



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1710/12

In the matter between:

NGWATHE LOCAL MUNICIPALITY

Applicant

And

SOUTH AFRICAN LOCAL GOVERNMENT

First Respondent

BARGAINING COUNCIL (SALGBC)

COMMISSIONER HELEN HLATSHWAKO

Second Respondent

SITHEMBISO SLINGBY MADONDO

Third Respondent

Heard: 17 December 2014

Delivered: 26 February 2015

Summary: Review of arbitration award- Gross irregularity- A Commissioner may determine a dispute in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly. It remains important in any arbitration proceedings that the Commissioner grants each party a proper and fair opportunity to present their respective cases- *Audi alteram partem* principle- Fundamental right to fair trial- Right cannot be dispensed with lightly it can only be departed from in exceptional circumstances. Arbitration award reviewed and set aside.

JUDGMENT

VAN DER MERWE, AJ

Introduction

- [1] This is a review application wherein the Applicant (“the employer”) seeks to review an arbitration award dated 31 May 2012 made by the Second Respondent (“the arbitrator”) acting as an arbitrator of the First Respondent being the South African Local Government Bargaining Council (SALGBC).
- [2] The review application was dated 9 July 2012 and the review was brought in terms of Section 145 of the Labour Relations Act, 66 of 1995, as amended.
- [3] The review application is unopposed.

Background

- [4] The Third Respondent, Mr Madondo (hereinafter “the employee”) was employed on a fixed term contract for the period 3 November 2008 to 3 November 2011 as an MIG Coordinator in the Applicant’s Project Management Unit.
- [5] Prior to the expiry of the aforementioned fixed term contract, the employee signed another contract of employment with the Applicant on 8 September 2011. This contract was also a fixed term contract with the period thereof being from 1 September 2011 to 1 September 2016. In terms of the second fixed term contract the employee was appointed as a Project Management Unit Manager.
- [6] The second fixed term contract of employment was accompanied by a Letter of Appointment dated 8 September 2011. The relevant part of the letter reads as follows:

'Ngwathe Local Municipality hereby appoints you in renewal and substitute of your current contract in the position of a Project Management Unit Manager/MIG Co-ordinator which is effective from 1 September 2011'.¹

- [7] On 15 February 2012, the employee received a memorandum from the Directive Corporate Service stating that:

'On 13 January 2012 I presented a letter to you indicating that your contract with this municipality would come to an end on 31 January 2012 but you refused to take and acknowledge receipt of that.

Your contract with this municipality ended on 31 January 2012 so you are not allowed to occupy any municipal offices, failing which a case of trespass would be instituted against you.

Hope you find the above in order'.²

- [8] The arbitrator, after the arbitration proceedings, came to the following finding:

- '21. The Applicant discharged the onus to prove that a dismissal exists.
- 22. The Respondent failed to discharge the onus that the dismissal was fair. Therefore, the dismissal was unfair'.³

- [9] The arbitrator proceeded to reinstate the employee in the employ of the Applicant on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to the dismissal and the arbitrator further made such reinstatement to operate with retrospective effect from 31 January 2012.

Review proceedings

- [10] In the review papers the employer challenged the finding by the arbitrator and alleged that she committed a gross irregularity in the main by alleging that the

¹ Bundle of documents – record - p28

² Bundle of documents – record – p29

³ Pleadings – p 41 – paragraphs 21 and 22

arbitrator made an award on incomplete evidence. The employer raised a number of challenges to the award in its Founding Affidavit and thereafter supplemented its grounds by means of the Supplementary Affidavit. In this Court the employer's representative confined the grounds of review under four main headings –

- 10.1 Firstly, that the arbitrator had incomplete evidence and that the arbitrator in effect “shut the door on the employer” and prevented it from presenting all the evidence;
- 10.2 Secondly, that the arbitrator committed a gross irregularity in that she agreed to excuse the employer's representative when he did not feel well but then proceeded with the evidence of the employer nonetheless. This also resulted in there being no re-examination;
- 10.3 Thirdly, that the arbitrator made strange remarks, for example “you cannot kill a dead horse” which indicates that the arbitrator made up her mind before all the evidence were tendered;
- 10.4 Fourthly, the issue that the first contract was a contract for three years and that it was project related and as such a decision from Council whereas the second contract was not sanctioned by Council;
- 10.5 Fifthly, that the acting Municipal Manager had no authority to extend the contract and to conclude the second fixed term contract.

[11] The first ground of review also incorporates the allegation that the arbitrator committed a gross irregularity by proceeding with the employee party's case at a time when the employer's witness was still continuing with his evidence in chief. The employer also did not close his case and no cross examination was allowed of the employer's witness.

[12] The first two grounds of review are based on what is reflected in the record of proceedings, which is self-explanatory. The context of the quotation in the record is that this occurred when the employer's first witness (identified in the transcript as Mr Gotlagomang) was giving evidence in chief and before this

witness was cross- or re-examined. I will not attempt to summarise the events that unfolded at the arbitration as only a comprehensive quotation can properly reflect what occurred. The record reflects from pages 73 to 79:

‘MR GOTLAGOMANG: Firstly, we are saying there was no contract signed by the Municipality because if you look at page 14 of that bundle it is, there are two initials, “SS” and “TJ”, on the second page of that page which is actually a photocopy of what we indicated was the original Mr Senomadi, is “SS” and “TJ” and the third page is ...

MR PONOANE: Page 15.

ARBITRATOR: Ntate, please do not use “the third page”, “the second page”, use the actual paginated pages so that we know where you are.

GOTLAGOMANG: Okay, Page 15.

ARBITRATOR: Yes?

GOTLAGOMANG: The contract of employment of Mr Madondo which is in the personal file, page 14, signed by two people, “SS” and “TJ”, page 15, “SS” and (indistinct). The original that is in the personal file, that is page 16, is only signed by TJ is the original document in possession of the Municipality, as to how this one was signed by TJM and SS is something that is not in the (inaudible)...(intervenes)

ARBITRATOR: I am not, sorry, I am not understanding you. You are saying the file in the personal file?

GOTLAGOMANG: The original file.

ARBITRATOR: Yes?

GOTLAGOMANG: (Inaudible) the personal file.

ARBITRATOR: Yes.

GOTLAGOMANG: Which is in our possession as the Municipality.

ARBITRATOR: Yes.

GOTLAGOMANG: We are saying the following, page 14, I will go back (inaudible).

ARBITRATOR: 14, 15 and 16.

GOTLAGOMANG: 14, 15, 16, it is only signed by one person saying "SS Madondo", (inaudible) TJM and SS, whereas the original file, which is which we are having, is only TJM and it is only having three pages, that is the original contract that is attached to the file of the Municipality, not many pages as appearing page 17, page 18 and page 19.

ARBITRATOR: You know what I have a problem with, Ntate? You are telling us about a contract that is in the personal file, (other official language) for evidence?

GOTLAGOMANG: Madam Commissioner, with respect, my attorney has been trying to do that (inaudible) ... (intervenes)

ARBITRATOR: No, Ntate (other official language) in the hearing, (other official language) before the hearing, how (other official language) in the hearing you submit a bundle of documents, and you know that. Do you not know that? You know that. WE cannot be running around fetching pages. Do you understand what I am trying to say? It is not on, Ntate. Like I said, section 138 requires me to hear this matter quickly and fairly. Now how is it going to be fair and quick if we have to run around finding a page in that office, and finding a page in that office and this file? I mean, really.

GOTLAGOMANG: Madam Commissioner ... (intervenes)

ARBITRATOR: The reason we require there should be an index, there should be pagination, is because the person who will read this thing when it goes for review for instance must be able to understand the proceedings as if he was sitting in these proceedings.

GOTLAGOMANG: Madam Speaker, Madam Commissioner ... (intervenes)

ARBITRATOR: No, if you fetch a page how do we know what page it is? When once all these documents are sitting on this table and I am required to write a report what page do I say where does this page come from? It appears at 4 o'clock, this one appeared at 3 o'clock, that one appeared at 1

o'clock. Now a person who is reading the transcript how is he supposed to understand and follow what you are saying?

GOTLAGOMANG: Madam Commissioner, I was trying to answer the question.

ARBITRATOR: I understand that you are trying to answer the question (intervenes)

GOTLAGOMANG: (Inaudible)... (intervenes)

ARBITRATOR: Ntate, but you are not making our lives easy.

GOTLAGOMANG: You are not allowing me to answer the question because I am trying to answer the question as to what transpired this morning. I am saying my attorney when he arrived and when we arrived we had an agreement with the applicants that we were going to postpone this matter (inaudible) it is indeed so I, am not going to blame my attorney for not having the bundle ready today because it was only yesterday after that he was instructed by the Municipality to come and represent the Municipality. He only prepared over the night and he still had to drive to Parys from Durban (?)

So the reason why we wanted to also to get a postponement (inaudible) was going to engage with the applicant so that we can be able to settle this matter as speedily as possible.

ARBITRATOR: Ntate, if you wanted a settlement, have you read the Main Collective Agreement, (other official language) and the Council, and how does it state? It states there clearly how you apply for a postponement and you do not rock up in the morning and get an agreement on the other side to postpone a matter. And you should have known that. It is clear. The only way you can make application, you can make in the hearing, it is an application which could go either way, so your representative should have prepared.

Granted, the Municipality might have informed him yesterday of the matter but whose fault is that? Because they got the notice how many days back?

GOTLAGOMANG: Madam Commissioner, with respect, I am sure you being the person who has been (inaudible) coming to do the arbitration (inaudible)

matter you are aware of how many matters we are dealing with on a daily basis.

ARBITRATOR: Ntate. (intervenes)

GOTLAGOMANG: Yes, but what I am saying is the following, ma'am, (inaudible)... (intervenes)

ARBITRATOR: The incapacity issues ... (intervenes)

GOTLAGOMANG: You know for a fact that ... (intervenes)

ARBITRATOR: (Inaudible) Municipality, they are supposed to deal with them.

GOTLAGOMANG: Yes.

ARBITRATOR: Not *nna*. The Municipality is supposed to deal with their incapacity issues, not *nna*. *Nna*, I am required to arbitrate. I think we are wasting time here, we are honestly, I think we are wasting time.

MR PONAONE: Madam Commissioner, is it not appropriate to take just a comfort break?

MR NOLTE: That is the word (inaudible), comfort break, I was looking for that word.

MR PONAONE: Comfort break.

ARBITRATOR: But Ntate, unfortunately we are not going to take a comfort break because we are late, we started late, we need to proceed with this matter and finish it. It is already 14:00.

MR PONAONE: But the call of Nature is not allowing that, Madam Commissioner. We are begging (inaudible) a comfort break (inaudible) a fairly short time.

ARBITRATOR: I will give you a minute, Ntate, to go to the ...

MR PONOANE: No, it is not (inaudible) just a minute, I just need to take a comfort break... (intervenes)

ARBITRATOR: Ntate (intervenes)

MR PONOANE: For my health reasons, for my health reasons (inaudible)

ARBITRATOR: What health reasons, Ntate?"

MR PONOANE: For my health reasons, for my health reasons (inaudible).

ARBITRATOR: What health reasons Ntate?

MR PONOANE: My health reasons do not allow, I need to go and take my tablets (inaudible).

ARBITRATOR: What tablets (inaudible)

MR PONOANE: My tablets for my health.

ARBITRATOR: Does it take you, require more than a minute?

MR PONOANE: It will not take less than a minute because the car is that other side, by the time I am still walking to the car... (intervenes)

ARBITRATOR: Sorry, Ntate, we are proceeding. Let us proceed. Proceed, Ntate.

MR PONOANE: Madam Commissioner, I am unable for my health reasons to proceed.

ARBITRATOR: Ntate, proceed. You knew that you have a health problem and you did not bring your medication.

MR PONOANE: It is there in the car. It is there in the car and it is outside, me medication.

ARBITRATOR: Ntate, proceed.

MR PONOANE: Madam Commissioner, I am unable to proceed for my health reasons.

ARBITRATOR: Ntate, because you are the instructor, he says he cannot proceed, are you going to proceed?

GOTLAGOMANG: We have appointed an attorney as a Municipality as you correctly pointed out when we started these proceedings (inaudible)... (intervenes)

ARBITRATOR: No, let him proceed... (intervenes)

GOTLAGOMANG: (Inaudible)... (intervenes)

ARBITRATOR: Let him proceed, Ntate.

GOTLAGOMANG: If he is not able to proceed is he going to be forced now to proceed when he is not ready?

ARBITRATOR: He must tell us why he is not proceeding. Ntate, I do not have time for this. I have done this over and over in time and I know when people are wasting time. And it seems you are ready to and you are not prepared like you say, so what I am going to do is you forfeited your opportunity, I am going to give the other side an opportunity to proceed. Proceed, Ntate, with your case.

NO FURTHER QUESTIONS

CASE FOR RESPONDENT

MR NOLTE: Do I proceed with the cross-examination?

ARBITRATOR: You can start your case (inaudible)'

- [13] The arbitrator interrupted the employer's witness because he referred to a document that was on the employee's personnel file and seemingly did not have the document at the arbitration included in an indexed and paginated bundle. The witness' response was to rely on the initial request for a postponement and the arbitrator thereafter concluded that the witness was "wasting time". The arbitrator refused the comfort break suggested by both representatives and, after asking the employer's witness to proceed with the witness enquiring as to ability of his representative to proceed, ruled that the employer was "wasting time" and had lost its right to proceed. The arbitrator concluded by stating that "you forfeited your opportunity". The arbitrator then proceeded with the arbitration as if the employer party was absent from the

proceedings. The arbitrator in doing so effectively closed the door on the employer. The arbitrator did not allow cross-examination or re-examination of the employer's witness and in fact when asked by the employee's representative whether cross-examination was to commence the arbitrator insisted that the employee must start his case.

Evaluation

[14] It is a fundamental principle that a party should be allowed to present his/her case in an effective manner. The right to present one's case applies to all aspects of proceedings where a factual finding is to be made. This right is an expression of the *audi alteram partem* principle.

[15] One of the cardinal rules of natural justice is that an employee has the right right to be heard. In *Kock and Another v Department of Education, Culture & Sport of the Eastern Cape and Others*,⁴ Acting Judge Nkabinde gave a brief analysis of the rules of "natural justice":

'[15] The primary procedural safeguards in South African administrative law are expressed by the twin principles of natural justice: *audi alteram partem* ('the audi principle') and *nemo iudex in causa sua*: that is, that a public official should hear the other side, and that one should not be a judge in his own cause. As a general rule it may be said that the principles of natural justice apply whenever an administrative act is quasi-judicial. An administrative act was considered to be quasi-judicial if it affects the rights, liberties (and perhaps, the privileges) of an individual'.

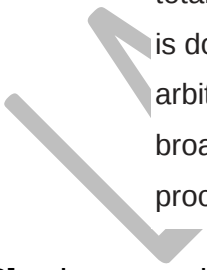
[16] A Commissioner may determine a dispute in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly. This much is clear from the first part of section 138(1) of the LRA which deals with the general provisions of arbitration proceedings. It, however, remains important in any arbitration proceedings that the Commissioner grants each

⁴ [2001] 7 BLLR 756 (LC)

party a proper and fair opportunity to present their respective cases before an unbiased arbitrator.

- [17] The test on review in the Labour Court has recently been captured by the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁵, at paragraphs [20] - [21], as follows:

'[20]...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...'.


- [18] In my view the arbitrator's conduct falls far short of at least the aforementioned questions posed as (i) and (v).
- [19] By disallowing the employer's witness to complete his evidence in chief and also disallowing cross- and re-examination, the arbitrator infringed on the employer's right to natural justice and specifically the employer's right to have

⁵ (2014) 35 ILJ 943 (LAC)

its case fully and fairly determined. In the words of the LAC, the process that the arbitrator employed did not give the employer 'a full opportunity to have their say in respect of the dispute'.⁶

[20] The right of a party to give and adduce evidence, is regarded as a fundamental right to a fair trial. This right cannot be dispensed with lightly. It is true that this right is not absolute but it can only be departed from in exceptional circumstances.

[21] The circumstances of this case certainly did not warrant such a departure and did not justify the finding by the arbitrator that the employer party had forfeited its opportunity to state its case. The arbitrator should have allowed the employer party to complete their evidence and should have granted a reasonable comfort brake if this was what was required to ensure that the employer received a full opportunity to have their say. The employer's case should also have been tested by means of cross-examination. The arbitrator did not in my view follow a proper process and consequently cannot then produce a reasonable outcome.

[22] Given that the review succeeds on the first two grounds I do not have to pronounce in the remaining grounds of review.

[23] In the result, the following order is made:

23.1 the arbitration award made by the Second Respondent under case number FSD 031202 is hereby reviewed and set aside;

23.2 the dispute is referred back to the First Respondent to be heard *de novo* by a different arbitrator; and

23.3 there is no order as to costs.

⁶ See *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others supra* at par 20

G Van der Merwe

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr Ponoane of Ponoane Attorneys

For the Third Respondent: Unopposed