

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN

D343/07  
Reportable

ETHEKWINI MUNICIPALITY

APPLICANT

And

SA LOCAL GOVERNMENT  
BARGAINING COUNCIL

FIRST RESPONDENT

INDEPENDENT MUNICIPAL ALLIED  
TRADE UNION [IMATU]

SECOND RESPONDENT

COMMISSIONER A.S DORASAMY

THIRD RESPONDENT

THE PERSONS WHOSE NAMES APPEAR  
ON THE SCHEDULES ANNEXED  
TO THE NOTICE OF MOTION

FOURTH AND  
FURTHER RESPONDENTS

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JUDGMENT

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Cele J

### **Introduction**

- [1] This application is one brought in term of S 158 (1) (g) of the Labour Relations Act 66 of 1995, (“the Act”) to review and set aside or correct an arbitration award dated 14 May 2007 issued by the third respondent as an arbitrator of the first respondent. The arbitration award was issued in favour of the employees grouped as the fourth respondents duly assisted by their union, the second respondent who all opposed this application. The employees should be the 4<sup>th</sup> to further respondents.

### **Background facts**

- [2] The applicant found its existence through the amalgamation of three local authorities namely, the Kingsburgh City Council, Umkomaas Local Authority and the Borough of Amanzimtoti. As a consequence of such amalgamation, the applicant had to restructure its staff complement. Negotiations about the restructuring took place between the applicant and representatives of the employees resulting in the compellation of an agreed and negotiated document called the Staff Placement Policy and Process.
- [3] As will be shown, the date 8 October 2003 is significant in this matter. Prior to it, the fourth and further respondents (“employees”) were often utilised by the applicant as its relief staff in various libraries. The employees sought to be placed in

permanent employment positions within the applicant as librarians. As a consequence a dispute arose between them and the applicant when the applicant resisted such placement. They referred the dispute for conciliation and arbitration. An arbitration hearing was scheduled for 30 September 2003 before Mr. Rajah Naidoo as the appointed arbitrator. The dispute was however settled between the parties and was by agreement, made an arbitration award on the same date. The terms of agreement were that:

- “1.The 19 applicants reflected in schedule “A” shall be permanently employed by the Respondent, South Operational Entity, with effect from 8 October 2003.
2. The 19 applicants shall be employed as part-time Library assistants on grade TK7 of the Metro Scale. The applicants shall work a maximum of 5 hour day, 25 hour- 6 day week. The 5 hour shall be worked consecutively and in one shift (sic).
3. The applicants shall enjoy all the normal benefits of permanent employment eg. leave, medical aid, housing subsidy etc.
4. The applicants shall be notched as per qualification plus one notch for every year of service from date of appointment as relief worker.

5. The respondents shall be entitled to redeploy the applicants during areas of need provided that this is done fairly, equitably, reasonably and in consultation with the unions and bargaining council resolutions on re-deployment.
6. The applicants shall be granted seven days additional annual leave, which shall be taken within the first twelve months of employment.
7. The issue of Ms Pat Hayter shall be addressed separately by the management and the unions.”

[4] The agreement of the parties was then to be taken for submission to the next Exco meeting of the applicant and the unions were to be informed of the response by 11 November 2005. If the agreement of the parties was not authorised by Exco, the matter had to be referred to arbitration by 16 November 2005. The issue of the placement of the employees as the permanent staff component of the applicant was finalised. A further dispute arose between the parties pertaining to pension, leave, and bonus benefits of the employees prior to 8 October 2003. The employees referred that dispute to conciliation and arbitration. Three points *in lime* were raised by the applicant during the arbitration hearing which was before Ms Shanta Reddy as the appointed arbitrator. The first point raised was that the arbitration hearing of 30 September 2003 had dealt with all the issues pertaining to pension, leave and

bonus benefits, leaving the employees with having to review the award if they were not satisfied by it. Ms Reddy ruled that the settlement agreement of 30 September 2003 did not deal with the issues of retrospective pension, leave and bonus benefits due to the employees and that there was no waiver in respect of those benefits by the employees. The employees proceeded to refer an unfair labour dispute pertaining to those benefits, for conciliation and arbitration. The third respondent was appointed to arbitrate it. He found in favour of the employees by issuing an arbitration award in the following terms:

“Award

1. The applicants have discharged the onus of proving on the balance of probabilities that the respondent has committed an unfair labour practice by failing to pay the applicants their leave and annual bonus and in Mrs Govender’s case her pension benefit.
2. Mrs Peggy Cockraine is entitled to be a party to the proceedings and is entitled to her leave and bonus benefits from date of commencement to date of leaving the respondent’s service, alternatively up to November 2003.
3. Mrs T Judy Govender is entitled to retrospective pension fund benefit.

4. All applicants are entitled to leave benefits from date of commencement up to the 8 October 2003.
5. All applicants are entitled to an annual bonus from date of commencement up to the 8 October 2003. (sic)
6. The respondent shall pay the monies due, owing and payable in terms 4 and 5 above by no later than the 30 JUNE 2007. (sic)
7. The respondent is to bear the costs of the hearing from conciliation up to and including the conclusion of the arbitration (4 MAY 2007).

### **Grounds for review**

[5] The applicant has made the following submissions as constituting the grounds for review and the circumstances under which a defect is said to have been committed:

(a) The award was improperly obtained in that the arbitrator relied on evidence that was tendered in two prior arbitration hearings, which formed part of the Applicants' and Second Respondent's bundles of documents. The reliance on evidence tendered at prior arbitration hearings to prove the existence of any rights and or benefits, and the commission of an unfair labour practice against the employees, were

entirely misplaced and incorrect in law on the following grounds:

- (i) It is trite that each case is to be judged on its own merits;
- (ii) the reliance on evidence given at a previous arbitration, to establish the existence of facts, not proved by the Fourth and Further Respondents is grossly irregular as such evidence would not be subject to the test of cross examination;
- (lii) the reliance on evidence submitted at a previous arbitration hearing to prove the existence of certain facts in a new dispute, ousts the jurisdiction of the arbitration tribunal.

(b) The arbitrator committed a gross irregularity, in that he failed to apply his mind to the legislative provisions contained in Basic Conditions of Employment Act, the 1983 Act and the 1997 Act and the regulation to The Natal Joint Municipal Pension Fund in that:

- (i) Since the employees were “panel” employees, their terms and conditions did not form part of the regulations governing terms and conditions of employees that fell within the former Local Authorities, hence the former provisions of the repealed and the Basic Conditions of Employment Act, 1997 Basic Conditions of

Employment Act would have been applicable for the period in which the leave and bonus pay benefits were claimed, namely from date of commencement of employment to 8 October 2003.

- (ii) In terms of Section 12 (2) of the Basic Conditions of Employment Act, accrued leave would have expired within four months after the termination of any leave cycle. A leave cycle being twelve months. The employees' accrued leave, if any, would have therefore lapsed automatically within a period of four months after a leave cycle; the Basic Conditions of Employment Act similarly makes provision for the lapsing of accrued leave, not taken within a leave cycle.
- (iii) If an employee satisfies the definition of a part time employee, as defined in the Natal Joint Municipal Pension Fund regulations, the employing Local Authority must consent to that employee becoming a member of the Fund prior to admission to membership. The admission to membership of the Fund is also subject to the approval of the committee. The

employees put up no evidence of such consent and or Committee approval.

- (c) The arbitrator committed gross irregularity:
- (i) in that he failed to take cognisance that the employees did not have contracts of employment, which issue was common cause, with the former South Operational Entity. The applicant's submission being that there was no contract evidencing any entitlement to bonus pay, retrospective from date of commencement of employment with the former South Operational Entity up until 8 October 2003.
  - (ii) by finding that the applicant had committed an unfair labour practice when the employees failed to establish in the first instance, the existence of such benefits and/or rights, neither had the employees proved or established the commission of an unfair labour practice committed by the applicant against them.
  - (iii) by ordering that the applicant pay the employees costs from the date of conciliation up to and

including the conclusion of the arbitration. In terms of Section 138 (10) of the Act, read with rule 39 of the CCMA rules, costs should only be awarded against the applicant in the event that it was found to have acted in a frivolous and vexatious manner, by proceeding with or defending the dispute in the arbitration proceedings or in its conduct during the arbitration proceedings.

(d) The arbitrator committed a mistake in law:

- (i) by relying on a document, being a computation of accrued leave pay, when the use of this document was objected to by the applicant's representative and the author of the document was not called to prove the contents thereof.
- (ii) in that he misapplied the provisions of the decision taken in *University of the North v Nobrega and another* (1999) 20 ILJ 2117 (C) by extending the application of the admission of documents that were not objected to, namely the arbitration awards of Ms Pat Hayter and Mrs Urquhart, to include the admission of evidence that was tendered at these arbitration hearings.

- [6] In response, the respondents denied the circumstances outlined by the applicant to constitute reviewable grounds. They disputed that the third respondent relied on evidence tendered in the previous arbitration hearings. To the extent that he may have relied on submissions made or on the findings of such arbitration hearings, they say he was entitled to do so. Their contention is that it is evident from the award that the third respondent applied his mind to the provisions of the Basic Conditions of Employment Act. According to them the third respondent took cognisance of the fact that they did not have contracts of employment but that he determined such a consideration to have been irrelevant to the issues before him and that by so doing the third respondent committed no error.

### **The arbitration hearing**

- [7] None of the parties led any *viva voce* evidence at the arbitration hearing. They relied on the documents which they produced. One such document produced was intended to show the total average hours worked by the employees and the leave benefit they said was due to them. The applicant objected to the admission of that document in the absence of its author and on the basis that it did not purport to be a correct reflection of the number of leave days due to the employees. The third respondent *mero moto* called a witness for classification purposes. She was the Human Resources Manager of the applicant, Ms Minette Van Zyl. The third respondent put some

questions to the employees but he pointed out that he would not swear them as witnesses. There was an attempt made to call a Mr Suresh Rambally to explain the document contested by the applicant, as its author, but he was reportedly unavailable.

- [8] In his address, Mr Perumal, who appeared for the employees made numerous references to how issues of other employees were resolved. He referred to arbitration awards which preceded the arbitration hearing in this matter and argued that the employees were similarly entitled to benefits. Ms K James appearing for the applicant submitted that the terms and conditions of employment applicable to the employees were those stipulated in the Basic Conditions of Employment Act of 1983 which made no provision in respect of bonus benefits. She said that the bonus benefits were a discretionary matter not covered by legislation and that the employees had no entitlement to it. In respect of retrospective leave accumulation, she said that the Basic Conditions of Employment Act made no agreement for employees to accumulate leave and as such they were not entitled to leave benefits. In respect of Mrs Pat Hayter, she said that the arbitration did not grant her the pension fund benefit. Mr Rambally never came to testify at the arbitration hearing. The contents of the contested document remained in dispute. The third respondent recorded that he

would have to draw inferences in regard to the evidence pertaining to that document.

### **Submissions by the parties**

#### **Applicant's submissions**

- [9] Mr Nxasane appeared for the applicant. He highlighted the grounds for review and facts submitted to support them. He said that the employees bore an onus to prove the unfair labour practice they alleged the applicant to have committed. He said that the employees had to prove the existence of benefits which were not granted to them by the applicant such that it could be said that an unfair labour practice was committed by the applicant. He pointed out that the claims which the employees were saying they were entitled to were to be retrospective from the dates on which employees joined the South Operational Entity, which dates were not established. In essence, the claims for the benefits preceded the date of deemed permanent employment, being 8 October 2003. He submitted that no *viva voca* evidence was led to establish the existence of such benefits and the commission of an unfair labour practice by the applicant.

[10] He criticised the third respondent for having relied on the:

- arbitration award of commissioner Odayan in respect of Ms Pat Hayter dated 3 March,
- arbitration award of commissioner Mathe in respect of Ms M. Urquhart and others dated 22 September 2004, and
- the letter dated 23 December 2002 from the Natal Joint Pension Fund to Ms M. Goba in respect of Mrs W. Pather.

[11] He submitted that the third respondent ought not to have accepted the document recording the computation as an accurate record of what leave pay would have been due to the employees while he ignored the objection to the document. He said that a gross irregularity was committed by the third respondent who accepted the document without its contents being proved. He said that the third respondent extracted evidence that was tendered by the witnesses that testified at previous arbitration hearings and was therefore influenced by outside evidence, when the existence of such facts was not proved before him. He said that the employees failed to put up contracts of employments to establish the existence of bonus benefits or pension benefits. He said that the claim for leave benefits dating back from the date of commencement of employment, up till the date of

deemed permanent employment would have become prescribed by virtue of the provisions of the Basic Conditions of Employment Act of 1983 and Act 75 of 1997. Further leave benefit was not leave benefit as defined in S186 (2) of the Act, as it is a right derived from the Basic Conditions of Employment Act. He argued that the applicant's pursuance of this matter was neither frivolous nor vexatious and therefore did not warrant an adverse costs order and that such order was an error in law.

- [12] In response to a submission made on behalf of the employees, he denied that the applicant had sought to improve its own condition by virtue of its wrong doing. He pointed out that, that submission had never been pleaded, nor was it canvassed in the heads of argument tendered on behalf of the employees. In that regard, he said that it was never contended by the employees nor was it a finding by the third respondent that, during that period, 1990 up to and including 8 October 2003 any of the employees sought annual leave. Nor was it alleged that the applicant declined to grant the annual leave to them. The third respondent was required, *ex post facto* to determine whether the employees were entitled to leave benefits from the date of commencement of employment up to 8 October 2003.

**Employee's submissions**

[13] Mr Winchester appeared for the employees. He submitted that the third respondent acted properly and that his arbitration award was not based on any error in law, or any other irregularity. He pointed out that the applicant was legally represented at the arbitration hearing and such representative did not object to the document now complained of, being admitted into evidence. He said that, apart from the obliged reference, the applicant did not properly challenge the authenticity of the document which purported to be a computation of average hours worked by the employees. He said that the applicant did not object to the document being tendered into evidence. He submitted that the applicant did not challenge the evidence of Ms Govender, Cockraine, Kay or Brady, nor was the applicant's version put to them.

[14] He said that Mr Perumal's opening address, at the arbitration hearing, constituted facts which the applicant had agreed to, even though it is not confirmed by the transcript. He contended that the applicant did not challenge the transcribed record. He said that the document which was being challenged had been put up by the very party that sought to challenge it, the applicant. He said that the document had been produced and relied

upon in the arbitration hearing before commissioner Mathe. He submitted that the parties had agreed on an informal type of an arbitration hearing where there would be no evidence tendered. He said that the third respondent was entitled to use prior arbitration awards for precedent.

[15] According to him, the employees were not asking for anything more than they were entitled to. They wanted to participate with their contributions as did Ms Pather. In respect of the leave benefit, he said that the rationale of the applicant was very strange. It said that the employees were not entitled to leave benefits. If they were entitled, they forfeited the leave. He submitted that no one could improve one's position by wrong doing. As such, an employee could not forfeit a leave which she was denied the exercise thereof in the first place. He referred to *Wimbledon Lodge (Pty) Ltd v Gore N.O and others 2003 (4) SA 315 (SCA)*.

[16] In respect of the bonus, he said that payment for it was in terms of the rules. He said that the issue was pertaining to entitlement. Calculation of the amount could be left out as with leave benefits. He said that the applicant had not demonstrated that the third respondent's order directing it to pay the costs of the arbitration was grossly irregular, in

circumstances where the third respondent based such findings on facts placed before him. He argued that the applicant was effectively seeking to appeal the costs order, which in the instance case was inappropriate.

### **Analyses**

[17] The dispute referred by the employees to conciliation and thereafter to arbitration was that the applicant committed an unfair labour practice by not recognising and honoring their benefits for leave and bonus pay. In respect of the tenth respondent it was said that the applicant declined her entitlement to pension benefits in terms of the Natal Joint Municipal Pension Fund. All of the claims are retrospective from the dates on which they joined the South Operational Entity.

[18] Section 186 (2) (a) has relevance to these proceeds and it reads:

“(2) “Unfair labour practice” means any unfair act or omission that arises between an employer and an *employee* involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to

probation) or training of an *employee* or relating to the provision of benefits of an *employee*.”

[19] It was therefore part of the enquiry which the third respondent was to determine if each source of the claim amounted to a benefit as envisaged in S186 (2) (a). It must always be borne in mind that a difference needs to be drawn between “benefits” and “remuneration” – See in this respect (1) *Schoeman & another v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC), (2) *Gaylad v Telkom South Africa (Pty) Ltd* 1[998] 9 BLLR 942 (LC) Revelas J held in the Gaylad case that payment for accumulated leave formed part of remuneration and was therefore not a benefit. The third respondent omitted this investigative task in the execution of his duties.

[20] The applicant has correctly pointed out that the onus to prove the commission of an unfair labour practice rested on the employees. The transcript record of the arbitration proceedings shows that only one person testified at the hearing, Ms Van Zyl who was called by the third respondent *mero moto*. The rest of the other people who were asked questions were not really testifying as the third respondent deliberately decided not to swear them in. None of the employees therefore testified during the arbitration hearing. It is difficult to categorise the

utterances of those who were asked questions as such did not constitute evidence.

[21] It is my view that there has not been a full and fair trial of the issues in this arbitration hearing. Parties agreed to holding “an informal” arbitration hearing. If it was their intention not to lead evidence, one would have expected that they would first produce a pre-arbitration minute. The minute would identify facts which they had agreed to, facts that were in dispute and the issue which the third respondent was called upon to determine. It seems that there are facts which parties agreed to but the same were not incorporated into the record. I have therefore been unable to determine these facts. The parties could also have agreed on the status of the documents which they wanted to hand in. That would obviate any of them who might have sought to distance themselves from their documents. As such, I have been unable to find that evidence which the employees tendered to prove that the applicant committed an unfair labour practice. The transcript record suggests that the onus of proof was infact placed on the applicant, where it never belonged in the first place.

[22] When the third respondent gave out a helping hand by calling Ms Van Zyl and by putting questions to some of the employees, he must have realised the predicament in

which the parties placed him by resorting to an informal hearing. When he could not find joy in handling the contested document, he recorded that he would draw an inference. It is not clear how an inference could be drawn in the absence of proven facts from which it could reasonably be drawn. The award is silent about the drawing of an inference. A conclusion is irresistible then, that an inference adverse to the applicant was drawn. In that event the award suffers from a latent defect of serious magnitude.

[23] I have been persuaded by the submissions made on behalf of the applicant that, in the circumstances of this matter, it was grossly irregular of the third respondent to import evidence from the prior arbitration hearings into the arbitration hearing before him. The third respondent did not have as much benefit as did the other commissioners or arbitrators who were steeped into the trial of issues brought to them.

[24] I am also not persuaded that the applicant ought to have been ordered to pay costs of the arbitration hearing in the instant matter.

[25] In the circumstances, the following order will issue:

1. The arbitration award dated 14 May 2007, issued by the third respondent in this matter, is reviewed and set aside.
2. This matter is remitted to the first respondent for a *denovo* arbitration hearing before an arbitrator other than the third respondent.
3. No costs order is made.

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Cele J

27/02/09

**Appearances**

For the applicant: Joseph Nxusani

Instructed by: Kathy James

For the Respondent: Allyn Winchester SC

Instructed by: Futcher Attorneys