

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: J 404/00

In the matter between:

SADTU

First Applicant

CHABELI & 5 OTHERS

Individual Applicants

and

ADV MAHOMED JAJBHAY

First Respondent

HEAD OF THE FREE STATE EDUCATION DEPARTMENT

Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

J U D G M E N T

BASSON, J:

- [1] This is an application for the review of the arbitration award made by the first respondent in terms of which he found that the appointments made by the officials of the second respondent were regular.
- [2] The application for review is some two-and-a-half weeks late, that is, outside of the prescribed six weeks period in terms of the prescriptive provisions contained in section 33 of the Arbitration Act, 42 of 1965 (“the Arbitration Act”).
- [3] The explanation for the delay was that the period within which the delay took place was over the annual “shut-down” period during December/January. In this regard I was referred to the case of Transport and General Workers Union and others v Hiemstra and another (1998) 19 ILJ 1598 (LC) where it was held to be a satisfactory explanation if a delay took place during the mid-December to early January “shut-down” period.

- [4] In the event, there was a not insignificant period of delay coupled with an explanation which I regard as not completely satisfactory. I now have to weigh up the prospects of success in deciding whether to grant condonation for the late filing of the review application. In deciding the prospects of success, I will at the same time address the merits of the review application.
- [5] The subject matter of the review concerned the alleged irregular appointment of teachers at the Tlotlisong Secondary School in the posts of principal, head of department (natural sciences) and head of department (languages).
- [6] The essential dispute to be determined is whether the arbitrator in coming to the conclusion that these appointments were regular, applied his mind to the facts before him, or not. In other words, the applicant's submissions were, crisply, that the first respondent made a material error of fact that caused him to misconceive completely the true issues in dispute.
- [7] In this regard, the applicant argued that the first respondent failed to appreciate that the three posts under consideration were so-called promotion posts and not so-called level-one posts, as he appeared to have assumed in his award.
- [8] Further, it was argued that the first respondent failed to appreciate that the so-called Human Resources Circular, 2 of 1997 ("the Circular"), required different procedures to be followed. When post level-one appointments are made, such procedures are governed by the provisions set out in paragraph 1.1 of the Circular. On the other hand, when promotion post appointments are made, such procedures are governed by the provisions set out in paragraph 1.2 of the Circular.
- [9] The applicant (SADTU or "the union") argued that the first respondent's failure to make this conceptual distinction was the root cause of his misconception of the true nature of the dispute.
- [10] This misconception allegedly also led the first respondent to fail to understand that there were two different sets of interviews held, in that the first respondent assumed that the union's witnesses' evidence related to the promotion posts' appointments.

- [11] In the judgment of Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO and others (unreported case C483/99) I held that arbitrations that take place in terms of the Arbitration Act (such as the present arbitration) stand to be reviewed on the so-called narrow basis or grounds of review and not in terms of the wider basis or grounds of review that was enunciated for the review of arbitration awards under the auspices of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) in the judgment of Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC). The applicant's legal representative argued that, even on the narrow grounds of review, the arbitration award in casu falls to be set aside.
- [12] In this regard it was stated that the first respondent allegedly committed a gross irregularity in the conduct of the proceedings within the meaning of section 33(1) of the Arbitration Act. Section 33(1) of the Arbitration Act read together with section 157(3)(b) of the Labour Relations Act, 66 of 1995 (“the LRA”), gives the Labour Court the power to review and set aside “private” arbitration awards where a arbitration tribunal has committed a gross irregularity in the conduct of the arbitration proceedings.
- [13] In terms of the common law it is trite that a material mistake of fact can be reviewed and set aside if the mistake causes the decision maker to misconceive the true issues in dispute and as such constituted a gross irregularity in the conduct of the arbitration proceedings. See Abdul and another v Cloete NO and others (1998) 19 ILJ 799 (LC) at 802 to 804.
- [14] It is, however, equally as trite that every irregularity in the proceedings will not constitute such ground for review.
- [15] In order to justify review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined. See, inter alia, Bester v Easigas (Pty) Ltd and another 1993 (1) SA 30 (C) at 43.
- [16] There need, however, not be any intentional arbitrariness or conduct or any conscious denial of justice. In fact, any behaviour which is perfectly well-intentioned and bona fide, though mistaken, may fall under such description. The crucial question is whether the irregularity prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to a gross irregularity. See, inter alia, Goldfields Investments Limited and another v City Council of Johannesburg and another 1938 TPD 551 at 560 and Blue Circle Limited v Valuation Appeal Board Lichtenburg and another 1991 (2) SA 772 (A).

- [17] Our courts have also distinguished between what are called patent and latent irregularities. Patent irregularities are those that take place openly as part of the conduct of the trial or proceedings, whereas latent irregularities are those that take place in the mind of the judicial officer which are only ascertainable from the reasons given by him or her. See Goldfields Investment Limited and another v City Council of Johannesburg and another *supra* at 560.
- [18] It was not contended *in casu* that the first respondent committed any patent irregularity. Rather it was contended that the first respondent committed a latent irregularity. This, the applicant argued, can be found in the fact that the first respondent failed to distinguish conceptually between the procedures to be followed in terms of a post level-one appointment and a promotion post appointment, respectively.
- [19] In the event, such a material mistake of fact may constitute a gross irregularity for the purposes of review proceedings. As is pointed out above, this would be so in circumstances where the mistake prevents a fair trial on the issues. Put differently, this would happen where the arbitrator concerned labours under a material error of fact to such an extent that the error precluded the presiding officer from applying his or her mind to the true issues in dispute. See also Paper Printer Wood and Allied Workers Union v Pienaar NO (1993) 14 ILJ 1187 (A) and Ferreira v Premier Free State and others 2000 (1) SA 241 (O) at 251 to 252.
- [20] See further the recent decision of Toyota South Africa Motors (Pty) Ltd v Radebe and others [2000] 3 BLLR 243 (LAC) where the Labour Appeal Court held that mistakes of facts and law are usually insufficient grounds for interference, but also made it clear (at paragraph [39] of this judgment) that this is so “subject to certain exceptions”.
- [21] In my view, one such exception is where the arbitrator concerned failed to exercise his discretion, or put differently, failed to apply his mind to the true issues in dispute.
- [22] The Circular (referred to above at paragraph [8] and attached at pages 51 *et seq* of the papers) makes it clear that there are prescribed procedures for the recruitment and selection of level-one posts, and, on the other hand, there are different procedures prescribed for principal and other “promotion posts”.
- [23] It was argued, and this was also clear on a correct reading of the Circular concerned (referred to above at paragraphs [7] to [8]), that the posts in question were promotion posts.

- [24] However, nowhere in the award did the arbitrator appear to clearly distinguish between the two types of posts and neither was a clear identification made of the posts in question.
- [25] Without having made this distinction and identification, the arbitrator (the first respondent) clearly could not have applied his mind to the different procedures that flowed from this distinction.
- [26] This is especially so in regard to the so-called shortlisting committee which must shortlist candidates. In terms of the Circular, at paragraph 1.1a(ii) (at page 53 of the papers) which deals with level-one posts, it is clear that two elected representatives from the parent community must sit on such shortlisting committee. However, such parent involvement or component is completely ruled out in terms of the provisions under paragraph 1.2 of the Circular which deals with so-called principal and other promotion posts.
- [27] Not having made such distinction, the first respondent clearly did not apply his mind properly to the issue in dispute, that is, whether the appointments in casu were regular, or not. This grave error of fact thereby precluded the first respondent from applying his mind to the true issue in dispute. The first respondent namely appeared to accept that the prescribed procedures were the same, without making the necessary distinction between promotion posts and level-one posts.
- [28] It follows that the failure to do so amounts to the failure to apply his mind to the issues in dispute. In the event, the award falls to be set aside on the basis of a gross irregularity.
- [29] The prospects of success are then clearly good in the present matter. In weighing up the different factors, including the length of the delay and the explanation for the delay (discussed above at paragraph [4]) in terms of the well-known principles enunciated in the case of Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) at 532, I believe that condonation should be granted in the present matter for the late delivery of the review application.
- [30] It must be noted that it was held in the case of Queenstown Fuel Distributors CC v Labuschagne NO and others [2000] 1 BLLR 45 (LAC) (per Conradie JA) that it is possible to grant condonation for delivering an application for review outside the prescribed 6 weeks period contained in section 145 of the LRA. This section mirrors the prescriptive provisions of section 33 of the Arbitration Act. In the event, this case is also authority for the conclusion that the Labour Court may condone the lateness of a review application in terms of section

33 of the Arbitration Act.

[31] It follows that the application for review in the present matter must succeed.

[32] The only question remains as to the correct remedy. It is not possible to determine the dispute between the parties on the papers as they stand as there was no proper record filed in this matter. The applicant therefore requested that the award be set aside and referred back to the third respondent for arbitration as per section 33(4) of the Arbitration Act.

[33] There will be no order as to costs as this matter was unopposed.

[34] I make the following order:

- 1.The arbitration award made by the first respondent under the auspices of the Independent Mediation Services of South Africa is reviewed and set aside.
- 2.The matter is referred back to the third respondent, the Education Labour Relations Council, for an arbitration anew in terms of which a new arbitrator must be appointed.
- 3.There is no order as to costs.

Basson, J

: 8 August 2000

: 8 August 2000 (*ex tempore*)

: Ms Carla Raffinetti of Cheadle Thompson & Hayson Inc.

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