



IN THE LABOUR COURT of South Africa, JOHANNESBURG

Not Reportable

Case no: JR 414/14

In the matter between:

**GENERAL INDUSTRIES WORKERS UNION
OF SOUTH AFRICA
93 EMPLOYEES**

**First Applicant
Second Applicants**

and

**THE NATIONAL BARGAINING COUNCIL
FOR THE FURNITURE INDUSTRY
FJ STASSEN N.O
JACK MASEROW FURNITURE MANUFACTURER CC**

**First Respondent
Second Respondent
Third Respondent**

Heard: 30 November 2017

Delivered: 08 November 2018

JUDGMENT

MAHOSI.J

- [1] This is an application in terms of section 158(1)(g) of the Labour Relations Act¹ (LRA) in which the applicants seek an order to review and set aside the jurisdictional ruling issued by the second respondent (arbitrator) under the auspices of the first respondent (Bargaining Council), under case number FAJA 4710-11/12 dated 21 December 2013. In his ruling, the arbitrator found that the bargaining council lacks jurisdiction to adjudicate the matter.

Material background facts

- [2] On 27 September 2012, the third respondent dismissed all of its employees after they took part in an unprotected strike action that commenced on 19 September 2012. Following their dismissal, the third respondent placed notices outside of its premises on 28 September 2012 and 1 October 2012 in terms of which it offered all the dismissed employees an opportunity to re-apply for employment at the same rate of pay, with the same benefits and without any loss of their long service benefits. The offer for re-employment was to expire on 2 October 2012 at 16:30. None of the employees had taken up the third respondent's offer and/or invitation of 28 upon expiry thereof.
- [3] It is not in dispute that on 4, 5 and 6 October 2012, the third respondent posted adverts in the Daily Sun and Sowetan Newspapers inviting suitable members of the general public to apply for the vacant posts. On 10 October 2012, there was a long queue outside of the third respondent's factory made up of prospective job applicants as well as previously dismissed employees of the third respondent. The queue was serviced on a first come first serve basis and on the same day there were in excess of 60 of the first applicant's members standing outside watching the queuing job applicants. The owner of the third respondent approached the first applicant's members with the view of inviting them to join the queue and to apply for employment. Some of the members joined the queue to apply for employment. On 12 October 2012, all the advertised positions were

¹ Act 66 of 1995 as amended.

filled and of the total number of applicants appointed 68 of them were members of GIWUSA at the time.

- [4] The first applicant referred a selective re-employment dispute to the bargaining council. After being unsuccessfully conciliated, the matter was referred to arbitration. During arbitration, the third respondent raised two points *in limine*. Firstly, that the bargaining council has no jurisdiction to arbitrate the dispute because the applicants raised allegations of discrimination. Secondly, that the applicants' case did not sustain a cause of action on the basis of selective re-employment. The arbitrator issued an award in terms of which he found that the bargaining council lacked jurisdiction to arbitrate the matter. It is this ruling that is the subject matter of this application.
- [5] In its answering affidavit, the third respondent raised two points *in limine*. The first being that the first applicant failed to annex a list of employees it claims to represent. This issue was initially raised by the third respondent at the arbitration hearing on the basis that some of the employees listed were not recognised as having ever been employees of the third respondent. The second point was that the applicant failed to file a transcribed record within the prescribed period. For the reasons that become apparent below, I do not deal with these points.

Grounds of review

- [6] The applicant's grounds for review are as follows:

- '15.1 The commissioner committed gross irregularities in the conduct of his duties in that he misconstrued evidence before him and thus reached a conclusion which is not justifiable with regard to the evidence which was before him.
- 15.2 The commissioner failed to apply his mind to the relevant evidence properly placed before him in that he failed to look beyond the mere allegation of the third respondent in establishing the nature of the dispute when he was obliged to examine all the facts in order to ascertain the real dispute between the parties.

- 15.3 The commissioner misconceived the nature of his discretion in that he failed to apply the correct principles governing the rules of evidence and failed to apply the proper test to interpret relevant statutory and case law.
- 15.4 The Commissioner exceeded his powers by committing a material error in law when he attached undue weight to the fact that the conciliating commissioner has certified that the dispute *in casu* was justiciable in the Labour Court and the applicant ignored that route and then awarded costs against the First Applicant.²

Applicable law and analysis

- [7] The test for review applications based on jurisdictional error is well established and has been stated in numerous cases of this Court and the Labour Appeal Court as the correctness test. In *SA Rugby Players' Association v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*,³ the Labour Appeal Court (LAC) held as follows:

‘...The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.’

- [8] The applicant has to establish that the arbitrator's decision was objectively wrong. In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others*,⁴ the court held as follows:

‘In my view where the power to be exercised is statutory, the answer to the question of what the jurisdictional fact(s) is (are) which must exist before such power can be exercised lies within the four corners of the statute providing for such power. Accordingly the provisions of such statute require to be considered carefully to determine what the necessary jurisdictional fact(s) is (are). In the light of this I consider it necessary to have regard to the provisions of the Act to determine what the necessary jurisdictional fact(s) is (are) which must exist in a

² Page 13 of the Index to Pleadings.

³ [2008] 9 BLLR 845 (LAC) at para 41.

⁴ [2000] 12 BLLR 1389 (LAC) at para 7.

case such as this one before it can be arbitrated or adjudicated in terms of the Act.’

- [9] The arbitrator’s finding that the bargaining council had no jurisdiction to hear the dispute was premised on two issues. The first one was that the applicant’s case was based on the fact that the employees were not re-employed because of their union affiliation. The second one was that the factual basis of the dispute did not constitute a cause of action based on selective re-employment as envisaged in section 186(1)(d) of the LRA. The applicant submitted that the arbitrator misquoted the part of the pre-arbitration minute that he relied on to reach his finding when he stated that: *“it is abundantly clear that the applicant in essence relies on unfair discrimination as foundation for its dispute”*. The relevant part of the pre-arbitration minute stated as follows:

‘4.7 The applicants further allege that some of the individual applicants were not appointed by the respondent because of the union affiliation and membership and further that this constitutes an alleged unfair dismissal based on the selective non re-employment by the respondent.’

- [10] In his award, the arbitrator recorded that:

‘The respondent’s argument is that the applicant’s case is based on the fact that the employees concerned were not appointed because of the union affiliation to the applicant union.’

- [11] In this regard, the applicant submitted that while other employees were discriminated against, it could not have referred a discrimination dispute as it would prejudice most of the employees for whom the reason for non re-employment was not discrimination. It was on this basis that the applicant argued that the arbitrator failed to look beyond the mere allegation in establishing the real dispute between the parties. The respondent submitted that clarity in relation to this was sought during arbitration which resulted in the applicant’s confirmation that the reason for non re-employment was a combination of arbitrary reasons and union membership. Nothing turns on this ground given the arbitrator’s finding on the second pre-liminary point below.

[12] On the arbitrator's finding that the dismissal on selective re-employment cannot succeed, the applicant submitted that the arbitrator lost sight of the realities and the agreed facts between the parties. The relevant part of the award states as follows:

'4.7 It was common cause that an offer was initially made to all dismissed employed. The affected employees in this dispute did not accept the offer. Therefore, if the applicant wanted to succeed, on the basis of the newspaper advertisement, it would have to show that it constituted an "offer". In this regard, the respondent submitted that the dictum in a 105 year old decision, namely *Crawley v Rex* 1900 TS 1105, clearly cripples a reliance based on an "offer". In this decision it was held that the fact that a tender advertises aprios for a commodity does not per se constitute a binding contract at that price. The court also went on to state that it would lead to most extraordinary results if advertisements in that fashion were to be held to constitute binding agreement if accepted by those who acted upon it.

4.8 The applicants' response to the second point *in limine* was, in my opinion couched in an academic treatise of some principles of the law of contract. Most of the submissions are obviously correct if considered in isolation. However, it appears to me, with respect, that the author of the document, in his or her search for a sound argument against that of the respondent lost sight of the realities and the agreed facts in this case. The basic facts are that the offer of re-employment was made to the relevant employees on the same terms that existed prior to their dismissal. They did not accept the offer before the expiry thereof. The subsequent advertisement did not constitute an offer as envisaged in the LRA. Even if the employees had applied for positions on the strength of the advertisement (then obviously with less favourable terms and conditions than those that existed prior to their dismissal), the respondent was under no legal obligation to appoint any or all of them. It was the employer's right to select any of the applicants from the newspaper advertisements, whether they were ex-employees or "first timers" whom it considered to be suitable

for the respective positions. The employees had an opportunity to return to the workplace. They rejected it. They cannot now demand positions they have rejected when it was offered to them without sacrificing any previous benefit. I am therefore of the view the second point *in limine* should also succeed.'

- [13] The reading of the record and the award clearly indicate that the parties signed and presented the arbitrator with a pre-arbitration minute that determined how the matter was to run and what issues the arbitrator had to consider. The arbitrator assessed the evidence presented before him and determined whether the facts which would give the bargaining council jurisdiction to entertain the dispute existed and concluded that such facts were absent. The employees were dismissed which dismissal they did not challenge. The third respondent offered to re-employ them but they failed to take up the offer. Two choices were left for the third respondent that is to close the business or to open up the recruitment process to the general public. The applicants failed to show to the arbitrator that the advertisement for employment to the general public amounted to an offer to re-employ them. For those reasons, the arbitrator found that the factual basis of the dispute did not constitute a cause of action based on selective re-employment as envisaged in section 186(1)(d) of the LRA. As such, the applicants failed to establish that the arbitrator lost sight of the realities and the agreed facts between the parties.
- [14] On the issue of costs, the applicant submitted that the arbitrator misdirected himself and committed a gross irregularity in that he overlooked the fact that he was not bound by the determination of the conciliating commissioner. In his award, the arbitrator ordered the applicant to pay the third respondent's costs on the basis that the applicant ignored the certificate of outcome which directed it to refer its dispute to the Labour Court and instead referred its dispute for arbitration.
- [15] The arbitrator's discretion to award a costs order in arbitration proceedings is regulated by section 138(10) of the LRA, which requires the commissioner to

make an order for the payment of costs according to the requirements of law and fairness, in accordance with CCMA rules. In ordering the costs, the commissioner should, in terms of Rule 39(1) of the Rules of the CCMA have regard to the following factors:

- '(a) The measure of success that the parties achieved;
- (b) Considerations of fairness that weigh in favour of or against granting a costs order;
- (c) any prejudice offers that were made with a view to settling the dispute;
- (d) Whether a party or the person who represented that party in the arbitration proceedings acted in a frivolous and vexatious manner by proceeding with or defending the dispute in the arbitration proceedings, or in its conduct during the arbitration proceedings;
- (e) The effect that a costs order may have on a continued employment relationship;
- (f) Any agreement concluded between the parties to the arbitration concerning the basis on which costs should be awarded;
- (g) The importance of the issues raised during the arbitration to the parties as well as to the labour community at large;
- (h) Any other relevant factor.'

[16] The costs order where parties are represented in the arbitration by a person contemplated by Rule 25(1)(a), that is persons other than a legal representative, is regulated by Rule 39(2). These persons may be awarded reasonable disbursements actually incurred in the conduct of its case. A commissioner who makes an award in terms of this provision is required to specify clearly the items and amounts in respect of which costs are ordered. A commissioner may, in terms of Rule 39(3), make an award of costs in respect of the legal fees of a party that is represented in arbitration by a legal practitioner, only if the other

parties to the arbitration were represented by a legal practitioner. An award for costs in terms of sub-rule (3) is limited to an amount of R6 000.00 in respect of the first day of an arbitration (including any arbitration concluded in a single hearing) and R4 000.00 in respect of each additional day of arbitration. These amounts are inclusive of VAT.

[17] In this case, there is no indication that the arbitrator had regard to the provisions of Rule 39(2) which requires him to make an award of costs in respect of the legal fees of a party that is represented in arbitration by a legal practitioner only if the other parties to the arbitration were represented by a legal practitioner. As such, it cannot be said that the arbitrator applied the requirement of law and fairness in arriving at a finding that the applicant must pay the costs of the arbitration.

[18] The arbitrator's ruling in relation to the two preliminary points raised is correct. There is, therefore, no reason for this Court to interfere with it. With regard to costs of this application, 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.

[19] In the circumstances, I make the following order

Order

1. The review application on the arbitrator's ruling that the bargaining council lacks jurisdiction to adjudicate the matter is dismissed;
2. The costs order granted by the bargaining council is set aside;
3. No order as to costs is made in relation to the proceedings in this Court.

D Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant

Mr M. Bayi of Bayi Attorneys

For the third respondent

Mr Preston of Cliffe Dekker Hofmeyer Attorneys

LABOUR
COURT