



THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not Reportable

Case no: JR 625/17

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES

Applicant

and

THE GPSSBC

First Respondent

MASHOODA PATEL N. O

Second Respondent

POPCRU obo DLAMINI

Third Respondent

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 second 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 Dlamini pay progression for the period 2015 amounts to an unfair labour practice. He ordered the applicant to pay Dlamini 3% of his salary dated from 2015.

Background facts

- [2] Mr Dlamini (Dlamini) is in the employ of the applicant and holds a position of Correctional Services Security Officer Grade 1. He is on salary level 7. The performance of Dlamini was assessed and he was rated as having achieved the average performance rating, which qualified him for a notch increment. The applicant could not give effect to the results of the performance appraisal as he was already on the last notch of his salary scale.
- [3] Aggrieved thereby, Dlamini referred a dispute alleging unfair labour practice. The second respondent arbitrated the dispute and ruled in Dlamini's favour. The applicant was aggrieved thereby. Owing to the fact that the review application was three weeks out of the prescribed time, the applicant launched the present application with a prayer seeking condonation for the late filing of the application. The application is opposed by the third respondent.

Grounds of Review

- [4] 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.

Evaluation

[5] 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*¹, 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...

[6] I fully agree with the above sentiments. In *casu*, the third respondent condoned an agreement not to lead evidence. The arbitration award records that "it was agreed between the parties that this matter will be disposed of by way of written submissions." This may have been a convenient manner to deal with the matter, but such an approach renders the award issued susceptible to review which ultimately sacrifices the principle of speedy resolution of disputes.² In support of

¹ Case number C233/14 delivered on 30 April 2015 per Rabkin- Naicker J

² See also MEC: Public Works and infrastructure Free State v GPSSBC and others Case number JR 857/2017 delivered on 8 May 2018.

this view, the LAC in *Arends and others v SALGBC and others*³ 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 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...

[7] The award records that as agreed between the parties the dispute was to be dealt with by way of written submissions.

[8] 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.

[9] Therefore, the third respondent failed to arbitrate the dispute. In terms of section 186 (2) an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving

³ [2015] 1 BLLR 23 (LAC)

unfair conduct by the employer relating to promotion. In order to answer this legal question an arbitrator must receive evidence and or be furnished with a stated case.⁴

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

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

Order

1. The award issued by the second respondent on 4 January 2017 under case number GPBC 1258/2016 is hereby reviewed and set aside.
2. The dispute is remitted to the first respondent to be determined by another panelist other than the second respondent.
3. No order as to costs.

GN Moshoana

Judge of the Labour Court of South Africa.

⁴ 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: Attorney Tlou Makgamatha of M M Mitti Inc,
Edenvale

LABOUR COURT