



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J1993/22

In the matter between:

PUBLIC SERVANTS' ASSOCIATION OF SOUTH AFRICA
obo MEMBERS

Applicant

and

ADVOCATE MARK THYS N.O.

First Respondent

THE SOUTH AFRICAN REVENUE SERVICE

Second Respondent

Heard: 17 June 2025

Delivered: 5 September 2025

JUDGMENT

LENNOX, AJ

[1] This matter has a long and complicated history, which resulted in private arbitration proceedings, the outcome of which the Applicant (PSA) seeks to review and set aside.

[2] The First Respondent (Arbitrator), being the duly appointed arbitrator dealing with the matter, upheld a special plea of prescription and dismissed the claim as brought by the Applicant.

[3] The law in respect of the review of a private arbitration award is well canvassed, and is governed by section 33(1) of the Arbitration Act¹ (Arbitration Act) as follows:

‘(1) Where-

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

[4] The time period provided for the launching of such a review is provided for in section 33(2) and must be within six weeks of the publication of the award. The present application has been brought some three weeks out of time, and as such, condonation is sought for the late filing thereof.

Background facts

[5] The genesis of the matter is located in a decision of the Second Respondent (SARS) to implement the Hay Grading System. An evaluation of all posts was undertaken thereafter, and at or about June 1999, letters were sent to the employees of SARS reflecting their job grades. Later in 1999, a verification exercise was undertaken by SARS and on 13 November 2000, letters were issued setting out the

¹ Act 42 of 1965.

verified job grades. Those employees who were dissatisfied therewith could appeal against the grading determination by 16 March 2001.

[6] On 30 May 2001, a collective agreement was concluded between SARS and NEHAWU providing for arbitration proceedings in respect of disputes (Collective Agreement).

[7] Thereafter, on 31 August 2001, the outcomes of the appeals were issued, and on 18 January 2002, the decisions of the National Grading Review Committee were published.

[8] An arbitration agreement was concluded between the PSA and SARS on 20 June 2002 (Arbitration Agreement), which provided that disputes relating to the grading of jobs would be dealt with by means of private arbitration proceedings, which would take the form of a review of SARS' decision to allocate a specific grade to an individual employee.

[9] On 21 February 2003, an addendum to the Arbitration Agreement (Addendum) was concluded, which provided for matters ancillary to the Arbitration Agreement.

[10] Arbitration proceedings thereafter commenced and resulted in the resolution of the dispute in respect of category "A" employees on 5 April 2003.

[11] It is at this point that matters went awry when the parties could not agree on the terms of reference of an arbitrator in respect of category B employees. The PSA then referred an interpretation dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 25 April 2004. The CCMA held on 9 September 2004 that it lacked the jurisdiction to determine the dispute as there was no evidence that SARS was frustrating the Arbitration Agreement.

[12] In 2005, the PSA submitted to SARS a list of its members who wished to engage in arbitration proceedings.

[13] The next development in the saga seems to have taken place on 9 February 2007 when SARS advised that the re-evaluation process had been concluded. On 27 June 2007, the PSA advised SARS that it would refer a dispute relating to category B determinations to arbitration.

[14] On 14 January 2008, SARS recorded its view that the dispute resolution process had been exhausted, whereafter the PSA referred a second interpretation dispute to the CCMA. SARS raises a jurisdictional point based on clause 3 of the 2001 collective agreement, as it required private arbitration. It appears that the PSA then withdrew the dispute so that an arbitrator could be agreed on. It is not clear what happened with this, but on 16 February 2010, the CCMA seems to have found that it could not arbitrate the dispute.

[15] On 18 August 2014, an arbitration agreement was concluded for an arbitrator to determine if the 20 June 2002 agreement was extended past 30 May 2003 and, if so, to determine whether the PSA had waived its right to enforce the arbitration agreement or where it was estopped from doing so.

[16] The arbitration proceeded before Adv. Sirkhot, who published his arbitration award on 6 January 2015, finding that the matter could proceed. He held in his arbitration award as follows:

‘73.1 I find that the arbitration agreement by the parties on (sic) June 2002, read together with addendum concluded 21 February 2003, did not need to be extended beyond 30 May 2003 in order to remain valid and binding on the parties.

73.2 There are no impediments to the resolution of the category B Hay Grading disputes by arbitration as provided for by the arbitration agreement dated the 20 June 2002 read together the addendum dated the 21 February 2003.

73.3 The points in limine as raised by the Respondent are accordingly dismissed.

73.4 No order is made as to costs.’

[17] It appears that, at an unknown time to the Court, the First Respondent was appointed as the arbitrator. More time passed and, on 29 February 2019, the PSA and SARS met with the Arbitrator to discuss the discovery process in respect of the arbitration proceedings.

[18] On 24 November 2021, SARS entered a plea of prescription, whereafter on 14 December 2021, a pre-arbitration minute was signed between the PSA and SARS. Oral arguments in respect of the special plea of prescription took place on 7 February 2022, whereafter the Arbitrator published his award on 7 July 2022.

The arbitration proceedings

[19] The special plea of prescription was raised by SARS after the arbitration proceedings had commenced but prior to the leading of evidence.

[20] A pre-arbitration minute was concluded, which set out the issues which the Arbitrator was to consider. The relevant portion read as follows:

‘6.1 Whether the Union’s claim has prescribed

6.1.1 SARS has filed a special plea of prescription on 24 November 2021;

6.1.2 The Union contends that the issue of prescription had been dealt with in the arbitration award of 6 January 2015 and is therefore *res judicata*.

6.2 Whether SARS’ decision to allocate the grade it allocated to the individual Members’ jobs in terms of the Hay Grade Evaluation System was, on a balance of probabilities, correct.

6.3 If the grade SARS allocated to the individual Members’ jobs in terms of the Hay Grade Job Evaluation was not correct, determining the correct grade to which the Individual members must be allocated, together with the date of implementation.

6.4 Instead of having the correct grading implemented with retrospective effect, to award each of the individual members compensation, calculated on the salary they received the month preceding the implementation of the revised grade, alternatively a reasonable amount as compensation.’

[21] The Arbitrator considered the arguments led before him and determined the following:

'79. The special plea of prescription is upheld and the *Claimant's* claim is dismissed.

80. There is no order as to costs.'

[22] In coming to his conclusion, he evaluated the submissions before him and arrived at the conclusion that the monetary aspect of the claim had been prescribed. This is the first issue to be considered in these proceedings.

[23] However, the Arbitrator then dismissed the entire referral, including the dispute as to whether the gradings had been performed correctly. He failed to consider this aspect, relying solely on the issue of prescription. This is the second issue to be considered.

The condonation application

[24] Whilst a three week delay in instituting review proceedings is not a short one, in the context of the protracted history of this matter, it is not a long one. Given that there are reasonable prospects of success and an element of public interest in this matter, it would be appropriate to grant condonation. The matter was, in any event, fully argued before the Court and the Court is persuaded that there are prospects of success as set out more fully hereunder.

[25] As such, condonation for the late filing of the review application is granted.

The issue of prescription

[26] The majority of the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*² observed the following in respect of when a Court may intervene in private arbitrations:

² 2009 (4) SA 529 (CC); [2009] ZACC 6 at para 236.

'Courts should be respectful of the intention of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.'

[27] In *Stocks Civil Engineering (Pty) Ltd v Rip NO & another*³ the following was held:

'A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable... An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.'

[28] In respect of the issue of prescription, this Court could well have a differing view to that of the Arbitrator which is more aligned to the views submitted by the PSA. Regrettably for the PSA, this would be of no assistance to it or its members insofar as a claim for backpay is concerned in the light of the above decisions.

[29] That an arbitrator comes to an incorrect decision is one of the consequences of allowing the arbitrator to determine the dispute. The parties have put their faith in the arbitrator, for better or for worse.

³ (2002) 23 ILJ 358 (LAC); [2002] 3 BLLR 189 (LAC) at para 52.

[30] There is nothing in the arbitration award which suggests that the Arbitrator did not apply his mind to the facts before him, or that he reasoned his way to a conclusion on prescription. That decision is, in the event, is unassailable regardless of one's view on the correctness of same.

[31] This ground of review has to fail, for to intervene would be to undo the stitching of the fabric of private arbitration proceedings.

[32] It is also so that the Arbitration Agreement did not anticipate a claim in money. The terms of the Arbitration Agreement dealt with the issue and terms of reference:

'The issue which the arbitrator must determine in each arbitration is whether, in the arbitrator's opinion, SARS' decision to allocate a specific grade to an individual employee in terms of the Hay grade verification process and career ladder positioning exercise, is fair and reasonable.'

[33] Quite why SARS did not take this point is not apparent from the papers before the Court. This may not be the end of the matter, as if the gradings are found to be incorrect, it is possible that they be rectified retrospectively which may require a payment to those members who successful in their complaints.

The issue of grading

[34] The grading issue is at the heart of the dispute between the parties. It is the primary, if not sole, issue that the Arbitrator was to determine.

[35] The grading dispute has not prescribed. The finding of the Arbitrator that it was not to be dealt with following his findings on prescription was a finding which indicates that he did not understand or apply his mind to the issue which he was called upon to determine.

[36] In failing to determine the issue at the heart of the dispute, the Arbitrator has committed a gross irregularity in the conduct of the proceedings, and this Court is obliged to intervene and rectify the irregularity.

[37] It has taken a period of over twenty years to arrive at this point, a factor which causes the Court to remind parties that labour disputes are not meant to be delayed to this extent. Indeed, the entire fabric of the present fabric of labour dispute resolution is woven from the terms of section 1(d)(iv) of the Labour Relations Act⁴ which provides that it was enacted to promote the effective resolution of labour disputes. The Court must raise its concerns that the manner in which the arbitration proceedings have been conducted. The delays have not assisted in the resolution of a longstanding dispute.

[38] It is for these reasons that the Court will make directions in the Order hereunder for the further conduct of this matter.

Costs

[39] The Court does not deem it fit to award costs against either party.

[40] Accordingly, the following Order is made:

Order

1. Condonation for the late filing of the application is granted.
2. The arbitration award issued by the First Respondent and dated 7 July 2022 is reviewed and set aside only insofar as it pertains to the dispute relating to the grading of the members of the Applicant.
3. The findings of the First Respondent in respect of the prescription of claims relating to financial compensation are not set aside.
4. The matter insofar as it relates to the grading of the members of the Applicant is to be heard afresh before an Arbitrator other than Advocate Thys.
5. Should the parties not agree as to the identity of the arbitrator to be appointed within 10 (ten) court days of the granting of this Order, the parties must jointly or individually request the chairperson of the Johannesburg

⁴ Act 66 of 1995, as amended.

Society of Advocates to appoint an arbitrator who has more than ten years post admission experience to act as arbitrator.

6. The arbitrator so appointed is to comply with the provisions of section 23(a) of the Arbitration Act 42 of 1965.

7. The arbitrator so appointed must determine in each arbitration whether, in the arbitrator's opinion, SARS' decision to allocate a specific grade to an individual employee in terms of the Hay grade verification process and career ladder positioning exercise is fair and reasonable.

8. There is no order as to costs.

M.A. Lennox

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr P Kirstein SC

Instructed by:

Couzyn Hertzog & Horak

For the Third Respondent:

Mr Z Navsa

Instructed by:

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