

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 2181/16

In the matter between:

SAMWU obo S SIBIYA

Applicant

And

THOMAS NTIMBANA N.O

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

EMALAHLENI LOCAL MUNICIPALITY

Third Respondent

Heard: 29 January 2020

Judgment delivered: 31 January 2020

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent (the arbitrator).
- [2] The material facts are set out in the award under review and do not warrant repetition here. It is sufficient to state for [resent purposes that the applicant union and the third respondent (the municipality) were in dispute about a refusal to place one of the union's members, Mr. Sibiya, in a higher post level in a new organizational structure following a merger of municipalities. A collective agreement was reached to regulate the placement of employees into the new structure. That agreement provides that a placement must not lead to demotion, but nowhere is the concept of promotion expressly incorporated into the agreement. The employee was engaged at post level five. The new structure did not have a post level four. The employee expected to be moved to post level four, and in the absence of post level four, at least to post level three. The principle applied was that if a post level occupied by an employee was removed, the affected employee was moved to the next post level in the new structure. It was not disputed that none of the employees on post level five were moved up.
- [3] The arbitrator's award records that the basis of the employee's challenge was that other employees were placed in different posts pursuant to the new structure and that he was among those who remained in their post levels. The municipality's case was that the placement of employees in the new structure had been properly managed by all parties concerned in terms of the signed

memorandum of agreement, and that the employee had not been unfairly treated.

- [4] The arbitrator concluded that there was no evidence that the employee had been unfairly treated. In particular, he held that when the new organizational structure was developed, the objective was not to promote employees, but to respond to service delivery challenges within the municipal area, in a process that was inclusive of all parties, including the employee's trade union. The policy provided for placement in a similar level, or the next immediate level in the directorate, with no guarantee of placement in a higher post level. Further, it was common cause that there was no post level four in the new structure and that no employee in post level five was placed at a higher level. In other words, the employee was not the only one who remained at the same level in the new structure. In these circumstances, there was no evidence that the municipality had exercised its discretion capaciously or for invalid reasons and there was no basis to interfere with the placement committee's prerogative or its decision. What the employee sought was 'promotion through the back door'; he had thus failed to establish that he had been unfairly treated.
- [5] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court must be particularly cautious not to blur the line, especially where the grounds for review smack of no more than a disagreement with the arbitrator's findings. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In *Head of Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), the LAC said the following:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and*

others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[32] ...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The

arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

- [6] In other words, arbitrators are allowed to be incorrect, and this court is not entitled to intervene only because it would have come to a different conclusion on the same evidence. What matters is whether the conclusion the arbitrator reached on the evidence is so unreasonable that no reasonable decision-maker could come to the decision he did.
- [7] I am unable to find, on the papers before me, that the arbitrator committed any reviewable irregularity either in the conduct of the proceedings, or that the conclusion to which he came was so unreasonable, having regard to the evidence, that no reasonable decision-maker could come to that conclusion. The arbitrator clearly appreciated the issue that he was called on to decide, he considered the evidence and came to a rational and reasonable conclusion. There is no basis to interfere with the arbitrator's decision.
- [8] In so far as the union seeks to review the arbitrator's award on account of the fact that the arbitrator had failed or refused to order the production of documents that the union had requested, there is no merit in this submission. The record indicates an exchange between the parties' representatives and the arbitrator prior to the commencement of the proceedings on documents to be submitted, and two bundles were identified. At the conclusion of the proceedings, the union's representative raised the issue of documents. The arbitrator responded by stating that he had canvassed the issue of documents at the outset and that there had been agreement on the documents to be sued. The representative's response was "Okay, no problem". The same response was given to the arbitrator's statement that other documents that had not been part of the proceedings could not be taken into account. To the extent that the union contends that it had issued subpoenas in respect of certain documents, this issue was never pursued before the arbitrator. In particular, the union did not seek to

enforce any subpoenas that may have been issued in relation to any documents that it required. It is not open to the union now to seek to make out a case for the disclosure of documents, or to seek a review on the basis of matters that the arbitrator was never called on to decide.

- [9] In so far as costs are concerned, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. In general, the court is reluctant to make orders for costs in circumstances where the parties to a dispute are collective bargaining partners, and where the order may prejudice the collective bargaining relationship. There is no evidence of the latter in the present instance. The review application has no merit. The employee's real complaint is that he failed to be placed in the position he wanted – as the arbitrator put it, he was seeking to be promoted through the back door. That the union could advance this case on the employee's behalf, it having been a party to the memorandum of understanding and its implementation, is unfathomable. The union ought properly to have declined to act on Sibiya's behalf. In my view, the interests of the law and fairness are best satisfied by the application of the rule that costs ought to follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the Applicant: Adv. T Manda instructed by Maenetja Attorneys

For the Respondent: Adv. A Tema instructed by De Swart Myambo Attorneys

Labour Court