



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

**CASE NO JR 3204/10**

In the matter between:

**CITY OF JOHANNESBURG**

**APPLICANT**

and

**SOUTH AFRICAN LOCAL**

**GOVT BARGAINING COUNCIL**

**1<sup>ST</sup> RESPONDENT**

**ZARINA WALELE NO**

**2<sup>ND</sup> RESPONDENT**

**SAMWU obo THE SERGEANTS**

**3<sup>RD</sup> RESPONDENT**

**Application argued: 7 February 2014**

**Judgment delivered: 10 February 2014**

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## JUDGMENT

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### VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent ('the arbitrator') under case number JMD 021013 on 11 October 2010. In her award, the arbitrator held that the applicant had demoted the affected employees (referred to as the sergeants) when it grouped them on the equivalent salary structure and band level as their subordinates. The arbitrator directed that the sergeants who report to a superintendent are first line managers and should be retained at the level of first line managers, with immediate effect.
- [2] The material facts are not in dispute. They are contained in the arbitrator's award and the affidavits before me, and I do not intend to repeat them here. For present purposes, it is sufficient to record that the sergeants were appointed during the course of 2001. During 2002, a number of them were promoted to the level of inspector.
- [3] The essence of the dispute that the arbitrator was called upon to decide was whether the sergeants had been demoted. Their contention was that soon after their appointment, certain individuals were designated as inspectors, and appointed at a higher rank. The applicant required the sergeants to report to these persons. The sergeants claimed that at all material times, they had in practice reported to an inspector rather than a superintendent, a manager in terms of the applicant's organogram. On this basis, and in terms of the organogram, they should be placed at one level lower than that of 'manager', the level and salary scale on which the superintendents were placed. The sergeants sought an order to the effect that they continue to report to superintendents and that of their status thus be restored to a level consistent with the role description afforded to them when they were employed.

- [4] The evidence proffered at the arbitration hearing by one Prince Mdluli was that he is a sergeant who reports to a superintendent. The arbitration award records his evidence to the effect that the reporting lines that formed the subject of the dispute were challenged 'as far back as two years ago when it was suggested that the Applicants report to Inspectors'. Vikule Matiyela's evidence is recorded in the award to the effect that certain of his functions were taken away in 2008, and that his status was no longer the same. Bonagile Ntimaba also testified that certain of his functions were taken away in 2008, and that his status was no longer the same.
- [5] The applicant in the present proceedings contended at the arbitration hearing that the appointments of the sergeants had occurred in 2001 and that the basis of their complaint (i.e. the appointment of inspectors to whom they were required to report) had occurred in 2002. The applicants were fully aware of the situation but referred a dispute to the bargaining council only in February 2010. In their referral, they alleged (for reasons that remain elusive) that the dispute had arisen on 2 December 2009.
- [6] It is not disputed that the arbitrator rejected a submission by the applicant that the bargaining council lacked jurisdiction since the referring parties had failed to comply with the time limit prescribed by section 191 (b) (ii) of the LRA, in that the dispute had been referred to the council later than the 90 day period prescribed by the section. The basis of the arbitrator's ruling, it would appear, was that a certificate of outcome had been issued by the bargaining council on 28 March 2012 and that the certificate had not been taken on review. The arbitrator's reasoning appears to reflect the view that a party is not entitled to raise preliminary points at arbitration in the absence of a challenge to a certificate of outcome by way of review.
- [7] It is now well-established that the existence of a certificate of outcome does not preclude an arbitrator from considering a jurisdictional issue, when a jurisdictional challenge arises at arbitration. When a jurisdictional issue arises, an arbitrator or commissioner is generally speaking obliged to consider the issue and satisfy him

or herself that the bargaining council or CCMA, as the case may be, has jurisdiction - see *Bombardier Transportation (Pty) Ltd v Ntiya NO & others* [2010] JOL 25366 (LC), *BMW South Africa (Pty) Ltd v NUMSA obo members* [2012] 3 BLLR 274 (LAC).

- [8] It is trite that where an arbitrator's decision concerning the jurisdiction of a bargaining council or the CCMA is at issue, the test to be applied by a review court is one of correctness and not reasonableness. In other words, the reasonableness threshold applicable to decision-making in terms of *Sidumo and others v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC) does not apply – either the council (or the CCMA) had jurisdiction or it did not. This is a matter to be determined objectively by reference to all of the relevant facts. (*SA Rugby players Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* [2008] 9 BLLR 845 (LAC)). It is equally well-established that if an arbitrator issues an arbitration award in the absence of jurisdiction, this constitutes an excess of powers and a nullity.
- [9] In *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2012] 11 BLLR 1183 (LC), this court held that it was competent for a party to seek to review an arbitration award relating to an unfair labour practice dispute for lack of jurisdiction, even though the certificate of outcome issued at the end of the conciliation phase had not been set aside on review. In that case, the court reaffirmed the principle that the late referral of a dispute without any application for condonation deprived the CCMA of jurisdiction to entertain the dispute at arbitration.
- [10] The present case is no different. The facts clearly disclose (and I did not understand this to be disputed) that the history of the dispute goes back as far as 2002. The referral of the dispute was well out of time, and in the absence of an application for condonation for the late referral, the arbitrator lacked the jurisdiction to entertain the dispute.

- [11] It was submitted on behalf of the third respondent that the nature of the dispute was continuous, one akin to a discrimination dispute and that since it continued well into 2009 (and indeed to the date of referral), the referral was not late. I have difficulty appreciating the logic of this submission. I see no reason why a demotion does not fall into the same category as a dispute concerning a dismissal or any other disciplinary penalty, both of which are the subject of strict time limits which run from the date of the employer's actions,. Of course, an act of demotion has consequences in the form of a diminution of status perhaps, and those consequences may well be ongoing. But it is not so as it necessarily is in the case of an act of unfair discrimination, where the unfair act complained of is continuous, uninterrupted or repeated. For example, in a claim for equal pay, the fact that the employer continues each month to pay a lower wage on one or more discriminatory grounds, has the result that the act of discrimination is continuous. But an act of demotion is not continuous in the same sense. This much is acknowledged by the wording of s 191 (1) (b) (ii) which requires a referral within 90 days *'of the date of the act or omission which allegedly constitutes an unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence'*. The case in which the third respondent relies in support of its submission, *SABC Ltd v CCMA & others* [2010] 3 BLLR 251 (LAC), supports this analysis. That was a case that concerned unfair discrimination in the form of continuous conduct rather than a single act. Not only is it distinguishable on that basis, but the court drew a clear distinction between ongoing unfair labour practices (unequal pay) and 'one-off' decisions or single acts that are not repetitive in nature. Were an act of demotion (or dismissal or the issuing of a final warning for a 12 month period) to be regarded as continuous for the purposes of s 191, that would make a mockery of the time limits imposed by the section. An employee need only allege that he or she continues to suffer the consequences of dismissal, some lesser disciplinary measure or demotion to avoid the prescribed time limits altogether.
- [12] Secondly, it was submitted on behalf of the third respondent that the arbitrator acted in accordance with the law as it applied at the time, and that her ruling

ought to be upheld on this basis. It may be that the arbitrator acted in terms of her understanding of the law as it applied at the time, but in a review of a jurisdictional ruling, what matters is whether the arbitrator was correct. The law as affirmed by the Labour Appeal Court in *BMW* is and has always been that a certificate of outcome neither confers jurisdiction or deprives an arbitrator of jurisdiction, and that it represents no more than a recordal of the status of the dispute following conciliation.

[13] For the above reasons, I am persuaded that on the objective facts, the dispute referred to arbitration by the third respondent was referred outside of the statutory time limit and that in the absence of any application for condonation, the arbitrator lacked jurisdiction to consider the dispute. In these circumstances, the award is a nullity and the application for review stands to succeed.

[14] Finally, in relation to costs, this court has a broad discretion in terms of section 162 of the LRA to make an order for costs according to the requirements of law and fairness. Neither party's representative proffered any submissions as to why costs should not follow the result, and that is the order I intend to make.

It is ordered that:

1. The arbitration award issued by the second respondent under case number JMD 021013 on 11 October 2010 is reviewed and set aside.
2. The third respondent is to pay the costs of these proceedings.

ANDRE VAN NIEKERK  
JUDGE OF THE LABOUR COURT

## APPEARANCES

For the applicant: Adv. F Boda, instructed by Bowman Gilfillan Inc

For the third respondent: Adv. Kutumela instructed by Routledge Modise Inc.