



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PR215/17

In the matter between:

MINISTER OF THE DEPARTMENT OF

CORRECTIONAL SERVICES

Applicant

and

ARBITRATOR SOLOMZI MPIKO NO

First Respondent

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Second Respondent

HENDRIK LOURENS VOS

Third Respondent

Heard: 19 April 2018

Delivered: 24 April 2018

JUDGMENT

MAHOSI. JIntroduction

- [1] This is an application brought by the applicant (the Department) in terms of section 145 of the Labour Relations Act¹ (LRA) for an order to review and set aside a ruling (the ruling) issued by the first respondent (the arbitrator) under the auspices of the second respondent (the bargaining council) dated 10 July 2017, under case number GPBC1981-2013 in terms of which the arbitrator dismissed the Department's point *in limine*.
- [2] The issue is whether it is just and equitable for this Court to review the decision or ruling made by the arbitrator during the arbitration proceedings before the issue in dispute has been finally determined.

Background

- [3] This matter concerns an unfair dismissal dispute as referred to the bargaining council by the third respondent (Mr Vos), who was dismissed by the Department on 6 August 2013 for incapacity.
- [4] The matter has a long and convoluted history in that two arbitration awards have already been issued in respect of Mr Vos' unfair dismissal claim, both of which have been set aside by this Court. The first award dated 17 March 2014 was set aside by an order dated 3 June 2015 issued by Van Niekerk J.² The second award dated 19 August 2015 was set aside by Golden AJ in her judgment dated 8 December 2016 in terms of which the following was ordered:
- (a) The arbitration award under case number GPBC 1981/2013 is hereby reviewed and set aside
 - (b) The matter is remitted to the second respondent for a hearing *de novo*.

¹ Act 66 of 1995 as amended.

² Index to pleadings, page 63

(c) There is no order as to costs.¹³

- [5] Subsequently, the matter was remitted to the bargaining council for arbitration *de novo* as per Golden AJ's judgment and the arbitration was held on 1 June 2017. Preceding the arbitration proceedings, the parties participated in a pre-arbitration process in term of which the Department delivered a pre-arbitration notice on 17 May 2017 and Mr Vos replied to it on 17 May 2017. In his pre-arbitration notice, Mr Vos claimed reinstatement.
- [6] At the arbitration proceedings conducted on 1 June 2017, the Department raised a preliminary objection in terms of which it contended that this Court had already determined and disposed of the issue of Mr Vos' reinstatement. The Department accordingly contended that Mr Vos was barred from re-opening this issue as it has been pronounced upon by this Court.
- [7] After the Department's legal representative had addressed the arbitrator orally by way of background regarding the preliminary objection, it was agreed that the preliminary point would be decided pursuant to the filing of written submissions by the respective parties which was duly done. The arbitrator subsequently issued his ruling in terms of which he dismissed the Department's point in *limine*.

The ruling

- [8] In his ruling, the arbitrator recorded that the issue before him was whether the bargaining council had jurisdiction to entertain the merits of Mr. Vos' unfair dismissal claim.
- [9] The preliminary point raised by the Department was that two issues which Mr Vos sought to place before the arbitrator to determine had already been a subject of a judicial decision by the Labour Court in a judgment delivered by Golden AJ on 8 December 2016 and are accordingly correctly to be regarded in law as being *res judicata*. The two issues were whether Mr Vos was entitled to claim reinstatement where the sole reason was to place him in a position to

³ Index to pleadings, page 63 Index to pleadings, page 91

apply for retirement based on ill-health and whether he was entitled to claim back-pay.

[10] Mr. Vos opposed the Department's preliminary point and made the following submissions:

'(4) Unfair dismissal disputes lie exclusively within the jurisdiction of either the CCMA or Bargaining Councils (as the case may be). The Labour court has no power to adjudicate disputes alleging unfair dismissal. The Labour Court can no more entertain an unfair dismissal dispute referred to it, than it can indirectly adjudicate on an unfair dismissal dispute in the manner contended for by the Respondent. In effect the Respondent seeks to confer upon the Labour Court a power and jurisdiction which it does not have. To contend that the Labour Court has disposed of the Applicant's unfair dismissal dispute simply because it overturned an Arbitration Award on review (a power which the Labour Court does have) does not mean that the Labour Court could supplant the jurisdiction of an accredited Council. This is an extrapolation which cannot prevail and should certainly not be allowed to prevail.

(5) In reviewing the Arbitrator's award, all the Labour Court did was to set aside the award. To the extent that the respondent seeks to rely on observations made by the presiding judge as to the value or merit of the applicant's unfair dismissal dispute, such observations must, it is respectfully submitted, be regarded as having been made *obiter*. This is because the Labour Court would not have the power to determine the fairness or otherwise of applicant's dismissal, this being a prerogative vesting in an arbitrator. For this reason, the Court's reasoning set out in paragraph 40 to 42 of the judgment, must be regarded as *obiter*.'

[11] In his analysis the arbitrator stated as follows:

'15. Both parties made written submissions which I have considered in my ruling. I will not read (*sic*) what the parties placed before me. As much as this matter has dragged I would not agree that it should then be decided anyhow as a matter of complying with the LRA's "ethos".

16. Whether or not the LC already made findings and whether or not such findings were to be regarded as *obiter*, is not for me as the Arbitrator, to decide but, the Labour Appeal Court (“the LAC”). The Applicant submitted that the matter was *res judicata* and explained that to mean that the LC already made a judgment in the same matter between the same parties. I find no reason why the LC could be interpreted as having contradicted itself by making a determination on the dispute referred, and yet ordered the matter to be heard by the GPSSBC however, if there is such contradiction it is not for me but the LAC to so decide.
17. I am satisfied that the LC gave a clear direction as to what should happen with the dispute, which is to refer it to the GPSSBC for determination by an Arbitrator.
18. In the light of the parties’ submissions and arguments presented to me I cannot conclude that the GPSSBC does not have jurisdiction to hear the dispute in question.”

[12] It was on the basis of the above reasons that the arbitrator dismissed the Department’s point *in limine*. Dissatisfied with the arbitrator’s ruling, the Department brought this application.

Grounds of Review

[13] The Department is challenging the arbitrator’s ruling on the basis of the following three grounds.

- 13.1 The arbitrator misconstrued the nature of the enquiry which he was required to conduct in that he laboured under the wrong impression that the enquiry was whether he had jurisdiction to entertain the merits of Mr Vos’ unfair labour dismissal dispute.
- 13.2 The arbitrator erroneously found that it is only the Labour Appeal Court (LAC) which was empowered to decide whether the issues raised in the preliminary point were *res judicata*, and

13.3 The arbitrator failed to appreciate and understand that the issues as identified in the preliminary objections were correctly regarded in law as *res judicata* given the content of a judgment handed down by this Honourable Court.

[14] Mr Vos opposed this application on the basis that the Department has not made out a case that it is just and equitable for this Court to review the decision or ruling made by the arbitrator relating to the jurisdiction of the bargaining council. Mr Vos relied on section 158(1B) of the LRA and Clause 11.2.5 of the Labour Court Practice Manual in further submitting that there would be no basis for the ruling to be reviewed before the issue in dispute has been finalised.

[15] Therefore, the issue is whether it is just and equitable for this Court to review the decision or ruling made by the arbitrator during the arbitration proceedings before the issue in dispute has been finally determined.

Applicable law and evaluation

[16] Section 158(1B) of the LRA prohibits the Labour Court from reviewing any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the commission or any bargaining council before the issue in dispute has been finally determined by the commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to do so.

[17] In the hearing before me, Advocate Kroon SC acting on behalf of the Department, submitted that the arbitration was set down for hearing on 6 April 2018 on which date it was postponed *sine die* pending the outcome of this application. Advocate Grobler acting on behalf of Mr Vos, did not contest that the arbitrator misconstrued the nature of the enquiry which he was required to conduct and further conceded that there was a lot of logic to the Department's point *in limine* relating to *res judicata*. His argument was whether there was a need for this Court to intervene at this time or to wait for the finalisation of the

arbitration proceedings and whether the findings of Golden AJ bound the arbitrator.

- [18] While the Department readily accepted that it is not the norm to bring a review application on a piecemeal basis, it submitted that it was in the interest of justice and the provisions of the LRA to do so for three reasons. The first reason was that the ruling which impugned and which was patently incorrect would result in a substantial waste of time and costs because the arbitration, which may potentially be lengthy, would concern the very cardinal issue which this Honourable Court has already decided. Accordingly, it was the Department's submission that this issue should be clarified at the earliest opportunity.
- [19] In this regard, the Department relied on the judgment of *Clencor (Pty) Ltd v Mngezana N.O. and Others*,⁴ in which the LAC dealt with a situation, although not on all fours had analogous aspects to it. In that matter, Clencor (Pty) Ltd brought an appeal against certain findings of the Labour Court which brought uncertainty as to what issues were live issues at the Commission for Conciliation Mediation and Arbitration (CCMA) and whether these findings were binding on the arbitrator. In that judgment, the LAC held that:
- ‘It is in the interest of justice that the factual findings of the LC should be set aside, lest they cause confusion and protracted arguments and litigation.’
- [20] In a case where there is uncertainty or confusion as to what are live issues before the arbitrator, it must be clarified before the arbitration commences. In this case, although the review application concerns a ruling made during the arbitration, it is apparent from its reading that there is uncertainty as to precisely what issues are live before the arbitrator and whether the findings of the Labour Court on the issue of Mr Vos' reinstatement are binding on the arbitrator. Given the protracted nature of this dispute, it is clearly in the interests of justice to avoid confusion and protracted argument by determining whether the ruling should be set aside or not

⁴ [2018] 4 BLLR 332 (LAC).

[21] By recording that the issue before him was whether the bargaining council had jurisdiction to entertain the merits of Mr. Vos' unfair dismissal, the arbitrator clearly misconstrued the nature of the enquiry that he was required to determine. The preliminary point had nothing to do with jurisdiction. Instead, the Department's point *in limine* before the arbitrator was whether Golden AJ had already determined and disposed of the issue of Mr Vos' reinstatement. It is trite that the requirements for the granting of a plea of *lis pendens* are pending litigation between the same parties or their privies based on the same course of action and in respect of the same subject matter. In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*,⁵ the court appropriately summarised the principles relating to a plea of *lis pendens* as follows:

[2] As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.

[3] The plea bears an affinity to the plea of *res judicata*, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:

'Exception of *lis pendens* also requires same persons, thing and cause. The exception that a suit is already pending is quite akin to the exception of *res judicata*, in as much as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same

⁵ 2013 (6) SA 499 (SCA).

matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.' [Footnotes omitted]

- [22] In *Nehawu obo Kgekwane v Department of Development Planning and Local Government*,⁶ the LAC stated the following:

'...Allied to the rule against collateral challenges is the *exceptio res judicata*, which is available where another court (or tribunal) of competent jurisdiction has already pronounced finally on the same issue between the same parties. The previous judgment must have been given by a competent court, the matter must have involved the same parties (or their successors-in-title) and must have been based on the same cause of action with respect to the same subject matter or thing. These elements were all present in the dispute before the Commissioner in this matter. Importantly, in this regard, the *exceptio res judicata* is applicable also to arbitration awards whether obtained in private arbitration proceedings or in proceedings under the LRA'⁷ (Footnotes omitted)

- [23] In *casu*, it is common cause that one of the grounds of review before Golden AJ was whether the arbitrator acted both irregularly and grossly unreasonable in disregarding the common cause fact ground that Mr Vos was incapacitated and could not return to perform his job. In the review application, both Mr Vos and the Department were legally represented by both attorneys and counsels and the issue relating to the appropriateness of Mr Vos' reinstatement was thoroughly dealt with. In this regard, Golden AJ made the following findings:

'[40] The fact that the arbitrator not only went beyond the parameters of the stated case, but that he also disregarded an important fact in his determination as to whether Vos ought to have been reinstated is demonstrably a further reviewable irregularity that the arbitrator had failed to apply his mind. Vos had not worked for 10 years and could not return to work to perform his job. Reinstatement was clearly not the appropriate sanction, even if it could be argued that his dismissal was substantively unfair. The

⁶ [2015] 6 BLLR 575 (LAC).

⁷ (2015) 36 ILJ 1247 (LAC) at para 26.

order of back pay is a further irregularity, given that Vos had not worked for 10 years.

[41] I do not accept Vos' contention that reinstatement was correct and appropriate in circumstances, so that he could apply for ill-health retirement, and that if he is not reinstated, he would not be able to apply for ill-health retirement benefits. This contention, with respect, is illogical.

[42] An order of reinstatement cannot be granted just to afford an employee an opportunity to apply for certain benefits, which would ultimately see him in any event exiting the workplace permanently. An order of reinstatement is remedy that may ordinarily be granted if the employee's dismissal was found to be substantively unfair. Reinstatement as a remedy will depend on the facts of each case. It also does seem logical, and appropriate reinstatement where the employee himself, as in Vos' case, cannot perform his job and no longer wants to work for the Department.

[43] The manner in which the arbitrator dealt with the issue of reinstatement reveals that the arbitrator not only exceeded his powers, but that he had misdirected himself which has resulted an unreasonable finding.'

[24] Golden AJ found that in reinstating Mr Vos, the arbitrator did not only exceed his powers but he misdirected himself, which misdirection resulted in an unreasonable finding. Of importance is that the Court found Mr Vos' reinstatement not to be an appropriate sanction, even if it could be argued that his dismissal was substantially unfair. This is dispositive of the issue of Mr Vos' reinstatement. What follows is that Mr Vos is precluded from opening the issue of reinstatement at the arbitration *de novo*. There is, therefore, merit in the Department's submission that the arbitrator's impression that if the matter was remitted to be heard *de novo* then neither party could raise the issue of *res judicata* with reference to findings made by the very Court which had remitted the matter is wrong. In *Turnbull-Jackson v Hibiscus Coast Municipality and Others*,⁸ the Constitutional Court held as follows:

⁸ 2014 (11) BCLR 1310 (CC).

[62] It happens fairly frequently that a court will give more than one basis for determining an issue, each of which bases is dispositive. Do the second and subsequent bases become *obiter* purely because the first – standing all by itself – is dispositive of the dispute; or vice versa? I think not. The answer must still lie in whether each of the many prongs of the court's reasoning is central to the resolution of the issue under consideration. If the additional bases are central to the reasoning, not subsidiary and not mere reasoning on the facts, they are as much part of the *ratio decidendi* as the first basis. Not surprisingly, this Court has held that "the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever reasoning they prefer to follow".

[63] Brand AJ added:

"It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are 'doing the right thing'. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say this should be done in a manner which shows courtesy and respect, not only because it relates to a higher court, but because collegiality and mutual respect is owed to all judicial officers, whatever their standing in the judicial hierarchy."

[25] The arbitrator failed to appreciate and understand that the issues as identified in the preliminary objections were correctly regarded in law as *res judicata* given the content of a judgment handed down by this Honourable Court. The Court's findings are binding on the arbitrator. There is, therefore, no legal basis for the arbitrator's finding that it is only the LAC which was empowered to decide whether the issues raised in the preliminary point were *res judicata*.

The arbitrator was not only entitled, but he was obliged to decide and determine the preliminary point.⁹

[26] The Department's submission was that by deciding the preliminary point in the manner which he did, the arbitrator has effectively decided whether Mr Vos is entitled to claim reinstatement and further that there is an element of contempt in both the conduct of the arbitrator as well as Mr Vos in openly purporting to conduct themselves in the manner which disregards the findings and indeed the directions of this Court. This is a fair proposition. If Mr Vos was unhappy with the findings in Golden AJ's judgment, he should have filed an application to appeal it. In the premise, Mr Vos is precluded from claiming reinstatement and back pay.

[27] As such, the arbitrator committed an error of law in finding that it is only the LAC that was empowered to decide whether the issues raised in the preliminary point were *res judicata* and in failing to appreciate and understand that the issues as identified in the preliminary objections were correctly regarded in law as *res judicata*. In so doing, he committed a gross irregularity. The question is whether the error is material to an extent of having an effect to render the outcome unreasonable. The arbitrator's finding that he could not "*conclude that the GPSSBC does not have jurisdiction to hear the dispute in question*" resulted from an error in his interpretation of Golden AJ's judgment and it is legally wrong. In addition, he misconstrued the true nature of the dispute before him.

Conclusion

[28] As a result, the outcome the arbitrator arrived at cannot be reasonable. His decision does not fall within the range of possible justifiable decisions that could be reached based on the facts before the decision-maker. Therefore, the arbitrator committed a reviewable irregularity, and his ruling stands to be set aside. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

⁹ CCMA-Guidelines on Misconduct Arbitration, at para 24.

[29] In the premise, I make the following order:

Order

1. The ruling issued by the first respondent (the arbitrator) dated 10 July 2017, under case number GPBC1981-2013 is reviewed, set aside and substituted with the following ruling:
 - a) The preliminary point raised by the applicant, and in particular, the plea of *res judicata*, is upheld.
 - b) It is not permissible for the third respondent to seek reinstatement and back pay in the proceedings currently serving before the second respondent under case number GPBC1981-2013.
2. The second respondent is directed to set down the unfair dismissal dispute referred by the third respondent for arbitration to be heard by a commissioner other than the first respondent to determine whether or not the dismissal of the employee was fair.
3. There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant : Advocate Kroon SC with Advocate M Thys,

Instructed by State Attorney

For the Respondent: Advocate Grobler

Instructed by Randel & Associates Attorneys