IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 490/15

In the matter between:

ELIZABETH MATLAKALA BODIBE	**Applicant**
and	
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	**First Respondent**
DANIEL KGOMOTJE MATJI *N.O*	**Second Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Third Respondent**

Heard: **22 August 2017**

Delivered: **23 March 2018**

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA)[1] for an order reviewing and setting aside an arbitration award issued by the second respondent (arbitrator) acting under the auspices of the first respondent (PSCBC), dated 12 March 2015 under case reference number PSCB 166-12/13. In his award, the arbitrator ruled that PSCBC lacked jurisdiction to entertain the dispute between the parties and dismissed the applicant's claim.

[2] The key question is whether the arbitrator's jurisdictional ruling was objectively wrong.

Material background facts

[3] The applicant was employed by the third respondent as a Senior Court Interpreter at the Johannesburg Magistrate Court. She was charged and dismissed for misconduct relating to receiving a bribe from an advocate for an amount of R300.00. The dismissal took place on 18 February 2002 following a disciplinary hearing. The applicant appealed against the finding of her dismissal. Subsequently, the applicant was criminally charged in October 2002 and sentenced for a period of five years imprisonment. She was released on 18 May 2005. This occurred whilst she was still awaiting the appeal outcome.

[4] On 5 June 2012, the applicant referred a dispute to PSCBC on the interpretation and application of clause 7.4(c) of the PSCBC Resolution 1 of 2003, which reads as follows:

> 'The employer should not implement the sanction during the appeal by the employee.'

[5] The dispute was conciliated unsuccessfully and it proceeded to the first arbitration that was held on 25 September 2012. The dispute was arbitrated by commissioner F. Van der Merwe who dismissed the applicant's case on

[1] Act 66 of 1995 as amended.

the basis of unreasonable delay. Dissatisfied with the award, the applicant filed a review application. In his judgment, Molahlehi, J found as follow:

> '… There are no time frames within which an application for interpretation and application of a collective bargaining agreement need to be instituted. As indicated the arbitrator does not have the inherent power similar to that of the Court to dismiss an application due to unreasonable delay. Therefore, in dismissing the applicant's case in the present instance, this arbitrator exceeded his powers in that he exercised powers which he does not have. It is for this reason that I find that the arbitrator's award stands to be reviewed.'

[6] Accordingly, the arbitration award was reviewed, set aside and referred back to the PSCBC for a hearing *de novo*. The second arbitration was held on 6 February 2015. Subsequently, the arbitrator found that the PSCBC "has no jurisdiction as the applicant was not an employee on the date on which the dispute arose."

Arbitration and the award

[7] At the arbitration proceeding, there was no oral evidence as the parties agreed to submit written heads of arguments. The applicant's submission was that she was, in terms of clause 7.4(c) of the PSCBC Resolution 1 of 2003, entitled to be remunerated from the date of her dismissal to the date on which the appeal outcome was served on her. The third respondent raised a preliminary issue relating to the PSCBC's jurisdiction to deal with the dispute on the basis that the applicant was not its employee.

[8] In his analysis, the arbitrator found that it was not disputed that the dismissal was upheld in an appeal by a Ministerial Memorandum signed by the Minister on 17 September 2002. The arbitrator further found the question of authenticity of the Ministerial Memorandum irrelevant to the interpretation of clause 7.4(c) of the PSCBC Resolution 1 of 2003. Accordingly, he was satisfied that the appeal was processed and finalised.

[9] The arbitrator's view was that the issue relating to whether the outcome of the appeal was communicated to the applicant or not, fell outside the interpretation of clause 7.4(c) of the collective agreement and that it was a

matter affecting the fairness of the procedure in terms of which the appeal was heard or dismissal was effected. It was on this basis that he made the following findings:

> ‘30 Having found that the appeal was finalised on 17 September 2002, all the events that occurred subsequent to that date cannot be brought within the ambit of the employment relationship. A dismissal brings an end to the employment relationship. What I find strange is the relevance of the date 15 November 2002. Applicant hammered on the date of the 15 November 2002 which confirms that it is the date on which she regarded the dispute to have arisen.
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> 31. Perhaps the applicant would have had valid argument if her claim was that the respondent implemented the sanction of dismissal before her appeal was finalised on 17 September 2002. I am unable to find any justifiable basis for the applicant to have chosen 15 November 2002 as the date on which dispute arose. It is my finding that the applicant has ceased to be an employee of the respondent on 15 November 2002 and therefore not entitled to protection of the collective agreement.
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> 32. Secondly, Resolution 1 of 2003 was not yet effective when the dispute arose on 15 November 2002. The collective agreement cannot be applied retrospectively. In other words, the respondent could not have known in advance about the coming into effect of Resolution 1 of 2003 in the year 2002. The respondent could not have reached the provision of clause 7.4(c) of Resolution 1 of 2003 as it was not yet effective on 15 November 2002.
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> 33. Having considered the issues raised and the submissions of the parties, it is my considered opinion that the preliminary issues raised by the respondent are possessed sufficient legal merit. I have not dealt with the waiver argument but it is equally persuasive. The inescapable conclusion at which I have arrived is that the applicant has no *locus standi* to bring the matter to the Council as she ceased to be an employee when the dispute arose on 15 November 2002.’

[10] Accordingly, the applicant's claim was dismissed with no costs order. It is this finding that the applicant seeks to review and set aside.

Grounds of Review

[11] The applicant's ground of review is that the arbitrator acted against the judgment of this Honourable Court in deciding the issue of the PSCBC's jurisdiction.

[12] The applicant further challenged the arbitrator's award on the basis that his ruling was not justified by facts before him in that the third respondent failed to notify her of the appeal outcome which was required in terms clause 7.4(c) of the PSCBC Resolution 1 of 2003. The applicant's other ground of review was that the arbitrator's ruling was not in accordance with the law in that the arbitrator relied on the Ministerial Memorandum authenticity of which was questioned by the applicant.

[13] The third respondent contends that in seeking the interpretation of the collective agreement, the applicant seeks to circumvent compliance with the late referral of the dismissal dispute, if any. For that reason, the third respondent argued that it was important to first determine whether the applicant was the third respondent's employee. According to the third respondent, after 13 years of her dismissal, the applicant waived her right to pursue any legal remedies in terms of the LRA.

Applicable law and analysis

[14] The test for review applications based on jurisdictional error is well established and has been stated in numerous cases of this Court and the Labour Appeal Court as correctness. In *SA Rugby Players' Association v SA*

Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU,[2] the LAC held as follows:

> '…The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.'

[15] The applicant has to establish that the arbitrator's decision was objectively wrong. In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others,*[3] the court held as follows:

> 'In my view where the power to be exercised is statutory, the answer to the question of what the jurisdictional fact(s) is (are) which must exist before such power can be exercised lies within the four corners of the statute providing for such power. Accordingly the provisions of such statute require to be considered carefully to determine what the necessary jurisdictional fact(s) is (are). In the light of this I consider it necessary to have regard to the provisions of the Act to determine what the necessary jurisdictional fact(s) is (are) which must exist in a case such as this one before it can be arbitrated or adjudicated in terms of the Act.'

[16] In this case, the applicant submitted that, at the time of the referral of the dispute, the outcome of the appeal was not communicated to her and that the third respondent should have remunerated her from the date of dismissal to the date on which the appeal outcome was served on her. The issue is whether there had been an employment relationship between the applicant and the third respondent and, therefore, whether the PSCBC had the requisite jurisdiction to deal with the dispute. The issue of jurisdiction is dependent on the answer to this question.

[17] The third respondent referred this Court to *Transport Fleet Maintenance (Pty) Ltd and Others v NUMSA and Others*[4] to supposedly support the argument that the arbitrator was correct to rule that the applicant was not the third

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[2] [2008] 9 BLLR 845 (LAC) at para 41.
[3] [2000] 12 BLLR 1389 (LAC) at para 7.
[4] [2003] 10 BLLR 975 (LAC) at para 11

respondent's employee. The passage referred to reads as follows:

> '… The employment relationship certainly continues to exist where the dismissed person challenges the fairness of the dismissal and seeks relief through procedures provided for by the Act.'

[18] The third respondent's contention was that the extension of employment relationship does not continue to exist in this case as the applicant was not challenging the fairness of her dismissal or any of the rights protected by the LRA. It is apparent that the applicant referred a dispute in terms of section 24 of the LRA. There is therefore, no merit to the third respondent's argument. In *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal,*[5] the LAC dealt with the arbitrator's duty to interrogate the parties' characterisation of the dispute and stated as follows:

> 'What is a "dispute" *per se,* and how one is to recognise it, demands scrutiny. Logically, a *dispute* requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked…'[6]

[19] The arbitrator's finding that PSCBC had no jurisdiction to hear the dispute was premised on two issues. Firstly, he found that the applicant was not the third respondent's employee after accepting that the applicant's dismissal was finalised on 17 September 2002 when the Ministerial Memorandum was signed. Accordingly, he found that all the events that occurred subsequent to that date could not be brought within the ambit of the employment relationship. In his view, the applicant was, therefore, not entitled to the protection of the collective agreement.

[20] The arbitrator further disregarded the applicant's submissions when he found that the question of authenticity of the Ministerial Memorandum was irrelevant to the interpretation of 7.4(c) of the PSCBC Resolution 1 of 2003. The

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[5] (2016) 37 (ILJ) 1839 (LAC).
[6] At para 17.

arbitrator's finding was, therefore, wholly based on the Ministerial Memorandum receipt and authenticity of which were challenged by the applicant.

[21] Clause 2 of the PSCBC Resolution 2 of 1999 clearly state as follows:

'PRINCIPLES

2. The following principles inform the Code and Procedure and must inform any decision to discipline an employee.

2.1 Discipline is a corrective measure and not a punitive one.

2.2 Discipline must be applied in a prompt, fair, consistent and progressive manner.

2.3 Discipline is a management function.

2.4 A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:

(a) have a fair hearing in a formal or informal setting;

(b) are timeously informed of allegations of misconduct made against them;

(c) receive written reasons for a decision taken; and have the right to appeal against any decision.

2.5 As far as possible, disciplinary procedures shall take place in the place of work and be understandable to all employees.

2.6 If an employee commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings.

2.7 Disciplinary proceedings do not replace or seek to imitate court proceedings.

> 2.8 The Code and Procedures are guidelines and may be departed from in appropriate circumstances.

[22] It is clear that the fair treatment of employees includes the right to receive written reasons for any decision taken following a disciplinary enquiry. However, it is not apparent whether the third respondent disputes whether it is bound by the collective agreement and whether the collective agreement entitles the dismissed employee payment of his/her salary until the outcome of the appeal is communicated to him/her.

[23] What is apparent from the applicant's submissions is that there was a factual dispute whether she (the applicant) was informed of the outcome of appeal and whether she was issued with the Ministerial Memorandum. In *Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others,*[7] the LAC dealt with the admissibility of documents that were not properly admitted into evidence and held as follows:

> 'Having considered all of the above, I am of the view that in refusing the appellant's request to lead *viva voce* evidence and instead being content to dispose of the matter on the basis of documents that were not properly admitted into evidence, the second respondent committed a material irregularity warranting the setting aside of his decision. Insofar as the court *a quo* found otherwise, it erred. I am satisfied that the court *a quo* misdirected itself materially and that this misdirection alone warrants the setting aside of its order.'

[24] In this case, in finding that the applicant was not the third respondent's employee, the arbitrator relied on the Ministerial Memorandum without properly admitting it into evidence. In the absence of an agreement on the documentary evidence before the arbitrator, the question whether the applicant was an employee of the third respondent is one that can only be determined by adducing *viva voce* evidence.[8] The arbitrator chose to decide on the factual dispute without the benefit of oral evidence and affidavits. In so doing, he committed a reviewable irregularity and his award stands to be set

[7] (2013) 34 *ILJ* 1490 (LAC) at para 26.
[8] ibid para 24..

aside on this ground alone.

[25] The second premise on which the arbitrator arrived at his ruling was based on his view that the third respondent could not have breached clause 7.4(c) of the PSCBC Resolution 1 of 2003 as it was not effective on 15 November 2002, when the dispute arose. In *CUSA v Tao Ying Metal Industries and Others*[9] the Constitutional Court stated as follows:

> 'Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.
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> A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a

[9] 2009 (1) BCLR 1 (CC).

> consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'[10] [Footnotes omitted]

[26] Although the applicant's referral related to the interpretation and application of clause 7.4(c) of the PSCBC Resolution 1 of 2003, it was not in dispute that it has the exact wording as clause 7.4(c) of the PSCBC Resolution 2 of 1999. There was further no dispute that the PSCBC Resolution 1 of 2003 repealed the PSCBC Resolution 2 of 1999. It is trite that the arbitrator was not bound by the parties' description of the dispute. The arbitrator was obliged to examine all the facts to ascertain the real dispute between the parties.[11] In this case, it should not have been complicated for the arbitrator to do exactly that as the issue before him was clearly stated by Molahlehi J as that relating to the interpretation and application of clause 7.4(c) of the PSCBC Resolution 2 of 1999. It is my view that there is merit in the applicant's submission that the arbitrator acted against the judgment of Molahlehi J.

[27] It seems to me that, had the arbitrator applied his mind to the terms of the judgment of Molahlehi J, the PSCBC Resolution 1 of 2003 and/or PSCBC Resolution 2 of 1999, the factual dispute before him and the applicable case law, he would not have arrived at the conclusion that the applicant was not an employee of the third respondent. The result hereof is that the arbitrator's jurisdictional ruling was objectively wrong.

[28] To an extent that the third respondent raised a jurisdictional issue pertaining to the existence of the employment relationship, it must be objectively determined by the PSCBC prior to the determination of the dispute referred by the applicant. Therefore, it is appropriate to remit this matter to the PSCBC to be heard by a different commissioner. With regard to costs, taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[29] In the circumstance, I make the following order:

Order

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[10] At paras 64-65.
[11] *Zeuna-Stärker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC) at para 6.

1. The arbitration award issued by the second respondent acting under the auspices of the first respondent dated 12 March 2015 under case reference number PSCB 166-12/13 is reviewed and set aside.

2. The first respondent is directed to set down the dispute referred by the applicant for arbitration to be heard by a commissioner other than the second respondent.

3. Taking into account the delay and history of the matter, the senior commissioner is directed to set this matter down within 30 days from the date of this order.

4. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court

Appearances:

For the applicant	Ms Preshni Govender
Instructed by	Macgregor Erasmus Attorneys
For the respondent	Advocate A.M Pheto
Instructed by	State Attorney