THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR613/20

In the matter between:

HRF SCHAEFER VERVOER (PTY) LTD **Applicant**

and

MOKWENA, S.N.O **First Respondent**

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT AND LOGISTICS INDUSTRY **Second Respondent**

Heard: **26 November 2024**

Delivered: **24 June 2025**

JUDGMENT

BALOYI, AJ

Introduction

[1] The applicant seeks the review and setting aside of an award rendered by the first respondent relating to the interpretation and application of clause 35 of

the main collective agreement of the second respondent. In the award dated 10 February 2020 issued under the auspices of the second respondent, case number GPRFBC 5627455641, the first respondent held that clause 35 applied to the applicant and ordered that "*The interpretation of Clause 35 of the Council's Main Collective Agreement finds application and is binding to the Applicant*". Clause 35 regulates the introduction of employee incentive schemes.

[2] The application is opposed by the second respondent.

<u>Relevant facts</u>

[3] No oral evidence was presented before the arbitrator and the matter was disposed of based on written submissions and the parties respective bundles of documents which were admitted into the record.

[4] The following facts are common cause. The applicant HRF Schaefer Vervoer (Pty) Ltd (Schaefer) is an employer in the registered scope of the National Bargaining Council for the Road, Freight and Logistics Council (the Council), and it is subject to the main collective agreement.

[5] In 2002, Schaefer introduced a driver incentive scheme. In terms of the scheme, drivers are remunerated above the minimum remuneration for drivers prescribed by the main agreement from time to time. Save for adjustments to the amounts payable, the basis of the incentive scheme has remained the same throughout.

[6] On 16 January 2012, the simplified and consolidated main agreement came into effect. It, *inter alia*, introduced clause 35. Until May 2017, Schaefer was considered by the Council to be in compliance with the main agreement and, following inspections by the Council's inspectorate for compliance with the main agreement, it was found compliant and issued with letters of good standing in April 2015, May 2016 and August 2016. Things changed in May 2017 when the Council issued a report that Schaefer was non-compliant with the main agreement and issued compliance notices that it must comply with clause 35. Schaefer did not agree that clause 35 applied to its pre-existing

scheme and this culminated in a referral of a dispute to the Council concerning the interpretation and application of the main agreement, in particular clause 35. The Council's position is recorded in a letter to Schaefer of 5 September 2017 as follows,

> "… HFR (a reference to Schaefer), introduced the incentive scheme some 15 years ago and such a scheme was based on the Agreement provisions which dealt with "dual wage system", such an agreement is no longer applicable. As you will understand, the Bargaining Council Agreements are centrally negotiated by parties from time to time and clauses are altered and some are removed based on the needs and agreement of the parties. All companies with the industry, after the Agreement has been negotiated and agreed, are expected to implement."

[7] The letter to Schaefer also states that letters of good standing issued to Schaefer in 2015 and 2016 were erroneously issued. The Council directed Schaefer to comply with clause 35 and pursued enforcement proceedings against Schaefer to compel compliance. As I have mentioned, the compliance enforcement measures caused Schaefer to refer a dispute about the interpretation and application of clause 35 to it and, conciliation having failed, the dispute was referred to arbitration where the arbitrator held that clause 35 applies to Schaefer. Before me is the latest instalment in the quest for resolution of the dispute.

[8] In the arbitration, the parties contended for their positions as recorded above. In short, Schaefer contended that clause 35 applies to employers who seek to introduce an incentive scheme for the first time and does not apply to its incentive scheme which pre-dates clause 35. For its part, the Council contended that the coming into effect of clause 35 abolished pre-existing incentive schemes and that Schaefer must comply with clause 35 to implement a new driver incentive scheme.

[9] Before the arbitrator, and in this court, there is no dispute that Schaefer's incentive scheme does not contravene the minimum wage and conditions of employment prescribed in the main agreement. It is also so, and not disputed that Schaefer had an exemption from the second respondent from providing

registers in terms of clause 51 of the main agreement, as it uses electronic monitoring. There is no evidence in the record that this exemption has been withdrawn and so this fact too is common cause.

Discussion

[10] The application is brought in terms of section 145 and/or 158(1)(g) of the Labour Relations Act[1] (LRA). Schaefer contends that the award of the arbitrator is not one which a reasonable decision maker could arrive at for the following reasons – the arbitrator's factual findings do not account for all the evidence and documents placed before the arbitrator; the arbitrator exceeded his powers and he failed to properly, rationally and justifiably apply his mind to the facts and the law in his interpretation of the agreement; the award is not justifiable in relation to the reasons given, it is not rational or justifiable in its merits or outcome.

[11] The test for review is now settled. It is whether the decision sought to be reviewed and set aside is one that a reasonable decision-maker could not reach having regard to the evidence that was before the arbitrator[2].

[12] In *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and others*[3], Sutherland JA, writing for a unanimous court said:

> "In my view, there is much to be said for the proposition that an arbitrator in the CCMA or in a Bargaining Council Forum who wrongly interprets an instrument commits a reviewable irregularity as envisaged by section 145 of the LRA; *i.e* a reasonable arbitrator does not get a legal point wrong. If so, the reasonableness test is appropriate to both value judgments and legal interpretations. If not, 'correctness' as a distinct test is necessary to address such matters. However, on either basis, the ruling in this case must be set aside."

[13] This view also found approval in *National Union of Metalworkers of SA v*

[1] Act 66 of 1995, as amended.
[2] See: *Sidumo and another v Rustenburg Platinum Mines and others* (2007) 28 ILJ 2405 (CC) at para 110.
[3] (2016) 37 (ILJ) 2593 (LAC) at para 30.

Assign Services[4] where the Labour Appeal Court stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which "*will result in both an incorrect and unreasonable award … (which) can either be attacked on the basis of its correctness or for being unreasonable*"[5]. The award in the present matter must according be evaluated on this basis.

[14] The principles applicable to interpretation have been commented on by our courts sufficiently to now be trite. In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[6] the Supreme Court of Appeal (SCA) explained the correct approach to interpretation thus:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[15] The SCA went on to emphasise that "*from the outset one considers the*

[4] (2017) 38 ILJ 1978 (LAC) at para 32.
[5] Ibid at para 32.
[6] 2012 (4) SA 593 (SCA) at para 18.

context and the language together, with neither predominating over the other."[7] The interpreter of a document, statute or contractor must accordingly and as a matter of course, take context and purpose into account. For completion, it is in my view also instructive to be mindful of the SCA's 'caution' in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others,*[8] that:

> "…Endumeni has become a ritualised incantation in many submissions before the courts. <u>It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations</u>. <u>Neither Endumeni, nor its reception in the Constitutional Court, most recently in University of Johannesburg, evince skepticism that the words and terms used in a contract have meaning</u>." (my emphasis)

<u>Is the arbitrator's interpretation of clause 35 wrong in law?</u>

[16] It is necessary to quote clause 35 in its entirety. It reads:

> "(1) An employer may introduce an incentive scheme in terms of which an employee's remuneration is based on the quantity of work done or the employee's output, if –
>
> (a) the scheme complies with this clause and has the approval of the Council;
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> (b) the registers prescribed in Clauses 50 and 51 of this Agreement are properly kept;
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> (c) an employee who is part of the scheme, is not paid less than the amount that employee would otherwise be entitled to in terms of clauses 11, 14, 15 and 36 and Schedule 5.
>
> (2) An employer who wishes to introduce an incentive scheme must set up a committee consisting of an equal number of representatives of management and elected representatives of employees to negotiate and agree the terms of the scheme.

[7] Ibid at para 19, referring to *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G – 663A.
[8] 2022 (1) SA 100 (SCA) at para 49.

(3) The terms of an incentive scheme –

(a) must be reduced to writing and be signed by all the members of the joint representative committee; and

(b) may not be varied or terminated by any party to the scheme unless that party –

(i) has given all other parties notice in writing as may have been agreed upon by the parties who entered into the scheme;

(ii) has complied with any other obligations set out in the scheme for varying or terminating the scheme."

[17] The arbitrator accepts in the award that the literal meaning of '*introduce*' in clause 35(1) "*suggest[s] to establish or create something new*." The arbitrator however proceeds that "*the use of the word in the clause is preceded by the word may which suggests granting of discretion of/or permission subject to the conditions set out in the clause. Therefore, the meaning of the word introduce in the context of the clause suggests permission to establish a scheme subject to the conditions set out in the clause*". The logic of this construction is not plain to see.

[18] The arbitrator further held that if clause 35 was not to apply to a pre-existing scheme because it came into effect after the scheme was introduced, the Council would be emasculated to discharge its regulatory obligations in relation to such schemes. He proceeded to say:

> "The Council's only mechanism to discharge the regulatory duty is through the main collective agreement and clause 35 is the only mechanism to regulate incentive schemes in the main collective agreement. Therefore the discretion, as suggested by the word 'may', given to employers to introduce incentive schemes is also subjected to the regulatory mechanism of clause 35 by setting out conditions which the incentive scheme should meet and subject to the Council's approval".

[19] It therefore appears from the award that the arbitrator departed, in his analysis

of the application of clause 35, from the premise that the pre-existing incentive could not be excluded from the application of clause 35 because "*the Council would be emasculated to discharge its regulatory obligations in relation to such schemes"* and also *"[t]he Council's only mechanism to discharge the regulatory duty is through the main collective agreement and clause 35 is the only mechanism to regulate incentive schemes in the main collective agreement*". This in my view is a misdirection as this is not the question the arbitrator was required to answer. The dispute before him was whether, on a proper reading of clause 35, it applies to the applicant's pre-existing incentive scheme.

[20] It is apparent from the award that the arbitrator did not have any regard to the law on the effect of later legislation on rights that have accrued under previous legislation. He failed to have regard to the settled principles of our law applicable to the issue he was required to determine. I proceed to discuss the applicable legal principles relevant to the present facts.

[21] There is no controversy that the main agreement has the status of subordinate legislation[9]. It follows therefore that the rules and principles applicable to statutory interpretation must apply to the interpretation of clause 35, of course mindful that meaning must be given to the words used in that clause, having regard to the context provided by reading the clause in the light of the document as whole and the circumstances attendant upon it coming into existence.

[22] As a point of departure, the principle that no statute is to be construed as having retrospective operation unless the Legislature clearly intended the statute to have that effect is and must be accepted as still the correct position of our law.

[23] The Constitutional Court stated the position thus in *S v Mhlungu and others*[10], that:

[9] See: *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SA Transport and Allied Workers Union and others* (2010) 31 ILJ 2037 (LAC) at para 41.
[10] 1995 (3) SA 867 (CC) at para 65.

> "… there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, *or vice versa*, namely which affects transactions completed before the new statute came into effect".

[24] The presumption that new legislation is not intended to be retroactive remains the correct position of our law The Court also said:

> 'There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, for example by invalidating current contracts or impairing existing property rights,'

and

> "The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing".[11]

[25] In considering the question before him, the arbitrator was required and obliged to have regard to binding principles of law applicable to the question he was required to answer. He failed to consider whether, having regard to the presumption against legislative retroactivity, clause 35 applied to Schaefer's pre-existing incentive scheme. He concerned himself with the effect or consequence of excluding, from the application of clause 35, schemes which pre-date clause 35 and attached a meaning not supported by the text and context of that clause. In doing so, he committed the very sin that the SCA in *Endumeni* cautioned when it said:

> "Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made."[12]

[26] Schaefer's drivers presently benefit from an incentive scheme that preceded

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[11] Ibid at para 65.
[12] *Endumeni* (Id fn 7) at para 18.

the enactment of clause 35. If the arbitrator is correct in his conclusion, the consequence is that all rights which accrued to Schaefer's drivers were nullified because, according to the second respondent, without compliance with clause 35, Schaefer may not operate an incentive scheme. The practical consequence of this interpretation on rights of drivers accrued since 2012 is obvious to see – one such consequence would be that, upon clause 35 coming into effect, drivers lose the right to the above minimum wage salaries they were paid before the advent of clause 35 and Schaefer would have no obligation to introduce an incentive scheme, let alone similar to that rendered defunct by clause 35. This would be the consequence without the parties to the main agreement having agreed this far-reaching consequence, and without Schaefer and its drivers having agreed to end the agreed incentive scheme. And yet, this is a consequence of the interpretation of clause 35 preferred by the arbitrator. The interpretation preferred by the arbitrator would also mean that the exemption previously granted Schaefer falls off without withdrawal by the Council or any such intention being recorded or apparent in clause 35. This interpretation of clause 35 is not supported by the text and context of the provision. It in fact offends the presumption against retroactivity, a binding principle of our law.

[27] The parties to the main agreement must have been aware of pre-existing incentive schemes when they enacted clause 35. They could have, but elected not to, legislate that pre-existing schemes must comply with clause 35 as if they are introduced for the first time, or that any such pre-existing schemes were abolished upon clause 35 coming into effect. They did not state that schemes that pre-date clause 35 would become defunct upon clause 35 coming into effect when they could have said so. Neither did they say that clause 35 would have retroactive effect on existing schemes – an impracticality considering that on the plain terms of clause 35, it does not create an obligation to retain a pre-existing scheme and, as the arbitrator accepted, the word 'introduce' '*suggests to establish or create something new*'. This is another reason why the arbitrator's interpretation of clause 35 is flawed.

[28] It is plain that the arbitrator incorrectly interpreted clause 35 in so far as it applies to Schaefer. There is nothing in the text of clause 35, and the context in which it appears, which supports an interpretation that upon the advent of clause 35, Schaefer’s pre-existing incentive schemes became defunct or was abolished. There is also nothing in the text and context of the entire document which gives clause 35 retroactive effect. His misapplication of the law resulted in a reviewable award which must be set aside.

Conclusion

[29] The arbitrator erred in his interpretation of, and conclusion that Schaefer is required to comply with clause 35 if it is to replace its (according to the arbitrator) abolished incentive scheme. This incorrect interpretation of clause 35 resulted in the arbitrator holding and ordering that clause 35 is binding on Schaefer and that its driver incentive scheme was no longer operational or valid.

[30] The error of law is material as it resulted in a decision which, on a proper interpretation of the main agreement, and clause 35 in particular, was one that a reasonable arbitrator could not reach.

[31] It follows from the above that the award must be set aside and the applicant must succeed in the relief it claims.

Appropriate relief

[32] Schaefer seeks that the award be substituted with a determination or order that clause 35 does not apply to its incentive scheme and remittal as alternative relief.

[33] I do not consider that remittal is appropriate or fair to the parties for the following reasons.

[34] The facts relevant to the determination of the dispute are all part of the record and therefore presently before me. The Court is therefore in as good a position as an arbitrator would be to determine the dispute.

[35] Much time has passed since the dispute arose and when the arbitrator rendered the award. A remittal will only serve to further delay the finalisation of this matter.

[36] Neither in the answering affidavit nor in its submissions did the second respondent contend for a remittal. Accordingly, no case has been made out for a remittal.

[37] The applicant does not seek any costs and it will be ordered accordingly.

[38] Accordingly, the following order is made.

Order

1. The arbitration award issued on 10 February 2020 under case number GPRFBC 5627455641 is reviewed and set aside.

2. The arbitration award is substituted with the following order:

   "Clause 35 of the main collection agreement of the second respondent does not apply to the applicant's driver incentive scheme introduced in 2002."

3. There is no order as to costs.

MS Baloyi

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Mr. A Posthuma

Attorneys: Snyman Incorporated

For the Third: Adv. L Hutchinson

Instructed by: Moodie & Robertson