REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR2258/11

In the matter between:

SAA TECHNICAL (PTY) LTD	**Applicant**
and	
SJÖLUND, A N.O	**First Respondent**
CCMA	**Second Respondent**
SATAWU	**Third Respondent**

Heard: 25 October 2012

Delivered: 18 December 2012

Summary: Review of declaratory order granted by commissionerin section 24(2) referral of dispute re interpretation of collective agreement –tainted by gross latent and patent irregularities resulting in denial of a fair trial – review granted.

JUDGMENT

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Introduction

[1] This is an application in terms of section 145 (1) of the Labour Relations Act, 66 of 1995 ("the Act"), to review and set aside the arbitration award of the first respondent ("the commissioner") issued under the auspices of the second respondent under case number GAEK2624/10 dated 25 July 2011. The applicant further seeks an order substituting the award with an order dismissing the claim instituted by the third respondent ("SATAWU"), alternatively remitting the dispute to the second respondent ("the CCMA") to be determined afresh by another commissioner.

[2] SATAWU referred a dispute to the CCMA concerning the interpretation or application of a collective agreement in terms of section 24(2) of the Act. Conciliation was unsuccessful, and was followed by private mediation following which the parties agreed that the matter should be referred to arbitration in terms of section 24(5) of the Act. The parties elected not to lead any oral evidence at the arbitration and the matter proceeded on the basis of oral submissions and heads of argument.The only other documents before the commissioner were the collective agreements entered into between the parties. The parties did not exchange heads of argument but agreed to file them and make submissions at the arbitration. No further facts were placed before the commissioner.

[3] The issue in dispute was whether the applicant was obliged to make payment of a secondary salary in terms of a secondary agreement or addendum to a Wage Settlement Agreement ("wage agreement") entered into by the parties on 4 April 2002. The relevant terms of the wage agreement were as follows:

> 1. Scope of the agreement
>
> This agreement will apply and be of effect to all employees in the Ground Staff Bargaining Unit within South African Technical (Pty) Ltd.
>
> 2. Salary increase
>
> The company offered and the Union accepted an across the board pensionable salary increase of 6% retrospective from 16th June 2001 to 15th June 2002.

The parties agreed to a further pensionable salary increase of 6% effective from 16th June 2002 to 15th June 2003.

9. Car Allowance and Secondary Retirement Fund

The parties have agreed that the Union will come up with proposals to (sic) the viability of the facility and once the company is satisfied, the policy will be drafted and implemented and aligned in accordance with the principles of equity and fairness.

13. Duration of the agreement

This agreement will be of effect and applicable for the period 16th June 2001 to 15th June 2003.

[4] Thereafter, on 7 October 2004 the parties signed an agreement (which reflects that it had also been reached on 4 April 2002), entitled "Addendum to wage agreement for the period June 2001 to 2003" ("the secondary agreement"). The secondary agreement was as follows :

"THIS AGREEMENT concludes and relates to clause 9 of the above Wage Agreement.

SATAWU SECONDARY RETIREMENT FUND

WHEREAS the Company, South African Airways Technical and South African Transport and Allied Workers' Union (representing its constituency within its Bargaining Unit) reached an Agreement on 4th April 2002 on the following :-

"1. SECONDARY SALARY

The implementation of a Secondary Salary equal to 33.33% of a member's Basic Salary.

2. SCOPE OF THE AGREEMENT

The Agreement will apply and be of effect to all eligible members of SATAWU in the SATAWU Bargaining Unit within SAA Technical (Pty) Ltd.

3. IMPLEMENTATION DATE

Parties agreed that the implementation date will be 16th October 2002.

4. SATAWU SECONDARY RETIREMENT FUND

4.1 All eligible employees shall contribute 7.5% of their Secondary Salary referred to in clause 1 as per the rules of the " Astuence

Pension Fund", and the Company shall also contribute 7,5% on behalf of all eligible employees to the Fund as on the implementation date.

4.2 All the "non-eligible" employees within the SATAWU Bargaining Unit that have been promoted or transferred into the AUSA Bargaining Unit will be paid out right on a pro-rata basis".

[5] On or about 21September 2010[1], some six years after the conclusion of the secondary agreement, SATAWU referred a dispute concerning the interpretation and application of the wage agreement and the secondary agreement ("the collective agreements") to the CCMA. In its 7.11 referral form it describes the nature of the dispute as being that "SAAT is failing to act in terms of the agreement, saying its interpretation is different to SATAWU". The outcome sought wasa declarator that the applicant should complywith the collective agreements.

<u>The arbitration</u>

[6] The commissioner summarised the defences or points *in limine* raised by the applicant at the arbitration as follows:

6.1 Firstly, the referral should be dismissed on the ground of "unreasonable delay" in that SATAWU took six years, a period which is unexplained, in referring the dispute to the CCMA. This is contrary to the primary purpose of the Act being the effective resolution of labour disputes.

6.2 Secondly, that in terms of clause 13 of the wage agreement it applied from 16 July[2] 2001 to 15 June 2003, and the secondary agreement was consequently also only in effect for this period. The applicant was thus only obliged to pay the secondary salary for the period 16 October 2002 (the agreed implementation date) to 15 June 2003 when the wage agreement lapsed.

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[1] The referral was filed on 17 September 2010 but only served on the applicant on 21 September 2010.

[2] This is an error made by the commissioner in the award and should have referred to June.

6.3 Thirdly, declaratory relief was not competent as the “debt” in the secondary agreement became due on 15 June 2003 and therefore prescribed on 14 June 2006 in terms of the Prescription Act 68 of 1969.

6.4 Fourthly, the secondary agreement relates to a method of calculation of the pension fund contribution rather than actual increase in remuneration, and the wage agreement only applied to employees who were “members of SAT” (sic) on 4 April 2002.

[7] The commissioner notes that the relief sought by SATAWU was an order compelling the applicant to comply with secondary agreement from its implementation date, i.e. 16 October 2002, alternatively from 17 October 2007 (the date three years before the referral to the CCMA on 17 September 2010 if the Prescription Act was considered to apply).

[8] SATAWU’s submissions to the commissioner were in summary as follows:

8.1 The unreasonable delay rule does not apply if the Prescription Act 68 of 1969 applies, and even if it does the applicant is unable to show that it was prejudiced by the delay in these circumstances;

8.2 The wage agreement lapsed on 2003 but the secondary agreement did not. The wage agreement would been replaced by a new wage agreement in 2003 and this would have continued indefinitely. The secondary agreement was a separate collective agreement concluded well after 15 June 2003, and was not a term of it or contingent on it and clearly had an indefinite duration. Its duration wasclearly not dependant on clause 13 of the wage agreement. The applicant’s obligations in terms of the secondary agreement were therefore of an on-going nature and would continue until the secondary agreement itself was terminated by the parties. No such termination had occurred and the secondary agreement remained valid. After 2003 the applicant’s obligations to pay a secondary salary continued in terms of the secondary agreement and in addition, through the operation of section 23 (3) of the Act, the secondary salary also became a contractual term of the members’ individual contracts of employment. It could therefore be enforceable either by way of the declaratory or in a contractual dispute and SATAWU had elected the former approach.

8.3 The commissioner did not have jurisdiction to determine the prescription plea, although prescription did not affect the outcome of the arbitration. The dispute was an on-going one and the applicant's plea that the claim had prescribed on account of the application of the Prescription Act should be dismissed in that the Labour Appeal Court had held that where the unreasonable delay rule applies the Prescription Act was not applicable:*Solidarity and Others v Eskom Holdings* [2008] 29 *ILJ* 1450 (LAC)*("Eskom").*

8.4 The applicant is wrong in submitting that it was not obliged to make payment of the secondary salary because the Astuence Pension Fund had not been established. It was still under an obligation to establish it or an equivalent fund[3] and make the contributions as well as pay the secondary salary in terms of the collective agreements.

[9] SATAWU conceded in its heads of argument in the arbitration that the applicant's obligations (to pay the secondary salary and to contribute 7.5% to the pension fund) which it sought to enforce are "debts" within the meaning of the Prescription Act. However, it submitted that the entire claim had not prescribed, but only, at best for the applicant, its obligation to pay had prescribed three years prior to the referral of the dispute.[4] This rendered the applicant liable to pay the secondary salary and contribution to the pension fund from 17 September 2007 to 17 September 2010 (the date of the referral to the CCMA).

[10] The commissioner reached the following conclusion on the unreasonable delay rule :

"In dealing with the first issue and the respondent's first defense (sic), the excessive delay in bringing the matter to the CCMA; I will apply the parole (sic)

[3] In his answering affidavit Itani Sewadawada, deputy chairperson of Satawu states that the only inference to be drawn from the collective agreements is that when the secondary agreement was signed on 7 October 2004, the fund was already in existence. The parties therefore knew that the rules of the fund would come into effect on the implementation date, i.e. 16 October 2002.

[44] As provided in section 11(d) read with section 15(1) of the Prescription Act.

evidence rule. The parties stated that the matter was unsuccessfully mediated by the Senior Commissioner and Mediator John Brand. It is the applicant's submission that the dispute is "on-going". The respondent's first defence is that the matter had prescribed and the CCMA would therefore not have jurisdiction to deal with the matter. It is the intention of the LRA that the matter should be brought within a reasonable period of time. No provisions are made in terms of the LRA for the party to comply with any prescribed time limit when referring a dispute of mutual interest to the CCMA. The respondent directed me to various cases dealing with "excessive delay" and where matters had "prescribed". I am of the humble opinion that this would not apply in this matter. The respondent could at all time's(sic) invoked (sic) section 23(4) of the LRA by giving the applicant notice to terminate the agreement, but they had failed to do so. Further, the respondent did not dispute the submission of the respondent (sic) that the matter was on-going. It would appear that the applicant at all times intended pursuing the matter. I will deal further with this issue below."

[11] On the duration of the wage agreement, the commissioner found as follows :

"The respondent's second defense (sic) is in terms of Clause 13 of the wage agreement. The wage agreement was signed on 4 April 2002 and clause 13 states that the agreement will be for the period 16 July (sic) 2001 to 15 June 2003. I should therefore only consider this period for the intension (sic) of the addendum to the agreement being in effect. It is unlikely that the respondent's argument would be valid. The addendum to the wage agreement was signed on 07 October 2004. It is unlikely that the parties would sign an agreement on 07 October 2004, backdated to 04 April 2002 and agree that it will only be in effect from 16 July (sic) 2001 to 15 June 2003. The agreement further relates to contributions to the Astuence Pension Fund. This would, as indicated in the preceding paragraph, be an 'on-going' process."

[12] In relation to the prescription point the commissioner concluded:

"The respondent's third defense (sic) is that the Commissioner not grant declaratory relief due to the "debt" becoming due on 15 June 2003 and therefore prescribed on 14 June 2006. As indicated in the preceding paragraphs I am of the humble opinion that the meeting of the minds intended the agreement to be in effect for an indefinite period. As mentioned above, the respondent could have, but failed to invoke section 23(4) of the LRA. This would suggest that the respondent had no intension (sic) of abandoning the responsibilities agreed to in terms of the agreement."

[13] The commissioner's conclusion in relation to the terms of the secondary agreement was that : "[t]he respondent's fourth defense (sic) states that the agreement only relates to "methods" of calculation rather than an actual increase of remuneration. It is further contended that only employees who were members of SAAT on 04 April 2002 are covered by the agreement. This argument does not make sense as the agreement was signed on7 October 2004 and was backdated to 16 October 2002. This is also not specifically stated in the agreement. Clause 4.2 of the agreement states that "all the non-eligible employees within the SATAWU Bargaining Unit that have been promoted or transferred into AUSA Bargaining Unit will be paid out right on a pro rata basis". It would appear that the respondent embarked on a "fishing exercise" in terms of defending their case in not honouring their responsibilities in terms of the agreement."

[14] Therefore in his "humble opinion" and taking into account the case law submitted by the parties, the commissioner concluded that the secondary agreement was a valid signed agreement, and the parties had agreed in good faith that it would be implemented but for "some unknown reason the respondent never implemented the agreement on 7 October 2004, backdated to 16 October 2002".

[15] A declarator was then issued in the following terms:

"6.1 The respondent, SAA Technical (Pty) Ltd is ordered to comply with the agreement referred to as the 'SATAWU Secondary Retirement Fund'.

6.2 The respondent must implement the Secondary Salary equal to 33.33% of member basic salary as per clause 1 of the mentioned agreement.

6.3 The parties must comply with clause 2 in that all eligible employees shall contribute 7,5% of their Secondary Salary referred to in clause 1 as per the rules of the Astuence Pension Fund and the company shall also contribute 7,5% on behalf of all eligible employees to the fund as on the implementation date.

6.4 The implementation date of the agreement is interpreted to be in effect from 16 October 2002 as per clause 3 of the agreement.

6.5 The agreement applies to all eligible members of SATAWU Bargaining Unit within SAA Technical (Pty) Ltd.

6.6 No argument has been placed before me in terms of clause 4.2 of the agreement.

6.6 No order as to cost (sic) is made."

Grounds of review

Jurisdiction

[16] In this regard Mr Myburgh submitted that where a commissioner issues an arbitration award in the absence of jurisdiction, this constitutes an excess of power and a nullity.[5]Therefore, when a jurisdictional issue is raised the commissioner must satisfy himself or herself that they have jurisdiction. Failure to apply his mind to the existence of jurisdictional facts results in the award being reviewable on this ground alone.[6] On SATAWU's own version two jurisdictional issues arose for determination and the commissioner failed to apply his mind to either of these. Firstly, SATAWU submitted that the commissioner had no jurisdiction to determine the prescription issue. Secondly, on SATAWU'S ownsubmission the obligation to pay the secondary salary after 2003 arose from individual contracts of employment, and in this regard it is trite that the commissioner had no jurisdiction to enforce such contracts.The commissioner's failure to apply his mind to these jurisdictional issues renders the award reviewable on the grounds of latent gross irregularity.

[17] I am in agreement however with the submission made by Mr Van Der Riet that what the applicant takes issue with is not whether the commissioner failed to decide whether he had jurisdiction to determine the dispute, but that he failed to determine the jurisdictional facts before him. In any event as Mr Van Der Riet submitted, the issue of jurisdiction was never raised at the arbitration and it is for the Labour Court on review to determine as an objective fact whether the commissioner made a reviewable error in assuming jurisdiction should this be challenged.

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[5]*SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd & others*; *SA Rugby Pty Ltd v SARPU & another* [2008] 9 BLLR 845 (LAC) at para [40].

[6] See Francis J, *South African Airways v Commissioner C De Kock N.O, CCMA & SATAWU obo Msekeli Mgwatyu* (case no. C635/2010 dated 3/6/2011)

Unreasonable delayand prescription

[18] Mr Myburgh submitted that it is clear that the commissioner had regard to irrelevant facts and issues (the parol evidence rule, SATAWU's intention, the fact that the dispute was on-going, the applicant's failure to terminate the agreement, and the absence of a time period in the LRA) in rejecting the applicant's submission that the unreasonable delay rule applied. This is in itself a latent gross irregularity. Furthermore, the commissioner failed to consider that, even if the unreasonable delay rule was not applicable (in that it is trite that the unreasonable delay rule does not apply where the Prescription Act 68 of 1969 applies as was held in *Eskom (supra)*)the commissioner nevertheless has a discretion to refuse a declaratory order on the basis of the egregious delay in referring the dispute.In this regard he submitted that the failure to recognise the existence of a discretion and to exercise it,[7] and in addition the failure to recognise that a party seeking a declarator must do so within a reasonable time,[8]particularly in the context of a six year delay, implies that the commissioner failed to apply his mind to the issues. Thisconstitutes a latent gross irregularity.It does not assist SATAWU that (as Mr Van Der Riet submitted) at no stage did the applicant suggest at the arbitration that the commissioner should refuse the declarator, and there is no indication that he was aware of his discretionary powers to refuse on the basis of unreasonable delay. It is moreover clear from the applicant's heads that this issue was squarely placed before the commissioner and in any event the submission that he may not been aware of the full extent of his authority simply reinforces the applicant's submission that he applied his mind to irrelevant issues and failed to determine the actual controversy between the parties. In so doing he committed a grave error of law which constitutes a latent gross irregularity.

[19] Mr Myburgh submitted further that the commissioner dismissed the prescription plea on spurious grounds when instead he should have had regard to the fact that the claim might have been good in law for the three

[7] *Littlewood & others v Minister of Home Affairs & another* 2006 (3) SA 474 (SCA) at para 17.

[8] *Hattingh & Another v SA Airways* (2010) 31 *ILJ* 2407 (LC) at paras 7-8.

years preceding the referral in 2010. In other words, he failed to determine whether the claim had prescribed completely or in part, instead applying his mind to irrelevant facts including that the secondary agreement was for an indefinite period; the applicant failed to terminate it in terms of section 23 (4); and that the applicant had no intention of abandoning its responsibilities in terms of the secondary agreement.

[20] Mr Van Der Riet submitted that the applicant's reliance on the unreasonable delay rule was entirely misplaced since there was no allegation that the applicant had been prejudiced by the delay in referring the dispute. Moreover, it was never placed before the commissioner as an issue to be determined but arose simply in the context of whether the relief sought was academic. In regard to prescription he submitted that the parties are in agreement on the fact that only part of the claim prescribed, and that the applicant had in any event not required the commissioner to determine the issue but had simply reserved its rights. However, hesubmitted (without conceding the point) that the commissioner should have determined an implementation date having regard to the prescription issue but that it was nevertheless appropriate for this court to correct the award to clarity that the claim was only enforceable from 17 September 2007 since the claim prior thereto would have prescribed.

[21] In my view, although no such concession was made by Mr Van Der Riet, this is tantamount to conceding that the review (at least on this ground) has merit in that it is trite that this court cannot simply amend paragraph 6.4 of the award to this extent without reviewing and setting aside the award, or parts thereof, and determining the merits or remitting the matter for determination *de novo*.

Duration of the secondary agreement

[22] The applicant submits that in concluding that the secondary agreement contained an on-going obligation the commissioner failed to apply his mind to the following materially relevant facts and issues :

22.1 That the duration of the wage agreement determines the duration of the secondary agreement.While the secondary agreement was signed on 7 October 2004 (after the lapse of the wage agreement), the face of the agreement under the heading 'SATAWU secondary retirement' fund reflects that the agreement was reached on 4 April 2002.The secondary agreement in fact forms part of clause 9 of the wage agreement (it states expressly that 'this agreement concludes and relates to clause 9 of the above wage agreement'), and as a result clause 13 of the wage agreement (the duration clause) applied to it. The duration of the secondary agreement would therefore have been from 16 October 2002 (the implementation date in the addendum) to 15 June 2003 (the termination date of the wage agreement). There is therefore no basis in law or fact for the conclusionthat the secondary agreement survives or that the respondent's obligation continues after the expiry of the wage agreement. In fact, as the commissioner states, this is simply his "humble opinion."

22.2 In these circumstances the commissioner exceeded his powers by ordering the applicant to comply from 16 October 2002 "onwards". Mr Myburgh submitted that at most what he was able to do was to order the applicant to comply for the period 16 October 2002 to 15 June 2003. Thereafter the claims would have arisen in contract and the commissioner would have had no jurisdiction to enforce them.

22.3 However, although the applicant accepts that it would have had an obligation to pay the secondary salary for the period 16 October 2002 to 15 June 2003this was contingent on the pension fund coming into existence, since this was a condition precedent to the obligation to pay the secondary salary and the contributions. The fund was never established and accordingly this obligation never arose. In fact Mr Myburgh submitted that was the critical issue for the review and that the failure of the commissioner to determine the issue of the existence of the fund, by way of evidence or further submissions, reflected a failure to determine the material facts and was a latent gross irregularity. I agree with this submission and return to it below.

Interpretation of the secondary agreement

[23] Mr Myburgh submitted that it is implicit in the commissioner's conclusions, although it is not clarified or reasoned, that the secondary agreement envisages, in addition to a 6% salary increase year on year for 2002 and 2003, an additional increase of 33.33%. Instead, it is clear from the agreement that this is a proposed method of structuring the wage given the proposed implementation of a secondary retirement fund.The award also implies that this additional salary is due to *all employees* who were members of SATAWUand within the bargaining unit at the time and continues as an on-going obligation from 16 October 2002 to date. I agree that this is an absurd conclusion to say the very least and the reasons given by the commissioner are incomprehensible and at best reflect a manifest failure to apply hismind to the complexity of the dispute and the facts andissues before him.

The terms of the award

[24] The applicant submits that in failing to define the terms "implement" and "eligible members" the commissioner demonstrably failed to apply his mind to material issues. In addition, the Astuence Pension Fund does not exist and it is unclear what the effective implementation date is. Mr Van Der Riet submitted however that the meaning of the terms is clear but that in any event this does not have any effect on the validity of the award. In regard to the Astuence Pension Fund Mr van Der Riet submitted that it had not been proven that the fund does not exist, and even if this were correct it was self-evident that there was an obligation on the parties to establish the fund and ensure that it can operate on the basis that contributions will be made backdated to 16 October 2002 as awarded.

[25] In my view given that the submission was made to the commissioner in the applicant's heads that the fund did not exist,this should have at the very least have alerted him to the material dispute of fact on this issue and prompted him to call for evidenceor further submissions. MrVan Der Riet is correct insofar as the facts relating to the existence of the fund may not have been clearly conveyed to the commissioner (although it is clearly referred to in the applicant's heads submitted to the arbitration), but insofar as SATAWU isseeking an order that the applicant should contribute to the

fund it is incumbent upon it to present documentary evidence in the form of the rules of the fund or other indications that it had sought to initiate the establishment thereof. The existence of the fund was clearly a condition precedent, as Mr Myburgh submitted, to the coming into operation of the secondary agreement, and the failure to consider this reflects a failure by the commissioner to apply his mind to the crux of the dispute. Even if the commissioner did not commit misconduct or a latent gross irregularity in failing to have regard to the applicant's submission in its heads of argument that the Astuence Pension Fund does not and did not exist, Mr Myburgh submitted that the award nevertheless falls to be set aside on the grounds that he committed a material mistake of fact and this constitutes an administrative ground of review : see *Pepcor Retirement Fund & Another v Financial Services Board & another* 2003 (6) SA 38 (SCA) at para [47].Therefore even if one accepts the submission of Mr Van Der Riet that the fact that the fund did not exist was not before the commissioner and he cannot be faulted for failing to have regard to facts that that are not placed before him, where a fact is material to the resolution of a dispute there is a duty to determine the correct facts prior to making a decision, particularly one that has a significant financial impact on the applicant.In this regard the applicant submits that the potential costs of satisfying the award amounts to approximately R26 million.

[26] A third submission on this ground was that the commissioner committed a patent gross irregularity in not affording the applicant an opportunity to lead evidence on its interpretation of the secondary agreement given that it is clearly ambiguous on the face of it and the context in which it was negotiated was important. The commissioner should have reconvened the arbitration for the purposes of leading evidence on the interpretation point. In failing to do so and in his apparent disregard of the applicant's heads of argument the commissioner deprived the applicant of a fair hearing. In my view both parties are responsible for this since it should have been clear to them that the issue was incapable of determination on the basis of submissions and that evidence was unavoidable. In this regard I agree with Mr Van Der Riet that the applicant at no stage applied to lead oral evidence or attempted to re-open its case once it had filed its heads of

argument. Although the commissioner was constrained by the paucity of facts that were established and was forced to rely on assertions in heads of argument, it should in my view have been apparent to him not only that he had a discretion in regard to the relief sought but also that the matter was incapable of determination in the absence of evidence.

[27] In any event irrespective of whether or not the commissioner committed a latent and / or patent gross irregularity in other respects, in my view the failure to determine the factual issue of whether in fact the Astuence Pension Fund exists is a latent gross irregularity of the sort that is fatal to the award. This dispenses with the need in my view to determine whether the award is also reviewable on the other grounds submitted. Mr Van Der Riet however submitted that this is immaterial in that it is common cause that the fund does not exist, but that the obligation of the applicant is to establish a fund and pay the contributions agreed in terms of the secondary agreement as well as the secondary salary. This submission however ignores the express terms of the agreement, and while there may be some doubt as to whether it relates to a continuing obligation, there can be no doubt that the existence of the Astuence Pension Fund was agreed as a condition precedent to making the contributions and paying a secondary salary. It is clear therefore that the commissioner committed a series of reviewable defects *inter alia*, in issuing a declarator in circumstances where the Astuence Pension Fund does not exist and has never existed; in failing to require evidence on this issue and in applying his mind to immaterial facts and issues; and in committing errors of lawwhich constitute latent gross irregularities, as a result of which the applicant was denied a fair trial: see *Herholdt v Nedbank Ltd*.[9]

[28] In regard to the relief sought it is clear that the absence of evidence does not lend itself to a determination of the disputeby this court and remittal for re-determination is therefore appropriate.

[9][2012] 9 BLLR 857 (LAC).

Order

[29] In the premises, I make the following order :

1. The arbitration award issued by the first respondent under case number GAEK2624/10 dated 25 July 2011 is reviewed and set aside.
2. The matter is remitted to the second respondent to be determined afresh by a commissioner other than the first respondent.
3. There is no order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	A.T. MYBURGH SC (with him F. BODA) Instructed by Cliffe Dekker Hofmeyr,Johannesburg.
THIRD RESPONDENT:	J G VAN DER RIET SC Instructed byRuth Edmonds Attorneys, Johannesburg.