



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2134/15

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

First Respondent

BARGAINING COUNCIL

MARTIN SAMBO N.O.

Second Respondent

N H MOREMI & 30 OTHERS

Third Respondent

Heard: 9 October 2017

Delivered: 17 October 2017

Summary: Section 145 review application – parties deciding not to lead oral evidence in unfair labour practice dispute and for it to be determined on the basis of documents and heads of argument – commissioner not in a position to determine dispute fully and fairly – award set aside on review

JUDGMENT

MYBURGH, AJ

Introduction

- [1] The applicant (“the department”) seeks to set aside on review the arbitration award issued by the commissioner¹ on 17 February 2015, in terms of which he ordered the department to upgrade the positions of the 31 employees² (finger print officers) from level 6 to level 8 and to adjust their salaries accordingly (backdated to 1 April 2009). The cost of the award (as at the date thereof) is some R14-million.
- [2] The department also seeks condonation for the late launching of the review by some 165 days, i.e. 5 ½ months.
- [3] This matter initially came before me on 24 August 2017, when (by agreement between the parties) I postponed it to 9 October 2017 and ordered the department to file the missing portions of the review record by 8 September 2017. I did so in circumstances where the review record delivered by the department does not contain the bundles of documents referred to in the heads of argument presented to the commissioner, some of which documents are referenced in the award. On 7 September 2017, the State Attorney (on behalf of the department) filed a letter recording, *inter alia*, that the parties consider that the record filed is complete, with the result that no additional documents were filed. Although the aforesaid bundles have not been filed separately, upon reflection, I am satisfied that the majority of the documents in question are contained as part of the employees’ application for condonation brought in the bargaining council, which does form part of the review record. I

¹ The second respondent.

² The third respondent.

thus consider the record to be sufficiently complete for the purposes of the determination of this matter.

- [4] Given that the issue of condonation (insofar as prospects of success are concerned) is bound up with the merits of the review application, I intend to deal with the merits of the review first, before dealing with condonation. In so doing, I intend to deal only with those grounds of review that I consider material to the determination of the matter.

Relevant background

- [5] The dispute referred to the bargaining council³ was an unfair labour practice dispute relating to the promotion of the employees in terms of section 186(2)(a) of the LRA.
- [6] The matter was set down for arbitration on 11 July 2014 before the commissioner. In his award, the commissioner records that the following occurred on that day: “At the commencement of the sitting the parties indicated that since there is no need for oral evidence they prefer to send written submissions to [the bargaining council].” Later on in his award, the commissioner records that “[t]he parties submitted bundles of documents and opted to deal with the case by submitting written submissions”. The following timetable for the submission of written submissions was also agreed to: the employees’ submissions by 18 July 2014; the department’s answer by 25 July 2014; and the employees’ reply by 28 July 2014. At this sitting, the employees were represented by their attorney (Mr Gouws) and the department by a labour relations officer (Mr Masilela).
- [7] On 16 July 2014, the department addressed a letter to the bargaining council in which it “informed [the] bargaining council that it is premature to provide heads of argument when no evidence has been led on the issues raised and the status of documents were not decided on”.⁴ It also appears that the letter

³ The first respondent.

⁴ This letter is not part of the review record, but this is how the arbitrator describes it in his award.

contained a “request to hear oral evidence”.⁵ The letter did not come to the attention of the commissioner at the time.

- [8] On 18 July 2014, Mr Gouws delivered the employees’ heads of argument. The first paragraph of these heads record that “the parties agreed that no oral evidence shall be led at the hearing and that documentary evidence shall be submitted together with written heads of argument”. It is also recorded that bundles “A”, “B” and “C” were submitted as “documentary evidence”. Mr Gouws’ heads make frequent reference to the employees’ bundle (bundle “A”).
- [9] On 20 October 2014, and in circumstances where the department’s letter appears to have come to his attention by then, the commissioner “informed the [department], telephonically, that [he] was not acceding to the request to hear oral evidence and that its heads are to be filed on 28 October 2014”.⁶
- [10] On 28 October 2014, the department delivered its heads of argument, which were drafted by Advocate Platt. Attached to the heads were bundle “B” (being the department’s documents) and the department’s letter of 16 July 2014 (marked annexure “DHA1”). The heads make reference to both bundles “A” and “B”, as well as to annexure “DHA1”. Two main points were advanced in the department’s heads: firstly, that the bargaining council did not have jurisdiction because the dispute involved one of interest and not right; and, secondly, that insofar as he had jurisdiction, the commissioner was not in a position to determine the dispute on the merits – this in the absence of oral evidence and agreement on the status of the documents.
- [11] The second point referred to above (described as an “additional point *in limine*”) was advanced in the department’s heads as involving a breach of the rules of natural justice, in that the department (so the argument went) could not test the correctness of the employees’ version, the status of the documents had not been agreed to, and there was also no agreement on

⁵ This is also apparent from the award.

⁶ This being a quotation from the award.

common cause facts or facts in dispute. It was accordingly submitted that “if the commissioner is inclined to find on the merits of the matter, the [department] will be prejudiced as no evidence was led and no documents were agreed to”, and that “[t]he rules of natural justice would have been flouted”. In conclusion, the proposition was formulated as being that the commissioner “cannot determine the merits as the rules of natural justice have not been adhered to and the only finding that can be made is one of jurisdiction”. (It was on this basis that the department’s heads do not deal with the merits of the unfair labour practice dispute, and do not answer the employees’ heads.)

- [12] On 2 December 2014, the employees delivered their heads of argument in reply to the department’s heads. Their reply dealt only with the department’s jurisdictional point, and did not address the additional point *in limine* referred to above.

The commissioner’s award

- [13] In his award, the commissioner gives no indication as to why he refused the department’s request for oral evidence to be heard, although it appears implicit that he was of the mind that it was bound to the agreement reached on 11 July 2014.
- [14] What is noteworthy about the award is that in setting out the submissions made by the department in its heads of argument, the commissioner described both the points raised by the department as “jurisdictional points”, and appears not to have recognised that the department’s “additional point *in limine*” (see above) was a self-standing point not related to the jurisdictional point. That the point appears to have been lost on the commissioner appears from his finding (made in his “analysis of evidence and arguments”) that because he had allowed the department to submit heads of argument on 28 October 2014, “the argument that the [department] was not granted an opportunity to test the version of the [employees] cannot stand”.

[15] The commissioner then goes on to reject the department's jurisdictional point, and having done so, finds on the merits for the employees on the basis of these two sentences (without more): "Further, the [department] does not reply to the [employees'] submission on the merit[s]. I therefore find on a balance of probabilities that the [department] committed an unfair labour practice in not upgrading the [employees] to level 8." In the result, the commissioner made the award set out in para 1 above.

[16] Implicitly, the commissioner accepted the employees' submission – in its entirety and without any critical analysis whatsoever – which he described as follows in his "summary of evidence and argument":

"The [employees'] jobs were evaluated on 26/02/2008 and it was established that their job evaluation has been determined [at] the level of fingerprint officer at level 6 (annexure A p 42). The [department] conducted another job evaluation during March 2009 and recommended to the Director-General that the positions of fingerprint officer and senior fingerprint expert be merged and upgraded to level 8 (annexure A p 43 to p 69). [The employees] at this stage acted in the capacity of fingerprint officers as per annexure A p 42.

The Director-General approved the recommendations made in p 43 annexure A and announced the upgrading of fingerprint officers' positions and salaries to level 8 with effect from 1 April 2009 (annexure A p 70-72). The [department's] submission that [the employees'] job evaluation was graded as fingerprint comparer are incorrect. The position of fingerprint officer and fingerprint experts are the same as indicated in paragraph 2.5 of annexure A p 44."

[17] In effect, the commissioner accepted as true and correct the employees' rendition of the facts based on 31 pages of their bundle of documents (p 42, pp 43-69 and pp 70-72). Put differently, the commissioner accepted the authenticity and truth of the contents of the aforesaid documents, and accepted them as constituting evidence, as portrayed by the employees in their heads of argument.

What was agreed on 11 July 2014?

- [18] The record delivered by the bargaining council contains no mechanical recording of (or bench notes on) the proceedings on 11 July 2014, presumably because none was kept by the commissioner. In order to determine precisely what was agreed between the parties on that day recourse should thus be had to the award and affidavits in the review application.
- [19] On the face of the award (see above), what was agreed is that: (i) oral evidence would not be led; (ii) the parties would rely on written argument; and (iii) such argument would be based on documents submitted to the commissioner. But on the face of the award, there was no agreement on the status of the documents and the manner in which they would be dealt with. In the words of rule 18(2) of the bargaining council's rules (dealing with what must be dealt with at a pre-arbitration conference), there was no consensus on "the manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether documents, or parts of documents, will serve as evidence of what they appear to be".
- [20] Although the department contests the commissioner's description of the 11 July 2014 agreement in its affidavits in the review, it does so with little vigour, and is content (in other parts) to accept the description of the agreement, but to contest the commissioner's decision not to allow it to change its stance (and require oral evidence).
- [21] As regards the employees' rendition of the 11 July 2014 agreement, it is unnecessary to traverse the contents of their answering affidavit in the light of the concession made by Mr Maseko (who appeared for the employees) in argument to the effect that the agreement was as recorded by the commissioner in his award (and paraphrased in para 19 above). As Mr Maseko also conceded (and fairly so), the agreement did not extend to any agreement on the status of the documents, or that they would stand as evidence.

[22] In conclusion under this head, I find that the agreement reached on 11 July 2014 was as recorded in para 19 above.

Is the award reviewable?

[23] There are four judgments which I consider to be of particular relevance. The first is *Hillside Aluminium (Pty) Ltd v Mathuse & others* (2016) 37 ILJ 2082 (LC), in which Prinsloo J held that the acceptance of documents as constituting evidence at arbitration “is an extraordinary scenario and requires an explicit and clear agreement between the parties”,⁷ and that the reliance on documents as constituting evidence in the absence of such an agreement constitutes a reviewable irregularity.⁸ In the present matter, the commissioner went wrong in precisely this manner.

[24] The second judgment is *SA Social Security Agency v National Education Health & Allied Workers Union on behalf of Punzi & Others* (2015) 36 ILJ 2345 (LC), in which Rabkin-Naicker J found that she could not “comprehend how a dispute which hinges on the fairness of the conduct of an employer can be decided (in the absence of a stated case) without parties giving oral evidence”.⁹ In setting aside the award, the court went on to find:

“[8] In the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Commissioners and arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review. In the result, the principle of speedy resolution of disputes is ultimately sacrificed.”

⁷ At para 62.

⁸ At paras 68-69.

⁹ At para 5.

[25] The third judgment is *Arends & others v SA Local Government Bargaining Council & others* (2015) 36 ILJ 1200 (LAC), in which Murphy AJA held as follows in the process of setting aside the commissioner's award:

"[15] ... When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. ... Where a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case a factual substratum which shows what has arisen and how it has arisen. The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results.

[16] Rule 20(1) of the Rules for the Conduct of Proceedings before the CCMA (which might be followed in proceedings before bargaining councils) allows for a pre-arbitration conference at which the parties must attempt to reach consensus *inter alia* on the agreed facts, the issues to be decided, the precise relief claimed and the discovery and status of documentary evidence. The parties in this case did not engage in a proper pre-arbitration process with the aim of agreeing a stated case. Although the CCMA Rules do not include provisions equivalent to the provisions of rule 33(1) and (2) of the Rules of the High Court, parties who prefer to proceed by way of a stated case at the CCMA or before a bargaining council, in my view, should follow their prescriptions. These rules provide that the parties to any dispute may, after the institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court. Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties, their contentions thereon and shall be divided into consecutively numbered paragraphs. The parties must annex to the statement copies of documents necessary to enable the court to decide upon such questions.

[17] Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case. An arbitrator faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request. In this instance, the arbitrator did not do that.”

[26] The fourth judgment is *PSA v Minister of Correctional Service* [2017] 4 BLLR 371 (LAC), in which Musi JA quoted the entire passage from *Arends* set out above “for the sake of emphasis and to focus arbitrators’ attention on best practice”.¹⁰ In the result, the LAC upheld this court’s decision to set aside the award which determined an interpretation dispute based on a stated case, which did not contain an agreed factual matrix. As Musi JA put it, the commissioner “could not apply his mind properly to the issue before him without a factual substratum”, and “[h]e should have refused to deal with the matter without an agreed set of facts”.¹¹

[27] In the present matter, the commissioner also went wrong in precisely the manner contemplated in *SA Social Security Agency*, *Arends* and *PSA*. In circumstances where the parties decided to proceed without oral evidence, the commissioner ought to have ensured that a stated case was concluded, which ought to have set out, *inter alia*, the agreed facts and incorporated documents on an agreed basis. Heads of argument based on the stated case could then have been submitted. As found in *Arends*, by failing to follow this process -

“[19] ... [t]he enquiry was undertaken in the wrong manner with the result that the appellants were denied their right to have their case fully and fairly determined. The principal cause of that denial or failure was the inept manner in which the case was put before the arbitrator. Be that as it may, the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of s 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair.”

¹⁰ At para 16.

¹¹ At para 19.

- [28] What is important about *Arends* (with *SA Social Security Agency* and *PSA* being to the same effect) is that it establishes that even if the department can be blamed (in equal part with the employees) for the inept manner in which the case was put before the commissioner in the present matter, this did not absolve the commissioner of his responsibility of ensuring that the matter was fully and fairly determined. The agreement concluded on 11 July 2014 (see para 19 above) was no substitute for the hearing of oral evidence, and fell dismally short of a stated case, which would have constituted a substitute therefor. In the result, the commissioner did not place himself in a position to fully and fairly resolve the dispute, and thereby deprived the department of its right to procedurally fair administrative action (a patent gross irregularity), which gives rise to a review irrespective of the merits of the outcome of the award.¹²
- [29] Seen in the light of the above, the commissioner clearly went wrong in holding the department to the 11 July 2014 agreement and not acceding to its request on 16 July 2014 to present oral evidence. This is so because in the absence of a stated case (there being none), the matter could not be fully and fairly determined without the presentation of oral evidence, irrespective of the parties' position in relation thereto. This is the import of *Arends*, *PSA* and *SA Social Security Agency*.
- [30] Although the department relies on a host of grounds of review, its pleaded grounds include an attack on the award on the basis outlined above, which attack I consider to be well founded. In the result, I find that the commissioner's award is reviewable.
- [31] In conclusion under this head, I should mention that Mr Maseko conceded in argument that, based on *Arends* and *PSA*, the commissioner committed a reviewable irregularity. As demonstrated above, the concession was both correctly and fairly made. What falls to be considered is the question of condonation, which remains in issue between the parties.

¹² This being the import of the passage from *Arends* quoted in para 27 above.

Should condonation be granted?

- [32] As a point of departure, I accept that condonation applications in the context of delays in launching section 145 review applications are subject to strict scrutiny, albeit that this applies particularly to individual dismissal cases (unlike the present matter).¹³
- [33] Turning to the considerations applicable to the grant of condonation and to begin with the delay of some 5 ½ months in launching the review application, when reckoned in relation to the fact that the application ought to have been launched within six weeks of the award having been issued, this is a very lengthy delay. (But a delay of 18 months has been condoned by this court, where prospects of success on review were found to be good.¹⁴)
- [34] The explanation for the delay is one unique to the circumstances of this case and can be broken down as follows: (i) it took the department some two months (from 2 March 2015, when the award was received, to 30 April 2015) to brief and obtain a consultation with senior counsel in relation to its prospects of success on review; (ii) on 11 May 2015, senior counsel rendered a written opinion providing a negative assessment of the department's prospects of success; (iii) an internal submission was then immediately drafted proposing settlement, which was reworked on several occasions and finally signed off by all authority levels (except for the Director-General, being the final signatory) on 27 August 2015; (iv) the Director-General, however, refused to authorise the settlement, which ultimately resulted in a decision being taken on 28 September 2015 to brief a new set of counsel to draft the review application; and (v) following an initial consultation with counsel of 2 October 2015 and extensive work on the matter (which has a long history), the review application was served on 2 November 2015.

¹³ *Queenstown Fuel Distributors CC v Labuschagne NO & others* (2000) 21 ILJ 166 (LAC) at paras 24-25.

¹⁴ *Maseko v Commission for Conciliation, Mediation & Arbitration & others* (2017) 38 ILJ 203 (LC) at para 17.

- [35] As appears from the above, the bulk of the delay was taken up with processing the internal settlement submission from about 11 May 2015 to 27 August 2015. Significantly, the explanation in this regard is that none of the signatories had any reason to believe that the Director-General would not agree with the advice of senior counsel, which dictated the pace of things to an extent. This is an unusual set of circumstances.
- [36] Judged holistically, while this is certainly not a water-tight explanation for a lengthy delay, it is not an unreasonable or wholly unacceptable explanation, and is by no means so inadequate as to render prospects of success immaterial.¹⁵ Put differently, this is not a case where there is, in effect, “no explanation for the delay [where] there may be no need to consider prospects of success”.¹⁶
- [37] Turning then to the department’s prospects of success, as discussed above, I am of the view that the award is clearly reviewable. This on the authority of the string of judgments analysed above, including two judgments of the LAC (*Arends* and *PSA*).
- [38] Also significant is the nature of the reviewable irregularity identified above. In effect, the commissioner deprived the department of its fundamental right to a procedurally fair hearing, which constitutes a patent gross irregularity. To my mind, the defect in the proceedings is of a kind which would result in a miscarriage of justice if it were allowed to stand, with this clearly favouring the grant of condonation.¹⁷ Put differently, given the potential for a miscarriage of justice in the event of the award being allowed to stand, it is in the interests of justice¹⁸ that condonation be granted.

¹⁵ *Colett v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 1948 (LAC) at paras 38-39.

¹⁶ *Grootboom v National Prosecuting Authority & another* (2014) 35 ILJ 121 (CC) at para 51.

¹⁷ *Queenstown Fuel Distributors* at para 24.

¹⁸ See *Grootboom* at para 50.

[39] Also of relevance is the importance of the case.¹⁹ Clearly, the matter is of considerable importance, *inter alia*, because the cost of the award to the State is some R14-million. This, too, is a factor in favour of the grant of condonation.

[40] In my view, the department's prospects of success, the gross nature of the reviewable irregularity committed by the commissioner, the potential for a miscarriage of justice if the award is allowed to stand and the importance of the case, make up for the lengthy delay and any shortfall in the explanation therefor.²⁰

[41] In all the circumstances, I am satisfied that good cause for the grant of condonation has been established by the department.

Order

[42] In the circumstances, the following order is made:

- 1) condonation for the late launching of the review application is granted;
- 2) the arbitration award issued by the second respondent is reviewed and set aside;
- 3) the unfair labour practice dispute is referred back to the first respondent for a fresh arbitration before a commissioner other than the second respondent; and
- 4) there is no order as to costs.

Myburgh, AJ

¹⁹ *Moodley v Department of National Treasury & others* (2017) 38 ILJ 1098 (LAC) at para 47.

²⁰ *Ibid.*

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv M Zondo instructed by the State Attorney (Pretoria)

For the third respondent: Adv M Maseko instructed by Johan Gouws Attorneys