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

Not reportable

**CASE NO. JR423/13**

In the matter between:

**MEC FOR SOCIAL DEVELOPMENT: MPUMALANGA** **Applicant**

and

**LUFUNO RAMABULANA *N.O*** **First Respondent**

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL BARGAINING COUNCIL (PHSDSBC)** **Second Respondent**

**TINY ZULU** **Third Respondent**

**SIMON UBISI** **Fourth Respondent**

**THEO TWALA** **Fifth Respondent**

**THEMBI MHAULE** **Sixth Respondent**

**Heard : 19 April 2018**

**Delivered: 07 June 2018**

**Summary: Arbitrator found the dismissal unfair based on point *in limine* oral arguments without oral evidence being led and not considering merits of the dispute. Award not sustainable, reviewed and set aside.**

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**JUDGMENT**

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**BALOYI AJ**

Introduction

[1] Review and setting aside of the First Respondent's arbitration award is the relief sought by the Applicant. In the said award the First Respondent found the dismissal of Third to Sixth Respondents (Respondents) unfair following the arguments presented based on points *in limine.* The point in question was raised on behalf the Respondents on protestation that the applicant had unreasonably delayed finalization of the disciplinary proceedings against the Respondents. Consequently, the First Respondent awarded a relief of retrospective reinstatement to the Respondents.

Factual background

[2] The Applicant dismissed the Third to Sixth Respondents on 14 February 2012 who subsequently, individually so, referred unfair dismissal disputes to the Second Respondent, Public Health and Social Development Sectoral Bargaining Council (PHSDSBC). The first matter to be heard was that of the Sixth Respondent Ms T Mhaule and the arbitration proceedings were concluded on 27 September 2012 before the First Respondent. The individual matters involving the Third to Fifth Respondents, namely T Zulu, S Ubisi and T Twala were respectively consolidated and scheduled to be heard together on 12 December 2012. These matters came before the First Respondent and it is apparent from the award that such consolidation was ordered by him.

[3] It is further apparent from the arbitration award that the First Respondent knew well in advance that the three matters were related to that of Ms Mhaule hence he made a request to the Second Respondent to have the issuing of the award deferred. The request was granted and somewhere in his award under the heading "*analysis of evidence and findings*", he recorded that he saw it fit to incorporate the matter of the Sixth Respondent into that of the Third to Fifth Respondents as the effects of the principle argued affects her matter. He further pointed that both parties confirmed and agreed that the individual cases should be recombined.

[4] The First Respondent disposed of the matter based on arguments presented by the parties for and against the point *in limine* raised by the Third to Fifth Respondents' representative. During such arguments the following was placed before him:

4.1 The Applicant discovered that fraudulent acts were committed by a number of employees with the Third to Sixth Respondents included in that payments of monies by the Applicant were diverted to benefit unintended recipients.

4.2 On 17 April 2008 the Applicant placed the employees in question on suspension. The suspension was lifted following a settlement agreement reached between the parties at the Bargaining Council that the employees should report for duty on 16 January 2009 and that charges should be served by no later than 12 January 2009.

4.3 No charges came forth until in August 2010 when such charges were accompanied by letters of intention to transfer the employees. The disciplinary hearings were concluded in March 2011 and followed by confirmation of dismissals on 14 February 2012.

4.4 The point *in limine* raised by the Third to Fifth Respondents was hugely rested on the delays in concluding the disciplinary process in violation of clause 2.2.2 of Resolution 1 of 2003. The Applicant took more than one year and four months to present the charges after the agreement was reached at the Bargaining Council. There was no cogent reason for the

delay as the Applicant still relied on the same material that was available at the time of suspension. These delays were indicative of the Applicant's waiver of its right to discipline the employees and relied on some case law to demonstrate that justice delayed was as much as justice denied.

4.5 The Applicant in response to the point *in limine* maintained that the settlement agreement was complied with as the disciplinary hearings were eventually conducted. Resolution 1 of 2003 only provided for prompt conduct of proceedings with no specific provision as to how long should such proceedings take. Lifting of suspension interrupted the delays which were occasioned as a result of an in depth forensic investigation and splitting of the department which functions fell under the governance of two MEC's. The new MEC had to familiarize himself with the matter.

The award

[5] In his finding that the dismissals were unfair, the First Respondent noted the delays and found them too unreasonable. Such delays violated the expediency principle and were prejudicial to the Respondents. He went on to set aside such dismissals on account of being unfair and awarded the Respondents relief of reinstatement retrospectively.

The review

[6] The Applicant firstly attacks the First Respondent's award on the ground that he had exceeded his powers by considering the Sixth Respondent as part of the Third to Fifth Respondents' case, whilst her own was heard and concluded separately. There was no agreement for such inclusion of the Third Respondent. The point *in limine* was not raised at her arbitration and the First Respondent had misdirected himself in belatedly filtering the point in her matter through another matter.

[7] Secondly, the First Respondent failed to appreciate the reasons for the delay and his reliance on the decision in *PSA obo Bawa v Department of Social Services and*

*Population Development*[1] was misplaced in view of the Applicant's available evidence in support of the explanation for the delay.

[8] Thirdly, the First Respondent did not look at the merit of the matter, most particularly that the Respondents were charged with serious acts of misconduct.

[9] Lastly, his finding that the dismissal was unfair could only attract relief of compensation. This point was expanded during arguments by Mr Mokhari SC for the Applicant that the pronouncement of unfairness of the dismissal either in terms of procedure and/or substance has bearing on the relief. His mere finding that the dismissal was unfair without stating on what respect, inescapably amounted to a misdirection, most particularly where reinstatement is awarded.

[10] In opposition, the Respondents raised the issue of unreasonable delays in prosecution of the review application on the part of the Applicant and called for dismissal of the application on this point alone. The delays were particularly related to the Applicant's sloppy handling of the matter prior to filing of the record. According to the courier services' delivery slip the record was dispatched with the Registrar on 02 July 2013. The Applicant failed to uplift the record timeously despite being reminded by the Respondents' trade union to do so. The Applicant had instead of uplifting the record from the Registrar elected to call a meeting for reconstruction of the record in May 2014 and failed to attend the very meeting.

[11] The Applicant ultimately served the record on 16 May 2014 and only filed a notice to stand by its notice of motion on 22 May 2015. The Applicant viewed this argument as irrelevant for purposes of the review application but for the application to dismiss the review application in terms of Rule 11. It bears mention that the Respondents filed the Rule 11 application on 11 April 2018 and it was withdrawn on the date of hearing of this application.

[12] From Ms Oken's arguments, the Respondents defended the Sixth Respondent's inclusion into this matter. The reason being that the other matters involving the rest

[1] (2009) 6 BALR 575 (PHSDSBC).

of the Respondents were scheduled to be heard on 27 September 2012 and the point *in limine* was also raised in the Sixth Respondent's matter. Further that the inclusion of the Sixth Respondent was discussed between the First Respondent and the parties' representatives.

[13] The Respondents further contended that the Applicant's reason for delays had no merit as it relied on the draft report to dismiss them and not on the final report. The splitting of the department did not change anything regarding administration of the cases. Since there was no evidence led on the breakdown of trust relationship, reinstatement remained an appropriate relief for the Respondents.

The legal framework and case law

[14] The provisions of section 138 of the Labour Relations Act[2] (LRA) forms the cornerstone of the process upon which Commissioners should conduct arbitration proceedings. Subsections 1 and 2 which are pertinent for determination of this matter provide as follows:

> "(1) The Commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
> (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner"

[15] In putting the above provisions to perspective the Labour Court in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[3] placed the following analogy regarding what is required of the Commissioner in conduct of arbitration proceedings at paragraph 27.

[2] Act 66 of 1995 as amended.
[3] (2000) 6 BLLR 716 (LC).

> [27] In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in *the* conduct of the arbitration proceedings. (See sections 145(2)(a)(i) and (ii) of the LRA ;McKenzie, The Law of building and Engineering Contracts and Arbitration, 5th Ed. pp l88-189).

[16] Since this application is founded on the First Respondent's approach in the conduct of arbitration proceedings by dispensing with oral evidence, it is imperative to look at the court's reaction to the approach in question. In *Arends and Others v SA Government Bargaining Council and Others*[4] the Labour Appeal Court at paragraph 15 cautioned on this radical approach where the parties only made written submissions as follows:

> "[15] The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. 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. Courts of law and arbitration tribunals dealing with disputes of right exist for the settlement of concrete controversies and not to pronounce upon abstract questions

[4] (2015) 36 ILJ 1200 (LAC).

> or to give advice upon differing contentions about the meaning of an agreement. 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".

[17] In *SA Social Security Agency v National Education Health and Allied Workers Union on behalf of Punzi and Others*[5] this Court per Rabkin-Naicker J had in a situation where parties agreed to have the arbitration be decided on written submissions and papers before the Commissioner held as follows at paragraph 8:

> "[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 C 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".

[18] In *Department of Home Affair v General Public Service Sectoral Bargaining Council*[6] the court per Myburgh AJ moved to the very same direction taken in the above decisions of the Labour Appeal Court and this court. In this regard I can safely accept that this position is well settled as it was in paragraph 29 specifically held as follows:

> "[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".*

[5] (2015) 36 ILJ 2345 (LC)
[6] (2018) 39 ILJ 248 (LC)

Evaluation

[19] It is in this instant case, specifically from the reading of the arbitration award it is indisputable that oral arguments coupled with documents handed to the First Respondent were presented with no oral evidence led. No agreement on the mode of conduct of arbitration proceedings was solicited from the parties by the First Respondent. Furthermore, the dispute that was the subject of arbitration proceedings was solely decided on the point *in limine* raised by the Respondents.

[20] The Respondents relied on *Bawa*[7] to persuade the First Respondent to uphold their point *in limine* which ultimately led to the finding that the dismissal was unfair. My reading of the *Bawa* arbitration award which was apparent that the First Respondent felt strongly obliged not to ignore, reveals these glaring features which unassailably distinguished the case in question with the issues he was required to deal with:

- Oral evidence was led in *Bawa* matter,
- The commissioner in *Bawa* matter noted the delays in prosecution of disciplinary processes, the matter was however decided based on its merits to arrive at the finding of unfairness of the dismissal

[21] It appears very clearly that the First Respondent elected to rely on the editor's summary which appeared on the face of the *Bawa* award and regurgitated it in his award as if he was quoting Commissioner Rex. I do not find any justification for various points of misdirection on the part of the First Respondent, including: (i) abrupt joinder of the Sixth Respondent in to this matter, (ii) manipulatively driving the parties into the conduct of the proceedings without giving them opportunity to adduce oral evidence, (iii) concluding the matter without getting to its merit, and (iv) awarding retrospective reinstatement without specifying the form of unfairness of the dismissal that, is, whether substantially or procedurally.

[7] *Ibid.*

[22] In the light of all episodes displayed in this matter at the hands of the First Respondent, I am unable to find any reason why the First Respondent's award should stand. Since it has become obvious that the parties did not have a fair hearing in this matter, I am inclined to rule in favour of a remittal of the matter to the Second Respondent for an arbitration *de novo*.

Costs

[23] Ordinarily when the matter is remitted for arbitration *de novo* the court finds it not to be within the requirements of law and fairness to make a cost order. This approach is predominantly rooted on the fact that remittal keeps litigation on going. Cost orders generally cause strain on the parties' future attempts to settle the dispute. It is regrettable that this matter gets to be remitted after the period of five years and the delays in having this matter heard timeously is solely based on human factor. To be precise the Applicant's conduct in these proceedings is the cause for all the delays which it failed to dispute. It elected to label them irrelevant for purposes of review. This demonstrates absence of reasonable explanation for the sloppy conduct of litigation on the part of the Applicant. The Respondents' counsel referred me to the Practice Manual of the Labour Court[8] in her submissions that this application was supposed to have been archived and ultimately deemed withdrawn. This matter has in fact survived the application of the 2013 Practice Manual which contains the said provisions as it was filed shortly before 01 April 2013.

[24] This is one matter which making of a cost order is not dependent on the result as the Court cannot under these circumstances ignore the conduct of the Applicant which clearly brought about insurmountable prejudice to the Respondents who kept on advising the Applicant to ensure that the record is uplifted from the Registrar to no avail. These prejudices are a result of non- compliance with the Rules and can in this regard be remedied by awarding costs to the Respondents.

[8] April 2013.

[25] In the premises the following order is made:

Order

1. The arbitration award under case number PSHS327-12/13, PSHS328-12/13, PSHS541-12/13 and PSHS923-11/12 made by the First Respondent is reviewed and set aside.

2. The dispute is referred back to the Second Respondent for arbitration *de novo* before an arbitrator other than the First Respondent.

3. The Applicant is ordered to pay the Third to Fifth Respondent's costs.

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MM Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

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| For the Applicant: | Advocate W Mokhari SC |
| Instructed by: | The State Attorney, Pretoria |
| For the First Respondent: | Advocate Oken |
| Instructed by: | Nkosi Attorneys & Associates |