



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 274/12

In the matter between:

WALTER SISULU UNIVERSITY

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

MBULI, M N.O

Second Respondent

DENOSA

Third Respondent

MNYIKIPA, NP

Fourth Respondent

Heard: 7 May 2015

Delivered: 5 November 2015

Summary: An arbitration award based on a dispute which falls outside the jurisdiction of the CCMA is reviewable

JUDGMENT

LALLIE, J

[1] This is an application to review and set aside an arbitration award of the second respondent who I will refer to in this judgment as the commissioner. It is opposed by the third and fourth respondents. The facts of this matter are briefly that in January 2011, the applicant offered the fourth respondent employment in the position of Clinical Associate Teacher on a limited duration contract of three years. Having commenced her duties, the third respondent realised that the applicant had already employed two Clinical Associate Teachers who had the same job description as hers. It was brought to her attention that those teachers were employed on a grade higher than her and were receiving benefits which she had not been offered. Those benefits were the scarce skills allowance, rural allowance and commuted over time. Her request to be placed in the same position was not acceded to leading her to refer an unfair labour practice dispute to the first respondent ("the CCMA"). The dispute was arbitrated by the commissioner who issued an award in favour of the third and fourth respondent. In this application, the applicant seeks this court to review and set aside the award.

[2] At the arbitration, the parties pointed out to the commissioner facts that were common cause and agreed not to lead oral evidence but to file closing arguments. Based on the information before him, the commissioner issued an arbitration award with the following salient parts:

- '20. The failure of the respondent to offer the same salary and benefits for the same category of employees as Clinical Associate Teachers was inconsistent and therefore unfair to the applicant. The applicant is therefore entitled to all the benefits attached to the position of the Clinical Associate Teacher as it is enjoyed by the other two employees employed in this position.

22. The respondent is ordered to pay the applicant the benefits attached to the position of the Clinical Associate Teacher with effect from the 01st January 2011 the date when the applicant was employed to this position. These include difference in salary to R29 836,00 per month, rural allowance at 22%, scarce skills allowance 15% and commuted over time.'

[3] The applicant's grounds for review are mainly that the commissioner lacked jurisdiction to arbitrate the dispute before him as it arose as a consequence of the fourth respondent discovering that her colleagues had been appointed at a higher scale. The issue before the commissioner was, therefore, the grade/scale at which the fourth respondent was appointed and fell outside the ambit of section 186 (2) (a) of the Labour Relations Act 66 of 1995 as amended ("the LRA") and outside the jurisdiction of the CCMA. A further attack on the award was that the commissioner committed a gross irregularity and exceeded his powers by failing to consider relevant evidence and facts including the evidence that the fourth respondent's counterparts were employed at the higher scale until the expiry of their contracts in April 2012. The gross irregularity led him to reach an unreasonable decision. The applicant submitted that the parties' failure to present a stated case or lead evidence at the arbitration rendered the award unreasonable.

[4] Opposing the application, the third and fourth respondent submitted that having agreed that no oral evidence should be led, the applicant was precluded from raising, as a ground for review, failure to lead evidence. They submitted that the manner in which the commissioner conducted the arbitration was consistent with the provisions of section 138 of the LRA. They added that as the arbitration award had been certified in terms of section 143 the LRA, it had become an order of court and not reviewable. They insisted that the award was unassailable.

[5] In *Tony Gois t/a Shakespeare's Pub v Van Zy and Others*¹ and *Du Preez v LS Pressings CC*,² it was held that the purpose of section 143 of the LRA was

¹ [2003] 11 BLLR 1176 (LC) at paras 19-21.

² (2013) 34 ILJ 634 (LC) at para 14.

to enforce an arbitration award as if it was an order of the Labour Court. It, however, did not make arbitration awards orders of the Labour Court. Nothing, therefore, precluded the applicant from filing the review application at hand. The issue of jurisdiction is dispositive of a matter because a decision taken without the necessary jurisdiction is a nullity. The CCMA is a creature of statute. It may arbitrate disputes which fall within its jurisdiction. Its jurisdiction in the matter before the commissioner was limited to the issue of benefits. Even an expansive interpretation of an unfair labour practice excludes disputes involving levels of remuneration. The court in *Apollo Tyres SA (Pty) Ltd v CCMA and Others*³ which the third and fourth respondents sought to rely on did not go as far as to place disputes regarding equal remuneration levels/grades within the purview of unfair labour practice. By making a determination on the applicant's failure to offer the respondent the same salary as other Clinical Associate Teachers, including ordering the applicant to pay the fourth respondent the difference in salary to R29 836,00, the commissioner exceeded his powers in that he determined a dispute which fell outside the ambit of section 186 (2) (a) of the LRA. As the dispute regarding the fourth respondent's job level and remuneration fell outside the jurisdiction of the CCMA, the award is reviewable. By determining the issue of the fourth respondent's job level and remuneration, the commissioner misconceived the dispute before him and rendered his award reviewable. In this regard see *Herholdt v Nedbank Ltd*⁴

[6] Months after the award was issued the commissioner, *mero moto*, issued a variation award in which he quantified the amount due to the fourth respondent. The applicant submitted that the commissioner's conduct also rendered his award reviewable as the amounts involved in the quantification were never placed before the commissioner by the parties. The third and fourth respondent deny that the commissioner committed an irregularity by issuing the verification award as it is based on paragraph 22 of the award.

[7] The commissioner committed a gross irregularity in issuing the verification award based on paragraph 22 of his award which includes an amount based

³ [2013] 9 BLLR 434 (LAC).

⁴ [2013] 11 BLLR 1074 (SCA)

on the fourth respondent's job level and remuneration which falls outside the jurisdiction of the CCMA.

[8] Although the issue of jurisdiction is sufficient to render the arbitration award reviewable, I deem it necessary to add a further issue which rendered the award reviewable. The applicant sought to rely on *C Arends and Others v South African Local Government Bargaining Council*, a decision of the LAC under case number PA6/13 where it was held that failure by parties in an arbitration to either lead oral evidence or present a written statement of agreed facts was grossly irregular and rendered an award reviewable. It was argued on behalf of the third and fourth respondent that the above principle did not apply in all cases and each case should be decided on its merits. It was further argued that the review application at hand is an example of the exception to the rule as the parties presented to the commissioner all relevant information. I am not convinced by the argument. A consideration of the case before the commissioner in its totality reflects a need for a proper evaluation of the dispute through oral evidence.

[9] In the premises, the following order is made:

- 9.1 The arbitration award issued by the second respondent under case number ECEL 2282 – 11 and dated 6 May 2012 is reviewed and set aside.
- 9.2 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie, J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Grobler

Instructed by: Kirchmanns Inc

For the Respondents: Advocate Phango

Instructed by: Morare Thobejane Attorneys

LABOUR COURT