



THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not Reportable

Case no: JR 1012/18

In the matter between:

DEPARTMENT OF EDUCATION: LIMPOPO PROVINCE

Applicant

and

L MOLEPO AND 83 OTHERS

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

T PHAHLANE N. O

Third Respondents

Heard: 29 November 2018

Delivered: 29 November 2018

Summary: An opposed review application – where evidence was not led to show the alleged unfair conduct on the part of an employer, it is not possible to determine the question of fairness. In the absence of oral evidence, there must be a stated case absence of which, there is no arbitration. An award issued without hearing evidence is a nullity and it is susceptible to review. Held (1): The award issued by the third respondent is hereby reviewed and set aside. Held (2): The dispute is remitted to the

second respondent to be determined by another arbitrator other than the third respondent. Held (3) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an opposed review application. The applicant attacks the award on the grounds that it is not one a reasonable arbitrator may arrive at. The third respondent found that by failing to pay the applicants (first respondents) the incentive amounts to an unfair labour practice. He ordered the applicant to pay the incentives from the day of implementation.

Background facts

- [2] On or about 15 December 2007, the then Minister of Education Honourable Naledi Pandor acting in terms of section 4 of the Employment of Educators Act, 1998 (EEA) published a notice in the Government Notice 30678 certain conditions of service for educators. Measures introduced were to provide for payment of incentives to academically qualified educators, if they meet certain prescribed criteria. Certain posts at a school would be identified to be eligible for the incentives in accordance with the set criteria.
- [3] On or about 12 February 2016, the Minister of Basic Education Honourable Angie Motshekga, acting in terms of section 4 of the EEA, published a notice in the Government Notice 39684, seeking to consolidate the terms and conditions of employment of educators. The notice was dubbed Personnel Administrative Measures (PAM). PAM sought to expand on the measures published earlier.

- [4] On 13 April 2017, the applicant through its head of the department, Mr. Mutheiwana issued a departmental circular¹. In terms of the circular, a determination was made that the posts will be Quintile 1 Schools and the weighted distance will be 140 kilometers and more. The first respondents contended that the determination excludes them from the incentive scheme. Resultantly, on 7 June 2017, they collectively referred a dispute of alleged unfair labour practice in relation to the provision of benefits. On 14 June 2017, conciliation was attempted, but the dispute remained unresolved.
- [5] The dispute was then referred to arbitration. On 10 July 2017, parties held a pre-arbitration meeting. The minutes produced recorded that the issue in dispute was whether the first respondents were entitled to a rural allowance in terms of the first published notice; whether the schools are quintile 1, and fall within the weighting distance as per the published notice and whether all the first respondents are on REQV13 and above. Further the parties recorded that the first respondents had the duty to begin and the parties shall call seven witnesses, five to be called by the first respondents and two to be called by the applicant.
- [6] At arbitration, the parties and the third respondent agreed that after orally stating their respective cases, they shall submit written argument whereafter the third respondent would issue an award. On 7 May 2018, the third respondent published his award. The applicant was aggrieved thereby and launched the present application.

Grounds of Review

- [7] The applicant raised a number of review grounds, which given the view I take at the end might not be necessary to tabulate in this judgment.

¹ Circular No. 71 of 2017.

Evaluation

[8] At the commencement of argument, I enquired from both counsel as to whether a proper arbitration was conducted. To my mind, this award was issued without a proper arbitration process and as such a nullity. In *SASSA v Nehawu and others*², the Labour Court had the following to say:

[5] I fail to comprehend how a dispute which hinges on the fairness of the conduct of an employer can be decided (in the absence of a stated case) without parties giving oral evidence. A decision made in such a way means that the Labour Court must answer all the following questions in the negative...

[6] The process used in the arbitration proceedings simply does not allow for a due and proper arbitration of the dispute. The Commissioner based her findings on the written submissions of the parties...

[8] In the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Commissioners and arbitrators should not condone an agreement between the parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions...

[9] I fully agree with the above sentiments. In *casu*, the third respondent condoned an agreement not to lead evidence. This may have been a convenient solution to the difficulty apparently faced by the respondents as some of them were absent, but such an approach renders the award issued susceptible to review which ultimately sacrifices the principle of speedy resolution of disputes.³ In support of this view, the LAC in *Arends and others v SALGBC and others*⁴ said the following:

[11] The decision of the representatives of the parties to limit themselves to providing the arbitrator with a verbal account of the

² Case number C233/14 delivered on 30 April 2015 per Rabkin- Naicker J

³ See also MEC: Public Works and infrastructure Free State v GPSSBC and others Case number JR 857/2017 delivered on 8 May 2018.

⁴ [2015] 1 BLLR 23 (LAC)

background relevant to the conclusion of the collective agreement, as the basis for the parties arguing the matter without leading oral testimony, was ill-advised...

[15] The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him...The stated case must set out agreed facts, not assumptions...

[10] The transcript in this matter reveals the following:

ARBITRATOR: ...Towards reaching that goal the parties have then agreed that they will submit what we call written argument...The applicant, through your representative will then present a state case and then the respondent will do the same. We call that opening and thereafter we will agree...written submissions...I will then have fourteen days to issue the outcome, okay.⁵ days

[11] The approach above is neither prudent nor correct. The LAC in *Arends supra* advised thus:

[16] ...Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties, their contentions thereon and shall be divided into consecutively numbered paragraphs. The parties must annex to the statement copies of documents necessary to enable the Court to decide upon such questions.

[17] Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case.

[12] Therefore, the third respondent failed to arbitrate the dispute. In terms of section 186 (2) an unfair labour practice means any unfair act or

⁵ Page 15 paginated Arbitration record.

omission that arises between an employer and an employee involving unfair conduct by the employer relating to the provisions of benefits to an employee. In order to answer this legal question an arbitrator must receive evidence and or be furnished with a stated case.⁶

[13] For all the above reasons, I come to the conclusion that the award is a nullity and ought to be reviewed.

[14] In the results I make the following order:

Order

1. The award issued by the third respondent on 7 May 2018 under case number PSES 188-17/18 LP is hereby reviewed and set aside.
2. The dispute is remitted to the second respondent to be determined by another panelist other than the third respondent.
3. No order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa.

⁶ See also NUM & Others v Hartebeestfontein Gold Mining Co Ltd 1986 (3) SA 53 (A) as to the meaning of a stated case.

Appearances:

For the Applicant: Adv T T Tshabalala.

Instructed by: State Attorney, Johannesburg.

For the 1st Respondents: Adv L G P Ledwaba.

Instructed by: Hlahla Attorneys, Pretoria.

LABOUR COURT