



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 306/13

In the matter between:

BIFAWU obo MEMBERS

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

COMMISSIONER DM HILLIGENN N. O

Second Respondent

SOUTH AFRICAN FOOTBALL ASSOCIATION

Third Respondent

Delivered: 27 September 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The Banking Insurance Finance and Assurance Workers Union (BIFAWU), representing its members, seeks an order reviewing and setting aside the arbitration award dated 14 December 2014 issued by the second respondent (Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). The third respondent (SAFA), opposed the application.
- [2] BIFAWU referred a dispute to the CCMA in terms of section 24(2) and 24(5) of the Labour Relations Act (LRA)¹ pertaining to the interpretation and/or

¹ Act 66 of 1995 (as amended)

application of a collective agreement, and in particular, the parties' Recognition Agreement signed on 6 July 2012. The dispute was triggered by a notice issued in terms of section 189(3) of the LRA by SAFA dated 20 July 2012. BIFAWU held the view that the provisions of clause 4(b) of the Recognition Agreement were applicable in circumstances where SAFA had due to its operational requirements, initiated a restructuring process at the workplace. BIFAWU further held the view that SAFA had acted in breach of clauses 6 (Collective Bargaining rights), 14 (Collective forums/Union/Management meetings) and 15 (Association Forums) of the Recognition Agreement in initiating the restructuring process.

- [3] Clause 4(b) of the Recognition Agreement (Recognition clause) provides that;

'Notwithstanding anything to the contrary contained in this agreement, the Union recognises that the Association has, and shall continue to have the right to conduct its normal managerial functions provided when contemplating the introduction of major changes in the Association as set out in sections 84, 85 and 86 of the LRA, the Association will negotiate with the Union, providing it with this purpose, with relevant information on the major changes and their effects'

- [4] Clause 19 of the Agreement (Retrenchments Clause), which SAFA relied upon in initiating the restructuring process, provides that;

'The Association and the Union agree that there may be circumstances in which the Association terminates Employees due to operational requirements. Should such a situation arise, a Retrenchment Collective Agreement shall come into force, in the absence of such agreement, section 189 of the Labour relations Act and amendments shall apply'

- [5] In the section 189(3) notice, SAFA had also indicated an intention to approach the CCMA to appoint a facilitator. A meeting was held between the parties on 20 July 2012 with the Chief Executive Officer (CEO) of SAFA, and following that meeting, BIFAWU sent correspondence to SAFA, essentially disputing or rejecting the appointment of a facilitator. Central to BIFAWU's contentions was that the provisions of clause 4(b) of the Recognition Agreement should be applied insofar as SAFA sought to restructure its operations. A written

response and plea to BIFAWU to join in discussions surrounding the restructuring appeared to have yielded no positive response. BIFAWU was steadfast in its approach that the provisions of the Collective Agreement were to be applied in the circumstances rather than those of the LRA. SAFA's approach on the other hand was that the section 189(3) notice was issued because of possible dismissal of a number of employees due to its operational requirements. It had made reference to clause 19 of the Recognition Agreement and pointed out that in the absence of a Retrenchment Agreement, the provisions of section 189 of the LRA were to apply, hence its stance that consultation meetings were to be conducted under facilitation by the CCMA.

- [6] On 3 September 2012, SAFA advised BIFAWU that it had agreed to engage in consultations directly with it without facilitation of the CCMA, and that the invitation to the CCMA for facilitation would be withdrawn. It appears that the proposal was not favourably received by BIFAWU, resulting in further correspondence from SAFA on 7 September 2012, in terms of which it was suggested that the parties should approach the CCMA on an urgent basis to request the appointment of a Senior Commissioner to make a ruling on whether clauses 4 or 19 of the Recognition Agreement applied to the consultation process initiated by SAFA in terms of section 189(3) of the LRA.
- [7] On 11 September 2012, SAFA being of the view that BIFAWU refused to consult with it, requested a facilitation by the CCMA. On or about the same date, BIFAWU referred a dispute to the CCMA. It incorrectly referred the dispute as pertaining to alleged unilateral change to terms and conditions of employment when in fact it related to the interpretation and/or application of the agreement. The matter was set-down for conciliation on 11 October 2012.
- [8] Despite extensive attempts at conciliation, the dispute could not be resolved. It was then properly referred as a section 24(2) and section 24(5) of the LRA for arbitration. The CCMA set-down the dispute for arbitration on 22 November 2012, and the Commissioner had directed the parties to file written heads of argument.

- [9] SAFA in the meanwhile had briefed its employees on 9 and 30 October 2012, and had proceeded to implement its new structure with effect from 1 December 2012. An urgent application brought by BIFAWU to this Court to interdict SAFA from implementing restructuring at the workplace was struck off the roll on 13 November 2012.

The submissions before the Commissioner:

- [10] BIFAWU's submissions in its written heads of argument before the Commissioner were essentially as summarised above. In a nutshell, its contention was that the section 189(3) notice as issued by SAFA amounted to a change in terms and conditions of employment; that SAFA was bound to negotiate with it directly in terms of clause 4(b) of the Agreement, and that section 84(1) of the LRA found application since SAFA had agreed to negotiate with it on all matters of mutual interest
- [11] SAFA's arguments before the Commissioner were that sections 84, 85, and 86 of the LRA as referred to in clause 4(b) of the Agreement were not applicable as there was no workplace forum in existence at the workplace, nor had BIFAWU requested for one to be established as contemplated in section 80(2) of the LRA. Since the parties had concluded a Recognition Agreement, and further since SAFA was contemplating a dismissal of employees based on its operational requirements, it was obliged to issue a notice in terms of section 189(3) of the LRA. To that end, it was submitted that clause 4(b) of the Agreement would only find application where SAFA wished to restructure its workplace, but did not contemplate a retrenchment of any of its employees, and clause 19 would thus find application. Thus the section 189 of the LRA route should be followed in the absence of a retrenchment agreement.

The award:

- [12] The Commissioner's starting point was that an approach disregarding the meaning parties intended to convey by words they had used in agreements was inappropriate, and that when the meaning was clear and unambiguous, additional evidence could not be given to alter that meaning, and further that it

was not for the Commission to inquire into the inherent fairness of provisions of agreements which were products of collective bargaining.

- [13] Based on SAFA's notice in terms of section 189(3) of the LRA, it was apparent that it had contemplated a loss of employment, and thus clause 4(b) of the agreement, and Sections 84, 85 and 86 of the LRA found no application. Clause 19 of the agreement according to the Commissioner was unambiguous and couched in simple grammar, and the fairness thereof could not be inquired into. The Commissioner concluded that these provisions could not be divorced from section 189(3) of the LRA, which found application in the matter.

Grounds of review:

- [14] BIFAWU contends that the award is reviewable on the basis that the Commissioner committed misconduct in relation to his duties as an arbitrator; committed a gross irregularity in the conduct of proceedings; did not apply his mind to the documentary evidence and the applicable law, thus making his conclusions irrational and therefore unreasonable; was biased and had ignored documentary evidence; committed a serious mistake in interpreting and applying the law; that he ignored the fact that the Agreement imposed a legal obligation on SAFA to consult, and was thus forbidden from implementing proposals regarding restructuring of the workplace.

Evaluation:

- [15] In accordance with the provisions of section 23 of the LRA, collective agreements are binding on the parties. The purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to interpret or apply its terms either correctly or at all². The principles applicable to the resolution of

² See *PSA obo Liebenberg v Department of Defence and Others* (2013) 34 ILJ 1769 (LC) at para [2]

such disputes are trite as restated in *Western Cape Department of Health v Van Wyk and Others*³. These are that;

- i. When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;
- ii. The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.
- iii. A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.
- iv. The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made⁴;
- v. The “parole evidence” rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.
- vi. Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

³ (2014) 35 ILJ 3078 (LAC) at para 22. See also *North East Cape Forests v SAAPAWU and Others* [1997] 6 BLLR 711 (LAC); *Food and Allied Workers Union v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 382 (LC) at para 35.

⁴ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA)

- [16] The test on review is well-established, and for an applicant to be successful, the Court must be persuaded that the award or the decision arrived at by the Commissioner is one that a reasonable decision maker would not have made in the light of the material presented to him or her. The enquiry is not whether the decision is correct or not, but whether the Commissioner properly applied her mind to the issues before her, considered all the material before, and adopted an approach that gave effect to the purpose of the provisions of the agreement. As it was stated in *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and Others*⁵,

‘...The test is concerned with outcomes, not the process by which the outcomes are achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an arbitrator’s reasoning, or inattention to mentioning every facet of relevance, or clumsiness in articulation are unimportant, unless they are causally connected to an unfair outcome.’⁶

- [17] Central to this review application is the allegation that the Commissioner in coming to his decision, acted unfairly, and failed to consider and apply his mind to the issues before him, or failed to take into account certain material evidence. Having perused the pleadings and written heads of arguments, what is clear is that sadly, BIFAWU tended to conflate issues, completely missed the point, and advanced arguments that not only lacked logic but also went contrary to the spirit and purpose of the Recognition Agreement. The mere fact that a collective agreement is binding, or that the parties had agreed to consult on all matters of mutual interests as relied upon by BIFAWU, cannot be factors that should be viewed in isolation from all other provisions of the Agreement.

- [18] The starting point as correctly pointed out by the Commissioner was the section 189(3) notice of the LRA. From that notice, SAFA’s intentions in respect of the restructuring it had contemplated could be gleaned. It was thus

⁵ [2018] 3 BLLR 246 (LAC); (2018) 39 ILJ 546 (LAC)

⁶ At para 18

in line with that notice that it had to be determined as to which provisions of the Recognition Agreement were to be applicable.

- [19] To the extent that BIFAWU relied on the provisions of clause 4(b) of the Agreement, the issue is whether SAFA had contemplated the introduction of major changes as set out in sections 84, 85 and 86 of the LRA, for it to be compelled to consult and negotiate with it. What is crucial however, and which point BIFAWU has consistently missed or deliberately misunderstood is that the provisions of sections 84, 85 and 86 fall under the general rubric of workplace forums as established under Chapter V of the LRA. Section 84 of the LRA provides for specific matters for consultation, which a *workplace forum* is entitled to be consulted by the employer. Section 85 of the LRA *inter alia* makes provision for the *workplace forum* to be consulted before an employer may implement a proposals in relation to any matter referred to in section 84(1), whilst Section 86 of the LRA makes provision for joint decision-making, and for matters the employer must consult and reach consensus with a *workplace forum* before implementing any proposal concerning.
- [20] It is therefore apparent that BIFAWU's reliance on the provisions of clause 4 (b) of the Agreement in contending that SAFA was obliged to consult with it is clearly misplaced, as the parties had not established a *workplace forum* in terms of the provisions of sections 80 or 81 of the LRA, nor had BIFAWU requested the establishment of a workplace forum.
- [21] In the absence of a workplace forum or a retrenchment agreement as contemplated in clause 19 of the Recognition Agreement, it follows that the only applicable provisions would have been those of section 189 of the LRA as correctly concluded by the Commissioner. It further follows that there is no merit in BIFAWU's contentions that the Commissioner committed a mistake when interpreting and applying the law or the provisions of the Agreement, or committed any other irregularity in the conduct of proceedings. The contention that the Commissioner was biased or had ignored documentary evidence is equally a red herring, and I fail to appreciate what was expected of the Commissioner when the provisions of clauses 4(b) and 19 of the Agreement were clear and unambiguous.

[22] The interpretation adopted by the Commissioner, *albeit* in inelegant terms, was fair to the parties, as it gave to the words used by the parties their plain, ordinary and popular meaning in the absence of ambiguity. In the end, and having considered all the factors pertinent to this case, I am satisfied that the Commissioner properly applied his mind to the issues before him, considered all the material before him, and adopted an approach that gave effect to the purpose of the provisions of the Recognition Agreement, and those of the LRA. Thus, the conclusions reached by the Commissioner are unassailable, as they fall within a band of reasonableness.

[23] I have further had regard to the question of costs insofar as the requirements of law and fairness are to be taken into account. It is my view that this application was clearly ill-considered as it had no merit. It was further submitted on behalf of SAFA that the application was frivolous and academic since the retrenchments had long been effected. To this end, I see no reason why BIFAWU should not be burdened with the costs of this application. The fact that there may be a relationship between the parties is irrelevant for the purposes of awarding costs, especially in circumstances where a party ought to have reflected long and hard prior to approaching the court.

[24] Accordingly, the following order is made;

Order:

1. The application to review and set aside the award issued by the second respondent is dismissed with costs.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

M Nhlapo, BIFAWU Official

For the Third Respondent:

PM Mosebo of Werksmans

LABOUR COURT