



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR246/17

In the matter between:

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

MNS DAWSON N.O

Second Respondent

SAMWU OBO NOMATHEMBA NGAWA

Third Respondent

Heard: 14 September 2018

Delivered: 28 September 2018

Summary: Review application – arbitrator clothed himself with the jurisdiction he did not have.

JUDGMENT

NKUTHA- NKONTWANA. J

Introduction

- [1] In this application, the applicant (Ekurhuleni Metro) seeks an order reviewing as setting aside the arbitration award under case number GPD111505 dated 1 August 2016 wherein the second respondent (the arbitrator) found that Ekurhuleni Metro's conduct in refusing to pay Ms Nomathemba Ngawe's (Ms Ngawe) back pay subsequent to her placement constitutes an unfair labour practice in terms of section 186 (2)(a) of the Labour Relations Act¹ (LRA).
- [2] The application is vigorously opposed by the third respondent, the South Africa Municipal Workers Union (SAMWU).

Background

- [3] The facts in this matter are mostly common cause. The genesis of the dispute between the parties can be traced to the establishment of Ekurhuleni Metro as a Metropolitan which resulted in amalgamation of 14 former municipalities. The employees from all the disestablished municipalities were transferred as a going concern and their placement in the new structure was regulated by the Collective Agreement on Placement (Placement Agreement) concluded between Ekurhuleni Metro and the trade unions, including SAMWU. The Placement Agreement sought to regulate placement of staff in the new structure and provided a dispute resolution process in the event placements are challenged. The 'close matching' of old and new positions was a fundamental principle agreed to and applied in the placement process.
- [4] Like most employees, Ms Ngawe challenged her placement. The placement disputes were presided over by independent arbitrators who issued final and binding arbitration awards in terms of Clause 4 of the Placement Agreement. In this instance, Ms Ngawe challenged her placement as a general worker and contended that the closely matched position was that of Clerk Grade 1. The arbitrator upheld her claim but refused to grant her back payment. In essence, Ms Ngawe was placed in a position of Clerk Grade 1 with effect

¹ Act 66 of 1995 as amended.

from 21 April 2010. Ekurhuleni Metro accepted the finding and complied without any waste of time.

- [5] In November 2015, SAMWU referred two separate unfair labour practice disputes pertaining to the same matter to the first respondent (SALGBC). The referral under case number GPD 121506 (second referral) was presided over by Advocate Mosala Matlatle (Advocate Matlatle) on 26 January 2016. Ekurhuleni Metro raised a jurisdictional point which was upheld. Advocate Matlatle rendered a well-reasoned jurisdictional ruling dated 15 February 2016.
- [6] The referral under case number GPD 111505 (first referral) was conciliated by Ms Lindiwe Khumalo on the same date, 26 January 2016. She subsequently issued a certificate of non-resolution. SAMWU requested that the matter be arbitrated on the strength of the certificate of non-resolution hence the impugned award.
- [7] Ekurhuleni Metro's main ground of review is essentially that the arbitrator misconstrued the enquiry and consequently exceeded his powers.

Review test

- [8] Tritely, the review test entails an inquiry into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.² In *Head of the Department of Education v Mofokeng*,³ the Labour Appeal Court (the LAC) made it clear that 'an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the

² See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14; see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

³ [2015] 1 BLLR 50 (LAC) at paras 30 to 33.

conduct of the arbitration and as a result failed to address the question raised for determination.'

- [9] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)*,⁴ quoted with approval in *Mofokeng*, the Supreme Court Of Appeal (SCA) stated:

'The general principle is that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a 'gross irregularity' is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. Where the arbitrator's mandate is conferred by statute then, subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law.' (Emphasis added)

Evaluation

- [10] It is clear from the record that the arbitrator refused to deal with Ekurhuleni Metro's jurisdictional point to the effect that the matter had been disposed of in terms of Advocate Matlatle's jurisdictional ruling. He was adamant that since he was armed with the certificate of non-resolution, his jurisdiction was well founded. Clearly, he was incorrect. The certificate of non-resolution only enabled the matter to be set down for arbitration. It was incumbent upon the arbitrator to embark on his own enquiry in order to satisfy himself that he was indeed clothed with the necessary jurisdiction to deal with the matter.⁵
- [11] In the proceedings relating to the second referral, Ekurhuleni Metro also raised the issue of condonation as the referral was 61 months late. Nonetheless, Advocate Matlatle correctly disposed of the matter on the main point *in limine*. He held that the arbitration award that placed Ms Ngawe without back payment was final and binding. As such, it could only be

⁴ [2013] 11 BLLR 1074 (SCA) at para 10.

⁵ See: *SA Rugby Players' Association (SARPA) and others v SA Rugby (Pty) Ltd and Others; SA Rugby Pty Ltd v SARPU and Another* (2008) 29 ILJ 2218 (LAC); [2008] 9 BLLR 845 (LAC) at paras 40 and 41. See also *Benicon Earthworks and Mining Services (Pty) Ltd v Jacobs NO and Others* (1994) 15 ILJ 801 (LAC); [1994] 9 BLLR 1 (LAC) at 804C–D.

interfered with through a review application in this Court. Advocate Matlatle's jurisdictional ruling was never challenged by SAMWU and it must stand.

- [12] The arbitrator patently misconceived the whole nature of the enquiry. As a result, he exceeded the mandate conferred to him by the LRA by clothing himself with the jurisdiction he did not have.

Conclusion

- [13] In all the circumstances, the arbitrator committed a reviewable irregularity and as such the arbitration award stands to be reviewed and set aside. There is no need to remit the matter back to the SALGBC in the light of Advocate Matlatle's jurisdictional ruling.

- [14] Condonation stands to be granted given the fact that Ekurhuleni Metro is successful on the merits.

Costs

- [15] On the issue of costs, it is well known that costs do not necessarily follow the result in this Court, especially if the parties are in a persisting relationship as typified in the present case. In any event, Ekurhuleni Metro did not persist with a request for costs.

- [16] In the premises, I make the following order:

Order

1. The arbitration award under case GPD 111505 dated 1 August 2016 is reviewed and set aside.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate L Monnakgotla

Instructed by: Mohamed Randera & Associates

For the first respondent: Advocate E Masombuka

Instructed by: Madlela Gwebu Mashaba Inc.

LABOUR COURT