**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 2007/17

In the matter between:

**DEPARTMENT OF AGRICULTURE &**

**RURAL DEVELOPMENT:**

**LIMPOPO PROVINCIAL GOVERNMENT** **Applicant**

and

**M.E. PHOOKO N. O** **First Respondent**

**GPSSBC** **Second Respondent**

**C.V NDLOZI** **Third Respondent**

**Heard**: **31 July 2019**

**Delivered**: **02 August 2019**

**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 first respondent is hereby reviewed and set aside. (2) The dispute is remitted to the second respondent to be determined by another arbitrator other than the first respondent. (3) No order as to costs.**

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**JUDGMENT**

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**MOSHOANA, J**

Introduction

[1] This is an opposed review application. The first respondent found that the applicant committed an unfair labour practice relating to the provision of benefits. He ordered the applicant to pay the third respondent a sum of money in respect of performance bonus within 30 days of the award being issued.

Background facts

[2] The third respondent, Mr Ndlozi, held a position at the level of Deputy Director, a level 12 position in 2008. During December 2008, in order to retain him in the department, he was offered salary at level 13. In September 2013, he was absorbed into a vacant post of a Senior Manager, which was at a Director level. During the 2013/2014 financial year, Ndlozi was performance assessed and received a rating of 4. Prior to the changes, the rating qualified him for a cash bonus. As a result, Ndlozi did not receive the bonus. Aggrieved thereby, he referred a dispute alleging an unfair labour practice. At arbitration parties agreed to dispose of the dispute by filing written submissions. Having considered the written submissions, the first respondent issued the impugned award.

Grounds of Review

[2] 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

[3] At the commencement of argument, counsel for the applicant brought to my attention a judgment of this court, which judgment, held that where evidence was not led the arbitration process is defective. 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…'

[4] I fully agree with the above sentiments. In *casu*, the first respondent condoned an agreement not to lead evidence. This may have been a convenient approach, 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 this view, the Labour Appeal Court (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…

[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.
[3] [2015] 1 BLLR 23 (LAC).

> [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…'

[5] The approach taken by the first respondent 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.'

[6] Therefore, the third respondent failed to arbitrate the dispute[4]. 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 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.[5]

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

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[4] Arbitrators are warned not to simply approve this approach. Soon the Labour Court shall be making costs orders against arbitrators who approve this kind of an approach.

[5] See also: *NUM and Others v Hartebeestfontein Gold Mining Co Ltd* 1986 (3) SA 53 (A) as to the meaning of a stated case.

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

Order

1. The undated award issued by the first respondent under case number GPBC1264/16 is hereby reviewed and set aside.

2. The dispute is remitted to the second respondent to be determined by another panelist other than the first respondent.

3. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S Tilly

Instructed by: State Attorney, Pretoria.

For the Third Respondent: In Person