

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J 1385/98

In the matter between:

TRANSNET LTD

Applicant

AND

HOSPERSA

1st

Respondent

STEMMET JP (N.O)

2nd

Respondent

–

JUDGMENT

–

MLAMBO J.

1. This is an application for review of second respondent's award ("Stemmett"). Stemmett was requested by the parties to arbitrate a dispute between them. In the resultant arbitration proceedings Stemmett acted in terms of the Arbitration Act

no 42 of 1965 as amended. (“the Arbitration Act”).

2. The first issue the Court had to consider was a condonation application made by the applicant. Miss Kyriakou, for Hospersa argued that it was not competent for this court to entertain this condonation application. She argued that as this review application was instituted in terms of section 33 of the Arbitration Act that section did not make provision for the condonation of applications brought beyond the period set out therein. Section 33(2) of the Arbitration Act provides that:

“An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: provided that when the setting aside of the award is requested on the ground of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was published.”

t section 145(1)(a)&(b) of the Labour Relations Act no. 66 of 1995 (“the LRA”) was identical to section 33(2) and also contained no provision catering for the condonation of late applications.

3. This court derives its jurisdiction to entertain matters instituted in terms of the Arbitration Act in terms of section 157(3) of the LRA which provides that:

“Any reference to the court in the Arbitration Act, 1965 (Act no.42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.”

It is clear therefore that section 157(3) of the Act accords jurisdiction to this court

to entertain matters brought to it in terms of the Arbitration Act. That being the case the court in considering matters under the Arbitration Act, acts in terms of its powers set out in section 158 of the Act.

4. Section 158(1)(f) accords this court the power to condone the late filing of any document or the late referral of any dispute to the court. On that basis it is competent for this court to entertain a condonation application relating to a matter brought to it in terms of the Arbitration Act. In this regard the empowering act is the LRA being the act that creates this court with jurisdiction and power to entertain certain specific matters. In **Transport & General workers Union & others v Hiemstra N.O & another (1998) 19 ILJ 1598 (LC)** Sutherland AJ considered a condonation application for non compliance with section 33(2). He refused condonation on the basis that no good cause had been shown not because the court lacked the necessary competence to grant condonation.
5. In now consider the application for condonation. From the applicant's founding affidavit it appears that the reasons for the late filing of the application are:
 - 5.1 the award was received on 20 April 1998.
 - 5.2 discussions were held by Mr Gopolang Modise ("Modise") with the applicant's line management as to the way forward and these discussions were concluded roundabout the 22 May 1998.
 - 5.3 thereafter the first respondent ("Hospersa") was informed by the applicant that it

intended to make application for the review and setting aside of the award.

5.4 as a result of the illness and absence of the applicant's attorney, Mr Coetzee, the application was filed approximately one month late.

6. In an application for condonation it is trite that good or sufficient cause must be shown. Relevant factors are the degree of lateness, the explanation therefor, the prospects of success and sometimes the importance of the case. See **Melane v Santam Insurance Co. Ltd 1962 (4) SA 53 (A)**. Considering the applicant's submissions in this regard and exercising the discretion this court possesses in such matters, I am of the view that the applicant has succeeded in showing good cause for its default. There is no suggestion that the applicant had deliberately failed to take action or deliberately set out to frustrate the finalisation of this matter. In the court's view condonation appears justified under the circumstances.

7. I turn now to the other preliminary issue. The applicant characterised its application as "Notice of application for a review section 158(1)(g) and 145". Mr Jammy, for the applicant submitted, correctly, that it was clear that what was intended by the applicant was to reflect that it was an application in terms of section 33 of the Arbitration Act. He submitted further that if Hospersa considered the mis-characterisation in the applicant's papers as fatally defective to the application, then a formal amendment of the heading was necessary. In my view mis-characterisation of the nature of the review is not fatal. This court has to

look beyond the legal label and consider the substance of the application. To look no further than the heading would be unduly formalistic.

8. I now turn to the facts. The applicant and Hospersa are bound by the provisions of the Transnet Bargaining Council (“the Council”). In compliance with the provisions of the Constitution of the Council the parties referred a dispute between them to the Independent Mediation Services of South Africa (“Imssa”) to be resolved in terms of the arbitration Act. The brief history of the dispute is that during June 1994 Maxie de Kok (“De Kok”), a member of Hospersa, applied for two positions advertised by the applicant. These positions were that of Assistant Manager and Professional Officer, both in the Training and Development Department. The selection committee that interviewed De Kok recommended her for appointment as an Industrial Social Worker. She was however offered the position of Professional Officer Human Resources. This position was graded as a junior officer whereas that of Industrial Social Worker was graded at level 610 at a status of middle management i.e. higher than the position offered to De Kok.
9. De Kok accepted the position offered and signed an agreement setting out her benefits and conditions of employment. She was officially appointed on 1 December 1994. During the course of her employment a dispute arose relating to her appointment. Her union, Hospersa, contended that the applicant had committed an unfair labour practice by appointing De Kok to a junior position

instead of a middle management position.

10. The dispute was initially referred to the Council on 24 June 1997 where the nature of the dispute was characterised as follows:

“Nature of dispute:

Ms. M. De Kok is employed as a Professional Officer (Junior Grade) whilst doing the job of social worker (Senior Grade/Middle Management) at the Spoornet office in Kimberly. She is employed on a very junior level whereas her colleagues and other social workers employed at Spoornet are performing the same functions with equivalent/lower qualifications on a level of middle management with the appropriate salary. A precedent has been set in that a colleague with a similar problem was promoted to middle management after taking the employer to the Industrial Court (NHK 11/2/3675).”

11. Conciliation failed and the parties referred the dispute to Stemmett to resolve through arbitration. In the arbitration agreement the issue for decision and the arbitrator’s powers are described thus:

- “1. The issue which the arbitrator will be asked to decide is whether, in the arbitrator’s opinion based on the evidence presented in the arbitration;
“Spoornet Kimberly committed an unfair labour practice in terms of the Spoornet policy in failing to appoint Ms De Kok to a middle management (610) position in the grade of Industrial Social Worker on 1 December 1994 at Spoornet Kimberly”**
- 2. The arbitrator shall have the power to make an award in which s/he orders Spoornet Kimberly:**
 - 2.1 to appoint Ms De Kok to a middle management position (610) in the grade of Industrial Social Worker retrospectively from 01 December 1994 in terms of Spoornet Policy;**
 - 2.2 make payment to Ms De Kok of all monies she would have earned had she been so appointed within one month of the award;**
 - 2.3 if the company is unable to place Ms De Kok in a position of the same status as Industrial Social Worker at level 610 in the new structure, she will accept a severance package in terms of the existent Spoornet Policy operative from a**

date two months after the date of the award.”

12. Stemmett issued his award on 17 April 1998 in which he made the following findings:

“After considering all the evidence and the arguments submitted to me at the arbitration, I find, on a balance of probabilities, that the company has treated Ms De Kok unfairly by appointing her as a Professional Officer in stead of an Industrial Social Worker at 610 level on 01 December 1994, for the following reasons:

- 1. One of the positions Ms De Kok applied for in June 1994, was that of Assistant Manager which is a Middle Management position.**
- 2. Ms De Kok’s selection committee recommended her appointment at middle management level and this was supported by the manager Human Resources in Kimberly.**
- 3. The company was not consistent in that it appointed some Industrial Social Workers at middle management level and others at junior officer level.**
- 4. Ms De Kok undertook and performed the functions of Industrial Social Worker and she performed them very well.**
- 5. The post of Industrial Social Worker is evaluated at middle management (610) level. The company’s approach to link the grading of Industrial Social Workers to their individual performance, is contrary to the Hay evaluation system.**
- 6. The company’s Assistant Manager (Training) in Kimberly conceded in December 1994 that the responsibility and competency of Industrial Social Workers justify their appointment at Middle Management level.**
- 7. Ms De Kok accepted her appointment as Professional Officer without knowledge of the full implications of this grade.**
- 8. In respect of overtime, Ms De Kok was treated as if she was a middle Manager.”**

13. The applicant takes issue with Stemmett’s findings. Its complaints are essentially that:

- 13.1 Stemmett applied schedule 7 of the LRA which was not applicable at the date of appointment of De Kok on 1 December 1994.

- 13.2 Stemmett made a mistake of law in holding that De Kok was entitled to fair treatment prior to her appointment which, it is submitted is contrary to the provisions of the 1956 LRA;
- 13.3 Stemmett exceeded his powers when he considered the inconsistent application of the applicant's appointment policy in force at the time, as, this issue fell outside the arbitration agreement between the parties.
14. The provision of section 33 of the Arbitration Act are similar to the provisions of section 145 of the LRA. The Labour Appeal Court ruled in **Carephone (Pty) Ltd v Marcus N.O & Others (1998) 19 ILJ 1425 (LAC)** that arbitration awards of the Commission can only be reviewed in terms of section 145. In that judgment the Labour Appeal Court noted that the judicial functions of the Commission and other organs of the state, though not transforming these bodies into courts of law, remained administrative action within the ambit of the administrative justice section of the Constitution.
15. Froneman DJP noted that section 33 and 23(b) of schedule 6 to the Constitution introduced a requirement of rationality in the merit or outcome of the administrative decision going beyond procedural impropriety. In paragraph 36 of the judgment Froneman DJP stated:
- “In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or other. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or

her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”

In my view the standard test of review of awards of the CCMA as set out by the Labour Appeal Court applies equally to awards issued in terms of the Arbitration Act. One reason is the similarity between section 145 of the LRA and section 33 of the Arbitration Act. The other reason is that inconsistencies and confusion could prevail if this court were to apply different standards of review.

16. In casu the primary complaint against Stemmett is that he misconstrued the nature of the duty upon him and misapplied the law to the question that he was requested to consider. As a consequence Stemmett exceeded his powers and committed a gross irregularity, so it was argued, by Mr Jammy, the applicant’s counsel. The case argued by Mr Jammy is that Stemmett was empowered to consider the situation as it prevailed on 1 December 1994. It was contended that Stemmett went further than he was empowered i.e. he considered what the applicant did after 1 December 1994 and the responsibilities given to De Kok etc.
17. In my view it is not correct that the basis of Stemmett’s ruling is based on his consideration of the functions and responsibilities given to De Kok subsequent to 1 December 1994. At most this can be viewed as one of his reasons for arriving at his ruling. It will be recalled that he specifically ruled against an attempt by Hospersa to include the period after 1 December 1994 within the ambit of the

arbitration. That however is as far as the criticism of his reasoning ends. The other reasons as stated are immune from any challenge and in my view, are not tainted by the reasons referred to above. In other words even if one were to discount this one reason the other reasons can stand on their own and are sufficiently rational within the requirements of Constitutional constraints. It is clear that he considered all the evidence placed before him and thereafter came to a decision. I therefore find no merit in the submission that Stemmett exceeded his powers in a manner that would justify interference with his award. To interfere with his award on the basis of that reason alone would amount to entering the merits to substitute my decision for his, something foreign to reviews of this nature.

18. The other submission is that Stemmett committed a gross irregularity in that he misapplied the law. This submission is based on the fact that in December 1994 when De Kok applied she was not an employee as defined in the 1956 LRA. That being the case Stemmett could not therefore have regarded her as an employee within the meaning of the present Act. In view of the legal position pertaining to the 1956 LRA it was not possible to commit an unfair labour practice against a non employee a situation covered by the present Act. In view of this, so the argument went, Stemmett misdirected himself when he applied the provisions of the present Act to De Kok's situation in December 1994 as the 1956 LRA applied then.

19. The arbitration agreement between the parties empowered Stemmett to decide whether **“Spoornet Kimberly committed an unfair labour practice....”**. On the face of it the agreement empowered him to consider the evidence and decide whether an unfair labour practice had been committed. The agreement also empowered him that in the event that he found that Spoornet had in fact committed an unfair labour practice he was to order Spoornet to appoint De Kok to a middle management position and that she be paid all monies she would have earned had she been correctly appointed on 1 December 1994.
20. To me the power to consider whether an unfair labour practice had been committed amounted to nothing more than empowerment to consider whether fair treatment had taken place or not. The agreement could easily have empowered him to consider if De Kok had been fairly treated at the time of her appointment. In essence the enquiry is the same whether the words unfair labour practice were used or not. In fact as it turns out nowhere in the award does Stemmett use the phrase “unfair labour practice” but instead he says **“I find on a balance of probabilities that the company treated Ms De Kok unfairly...”** That to me, is what he was empowered to consider.
21. Hospersa prosecuted the dispute in terms of the present Act hence this court has jurisdiction to entertain it. One also assumes that the parties had in mind that the present Act would apply to Stemmett hence the use of the phrase “unfair labour

practice” in the agreement. Furthermore it does not seem that it was argued before Stemmett that the present Act was not applicable. This could not be argued because the effect thereof would have been to divest Stemmett of any jurisdiction and power to arbitrate the dispute. In my view therefore Stemmett did not misapply the law. He simply considered the dispute within the four corners of the arbitration agreement.

22. The applicant also criticized Stemmett for finding that its appointment policy was inconsistent. It is so that Stemmett was not empowered to consider the policy itself. When he did so it was not to pass judgment on it but to see how it was applied regarding De Kok. The fact that he found that the policy was inconsistent does not detract from what he had to consider. Frankly I do not see how he could have considered the issue before him without also considering the policy.

23. Considering the whole matter I am of the view that it cannot be said that Stemmett misconceived the nature of the whole dispute and that the applicant did not have the benefit of a fair trial. In my view his award is appropriate and cannot be faulted on any basis to justify any interference by this court. In the circumstances I make the following order:

1. The application for review is dismissed with costs.

MLAMBO J

Date of judgment: 12 February 1999.

For the applicant: Mr P. Jammy instructed by Hofmeyer Herbstein Gihwala Cluver & Walker Inc.
ou of Hospersa.