



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 808/16

In the matter between:

TUBATSE CHROME (PTY) LTD

Applicant

And

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

COMMISSIONER RAYMOND DIBDEN

Second Respondent

NUM OBO SENEUS MABUZA

Third Respondent

Heard: 25 April 2018

Delivered: 06 November 2018

JUDGMENT

LALLIE. J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent. It is opposed by the third respondent.

Background

- [2] The factual background to this matter is that the applicant and the National Union of Mineworkers (NUM) concluded the disability management agreement (the collective agreement) on 12 December 1997. Clause 1 of the collective agreement provides that its purpose is to set down principles and procedures which will govern their relationship in respect of employees who experience a serious medical condition which impairs their ability to perform their normal duties.
- [3] The individual third respondent fell ill in August 2015. As he was close to retirement, the applicant placed him on extended sick leave until his retirement. The NUM referred a dispute in terms of section 24 of the Labour Relations Act¹ (LRA) to the first respondent (the Bargaining Council) for the interpretation of the collective agreement on the basis that its proper interpretation entitled the third respondent to benefits, which the applicant denied. The dispute was interpreted by the second respondent (the arbitrator) who issued an award to the effect that in terms of clause 5.2 of the collective agreement, the applicant was obliged to terminate the third respondent's services and pay him the separation benefits as set out in the collective agreement.
- [4] The applicant's main ground for review is that the arbitrator committed a material error of law in interpreting the collective agreement as a result of which he reached an incorrect and unreasonable decision. The applicant further submitted

¹ 66 of 1995, as amended.

that with reference to employees whose retirement was imminent, the intention underlying the collective agreement included allowing such employees to retain employment until their retirement, to protect them from losing their retirement benefits consequent upon the termination of their employment before their retirement dates.

- [5] In opposing the application the third respondent denied that the arbitrator erred in interpreting the collective agreement. It denied that the applicant sought to rely on the position of employees whose retirement was imminent at arbitration but its representative pointed towards a serious financial situation which the applicant found itself in at the time, which resulted in the refusal to pay the third respondent benefits in terms of the collective agreement.
- [6] Part of the applicant's argument to have the award reviewed and set aside was that as a result of the arbitrator's failure to require the parties to lead oral evidence, he did not place himself in a position to determine the dispute before him fairly. The third respondent argued that there was no need for oral evidence and that the arbitrator correctly decided the dispute on the submissions made by the parties before him.
- [7] Section 138 (1) of the LRA enjoins arbitrators to determine disputes fairly and to deal with the substantial merits of such disputes. It is common cause that the applicant and the third respondent decided not to lead evidence but to rely on written submissions. Notwithstanding the agreement, in terms of section 138 (1) of the LRA it is the arbitrator who has the power to determine how arbitrations should be conducted. He should have exercised this discretion judiciously with a view of fulfilling his duties as an arbitrator.
- [8] In a number of discussions, the Labour Appeal Court has expressed the need for parties to file a statement of agreed facts when they want to dispense with the leading of oral evidence. The applicant and the third respondent failed to file a

statement of agreed facts. In this application they raise different facts which led to the non-payment of benefits to the third respondent in terms of the collective agreement. The facts which led to the dispute are material. The arbitrator's decision on the interpretation and application of the collective agreement should have been based on the facts of the dispute. No facts were presented before the arbitrator either in the form of an agreed statement of facts or oral evidence.

- [9] The effect of the arbitrator's conduct of determining the dispute before him in the absence of either oral evidence or a statement of agreed facts is expressed thus in *PSA v Minister of Correctional Services*² as follows:

"[17] The factual matrix is important because each agreement must be placed in its proper context. Agreements are not made in a vacuum; they are a product of a particular background, context and knowledge of the parties thereto. It has been said that words without context mean nothing and that context is everything. That however does not mean that the words used by the parties become insignificant. Consideration must always be given to the language used in the particular context without allowing the context to drown the words chosen by the parties. The words used by the parties are the foundation on which the court and or arbitrator must build its interpretation. The process is succinctly set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³.

[18] I have sympathy for the arbitrator because he was called upon to interpret a collective agreement devoid of a factual matrix. He, therefore, chose what he perceived to be the rational and logical contention but failed to interpret the words that he was called upon to interpret in their proper context. It is clear from the approach in relation to the adjudication of a stated case and the interpretation of contracts that an agreement cannot properly be interpreted without a factual matrix.

² [2017] 4 BLLR 371 (LAC) at paras 17 – 19.

³ [2012] (4) SA 593 (SCA) at para 18.

[19] The absence of a factual plinth on which to build his interpretation renders his conclusion unreasonable. He could not apply his mind properly to the issue before him without a factual substratum. He should have refused to deal with the matter without an agreed set of facts. This irregularity distorted the result. The decision of the arbitrator falls outside the band of reasonable decisions and is consequently one which a reasonable arbitrator could not reach.'

[10] The arbitrator's error of interpreting the collective agreement without taking into account the facts of the dispute before him constituted a defect as envisaged in section 145(2) of the LRA in that he committed a misconduct in relation to his duties as an arbitrator. He erred in not conducting the arbitration fairly and reached an unreasonable decision.

[11] In the premises, the following order is made:

Order

1. The arbitration award issued by the second respondent under case number MEMP 165 dated 2 March 2016 is reviewed and set aside;
2. The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate E.Tolmay

Instructed by:

Solomon Holmes Attorneys

For the respondent:

K.D Maimane of Maimane Attorneys

LABOUR COURT