that reason.

[22] Counsel's submissions are predicated upon the premise that the sole provision which could possibly have conferred jurisdiction on the arbitrator was section 24 of the LRA. I doubt that is correct. If it were true then there may be merit in the contention that it would be pointless to refer the dispute back to arbitration. Given the manner in which the case was presented, it is not clear whether the appellants have alleged that the dispute about the reduction of salary was unfair conduct involving the provision of benefits and thus constituted an unfair labour practice. It appears from the papers that the parties are *ad idem* that the dispute is about the implementation of the collective agreement.

[23] It is unnecessary for this Court to decide the jurisdictional issue. It has not been properly ventilated because of the inept manner in which the parties presented their cases to the arbitrator. As already discussed, where parties

wish to proceed by way of a stated case, they are obliged to set out the facts upon which the proposed legal argument is to rest, to define the questions of law that the arbitrator is being asked to determine and to set out the parties' contentions in relation to those questions. Had that been done, the question of jurisdiction in this case would probably have been addressed more fully with due consideration to the relevant statutory provisions and the applicable collective agreements and in particular clause 5 of the collective agreement which provides that disputes regarding the implementation of the agreement should be referred to arbitration.

[24] The absence of any evidence; the absence of a stated case; and, the manner of its presentation make it impossible for this Court on appeal to determine whether the dispute is indeed one about the implementation of the collective agreement, and, if so, how it should be resolved. This Court cannot resolve the question of jurisdiction or the merits of whether the new grading system had been correctly implemented in terms of the applicable contracts and neither could the arbitrator.

[25] The arbitration proceedings should accordingly be set aside on the ground that the arbitrator committed an irregularity in undertaking the inquiry in the misconceived manner in which he did. As fault lies with both parties, it is just that they should bear their own costs in the appeal and the court below.

[26] The following orders are made:

i) The appeal is upheld with no order as to costs.

ii) The order of the Labour Court is set aside and substituted with the following order:

"The award of the second respondent dated 15 February 2012 is hereby reviewed and set aside with no order as to costs."

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Murphy AJA

I agree

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Waglay JP

I agree

_____

Dlodlo AJA

APPEARANCES:

FOR THE APPELLANT:	Adv J G Grogan Instructed by Gray Moodliar attorneys
FOR THE THIRD RESPONDENT:	Mr Minnaar Niehaus of Minnaar Niehaus Attorneys