



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: PR 84/2022

In the matter between:

MFUNDO BANI & 265 OTHERS

First and Further Applicants

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER VUYO NOMBEWU

Second Respondent

PIONEER FOODS ESSENTIAL t/a BAKERY (Pty) Ltd

Third Respondent

FOOD AND ALLIED WORKERS UNION

Fourth Respondent

Heard: 21 November 2024 and 13 February 2025

Delivered: 10 June 2025

This judgment was handed down electronically to the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 10 June 2025.

JUDGMENT

MAHALELO, AJIntroduction

[1] This is an application to review and set aside an arbitration award issued by the second respondent on 9 March 2022 under case number ECPE3465/22 (the Award) and to remit the matter back to the first respondent to be heard *de novo* before a different commissioner. The application is brought in terms of section 145 of the Labour Relation Act¹ (LRA) by employees of Pioneer Foods. In the award, the arbitrator dismissed the employees' referral in terms of section 73A of the Basic Conditions of Employment Act² on the basis that the dispute had prescribed alternatively, because the employees have not demonstrated prospects of success in the main dispute.

[2] The application is opposed by Pioneer Foods (third respondent).

Preliminary Issues

[3] Mr Mhleli Mbana (Mr Mbana), a Union representative from National Union for All Sectors (NUFAS), appeared on behalf of the first applicant Mr Mlangeni (Mlangeni), and confirmed that he had not been mandated to represent the other 265 applicants. The founding affidavit in the review application, which was deposed to by Mlangeni, does not purport to place the case of the other applicants before the court, nor to confer authority on Mlangeni to act on their behalf. Over and above this, the balance of the applicants have not deposed to confirmatory affidavits or any other pleadings to confirm their participation in the matter.

[4] Pioneer Foods has raised a dispute in the answering affidavit concerning the *locus standi* of the balance of the applicants and contended that they have been misjoined to the proceedings. As indicated, there was no opposition to this point.

¹ Act 66 of 1995, as amended.

² Act 75 of 1997.

Accordingly, the matter proceeded only with regard to Mlangeni as the applicant and no relief is sought in respect of the 265 Applicants.

Replying Affidavit

[5] Mlangeni's replying affidavit was not included in the indexed and paginated pleadings bundle in the court file. Whilst Pioneer Foods confirmed that same was served on them on 29 August 2022, the replying affidavit was not in the court file.

[6] At the commencement of proceedings, the Court alerted Mr Mbana to this and, without any objection from Pioneer Foods, elected to proceed with the matter without reference to the replying affidavit. Accordingly, the contents of the replying affidavit are not before the court and were not referred to by either party.

Background Facts

[7] Pioneer Foods is a national food manufacturing company with facilities in various parts of the country. It is comprised of two main divisions, namely groceries and essential foods. The current dispute concerns the essential food division.

[8] Pioneer Foods recognises its collective bargaining counterpart on a national level, and on the basis of which trade union is the majority trade union within the essential foods division. At all material times, the fourth respondent (FAWU) was the majority trade union nationally. In accordance with this arrangement, Pioneer Foods negotiated annually with FAWU over substantive terms and conditions of employment, and a National Substantive Agreement (NSA) is concluded for each bargaining year.

[9] Pioneer Foods has historically made use of temporary employment services (TES) in order to manage the demands of its customers. This is not a static phenomenon but changes from day to day. As bread is a perishable product, Pioneer Foods needed to be able to respond to customers' demands on a daily basis. For that reason, TES employees are engaged on a temporary basis from the TES engaged by the company.

[10] The broader dispute between the parties concerned clause 2.2 of the collective agreement, which has its origin in the NSA concluded for the 2013/ 2014 collective bargaining year, which was incorporated in the NSAs concluded between the parties in the subsequent years.

[11] Prior to the conclusion of the 2013 NSA, FAWU had raised a concern about certain TES employees who had been performing services for Pioneer Foods for a number of years on an on-and-off basis. FAWU stressed that these employees wished to become permanently employed, thereby being provided with security of employment.

[12] Clause 2.2 of the NSA concluded in 2013/2014 provides that:

‘For the closure of gaps on minimum wages, the following will be implemented as agreed in 2013:

...

New entry minimums for new employees from outside the company to be at 80% of the current grades in each category for two years.’

[13] According to Pioneer Foods, the purpose of this provision was simply to encourage Pioneer Foods to take up employees into permanent employment. Many such employees would previously have worked with temporary employment services or in other less secure forms of employment. After two years, the new entrants in employment would be paid at parity with the existing employees, such that there would be no differentiation between the earnings of new entrants and existing employees. Therefore, for the first two years of employment, new entrants would work for Pioneer Foods at a 20% discount.

[14] As stated above, the aforesaid provisions have been repeated in each and every NSA concluded between Pioneer Foods and FAWU, including that concluded for the 2021/2022 bargaining year.

[15] Historically, there has been a number of disputes regarding this provision, the most well-known of which was the dispute giving rise to this court’s judgment in

*Pioneer Foods Pty Ltd v Workers Against Regression (WAR) and Others*³ in which the court, (sitting as a court of appeal contemplated by section 6(8) of the Employment Equity Act⁴ (EEA), concluded that the implementation of the provision did not amount to unfair discrimination on an (unlisted) arbitrary ground for the purposes of section 6(4) read with Section 6(1) of the EEA.

[16] Notwithstanding the judgment in the above referred case there have now been a number of further disputes declared either by FAWU or by the Agricultural, Food and Allied Democratic Workers Union (AFADWU), concerning the application of the provision at amongst others, the company's Britos Bakery in Gqeberha.

[17] One such dispute was referred by FAWU to the CCMA under case number ECP E5142-20, purportedly in terms of section 73A of the BCEA. That dispute appears to have been abandoned notwithstanding the fact that AFADWU was substituted as a party to the dispute.

[18] In 2021, AFADWU referred a further dispute to the CCMA on behalf of the same employees and again concerning an alleged contravention of Section 73A of the BCEA and the matter was allocated case number ECPE3465-21.

[19] It appears that FAWU had also referred a dispute to the CCMA under case number ECPE5261-20, in which it alleges that the company had acted in contravention of Section 6(4) of the EEA. The dispute concerns all of the employees who were supposed to be the subject of this review application. In respect of the dispute, AFADWU succeeded in being joined to the proceedings, having demonstrated that it, rather than FAWU, had been mandated by the employees to act on their behalf. In short, the employees in this matter were pursuing the same dispute before the CCMA with the assistance of AFADWU in terms of Section 6(4) of the EEA.

[20] The current dispute came before the arbitrator on 24 March 2022.

³ [2016] ZALCCT 14; [2016] 9 BLLR 942 (LC).

⁴ Act 55 of 1998.

In the Arbitration

[21] When the matter came before the arbitrator, FAWU applied to be joined as a party to the proceedings, and the application was granted by agreement. At the commencement of the arbitration proceedings, Pioneer Foods raised preliminary points. It argued that Section 73A of the BCEA, which was adopted in 2019, did not operate retrospectively. It also contended that the employees' claim had prescribed in any event, as it was referred more than three years after 2013, the date on which the NSA, which might have founded the cause of action, was signed. Specifically, Pioneer Foods argued that all the employees were already employed for more than three years prior to the date on which they referred their dispute to the CCMA for conciliation.

[22] Pioneer Foods submitted before the arbitrator that it had not breached the agreement by underpaying its employees. FAWU supported the views raised by Pioneer Foods by submitting that the dispute was limited to the allegation that Pioneer Foods had breached the NSA. As there had been no breach of the NSA, and as the employees had not been underpaid, there was no case for Pioneer Foods to answer.

[23] In response, AFADWU submitted that it was correct that the dispute emanated from the NSA, which was renewed in subsequent years. It contended before the arbitrator that Section 73A of the BCEA operated retrospectively, the law of prescription does not apply to labour disputes and that although Pioneer Food's employees would ordinarily be bound by the NSA, it would not be binding in this case if the NSA was unlawful or unconstitutional.

The Award

[24] The arbitrator, having analysed the submissions of the parties, made the following findings:

- '1. The employees' dispute purported to be the one contemplated by Section 73A of the BCEA and it related to the NSA signed by FAWU and Pioneer Foods in 2013. AFADWU was not party to the agreement.

2. The claim had prescribed as it arose from the 2013 NSA.
3. The dispute had only been referred to the CCMA on 12 July 2021 and AFADWU had not taken any steps to interrupt the running of prescription.
4. In any event, NSAs were binding upon the employees and AFADWU had conceded same during arbitration.
5. The employees had not demonstrated that they had a right to any additional payment of monies in terms of a collective agreement, and there was no evidence that they had not been paid other than in accordance with the NSA.'

[25] The arbitrator concluded that the claim had prescribed alternatively, the employees had not established that they were owed any monies.

Grounds for Review

[26] Six grounds of review raised by the applicant are the following:

- 26.1 The arbitrator misconceived the inquiry before him and consequently came to an unreasonable decision.
- 26.2 The arbitrator committed gross misconduct, acted *ultra vires* in issuing an award in terms of section 138(1)(2) and failed to observe the directives of the CCMA procedure and Practice Manual where there were no submissions regarding the merits in the main dispute.
- 26.3 Inapplicability and inconsistency of *functus officio* and *res judicata* principles of law in that the award purported to bring the matter to finality without the merits being ventilated before the Commissioner.
- 26.4 The arbitrator committed a material error of law in finding that the claim had prescribed as the LRA and labour disputes in terms of the BCEA trumps the Prescription Act.
- 26.5 As such, the arbitrator misconceived the inquiry before him in issuing an award that is inconsistent with the submissions before him.
- 26.6 In the alternative, the arbitrator acted *ultra vires* by ignoring and overruling the rulings of three of the commissioners that the matter should proceed to arbitration on the merits.

[27] In his heads of argument Mr Mbana raised a further ground of review. He complained that none of the parties raised the issue of the claim having been prescribed in terms of the Prescription Act during arbitration, and accordingly principle of *audi alteram partem* was grossly violated by the award. Pioneer Foods objected to Mr Mbana raising the ground of review late. Even though this ground was raised late I am inclined to entertain it because there is no merit in it as I will demonstrate in the judgment.

Test for Review

[28] It has been confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ does not find application in the review of a jurisdictional ruling or finding⁶.

[29] This Court has to decide whether the arbitrator was right or wrong in finding that the he had no jurisdiction to adjudicate the applicant's case because the claim had prescribed. The question is not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach but whether the arbitrator was correct in his finding. It is within the ambit of the aforesaid principles and the test to be applied on review, that the applicant's application for review is to be considered.

Analysis

First ground of review: The arbitrator misconceived the inquiry and arrived at an unreasonable decision.

[30] Under this heading, the applicant contended that the arbitrator misconceived the inquiry before him and consequently came to a decision that a reasonable decision maker would not have reached on the facts. It is abundantly clear from the

⁵ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 78 - 79.

⁶ *SA Rugby Player's Association and others v SA Rugby (Pty) Ltd and others* (2008) 29 ILJ 2218 (LAC), *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and others* [2008] ZALC 161; (2009) 30 ILJ 2093 (LC), *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC), *Majatladi v Metropolitan Health Risk Management & others* [2013] ZALCCT 15; (2013) 34 ILJ 3282 (LC).

award that the arbitrator clearly articulated the issues in dispute that were before him. Paragraph four of the arbitration award records that the representative of Pioneer Foods had raised preliminary issues. From paragraph eight of the award, it is clear that Pioneer Foods required the following preliminary issues to be dealt with:

30.1 The dispute had become prescribed as it had been referred more than three years after the signing of the 2013 NSA.

30.2 The CCMA lacked jurisdiction because AFADWU was not a party to the 2013 NSA.

30.3 The CCMA lacked jurisdiction because the 2013 NSA had an internal dispute resolution mechanism.

[31] In paragraph eleven of the award, the arbitrator confirms that he is required to first determine if he has jurisdiction in the matter. He then found at paragraph fifteen that the dispute had prescribed and accordingly, he lacked jurisdiction. It was obligatory for the arbitrator to determine these issues before proceeding to deal with the merits of the referral. It was not open for him to simply ignore the points raised *in limine* or to commence with the determination of the merits of the dispute where his jurisdiction in the matter was challenged on a number of grounds.

[32] From the above, it is readily apparent that the arbitrator understood the nature of the inquiry, correctly identified the preliminary issues that he was required to determine and made a determination of those issues. This ground of the review is therefore without merit and stands to fail.

Second ground: Gross misconduct

[33] The applicant contended that the arbitrator committed gross misconduct and acted *ultra vires* in issuing an award on the merits and failed to observe the directives of the CCMA Procedure and Practice Manual where there were no submissions made regarding the merits in the main dispute.

[34] The CCMA Procedure and Practice Manual confirms the general and established process of arbitration at the CCMA in which preliminary issues are

considered prior to the merits being heard. This is simply because it would amount to misconduct were an arbitrator to determine the merits of a matter in circumstances where there was a challenge to his or her jurisdiction or powers.

[35] In relation to the merits, the arbitrator found that it was effectively common cause that the 2013 NSA was binding upon the employees as they were members of FAWU on the day that the 2013 NSA was concluded. In the absence of the contention that the 2013 NSA was unlawful or unconstitutional, it had to be regarded as binding. The arbitrator found that there was no claim by the employees that they had a right to payment of monies in terms of the 2013 NSA. The point is that the arbitrator found that he did not have jurisdiction to consider the dispute and dismissed it with final effect. It does not appear anywhere on the record of the arbitration that the parties were given an opportunity to ventilate the merits of the dispute. Even though the arbitrator found this in the alternative, it was irregular for him to pronounce on the merits where he had found that he had no jurisdiction to deal with the dispute. There is merit in this ground of review and it must succeed.

Third ground: Inapplicability and inconsistency of *functus officio* and *res judicata* principles.

[36] Properly understood, the applicant under this heading contended that the arbitrator committed a misconduct when he purported to bring the matter to finality without the merits being ventilated before him. The arbitrator engaged in the wrong enquiry when he appeared to consider the employee's prospects of success in the main dispute, in that he expressed a view concerning the fact that the employee had not proved any right or that there are any monies owed. This question, of course, could not properly arise until and unless the arbitrator has heard evidence on the merits and applied his mind thereto. There is merit in this ground of review.

Fourth, fifth and new grounds of review: Prescription, the arbitrator misconceived the inquiry, and none of the parties raised the issue of the claim having been prescribed during arbitration.

[37] It is convenient to deal with the three grounds of review together as they are interrelated.

[38] The applicant contended that the arbitrator misconceived the inquiry before him in issuing an award that is totally inconsistent with the submissions made before him. As indicated earlier, the arbitrator was required to objectively determine whether he had jurisdiction to determine the disputes prior to any consideration of the merits. It is clear from the record of arbitration that Pioneer Foods' representative raised the issue of prescription, and AFADWU, represented by Mr Mbana, raised it as a potential issue during argument before the arbitrator. Mr Mbana had sought to contend that the Prescription Act did not apply to labour disputes. The question of prescription was thus very firmly before the arbitrator and he was obliged to deal with it. The facts relevant to the determination of such a question were common cause and considered in the parties' oral argument.

[39] The application of the Prescription Act to labour disputes was settled by the court in the case of *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Limited*⁷ (hereafter "*Pieman's Pantry*") where the majority held that the Prescription Act and the Labour Relations Act were not inconsistent with each other, and prescription applied in respect of labour disputes.⁸ However, in this matter, it cannot be concluded that the claim of the employee had prescribed for the following reasons: In the founding affidavit, the applicant alleges that the dispute arose from monies owed to the applicant by Pioneer Foods from the NSA in a clause that dealt with 80% entry-level, which was first negotiated in the 2013/2014. The 80% clause referred to continued to be factored in all the subsequent NSAs that ensued after 2013/2014, including the 2020/2021 NSA. Pioneer Foods in its answering affidavit does not deny that the relevant clause has been repeated in each year's NSA, however, it contended that the employees were employed at least three years prior to the date on which they referred the dispute to the CCMA for conciliation. There is no merit in Pioneer Food's argument.

⁷ [2018] ZACC 7; (2018) 39 ILJ 1213 (CC).

⁸ Ibid at para 74.

[40] It is common cause that the dispute between the parties was referred to the CCMA on 12 July 2021 and came before the arbitrator on 24 March 2022. Now taking into account that the clause giving rise to the dispute between the parties though signed in 2013 was incorporated in each year's NSA including the one for 2021/2022, in my view, any dispute that arose from that clause in the collective agreement cannot be said to have expired except in a case where it is alleged that the claim may have arisen strictly from the 2013 collective agreement, which, as I understand, is not the applicant's case.

[42] For the reasons given above, the review application stands to succeed.

Costs

[43] In terms of section 162 of the LRA, the Court has wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of KwaZulu-Natal & others*,⁹ that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[44] In the result, the following order is made:

Order

1. The arbitration award issued by the second respondent on 9 March 2022 under case number ECPE3465/22 is reviewed and set aside.
2. The matter is remitted back to the first respondent to be heard *de novo* before a different commissioner.
3. There is no order as to costs.

M.B. Mahalelo

Acting Judge of the Labour Court of South Africa

⁹ (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC) at para 24.

Appearances

For the Applicant: M Mbana of NUFAS

For the Respondent: J Whyte, F Barker

Instructed by: Norton Rose Fulbright South Africa Inc

LABOUR COURT