



Of interest to other judges

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

Case no: JR 722/15

In the matter between:

**THE INDEPENDENT MUNICIPAL
AND ALLIED TRADE UNION obo R
M BONN & 46 OTHERS**

Applicants

and

**NAMA KHOI MUNICIPALITY
MAPUTLE MOHLALA (NO)
SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL**

First Respondent

Second Respondent

Third Respondent

Heard: 22 March 2018

Delivered: 27 March 2018

Summary: (Review – jurisdictional point – reason for dismissal – applicant's referring dispute to arbitration on basis that reason for dismissal unknown – letter of termination not specifically identifying reason as one of the legitimate grounds of dismissal – employer only raising jurisdictional question at arbitration – arbitrator deciding reason for dismissal based on submissions made by parties with their agreement – arbitrator finding reason for dismissal operational in nature)

JUDGMENT

LAGRANGE J

Background

[1] At the end of August 2014, the individual applicants ('the employees'), who were employed by Nama Khoi Municipality ('the municipality') were issued with termination notices in Afrikaans simply headed "Diensbeëindiging" (Termination of service). The letter concluded that the non-advertisement of the posts which the employees occupied, or alternatively, their placement in permanent positions was without justification ('ongegronde') for the following reasons:

1.1 Clause 3.8 of the Migration and Placement Policy of the municipality provided that no staff member appointed on the permanent establishment could be placed in a post to which a fixed term contract applied and no staff member employed for a fixed period could be placed permanently in a post in the permanent establishment.

1.2 The approved Personnel Provisioning Policy states that:

1.2.1 posts could only be filled in terms of the post structure approved by the Council and the executive committee for which budgetary provision is made;

1.2.2 all vacant posts must be first advertised internally and, if not filled, externally.

1.3 The last organogram approved by the municipality was approved at a council meeting on 15 November 2011. All organograms drawn up after that were merely drafts which were never approved.

[2] The letter gave the employees one month's notice of their termination.

[3] The applicants referred an unfair dismissal dispute to the SALGBC claiming that their dismissals were for an unknown reason. At the arbitration hearing the municipality raised a jurisdictional point claiming

that the dismissals were not for an unknown reason but for operational reasons. Accordingly, the municipality argued the dismissal dispute should be adjudicated by the Labour Court under s 191(5)(b)(ii) of the Labour Relations Act, 66 of 1995 ('the LRA').

The ruling

- [4] Instead of hearing evidence, the arbitrator decided the jurisdictional question on the basis of submissions made by parties' representatives. The parties acquiesced in this process. In the course of the municipality's submissions, it was argued by the municipality that the employees exceeded the numbers on the fixed establishment of the municipality as determined by the approved organogram and this placed a financial strain on it. The union representative emphasised that, it maintained that the real reason for the dismissals which the municipality relied on was that the appointment of the employees was invalid and that was a reason which could be arbitrated on. The applicants objected to the characterisation of their termination as dismissal for operational reasons because they maintain that the reason for the termination did not conform to the definition of operational requirements in section 213 of the LRA, which defines them as requirements based on 'the economic, technological, structural or similar needs of an employer'.
- [5] Essentially, the arbitrator found that, because the applicants had been employed in excess of the permanent staff establishment in terms of the approved 2011 organogram on which the approved staff budget was based, it was necessary for the municipality to align the staff complement with the approved staffing levels and budget and accordingly the need to terminate the services of staff like the applicants who had been employed unlawfully in excess of the lawful permanent establishment was operational in nature.

Evaluation

- [6] The applicants contend the ruling should be set aside because it was incorrect and the arbitrator committed a reviewable irregularity in the conduct of the proceedings on the jurisdictional point.

- [7] ***In National Union of Metalworkers of South Africa obo Sinuko v Powertech Transformers (DPM) and others***¹ the LAC reiterated the test to be applied in such cases as originally formulated in ***Wardlaw v Supreme Moulding (Pty) Ltd***², and stated:

“[20] What is clear from *Wardlaw* is that a two stage process in the adjudication before the Labour Court was not necessarily being advocated. The Labour Court assumes jurisdiction on the basis of what the employee alleges the reason for the dismissal to be - but if it later becomes "apparent" to the court that the reason for the dismissal is a different one and one in respect of which it does not have jurisdiction, the Labour Court should not adjudicate the merits of the dispute, but allow the matter to be referred to the right forum with jurisdiction in order for that forum to determine the merits of the dispute. In *Wardlaw*, this Court did not exclude the possibility that the true nature of the dispute may only become apparent once all the evidence has been led and the court has considered it. Generally, this is the time when the court will become aware of the true nature of the dispute. However, in *Wardlaw*, this Court also did not exclude the possibility that the true nature of the dispute may also become apparent earlier, i.e. before all the evidence is led. An example that readily comes to mind is if the issue of jurisdiction and the true nature of the dispute is separated from the merits of the dispute and raised at the outset of the proceedings, requiring the court to determine those issues on the evidential material available, or presented during that phase of the proceedings.

[21] There is no valid reason why the procedure that applies in the Labour Court does not also apply in arbitrations conducted in terms of or under the Act.”

- [8] On jurisdictional matters, the court needs to consider if the ruling was objectively correct³ not whether the arbitrator was unreasonable in arriving at it.

¹ [2014] 2 BLLR 133 (LAC) at 139-140,

² [2007] 6 BLLR 487 (LAC).

³ ***Qibe v Joy Global Africa (Pty) Ltd; In re: Joy Global Africa (Pty) Ltd v CCMA and others*** [2015] 4 BLLR 415 (LAC) at 417-8, para [5].

- [9] The municipality chose to identify the reason for the dismissals as being for operational requirements, thereby provisionally bringing it within the scope of one of the three legitimate reasons for a fair dismissal recognized in s 188(1) of the LRA. In whichever forum the matter proceeds, the municipality will have the onus of proving the fairness of that reason and the fairness of the procedure followed. The applicants appear to have adopted the view that the validity of that rationale for the dismissals is one that the arbitrator was required to determine when he was required to make the jurisdictional ruling on the point *in limine*.
- [10] Although the applicants referred the matter to arbitration under s191(5)(a)(iii) of the LRA on the basis that they did 'not know the reason for dismissal', when the municipality raised the jurisdictional issue it provided a reason for the dismissal. Whether that reason was genuine or not, the reason for the dismissal could not still be said to be 'unknown' at that stage, and on the basis of the reason provided the dismissal was not one which the arbitrator had jurisdiction to determine: it was not justified on the basis of incapacity or misconduct, nor did it involve the retrenchment of a single employee⁴, over which he would have had jurisdiction.
- [11] Moreover, if in fact the municipality had dismissed the employees because it considered their employment unlawful and invalid, as the applicants later appeared to argue at the hearing on the jurisdictional point, the arbitrator would have had no power to determine the fairness of such a dismissal, except indirectly by deciding that the real reason for the dismissal was not the one provided by the municipality. But, to even consider if there was a genuine operational reason for the dismissals the arbitrator would have to enter the terrain of deciding if the dismissals could be substantively fair on operational grounds, a matter lying outside his jurisdiction except where the retrenchment of only one employee is under consideration. It should also be mentioned that the applicants were not asking the arbitrator to decide that their dismissals could not be fair for any reason because they

⁴ Under s 191(12) of the LRA.

were invalid as occurred in ***Matatiele Local Municipality v Shaik and others***.⁵

- [12] Consequently, I am satisfied that, objectively speaking, the employer's reason for the dismissal was retrenchment, whether or not that is a sound justification for the dismissals. The soundness of that justification will be tested in trial proceedings and it was sufficient for the arbitrator to be satisfied that the reason relied upon is the one that would have to be adjudicated upon.
- [13] The applicants also argued that the arbitration proceedings should be set aside on the basis that the arbitrator committed a reviewable irregularity in the conduct of the proceedings. The applicants claim that the arbitrator should not have relied on submissions by the parties but should have heard evidence before reaching a conclusion on the reason for the dismissals. No objection to the process was made by the applicants who were represented at the arbitration and nothing prevented them from objecting to the process at the time. This case is distinguishable in my view from where the arbitrator decided the substantive merits of the case on the basis of submissions such as occurred in ***Arends and others v South African Local Government Bargaining Council and others***⁶ where a jurisdictional point was raised for the first time in written arguments submitted after the hearing and the arbitrator decided the matter on the basis of the jurisdictional point without affording the other party a reasonable opportunity to deal with it.⁷ In this instance, the arbitrator was dealing with a situation where one party said it did not know the reason for dismissal and the other provided its ostensibly legitimate reason, albeit that it may struggle to justify it as a substantively and, or alternatively procedurally, fair one. The applicants had a fair opportunity to make representations on the issue and the thrust of their submissions go to questions that are best addressed when the fairness of the dismissal are considered.

⁵ [2017] 11 BLLR 1090 (LAC)

⁶ [2015] 1 BLLR 23 (LAC)

⁷ At 30, para [19]

[14] On the reasoning above, I am satisfied the arbitrator did not commit a reviewable irregularity in the conduct of the proceedings and that objectively speaking the jurisdictional question was correctly decided.

Costs

[15] There may have been some merit in a cost award being made against the municipality at the arbitration proceeding for not raising the jurisdictional point earlier, but I do not think that should affect the issue of costs in these proceedings, where the principles of fairness and law lead me to conclude that the parties must bear their own costs.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

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