



Not reportable

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

Case No: JR 2742/13

In the matter between:

**THE MEMBER OF THE EXECUTIVE
COUNCIL: POLICE, ROADS AND
TRANSPORT (FREE STATE
PROVINCIAL GOVERNMENT)**

Applicant

and

**PUBLIC SERVICE CO-ORDINATING
BARGAINING COUNCIL**

First Respondent

MARTINUS VAN AARDE N.O.

Second Respondent

**PUBLIC SERVANTS ASSOCIATION
obo MEMBERS IN FLEET
MANAGEMENT**

Third Respondent

Heard: 7 December 2016

Delivered: 19 January 2017

Summary: (Review – Failure to determine factual issues – irregular proceedings – Determination of dispute on the basis of unlawfulness beyond remit of arbitrator)

JUDGMENT

LAGRANGE J

Introduction

- [1] The applicant in this matter seeks to set aside and review an arbitration award in which the arbitrator held that the posts of the individual respondents, who are members of the PSA were validly upgraded with effect from 1 January 2012, following the Member of the Executive Council for Police, Roads and Transport in the Free State approving the upgrades on 13 December 2011. Following the MEC's decision, the head of Department decided that the upgrades had been approved in error because the necessary job evaluation process had not been conducted to upgrade the posts. The head of Department instructed the finance Department to stop paying the individual respondents on the new scale and to recover payments already made to them in consequence of the upgrading.
- [2] The arbitrator was required to determine the dispute as an interpretation and application dispute in terms of section 25 (2) and (5) of the Labour Relations Act, 66 of 1995 ('the LRA'). The dispute referred concerned the interpretation of Resolution 3/1999 of the Public Service Coordinating Bargaining Council ('PSCBC'). In particular, the arbitrator was required to interpret clause 4.3 of Chapter XXXVI of the resolution which reads:
- "If a job evaluation as provided under the Public Service regulations indicates that a job has been undergraded, the employer shall either
- (a) within a reasonable period of time, endeavour to upgrade the position of an incumbent employee, or
 - (b) with the agreement of the affected employee, restructure her or his duties to reflect the grade determined by the job evaluation."
- [3] On the basis of documents provided by the parties, the arbitrator reasoned that the MEC had the authority to accept or approve a recommendation of a job evaluation panel and that the head of Department had no power in

terms of section 5 (7) (a) of the Public Service Act 1994 (Proclamation 103 of 1994) to reverse the MEC's decision. Section 5 (7) of the PSA provides:

“(7) (a) A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.

(b) The relevant executive authority shall in the prescribed manner keep record of and report to the Minister any correction by a functionary of a department within the portfolio of that executive authority.”

The review application

- [4] Firstly, the applicant complains that the arbitrator made his award without hearing any evidence. The applicant maintains that it was incumbent on the arbitrator to allow the parties to present evidence or to require them to submit a list of common cause facts on which he could make a determination. It appears to be an increasingly common practice in public service sector arbitrations for arbitrations to be conducted on the basis that a bundle of documents is submitted to the arbitrator, often without any clarity on the status of those documents as evidence, and the parties then make oral or written submissions to the arbitrator. In this instance, on the brief transcript of the proceedings, it is apparent that the arbitrator intended to decide the matter after hearing and considering the respective oral and written submissions made by the parties' representatives.
- [5] Not a murmur of concern was raised by the applicant about the procedure adopted by the arbitrator and the only reasonable interpretation on the record is that the applicant agreed with the procedure adopted by him. This was not a case where the representatives of the parties were unskilled and would not have realised the implications of what they were doing. It is inappropriate for a party to criticise the procedure adopted by the arbitrator when it collaborated and implicitly consented to the manner of conducting proceedings at the time. Nonetheless, the LAC has decided in *Arends & others v SA Local Government Bargaining Council & others* ¹

¹ (2015) 36 ILJ 1200 (LAC)

that an arbitrator should decline to determine a dispute where the facts are inadequately stated.² In that matter, the arbitrator determined that he did not have jurisdiction to hear the dispute without giving the parties an opportunity to make representations on that issue, which had not been raised previously in argument between them. In this application, the applicants did not state what the disputed facts were or why the arbitrator decided the matter on facts which were not common cause.

- [6] The applicant further argues that the arbitrator misconceived the nature of the enquiry by deciding the matter on the basis of the power of the head of Department to set aside the decision of the MEC rather than on the basis of interpreting resolution 3 of 1999. I must agree with the applicant that the arbitrator does not appear to have decided the matter on the basis of whether or not the applicant was obliged to comply with clause 4.3 of the resolution referred to above. The arbitrator did not consider if a job evaluation in terms of the Public Service regulations had in fact been conducted and whether the employer had unreasonably delayed in endeavouring to upgrade the position of the incumbent employees.
- [7] Instead, the arbitrator decided that the upgrading of posts approved by the successive MECs was validly approved within the context of resolution three of 1999. In essence, the arbitrator made his decision based on the apparent unlawfulness of the Head of Department's decision to a post 'correct' the MEC's approval, which the head of Department had no authority to do. On the face of it, his reasoning is probably correct and the only functionary who could alternate the decision was the MEC. Nonetheless, the arbitrator should have declined to make a decision based on unlawfulness, which lay outside his jurisdiction. It should also be noted that this was not an issue raised by the parties, nor were they given an opportunity to deal with it when they made their representations to the arbitrator.
- [8] Thirdly, the applicant contends that the arbitrator failed to appreciate that there was a factual issue which needed to be determined, namely whether a job evaluation in terms of the prerequisites of the public service

² At 1206-8, paras [15] – [19].

regulations had in fact been conducted. It is apparent from the written submissions made by the employer that this was a point raised in argument but the arbitrator seems to have decided it was not necessary to deal with it. I am satisfied that the arbitrator ought to have decided this issue and ought to have either required oral evidence or a stated case to be formulated by the parties on the nature of the job evaluation process that was conducted before he could take a decision on the issue. In this sense, apart from the fact that it concerned a jurisdictional question going to the heart of the interpretation and application dispute which he had to determine, the arbitrator failed in his duties by deciding the matter on inadequately pleaded facts, as in the *Arends*' case.

Conclusion

- [9] In light of the above, I am satisfied that the arbitrator made a finding on issues which were not canvassed with the parties. Secondly, he decided the issue on the basis of unlawfulness, which was a question beyond his remit. Thirdly, in failing to require the parties to submit a stated case or in failing to require them to lead oral evidence in respect of the relevant factual issues, he undertook the enquiry in the wrong or in an unfair manner which constituted an irregularity in the conduct of the proceedings. In the circumstances, the award must be set aside.
- [10] Because the facts pertaining to the jurisdictional question of the nature of the job evaluation conducted under the Public Service regulations not dealt with in the record on account of the arbitrator's failure to conduct the enquiry properly, the court is equally incapable of determining the merits of the dispute on the record and the only feasible solution is to remit the matter for a fresh hearing. As the court is also only concerned with the review of the arbitration award it would not be appropriate for the court to pronounce on the lawfulness of the head of Department's actions in purportedly rectifying the MEC's decision.

Order

- [11] The arbitration award issued by the second respondent on 26 October 2013 under case number PSCBC 196-13/14 is reviewed and set aside.

[12] The matter is remitted back to the first respondent to convene a hearing *de novo* before an arbitrator other than the second respondent to commence within thirty days of the date of this judgement.

[13] No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

APPLICANT:

S J Mushet instructed by
Lebea & Associates

THIRD RESPONDENT:

L A Roux instructed by
Lovius Block Attorneys

LABOUR COURT