



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO JR 834/12

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION obo

DR I MABUZA & 4 OTHERS

APPLICANT

and

COMMISSIONER R MOLETSANE

1ST RESPONDENT

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

2ND RESPONDENT

DEPT OF HEALTH AND SOCIAL DEVELOPMENT:

GAUTENG PROVINCE

3RD RESPONDENT

UNIVERSITY OF LIMPOPO

4TH RESPONDENT

MEC FOR HEALTH AND SOCIAL DEVELOPMENT

GAUTENG PROVINCE

5TH RESPONDENT

Date heard: 6 March 2014

Judgment delivered: 14 March 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the first respondent (the arbitrator) on 22 February 2012. In his award, the arbitrator found that the persons whom the applicant represents in these proceedings (the doctors) were not entitled to payment of an acting allowance for periods during which they had acted in posts of a higher grade.

The material facts

- [2] The factual background to the dispute referred to arbitration is not disputed. The applicant referred a dispute to the second respondent (the bargaining council) after the respondent failed to pay its members an acting allowance in accordance with a collective agreement referred to as Resolution 1 of 2002. The agreement regulates the payment of acting allowances to employees who act in higher posts for period of that appointment.
- [3] Clause 3.1 of Resolution 1 reads as follows:
- “3.1 An employee appointed in writing to act in a post of a higher grade than the grade of the employee by the Head of Department or his/her delegate at provincial or national level (hereafter the appointing authority) shall be paid an acting allowance to act in vacant posts provided that:
- 3.1.1 The post is a vacant and funded post;
 - 3.1.2 The acting period is longer than 6 weeks;
 - 3.1.3 The appointing authority is a level higher than the acting appointee;
 - 3.1.4 The employee must accept the acting appointment.”

- [4] The doctors were appointed in terms of letters signed by the chief executive officer of the hospital. These letters date from 2004 to 2009 depending on the doctor concerned, and make specific reference to the payment of an acting allowance. Indeed, they state unequivocally that approval had been granted for the acting appointment for a period not exceeding six months, and that the doctor concerned will be entitled to an acting allowance, being the difference of their then current packages and the remuneration package applicable at the next higher post level. It was common cause in the proceedings under review that the doctors rendered services in their acting positions in accordance with the letter of appointment, they were not paid acting allowances and that at no stage were they advised that their appointments were not authorised.

The award

- [5] The arbitrator correctly records that his function was to determine whether the third respondent had failed to comply with the collective agreement and that in doing so, he had necessarily to consider whether the appointments of the applicants in acting posts complied with clause 3.1 of the agreement. The arbitrator went on to find that there was no ambiguity in the agreement and that the applicants had acted in the posts to which they had been appointed. He found against the applicants on the basis, it would seem, that *“it is trite law that any delegation of a function/power by a person holding a public power must be in writing”*, and that the applicants had been *“unable to discharge proof that their acting in higher grades was authorized by the HOD or his/her delegate as per clause 3.1 of the collective agreement”*. He ruled that in the absence of such delegated authority from the HOD, the applicants were not entitled to be paid acting allowances for the period that they had worked in that capacity. In short: the arbitrator came to the conclusion he did on the basis that the doctors had failed for the purposes of clause 3.1 of the collective agreement to prove that they were appointed by the HOD or his or her delegate, and in particular, that the doctors had failed to provide proof of any written delegation of authority from the head of department to any person or body that made the appointments.

The applicable legal principles

- [6] The test to be applied is that enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*, recently affirmed by the Supreme Court of appeal in *Herholdt v Nedbank* (2013) 34 ILJ 2779 (SCA). In the latter judgment the court summarised the position as follows:

'[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

- [7] The *Heroldt* decision clarifies the *Sidumo* test, at least to the following extent:
- a. The test to be applied is cast in the negative- the court must ask whether the arbitrator's decision is one that could not reasonably be reached on the available material.
 - b. The test is concerned primarily with the result of the arbitration proceedings and not the arbitrator's reasoning. The arbitrator's reasons are relevant only in so far as they assist the court to determine how the result was reached, and whether the result can reasonably be reached by that route.
 - c. A 'latent irregularity' or 'dialectical unreasonableness' on the part of the arbitrator (i.e. a failure by the arbitrator to take into account one or more material facts, or the taking into account of irrelevant facts, or any unreasonableness flowing from the arbitrator's process of reasoning) is not in itself a sufficient basis for review.

The arbitrator's conduct in this regard is relevant only in so far as it renders the outcome of the arbitration proceedings unreasonable.

- [8] In *Goldfields Mining South Africa (Pty) Ltd v CCMA* (JA 2/2012, 4 November 2013) the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a "process-related review", at least in the sense that it is no longer open to a reviewing court to set aside an arbitration award only on account of a process-related irregularity on the part of the arbitrator. This has the consequence that the failure by an arbitrator to mention a material fact in the award, or to deal with any issue that has a bearing on the issue in dispute, or any error in regard to the evaluation of the facts presented at the arbitration hearing, is of no consequence. Provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material.

- [9] At paragraph [20] of the judgment, the court stated:

'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*

2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.

- [10] The test to be applied clearly maintains the distinction between a review and an appeal. The correctness of the commissioner's decision is not in issue, and the court is not entitled to interfere only because it would have come to a different conclusion on the same material. It also requires the court to overlook any lapses in reasoning on the part of the commissioner and to determine whether the outcome of the proceedings is nonetheless reasonable.

Grounds for review

- [11] The applicants have raised a number of grounds for review. The first is that the arbitrator failed to determine the true issue in dispute, and misconceived the nature of the enquiry. In particular, the applicant submits that when a dispute relates to the interpretation and application of a collective agreement (as does the present) the dispute must be resolved by having regard to the principles of interpretation established by this court. Secondly, the applicant submits that the arbitrator failed to hear evidence and to allow cross examination, that he failed to allow evidence of actual and implied authority, and that he failed to consider estoppel and/or waiver.

Analysis

- [12] The terms of the arbitrator's award are such that he patently acknowledges that the applicants had been treated unfairly, in that they had performed the work required of them while appointed in acting positions, but had not been paid.

[13] Section 138 of the LRA requires that the Commissioner determine a dispute in an appropriate manner, but must do so freely and quickly while dealing with the substantial merits of the dispute with a minimum of legal formalities. A commissioner is accordingly entitled to play an inquisitorial role and to take measures to shorten proceedings. However, in doing so, a commissioner must provide the parties with a full opportunity to state their case before any determination is made (see *Goldfields* above). In the present instance, it is not disputed that the arbitrator did not hear any evidence and that he determined the issues on the papers before him, in the light of what amounted to an interrogation by him of the parties in relation to the facts in dispute. It is apparent from the engagement that the third respondent's argument that there were no vacant posts for the purposes of clause 3 of the collective agreement was abandoned. The engagement between the parties in respect of the issue of the validity of the delegation of authority is less clear. What can be determined from the record is that the arbitrator required the applicants to produce a written delegation of authority, issued by the head of department or his delegate. Mr Sibeko, the applicant's representative at the hearing, was specifically charged to forward the letter of delegation from the HOD. In the exchange with the parties, the arbitrator says the following:

'COMMISSIONER: No, I don't think, it's not necessary because my understanding because both parties are here, unless you are going to dispute it, Mr Luzwano [i.e. **Letsoalo**] says, let me place it on record, Mr Luzwano says there is no letter of delegation, Mr Luzwano, by the way, is the director HR at George Mukhari Hospital, he says that there is no letter of delegation from the HOD, what are you saying, are you denying that?

Mr Sibeko: We are denying that, that's not in dispute, and as we have indicated, Mr Commissioner, we bear the responsibility to (inaudible).

What follows is an exchange between the arbitrator and the parties' representatives but at no point in that exchange, is there a concession in any unequivocal terms by the applicant's representative that Letsoalo did not have

delegated authority. Further, it is not at all clear from the record that it was common cause that the persons who issued the doctors with the letters of appointment did not have delegated authority. Nowhere is there any mention made of any requirement that any delegation be reduced to writing.

- [14] The arbitrator's ruling, simply put, is to the effect that it was incumbent on the applicants to furnish him with a copy of a written delegation of authority by the head of department or his or her delegate, and that in the face of the applicant's failure to produce such a document, there was no such authority.
- [15] It is apparent to me from the exchange between the parties and the arbitrator and from the heads of argument that the parties filed subsequently that they were a number of factual disputes. Not least of these is the question of who was authorised to appoint the doctors to the acting posts, whether the HR director and the Medex committee had to delegated powers and perhaps more fundamentally, whether the doctors were entitled to conclude that their appointments had been authorised on the basis of actual or implied authority, or in the absence of any actual authority whether they were entitled to rely on ostensible authority. The manner in which the proceedings were conducted, and in particular the failure by the arbitrator to hear evidence on these issues, in my view, prevented a proper ventilation of the dispute between the parties. In the words of the judgment of the Labour Appeal Court in *Goldfields*, the arbitrator failed to give the parties an opportunity to have their say, and as a consequence, he failed to deal with the substantive issues before him in a manner in which all relevant evidence was placed before him. While I appreciate that arbitrators frequently act under pressure and that any attempt to resolve a dispute as expeditiously as possible is to be commended, in this instance, as I have indicated, the arbitrator's conduct frustrated a proper consideration and determination of the issues. In these circumstances, it cannot be said that the decision to which the arbitrator came was a decision to which a reasonable decision-maker could come and the award accordingly stands to be reviewed and set aside.

[16] I fully appreciate that this matter has been festering for some years and that ideally, it ought to be brought to conclusion as soon as possible. In the light of the decision to which I have come, the only remedy open to the applicant is for the matter to be remitted for a hearing on the issue of authority. The order I intend to make will limit the proceedings to the determination of the question of authority, whether that be actual, implied, or ostensible authority. Assuming that such authority is established, it follows that the individual applicants would be entitled to payment of the allowances they claim.

I make the following order:

1. The arbitration award issued by the first respondent under case no PSHS 671-07/08 dated 22 February 2012 is reviewed and set aside.
2. The matter is remitted to the second respondent for determination by an arbitrator other than the first respondent of whether any requirements of authority that might properly be read into the preamble to clause 3.1 of Resolution 1 of 2002 were fulfilled prior to the appointment of the individual applicants into acting posts.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. F Boda, instructed by Hogan Lovells

For the third respondent: Adv. M Mthombeni, instructed by the state attorney.