



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

Not Reportable

Case no: JR 790/16

In the matter between

**LEJWELEPUTSWA DISTRICT MUNICIPALITY**

**Applicant**

and

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL**

**First Respondent**

**ADV P.M VENTER N.O**

**Second Respondent**

**IMATU OBO R HENNOP**

**Third Respondent**

**Delivered: 06 November 2018**

---

**JUDGMENT**

---

**MAHOSI J**

- [1] This is an application in terms of section 145 of the Labour Relations Act<sup>1</sup> (LRA) in terms of which the applicant seeks an order to review and set aside the arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent (SALGBC), under case number FSD 091509 dated 11 March 2016.
- [2] In his award, the arbitrator found that the applicant committed an unfair labour practice in terms of section 186(2)(b) of the LRA. The arbitrator ordered the applicant to pay the third respondent's member (employee) compensation equivalent to one month's salary, that the suspension should be lifted within five days from receipt of the arbitration award and that the employee must be allowed to resume her duties.
- [3] The key question that this Court must consider is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.

#### Material background facts

- [4] The employee was employed by the applicant as an Expenditure Clerk. She was served with a notice of intention to suspend on 28 May 2015 and was given 48 hours within which he was to submit written reasons as to why the suspension should not be effected. On 29 May 2015, the employee sent a correspondence to the applicant indicating that she was unable to provide reasons as requested as the notice was allegedly vague and confusing. On 8 June 2015, the employee was suspended.
- [5] The disciplinary hearing was set down for 28 July 2015 on which date the employee requested time to prepare her defence. The postponement was granted and the hearing was set down again on 10 September 2015 on which date the employee's representative requested that the matter be postponed *sine die* to allow her the opportunity to refer the matter to the SALGBC for the interpretation of clause 6.10 of the Disciplinary Procedure and Code Collective

---

<sup>1</sup> Act 66 of 1995 as amended.

Agreement (DPCCA). On 14 October 2015, the applicant set down the disciplinary hearing, but the employee requested the hearing to be heard following the determination of the interpretation dispute.

- [6] The interpretation dispute was set down for conciliation on 19 October 2015, but the employee did not attend the conciliation. The matter remained unresolved, and the certificate of outcome was issued.
- [7] The disciplinary hearing was set down again for 2 November 2015 for arbitration. The employee requested that the hearing be postponed to allow the arbitration proceedings on the interpretation dispute to take place first. While awaiting the arbitration on the interpretation dispute, the employee referred an unfair labour practice which was arbitrated on 23 February 2016. The arbitration was determined only on written arguments.
- [8] In its papers before the arbitrator, the applicant raised a jurisdictional point that the cause of action on which the employee based his claim was not binding on the parties in that the DPCCA was declared to be invalid by the Labour Court. The arbitrator ruled that the SALGBC was vested with the necessary jurisdiction as the matter was referred in terms of 186(2) of the LRA and that whether or not the employee could rely on the DPCCA formed part of the merits of the matter.
- [9] The parties then agreed that the only issue in dispute was whether the DPCCA was applicable to the parties as on 28 May 2015 up until 17 September 2015 when the judgment declaring the collective agreement invalid was handed down. It was the applicant's submission that the arbitrator's finding would bring an end to his enquiry. Further that there was no reasonable justification for awarding the employee compensation since she was on suspension with full pay. The arbitrator found that the applicant committed an unfair labour practice and ordered the Municipality to uplift the employee's suspension and to compensate her one month's salary. It is this outcome that the applicant seeks to review and set aside.

### Grounds of review

[10] The applicant's grounds for review were that the arbitrator exceeded his powers, alternatively committed gross misconduct in relation to his duties as an arbitrator, or alternatively committed a gross irregularity and further alternatively that his ruling is not rationally justifiable having regard to the material properly available to him at the hearing and that the ruling is one that a reasonable decision-maker could not have reached in circumstances in that he failed to :

10.1 Appreciate that the only dispute between the parties was whether the DPCCA entered into between the parties on 21 April 2016 was binding on the parties on 28 May 2015 up until 17 September 2015 when the judgment was delivered.

10.2 Appreciate that the applicant gave a full explanation as to why the suspension was necessary which explanation again was not refuted by the third respondent when they had an opportunity to do so in reply.

10.3 Provide reasons as required, for his finding why he considered the Disciplinary Code to be still applicable despite the Court declaring it invalid.

10.4 Provide reasons as to why he awarded compensation in the circumstances where the third respondent's suspension was with full pay.

### Applicable law and analysis

[11] The arbitration awards are reviewable in terms of section 145 (1) of the LRA, which provides that 'any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award'. Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration

proceedings, exceeding the commissioner's powers or improperly obtaining an award.

- [12] The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>2</sup> was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*<sup>3</sup> as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

- [13] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,<sup>4</sup> the Labour Appeal Court (LAC) stated as follows:

'[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.'

- [18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then

---

<sup>2</sup> 2007 (28) ILJ 2405 (CC) at para 25.

<sup>3</sup> 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA) at para 25.

<sup>4</sup> [2014] 1 BLLR 20 (LAC) at paras 17 and 18.

determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

[14] In *Head of the Department of Education v Mofokeng and Others*<sup>5</sup> the LAC confirmed *Herholdt* and *Mofokeng* judgments and held as follows:

'The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.'

[15] The LAC further held as follows:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether

---

<sup>5</sup> [2015] 1 BLLR 50 (LAC) at para 30.

a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, 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 conduct of the arbitration and as a result failed to address the question raised for determination.’<sup>6</sup> [Footnotes omitted]

[16] Although the applicant raised a number of grounds, the question is mainly whether the arbitrator understood and identified the nature of the dispute he was required to arbitrate and further that he dealt with the substantial merits of the dispute before him. The applicant’s submission was that the arbitrator failed to appreciate that the only issue before him was whether or not the DPCCA was applicable.

[17] Despite the fact that the dispute that was referred by the employee was whether the applicant committed an unfair labour practice, the parties signed and presented the arbitrator with a statement of case that determined how the matter was to run and what issue the arbitrator had to consider. It is apparent that the arbitrator followed a process that was agreed to by both parties. In his award, the arbitrator specified the issues in dispute as follows:

‘ISSUES TO BE DETERMINED:

- 9.1 I was firstly required to determine whether the matter had to be postponed; and
- 9.2 I was also called upon to determine whether the bargaining Council is vested with jurisdiction to determine the matter; and

---

<sup>6</sup> Id at para 33.

9.3 I was also called upon to determine whether or not the respondent committed an unfair labour practice within the ambit of section 186(2) of the LRA.'

[18] The arbitrator refused to grant postponement and ruled that the SALGBC had jurisdiction to arbitrate the matter as it was referred in terms of section 186(2) of the LRA. In his analysis of the evidence and arguments, the arbitrator identified the common cause issues and the dispute, i.e. whether the DPCCA entered into between the parties on 21 April 2016 was binding on the parties on 28 May 2015 up until 17 September 2015 when the judgment was delivered. The award shows that both parties addressed the arbitrator to this effect and that he understood the nature of the dispute before him.

[19] The applicant makes statements to the effect that the arbitrator failed to provide reasons for his finding that he considered the DPCCA to be still applicable despite the Court declaring it invalid. The Court cannot entertain this attack on the arbitrator given that the applicant provided the Court with an incomplete arbitration award.<sup>7</sup> The ground that the arbitrator failed to provide reasons as to why he awarded compensation in the circumstances where the third respondent suspension was with full pay is unwarranted and has no merit. It is apparent that the arbitrator declined granting the employee 12 months' compensation on the basis that she presented no evidence or argument to justify it and found one month's salary to be just and equitable.

[20] The manner in which the arbitrator analysed the dispute before him does not support the applicant's version that he misconstrued the enquiry he had to conduct. The arbitrator stated in clear terms that he had to determine whether the DPCCA was applicable between the parties and whether the applicant committed an unfair labour practice. The applicant further failed to establish that the arbitrator conducted the enquiry incorrectly because, as the award reflects, he dealt with the issue before him correctly. As such, the applicant failed to

---

<sup>7</sup> Page 23 of the arbitration award is missing from the record.

discharge the *onus* of establishing that the arbitrator either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or that he exceeded his powers. There is, therefore, no reason for this Court to interfere with the arbitrator's award.

[21] With regard to costs, taking into account the requirements of law and equity, I believe that this is a matter in which there should be no order as to costs.

[22] In the circumstances, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

LABOUR COURT

D Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Mr T. Modisane of Finger Attorneys

LABOUR COURT