



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 346/12

In the matter between:

STEVE TSHWETE

Applicant

LOCAL MUNICIPALITY

and

**SOTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL**

First Respondent

N MASEKO N.O.

Second Respondent

SAMWU OBO M TIBANE

Third Respondent

Heard: 5 February 2015

Delivered: 24 February 2015

Summary: Review – dismissal vs expiry of fixed term contract – commissioner not providing reasons for ruling that employee had been dismissed – reviewed and remitted.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, a municipality, seeks to have an arbitration award by the second respondent, an arbitrator on the panel of the South African Local Government Bargaining Council, reviewed and set aside. The arbitrator ruled, initially, that the employee¹ was dismissed by the Municipality; and subsequently that the dismissal was unfair. The Municipality seeks to have both the initial ruling and the eventual award of 14 December 2011 reviewed and set aside. It also seeks to set aside a variation ruling by the same arbitrator dated 17 January 2012.
- [2] The employee, represented by his trade union, also brought an application to dismiss the review application. Both applications were set down for hearing on the same day. Given that the review application was now properly before court, the application to dismiss it had become moot, save for the question of its costs.

Background facts

- [3] The employee, Mr Tibane, was employed as a personal assistant to the executive mayor from 26 April 2009. His term as PA was linked to the tenure of the executive mayor. Upon the expiry of the latter's tenure on 30 June 2011 the Municipality terminated the employee's employment. (He was initially transferred to a different post, but repudiated the transfer agreement through his trade union). He says he was dismissed. The Municipality argues that his fixed term contract expired.
- [4] The employee referred an unfair dismissal dispute to the Bargaining Council. It was set down for arbitration on 24 October 2011. The Municipality raised a point *in limine* that he was not dismissed. The arbitrator ruled that there was a dismissal and that he had jurisdiction to hear the unfair dismissal dispute. He gave no reasons for that ruling.

¹ The third respondent, represented by his trade union, the South African Municipal Workers' Union (SAMWU).

- [5] The arbitration proceeded on the merits some two months later. On 14 December 2011 the arbitrator issued an award finding that the dismissal was unfair. In that award, he reiterates his previous ruling:

“I must point out from the onset that this arbitration hearing was preceded by a hearing where the respondent [the Municipality] raised a point *in limine*.

The said [*sic*] point was in respect of SALGBC’s jurisdiction or lack thereof. The point was dismissed, and consequently SALGBC was found to have had the requisite jurisdiction. Further, it was ruled that the [employee] has indeed been dismissed from the employ of the [Municipality]. Having established at the previous sitting that the [employee] has been dismissed, I must now determine whether the dismissal was for a fair reason, and whether it was preceded by a fair hearing as contemplated by section 188 read with section 192 of the [Labour Relations] Act.”

- [6] Once again, the arbitrator gave no reasons for his finding. He proceeded to find that the Municipality did not lead evidence about the fairness of the dismissal and that, therefore, the dismissal was procedurally and substantively unfair.
- [7] The Municipality seeks to have the award set aside, inclusive of the earlier jurisdictional ruling.

Evaluation / Analysis

- [8] Ms *Edmonds* pointed out that, in its notice of motion, the Municipality only sought to have the award of 14 December 2011 and the variation ruling of 17 January 2012 reviewed and set aside. It did not specifically refer to the jurisdictional ruling of 24 October 2011.
- [9] I think this is too technical an approach. The award incorporates, and indeed is based on, the jurisdictional ruling. The Municipality asks for further or alternative relief. Its grounds of review sets out in detail that it challenges the jurisdictional ruling. That ruling, leading to the December award, is the very basis of the review. I accept that the challenge to the jurisdictional ruling is properly before court.

The initial ruling: Was the employee dismissed?

[10] The arbitrator has not given any reasons for his ruling that the employee was dismissed. His ruling should be set aside and remitted for this reason alone.

[11] It is hard to conceive of a ruling without reasons that can be reasonable. By definition, it is unreasoned and therefore unreasonable.

[12] As the Labour Appeal Court remarked in *Weder*²:

“Our law eschews the process of *ex post facto* provision of reasons for a decision taken, whilst no reasons are provided when the decisions is made”.

[13] In this case, the arbitrator did not even provide reasons for his jurisdictional ruling when he delivered his written award on 14 December 2011. In the absence of any reasons whatsoever, that ruling must be reviewed and set aside. As the Supreme Court of Appeal held in *National Lotteries Board*:³

“The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable”.

[14] There is also no transcript available of the October 2011 proceedings. In these circumstances, the matter should be remitted to another arbitrator to hear evidence and to decide afresh – and give reasons for his or her ruling – on the jurisdictional point.

The award on unfair dismissal

[15] The arbitrator’s finding that the dismissal was unfair is based squarely on his unreasoned ruling that he had been dismissed. Having found that the employee had been dismissed, he disregarded the Municipality’s explanation and simply found that the dismissal must *ipso facto* have been

² MEC, Department of Education, Western Cape v Weder; Mangena [2014] 7 BLLR 687 (LAC) para 38, citing *National Lotteries Board v South African Education and Environment Project* 2012 (4) 504 (SCA).

³ *Supra* para 27.

unfair, as the Municipality could not provide a fair reason, other than that the fixed term contract had come to an end.

- [16] This finding was based on an unreasonable premise. It follows that the award as a whole should be set aside and remitted to arbitration afresh.

The variation ruling

- [17] Ms *Edmonds* readily conceded that the variation ruling should be reviewed. It contains an inherent contradiction. In the arbitration award, the arbitrator ordered the Municipality to pay the employee five months' remuneration; in the variation ruling, he purported to quantify that amount, but based it on six months' remuneration.

- [18] In any event, given my decision that the dispute as a whole should be arbitrated afresh, the variation ruling has become moot.

Conclusion

- [19] The award as a whole, including the initial jurisdictional ruling and the subsequent variation ruling, must be reviewed and set aside.
- [20] There was no transcript available for the proceedings of October 2011. This Court is not in a position to substitute its own ruling for that of the arbitrator. The dispute must be remitted for a fresh arbitration.

Costs

- [21] With regard to the review application, I take into account that the dispute has not been finalised; and also that there is an ongoing relationship between the Municipality and SAMWU. In law and fairness, I do not believe that a costs order at this stage is appropriate.
- [22] Different considerations apply to the application to dismiss the review application. It has now become moot; but that is only after the union had to take a number of costly steps to force the Municipality to comply with the rules of this Court.
- [23] The Municipality delivered its review application on 17 February 2012. The union delivered a notice of intention to oppose it. The Municipality did not

deliver the record in terms of rule 7A(6). Only after the union threatened them with an application to dismiss, in June 2012, did the Municipality's attorneys write to the Bargaining Council to make enquiries about the record. Nothing further happened. The union's attorney, Ruth Edmonds, wrote to the Municipality's attorney, Johan Alberts, again on 5 July 2012. The Council filed a recording on the same day. A month later, on 6 August 2012, Alberts informed Edmonds that they had delivered the tapes to the transcribers "on even date". By 11 October Edmonds had heard nothing more. She wrote to Alberts again. He did not respond. She launched the application to dismiss on 6 November 2012. It is only after that that the Municipality lodged the transcription of the record, albeit incomplete.

[24] In those circumstances, the Municipality should bear the costs attendant upon the application to dismiss the review application.

Order

[25] I therefore make the following order:

25.1 The award under case number MPD 081109, inclusive of the jurisdictional ruling and the variation ruling, is reviewed and set aside.

25.2 The unfair dismissal dispute is remitted to the Bargaining Council (the first respondent) for arbitration *de novo* before an arbitrator other than the second respondent.

25.3 The applicant (the Municipality) is ordered to pay the costs of the third respondent (SAMWU) in the application to dismiss the review application.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R Venter
Instructed by Johan Alberts attorneys.

THIRD RESPONDENT: Ruth Edmonds (attorney).

LABOUR COURT