IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1643/16

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY **Applicant**

and

TK POO AND 3 OTHERS **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL ("SALGBC") **Second Respondent**

COMMISSIONER MNS DAWSON *N.O* **Third Respondent**

Heard: **13 November 2019**

Delivered: **29 November 2019**

JUDGMENT

MAHOSI.J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award issued by the third respondent (the arbitrator) under the auspices of the second respondent, the South African Local Government Bargaining Council ("SALGBC"), dated 10 June 2016 under case number GPD101519.

[2] Coupled with this application is the condonation application for the late filing of the above-mentioned review application.

[3] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties as summarised in the pleadings.

Material background facts

[4] The first respondents, Mr Tebogo Poo, Ms Jabulile Mthembu, Ms Dikeledi Blaai and Ms Thulisile Skosana (employees), were interns funded by the National Youth Services (NYS) and hosted by the applicant. The funding and internship program with NYS came to an end after which the employees accepted an internship program directly with the applicant.

[5] The fixed-term contracts of internship of Mr Poo commenced with effect from the 1 December 2013 for 2 or 3 months' periods, and renewed upon every expiry. The longest internship fixed term contract entered into between Mr Poo and the applicant was for the duration of one year, from 1 September 2015 to 31 August 2016. The contracts between the parties were reduced to writing recording the terms of their relationship as follows:

> "Fixed Term Agreement of Internship (Heading)"
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> "Parties – Mr T.K Poo herein referred to as the student"
>
> "Remuneration – The Municipality will pay the student a gross monthly remuneration of R3 500.00 which will be payable by no later than the last day of the month" No any other remuneration my emphasis
>
> "General Clause- This document contains the entire agreement between the parties. No party shall have any claim or right of action arising from any

[1] Act 66 of 1995 as amended.

undertaking, representation or warranty not included in this document. No agreement to vary, add or to cancel this agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties to this agreement"

[6] Ms Jabulile Mthembu was offered a fixed term contract of internship from 01 December 2013 for shorter periods of 2 or 3 months until she was given an internship fixed term contract for one year commencing from 1 September 2015 to 31 August 2016. Similarly to Mr Poo, Ms Mthembu's internship contract contained the same terms and conditions. Her stipend was for R3500.00 from inception until the expiry of the fixed term contract.

[7] Ms Dikeledi Blaal entered into a fixed term contract of internship like the other employees from 01 December 2013 for shorter periods of 2 or 3 months until her last fixed term internship contract expired on 31 August 2016, and she was receiving a stipend of R3500.00. Her internship fixed term contracts had similar clauses as the mentioned *supra*.

[8] It was only for the period of 01 July 2014 to the end of September 2014 that she was given a fixed term contract in order to relieve in the Office of the Chief Operation Officer as the Secretary and was paid R12 389.51 per month. This fixed term contract was extended for 03 months ending 31 December 2014 on the same conditions. When the fixed term contract expired she was, with effect from 01 January 2015 until 31 August 2016, offered a written fixed term agreement of internship with a stipend of R3500.00. She signed and agreed to the terms of that contract.

[9] Ms Thulisile Skhosana also signed the fixed term contract of internship like the other interns with effect from 01 May 2013 for a stipend of R3500.00. From 01 July 2014 to 31 December 2014, a period of 6 months, she was asked to relieve in the Office of the Acting Manager: Human Capital, and was remunerated R12 389.51 just like the other employee. She then returned back to her internship fixed term contract with effect from the 01 January 2015 until she resigned on 30 June 2016 and she was earning R3500.00. She also signed the written contracts at all material times.

[10] On 13 October 2015, the employees referred an unfair labour practice dispute to the South African Local Government Bargaining Council (SALGBC) for conciliation. In their referral they alleged that the applicant promised to give them fixed term contracts of 12 months, the same as one as Sthembiso Mageza's, which will culminate into permanent employment. They further alleged that the applicant owed them their stipend from August 2015. The dispute could not be resolved through conciliation and as a result, the certificate of non-resolution was issued. The employees then referred the dispute to arbitration.

[11] On 18 March 2016, the parties held a pre-arbitration conference in which a pre-arbitration minute was concluded. The arbitration was scheduled for and held on 22 March 2016. Ms Lulama Daisy, the applicant's Labour Relations Officer, represented the applicant and Advocate Fumali Baloyi represented the employees.

Arbitration

[12] At the commencement of the arbitration, Ms Twala (for the applicant) made an application for postponement on the basis that she was not ready to proceed with the arbitration. The employees opposed the postponement application stating that the applicant became aware of the date of the arbitration on 16 February 2016 and that the applicant failed to indicate that it needed a postponement when the parties held a pre-arbitration conference. Subsequent to considering the parties' submissions, the arbitrator refused to grant the application. In her award, the arbitrator recorded that after taking instructions from her superiors, Ms Twala opted to walk out of the proceedings.

[13] The arbitration proceeded without the applicant's representative. Subsequently, the arbitrator issued an award in terms of which she found that the applicant committed an unfair labour practice and further ordered the applicant to pay the employees compensation. It is this default award that is the subject of this application.

[14] The basis on which the applicant seeks to review the award is that the arbitrator misconstrued the nature of the dispute before him, exceeded his powers by

awarding remuneration, made unreasonable findings and unreasonably dismissed the postponement application.

Condonation

[15] As aforesaid, the award was issued on 10 June 2016. However, it is the applicant's contention that the said award was served on it on 22 June 2016. It follows that the review application should have been filed by 19 August 2016. Instead, it was filed on 12 September 2016. This makes the degree of lateness to be 15 days which is not excessive.

[16] I have had regard to the explanation proffered by the applicant for the delay, the prospects of success and the issues of prejudice. I have further considered opposition thereto and I am satisfied that on the whole, good cause was shown and ultimately, the considerations of the interests of justice dictate that condonation be granted.

Review of a default award

[17] The first question to be considered is whether it is appropriate for the applicant to seek an order to review the default award instead of making an application to rescind the default award. Section 144 of the LRA deals with the variation and rescission of arbitration awards and rulings and it reads:

> '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;
>
> (c) granted as a result of a mistake common to the parties to the proceedings; or
>
> (d) made in the absence of any party, on good cause shown.'

[18] In *Qibe v Joy Global Africa (Pty) Ltd, In re: Joy Global Africa (Pty) Ltd v Commission for Conciliation Mediation And Arbitration and Others*[2] the Court stated as follows:

> '…a default arbitration award made by an arbitrator in the absence of one of the parties is not final in effect, as it may be rescinded or revisited by the arbitrator who made the award. Therefore, although a default arbitration award will have full effect until set aside, it is not final for purposes of a review, as contemplated in the LRA, because the proceedings are not complete and the award may be revisited or rescinded by the arbitrator who made the default award. It follows that only the decision of the arbitrator dismissing the rescission application may be reviewed − and not the default arbitration award itself – as it is not a final decision.'

[19] In *Bloem Water Board v Nthako NO and Others*[3] the Labour Appeal Court (LAC) dealt with a case where the arbitrator had arrived late for the hearing after the employer who had been in attendance had already left. The arbitrator concluded that the employer was obliged to attend for the whole day and that the employer had abandoned the arbitration and proceeded to hear evidence and issued an award. The employer did not seek to rescind the award in terms of section 144 of the LRA but instead launched an application to review the alleged misconduct of the arbitrator. This Court refused to review the default award. The LAC overturned the judgment of this Court and had the following to say:

> 'The conventional approach of a court of review to decisions of a court or administrative body, whether under the Promotion of Administrative Justice Act 3 of 2000 or otherwise, is that internal remedies should be exhausted and piecemeal reviews are to be avoided. But a court may intervene *in medias res* where the interests of justice require it (ie where injustices would otherwise occur), although it is to be used sparingly and only in exceptional circumstances. In *Wahlhaus v Additional Magistrate, Johannesburg (Wahlhaus)* the Court expressed the principle this way:
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> 'While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise upon unterminated

[2] (2015) 36 ILJ 1283 (LAC).
[3] (2017) 38 ILJ 2470 (LAC).

course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained..... In general, however, it will hesitate to intervene, especially having regard to the effect of such procedure upon the continuity of the proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'

[20] The LAC further stated that:

'[14] Section 144 of the LRA provides, *prima facie*, a remedy, and in the ordinary course the Labour Court would encourage an aggrieved party to exhaust other remedies even though it has the obligation, jurisdiction and power to oversee the dispute resolution bodies created in terms of the LRA. But section 144 does not, in my view, exclude the Labour Court review powers. Subject to the consideration in the *Wahlhaus* judgment, the Labour Court may review a decision *in medias res*.

[15] Even where the jurisdiction of a court is excluded or deferred, a court would be slow to find this to be the case. However section 144 is limited in its scope and does not allow for the correction of every mistake or irregularity, it may be especially difficult to show "absence" and meet the requirements of section 144 where the appellant's Representative attended but left the vanue before the arbitration commenced.'

[21] It is apparent from the above that this Court may intervene *in medias res* where the interests of justice require it and only in exceptional circumstances. I am of the view that this is one of the instances where this Court may do so.

The merit

Postponement application

[22] The applicant challenged the arbitrator's ruling in terms of which he dismissed its application for the postponement of the arbitration. The basis on which the applicant made an application for postponement was for it to secure the material that supports the common cause issues and to apply its mind to the discovered

documentary evidence. The employees opposed the application and submitted that the postponement application was meritless as the material referred to was the employee's contracts with the applicant, which were in its possession

[23] In opposing the review application, the employees' contention is that the applicant's application for postponement lacked merit and further that the arbitrator applied his mind to the facts presented before him before refusing to grant postponement.

[24] It is trite that granting of posponement is an indulgence which involves the exercise of a discretion on the part of the commissioner. In *Carephone v Marcus NO and Others*[4], the Court stated:

> '[54] In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised (*Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-399).
>
> [55] There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with a dispute fairly *and quickly* (s 138(1)). Secondly, it must be done with '*the minimum of legal formalities*' (s 138(1)). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (s 138(10)).'

[25] In *Psychological Society of South Africa v Qwelane and Others* [5] the Constitutional Court had the following to say in relation to postponements:

[4] JA 52/98 ZALAC 11 (1 September 1998).
[5] 2017 (8) BCLR 1039 (CC).

'[30] Postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply because it disagrees. The decision to postpone is primarily one for the first instance court to make.

[31] In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.'

[26] Considering the above authorities, it is apparent that the refusal of postponement is reviewable if the discretion was not judicially exercised, that is, if it was exercised capriciously or upon any wrong principles. In exercising the discretion, the Court and the arbitrator are required to consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and whether it is in the interests of justice to grant the postponement. In the current matter, although the award does not disclose the arbitrator's reasons for refusing to grant the postponement, the transcibed record shows that his reasons were as follows:

'ARBITRATOR: Ja, application for adjournment is refused. Just to elaborate I'll tell you why. This matter was sent to the Municipality on the 12th of February. Now from 12th of February until today there was ample time for the contracts of these people to be [got], for the letters that - For everything that is held by HR to have been given to you so that you would come here in a position to run the matter. You can't come here half dressed and say to us look, I forgot this, this. I didn't get this, this, this. I now need since I've heard what the matter is about, I need to now time to adjourn the matter. These proceedings [is] supposed to be

> urgent proceedings. We're supposed to get rid of this matter as soon as it's possible so I'm just explaining to your why I am refusing your application for adjournment. So you got something else to say?'

[27] The arbitrator rejected as inadequate reasons proffered by the applicant, mainly on the basis that the applicant had ample time to obtain the employee's contracts and letters from its Human Resource in preparation for the proceedings and further that the parties had convened a pre-arbitration meeting on the eve of the proceedings in which common cause issues were agreed on. In addition, the arbitrator noted that the proceedings were of an urgent nature.

[28] Clearly, the arbitrator's decision not to postpone the proceedings is rationally connected with the material before him and therefore justifiable. He did not exercise his discretion capriciously or upon any wrong principles, but he did so judicially. Thus, he did not commit any gross irregularity as alleged by the applicant. There is, therefore no basis for this Court to review his decision not to grant postponement.

Nature of the dispute

[29] The applicant's other contention is that the arbitrator misconstrued the nature of the dispute before him. The dispute referred by the employees was an unfair labour practice dispute. The facts of the dispute were summarised by the employees in the request for conciliation form as follows:

> 'The employer promised to give us fixed term contract of 12 months, the same as Sthembiso Mageza which will culminate into permanent employment. The employer owes us stipend for August 2015.'[6]

[30] In the aforementioned referral form, the employees provided further information and stated that although Ms Sthembiso Mageza started as intern like them, she was given a fixed term contract.[7] Similarly, in the request for arbitration, the issues in dispute were summarised as follows:

[6] Index: SALGBC record of proceedings, page 18
[7] Index: SALGBC record of proceedings, page 16

> 'Unfair labour practice. Ms Sthembiso Mageza (intern) was given fixed term contract of 12 months, but we were denied the same, though promised by the employer.

[31] The relief the employees sought was *"12 months fixed term contract (level 9-8), as the one given to Miss Sthembiso Mageza, and equal treatment moving forward, also get backpayed."* The pre-arbitration minute recorded the issue in dispute to be whether the employees were entitled to benefits similar to Ms Mageza as from 1 July 2014 and the relief sought to be *"back payment of the benefits as of July 2014 and the payment of the benefit until the expiry date of the contract in August 2016."*

[32] The arbitrator simply identified the nature of the dispute as an unfair labour practice. He did not specify what the unfair labour practice related to. It is apparent from the referral that the employees' dispute related to the expectation for an appointment on a 12-month fixed term contracts and/or promotion or appointment on level 9-8. All that the employees wanted was to be appointed on a 12 month fixed term contract like Ms Sthembiso Mageza. In support of their case, the employees gave evidence on the various internship and fixed term contract entered into with the applicant and how they perceived they were unfairly treated.

[33] In relation to Tebogo Poo and Jabulile Mthembu, the arbitrator made a finding that they were unfairly treated in relation to promotion and training and ordered the applicant to adjust their salaries from R3 500 to R12 389.51 backdated for a period of one year. In relation to Dikeledi Blaai and Thulisile Skosana, the arbitrator did not specify the unfair labour practice. Instead, at the tail of his award, he made a finding that the applicant committed an unfair labour practice and ordered that the applicant adjust their salaries to a higher level and to pay them back salaries. The basis for this finding is not apparent.

[34] The arbitrator seems to have based his findings on a memorandum that was relied on by the employees, which talks to the rotation of interns and the evidence that other interns were offered fixed term contracts as secretaries in different offices in terms of which they were paid salaries aligned to those positions.

However, the arbitrator's finding ignores the evidence that the employees' relationships with the applicant, both as interns and secretaries, were regulated by fixed term contracts signed by both parties. The finding further ignores the fact that a memorandum outlining the applicant's intention to rotate interns is not a policy and therefore, it does not in itself create a right for the interns to be rotated, let alone equating rotation to amount to an unfair labour practice.

[35] Of importance though, is that the arbitrator failed to show, in his award, how the applicant committed an unfair labour practice, either relating to promotion, appointment, training or benefits. In so doing, he failed to make a determination of an unfair labour practice and his conduct is grossly irregular.

[36] The applicant's further contention was that the arbitrator incorrectly found the dispute to be one of salaries and that in ordering payment of back salary and remuneration the arbitrator inferred that the applicant owed the employees salaries. This is a fair proposition.

[37] Making an award for the adjustment of the employees' salaries and the payment of back salary in an unfair labour dispute of this nature, is a clear indication that the arbitrator misconstrued the nature of the dispute before him. The dispute before the arbitrator was whether the employees were entitled to be appointed on a fixed term contract and whether they were entitled to the benefits enjoyed by their colleague, Ms Sthembiso Mageza. It was not whether the applicant owed the employees salaries.

[38] It follows that the arbitrator not only failed to identify the dispute he was required to arbitrate, but also misconstrued the dispute. This resulted in him arriving at an unreasonable decision. For this reason alone, his award stands to be reviewed and set aside. There is no reason for this Court to make a determination in relation to the remaining grounds of review. In view of the fact that there was no determination of the real dispute that was before the arbitrator, it is appropriate to remit the matter to the second respondent to be heard by a different arbitrator.

Costs

[39] I have had regard to the issue of costs and I find that taking into account the requirements of law and equity, there should be no order as to costs.

[40] In the circumstances, I make the following order.

Order

1. The arbitration award issued by the third respondent (the arbitrator) under the auspices of the second respondent, the South African Local Government Bargaining Council, dated 10 June 2016 under case number GPD101519 is reviewed and set aside.

2. Taking account the delay and history of the matter, it is directed that this matter be set down for arbitration *de novo* to be heard by a different arbitrator within 30 days from the date of this order.

3. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate K.A. Tema

Instructed by: De Swardt Vogel Myambo

For the third respondent: Advocate T.E. Tshoma

Instructed by: Semenya Gwangwa Incorporated