

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR1729/15 and J571/16

Case Number: JR1729/15

In the matter between:

LEKWA LOCAL MUNICIPALITY

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

L DLAMINI N.O

Second Respondent

TL MOFOKENG

Third Respondent

R JACKSON

Fourth Respondent

NJ KOCK

Fifth Respondent

Case Number: J571/16

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Applicant

and

LEKWA LOCAL MUNICIPALITY

Respondent

Heard: 07 February 2019

Delivered: 15 May 2019

Summary: Declaratory order – arbitration award enforceable – An order in terms of section 158(1)(c) of the LRA competent.

JUDGMENT

NKUTHA–NKONTWANA. J

Introduction

- [1] The two applications were consolidated for the hearing. For convenience sake, parties shall be referred to as cited in the first application.
- [2] In the first application under case number JR1729/15, the applicant, Lekwa Local Municipality (the Municipality), seeks an order declaring that the arbitration award issued by the second respondent under case number MPD031510 dated 11 August 2015 (the award) is not capable of practical implementation and should, accordingly, be set aside.
- [3] In the second application under case number J571/16, the applicant, the South African Municipal Workers Union (SAMWU), seeks an order making the award an order of Court in terms of section 158(1)(c) of the Labour Relations Act¹ (LRA).

Background facts

- [4] SAMWU referred an unfair labour practice dispute in terms of section 186(1)(a) of the LRA on behalf of its members, the third to the fifth respondents in the first application (respondent employees). The crux of its dispute was that the employees were treated unfairly in terms of placement. It was their assertion that all Divisional Managers were placed at level 2. Even though they were appointed at level 3, their roles were those of Divisional Managers and two of their colleagues with the same functions and responsibilities were placed at level 2 whilst they remained at level 3.

¹ Act 66 of 1995 as amended.

[5] The second respondent (the arbitrator) found that the Municipality acted unfairly when it failed to place the employees at level salary level 2 and accordingly issued the following award:

5.1. The first respondent [the Municipality] is ordered to place the applicants [respondent employees] with immediate effect;

5.2. The applicants' remuneration be adjusted to post level 2 with effect from the date in which the Divisional Managers for Environmental, Sport and Recreation and Environment Health salaries were adjusted.

[6] The Municipality did challenge the award by instituting review proceedings. In fact, it is adamant in these proceedings that it is not challenging the findings arrived at by the arbitrator but that, the award is unenforceable and should for this reason, be set aside. It was submitted on behalf of the Municipality that the award directs for the adjustment of the respondent employees' salaries with effect from the date that is prior to the date of their employment with the Municipality.

[7] On the other hand, SAMWU seeks to make the award an order of this Court. Although SAMWU is not cited as a party in the first application, it is acting on behalf of its members, the respondent employees, in terms of section 200 of the LRA.

The enforceability of the award

[8] The essence of the Municipality's case is that the award is not capable of practical implementation in that it requires it to adjust the salaries of the respondent employees with effect from the date on which they had not been in its employ. However, it does not give a specific date on which a decision to adjust salaries of the Divisional Managers for Environmental Sport and Recreation and Environment Health was taken. Mr J Mtsweni, the Municipality's Human Resources Manager, testified that the Municipal Council took a resolution in 2008 to adjust the salaries of the employees who had

been placed at salary level 2 but were still remunerated at salary level 3. Two of the respondent employees' colleagues benefited hence their claim.

- [9] Accordingly, it is easily discernible from the award that 2008 is the year in which a decision to adjust salaries of the Divisional Managers for Environmental Sport and Recreation and Environment Health from salary level 3 to salary level 2 was made. Since the Municipality does not challenge the enquiry undertaken by the arbitrator and the outcome he arrived at as unreasonable, it should not be difficult to ascertain the exact details of the 2008 Resolution from its records.
- [10] It is not correct that all the respondent employees were employed post 2008. Mr Jackson, the forth respondent, commenced his employment with the Municipality in March 2007. As such, there is no impediment to the adjustment of his salary as per the award. In the case of the third respondent, Mr Mofokeng, he commenced his employment with the Municipality in July 2012. His salary adjustment would accordingly be retrospective to that date. The same would apply to the fifth respondent, Mr Kock, who commenced his employment with the Municipality in 2010 and his salary adjustment would be retrospective to that date.
- [11] The Municipality's submission that the order that the respondent employees should be placed at salary level 2 with 'immediate effect' meant that the placement had no retrospective effect has no merit. Given the context of the award, the words 'immediate effect' could only mean instantly or without any delay. In any event, the Municipality contends in its answering affidavit in the second application that it has complied with the award as the respondent employees have since been placed at salary level 2 consequent to a job evaluation process.

- [12] To a large extent, the fate of the Municipality's case is hinged on the interpretation of the award. In *Eke v Parsons*,² referred to by the Municipality, the Constitutional Court said the following:

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

- [13] In *Department of Transport v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation*³ the Constitutional Court, referring with approval to *Firestone South Africa (Pty) Ltd v Genticuro AG*,⁴ said that:

'In *Firestone*, the Appellate Division (now known as the Supreme Court of Appeal) said that the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order. The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary or qualify, or supplement it.'⁵

- [14] As alluded to above, it is clear from the arbitrator's reasons that in 2008 the Municipality took a decision to adjust salaries of the respondent employees' colleagues who are Divisional Managers for Environmental Sport and Recreation and Environment Health and had been placed at salary level 2 but still remunerated at salary level 3. Given the fact that the respondent employees have since been placed at the salary level 2, the only issue

² 2016 (3) SA 37 at para 29.

³ [2018] ZACC 21 at paras 42 and 43.

⁴ 1977 (4) SA 298 (A) at para 13.

⁵ *Tasima* supra n 3 at para 43.

outstanding is the retrospective adjustment of their salaries in accordance with the award.

[15] Having perused the award and, particularly, the reasons provided by the arbitrator for his findings, I am of the view that the arbitrator could not have intended that Messrs Mofokeng and Kock be unduly enriched by having their salaries adjusted retrospective to a date prior to their employment with the Municipality. SAMWU and the respondent employees conceded that the salary adjustment in respect of Messrs Mofokeng and Kock would be retrospective to the respective dates that they commenced employment with the Municipality. That should not be difficult to quantify and enforce.

[16] It follows in my view, that the award is capable of enforcement and as such the application for a declaratory order must fail.

Alternative remedies

[17] I have also considered the fact that the Municipality has alternative remedies within the comprehensive machinery of the LRA as correctly submitted by SAMWU. The Municipality failed to approach the arbitrator for a variation order in terms section 144 of the LRA which provides that:

‘Any commissioner who has issued an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.’

[18] To the extent that the Municipality alleges that the award is ambiguous and therefore, unenforceable, it ought to have availed itself to the provisions of section 144(b) of the LRA. Alternatively, since the Municipality seeks an order not only declaring the award unenforceable but also an order setting it aside, it ought to have availed itself to the review procedure in terms of section 145 of the LRA.⁶

[19] In *Steenkamp and Others v Edcon Limited*,⁷ the Constitutional Court reinforced the principle that the LRA remedy must be pursued for the LRA breach and stated the following:

‘The principle is that, if a litigant’s cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.’

⁶ ‘145. **Review of arbitration awards**

- (1) 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-
 - (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
 - (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.
- (1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1)
- (2) A defect referred to in subsection (1), means-
 - (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained.’
 - (c)

⁷ (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) at para 137.

- [20] In this instance, stripped of all the verbiage, the essence of the Municipality's case is that the order is ambiguous and unenforceable. It is therefore, impermissible for the Municipality to resort to the common law remedy of a declaratory order when there is an adequate remedy provided for in terms of section 144 of the LRA.
- [21] Furthermore, despite the Municipality's disavowal that it is challenging the reasonableness of the award, it ultimately seeks an order setting the award aside. Section 145 provides for the mechanism for the review and setting aside of the award.
- [22] I am in agreement with SAMWU that, in bringing this application, the Municipality sought to circumvent the provisions of the LRA and this Court cannot countenance that. Accordingly, on this ground, too, the application stands to be dismissed.

Condonation

- [23] SAMWU raised several points *in limine* in its answering affidavit. However, it abandoned the rest and only pursued the issue of condonation. The impugned arbitration award was issued on 11 August 2015 and the Municipality launched this application on 11 April 2016, eight months later.
- [24] According to SAMWU, the Municipality ought to have applied for condonation as it had launched this application outside of a reasonable time, which could be more than six weeks or 180 days, so it was submitted. The Municipality rejected SAMWU's contention. It was adamant that the issue of condonation does not arise in the context of a declaratory order as it does not seek an order reviewing the arbitration award in terms of section 145.
- [25] In *Minister of Public Service and Administration and Others v Solidarity*⁸ and Others, the Labour Appeal Court (LAC) stated the following:

⁸ (2007) 28 ILJ 1747 (LAC) at para 19.

'A further factor which the court a quo ought to have considered was the time lapse between the adoption of Resolution 1 of 1998 and the launch of the present proceedings. That period was five (5) years. In *Naptosa and Others v Minister of Education, Western Cape*, and others 2001 (2) SA 112 (C) at 126 E to G Conradie J stated;-

"I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well established law that undue delay may be taken into account in exercising discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the Court, the order could serve as a review. A Court, in exercising its discretion whether to grant a declaratory order should, accordingly, in an appropriate case weigh the same consideration of "justice or convenience" as it might do in the case of an interdict or a review.' [Emphasis added]

- [26] The assessment of a challenge of undue delay entails '...examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.'⁹ In this instance, the Municipality failed to provide an explanation for the delay of about eight months. Therefore, in refusing to grant the declaratory order, I also considered the delay which is not inconsequential.

Conclusion

- [27] In all the circumstances, the application for a declaratory order stands to be dismissed. Having found that the award is capable of enforcement, there is no reason why it cannot be made an order of this Court in terms of section 158(1)(c).

⁹ *Gqwetha and Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at para 24.

Costs

[28] As a rule of practice, costs do not follow the result in this Court, particularly in case where parties have a persisting collective bargaining relationship typified in this matter.

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

Order

1. The application for a declaratory order is dismissed.
2. The arbitration award issued by the second respondent under case number MPD031510 dated 11 August 2015 is made the order of this Court.
3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate: K Tsatsawane

Instructed by:

Gildenhuiys Malatji Attorneys

For the first respondent:

Advocate: N.S. Mteto

Instructed by:

Maenetja Attorneys