IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR1521/2006
In the matter between:

BOTSHELO WATER BOARD	**Applicant**
and	
SA LOCAL GOVERNMENT BARAGAINING COUNCIL	**First Respondent**
MAJAKI MOSALA	**Second Respondent**
SAMWU OBO ITS MEMBERS	**Third Respondent**

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is a review application for the setting aside of the second respondent's award making an agreement entered into between the applicant and the third respondent an arbitration award.

[2] The crisp issue in this case is whether the agreement here in issue

can, on application of any party thereto, be made an arbitration award under section 142A of the Labour Relations Act, 66 of 1995 ("the Act"), presumably with a view to enforcing same against the other party to the agreement. The applicant maintains that this cannot be done under section 142A of the Act because that section applies to settlement agreements while we are here concerned with a collective agreement. The third respondent urges that because it has a right to refer a dispute relating to the enforcement of the collective agreement under another provision of the Act (section 24) to the first respondent for arbitration, the agreement is thus capable of being made an arbitration award under section 142A.

The facts

[3] During 2005 the applicant and third respondent commenced collective bargaining talks on wages for the 2005/2006 financial year. When the parties failed to agree on all the third respondent's demands (the demands related to salary increases, long service awards, correcting disparities and minimum salary) the matter was referred to the first respondent for conciliation. The conciliation was apparently set down for 13 October 2005. But before the matter could be conciliated, the parties reached agreement, reduced

it to writing, and signed it on 11 October 2005.

[4] It appears the applicant continued to ignore the agreement because the third respondent approached the first respondent to make the agreement an arbitration award so that it could enforce it. The application was heard by the second respondent who decided that the agreement of 11 October 2005 was capable of being made an arbitration award under section 142A of the Act.

The court's finding

[5] The third respondent sought condonation for the late filing of its answering affidavit. As there was no opposition from the applicant, nothing more need be said in this regard.

[6] Section 145 of the Act requires the applicant to prove one of four grounds of review. These are misconduct on the arbitrator's part in relation to his duties as an arbitrator; gross irregularity in the conduct of arbitration proceedings; *ultra vires* conduct by the arbitrator in the exercise of his powers and an improper obtaining of the award. On a *conspectus* of all the cases, however, it seems to me the permissible grounds of review are wider than those set out

in section 145 of the Act and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 *ILJ* 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1425 (LAC) at paragraph [37]; *Pharmaceutical Manufacturers' Association of SA and Others: In re Ex Parte Application of the President of the RSA and Others* 2000 (3) BCLR 241 (CC)). It is not the reviewing court's task to consider whether or not the decision is correct in law as that would be an appeal (*Minister of Justice and Another v Bosch NO and Others* (2006) 27 *ILJ* 166 (LC) at paragraph [29]).

[7] The applicant submits that the second respondent committed a gross irregularity in misconstruing the nature of the agreement of 11 October 2005 and finding that it is capable of being made an arbitration award under section 142A. It also submits that the

second respondent acted *ultra vires* in making the agreement an arbitration award under the section.

[8] Section 142A provides as follows:

> "(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any *dispute* that has been referred to the Commission, an arbitration award.
>
> (2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a *dispute* that a party has the right to refer to arbitration or to the Labour Court … ."

[9] The second respondent found that the agreement is both a settlement agreement and a collective agreement and proceeded to make it an arbitration award. The question that arises is whether the second respondent's decision is justifiable in relation to the reasons given for it. Simply, the decision to make the agreement an arbitration award under section 142A is based on the finding that the agreement is at once a settlement agreement and a collective agreement and that the way to enforce it is by making it an arbitration award under the section.

[10] After quoting section 142A, the second respondent writes in her award:

> "Undoubtedly from the evidence before me I am dealing with a settlement agreement that originates from matters of mutual interest."

[11] But later on in the award, she quotes the definition of "*collective agreement*" in section 213 of the Act and proceeds to conclude thus:

> "Clearly this agreement meets the essential elements of the definition. As a result how do you enforce such an agreement? Section 142A of the Labour Relations Act 66 of 1995 as amended seems to be the appropriate mechanism."

[12] It thus appears the second respondent considers that section 142A is the way to enforce the agreement whether it is a settlement or a collective agreement. The applicant maintains that this is a collective agreement and the way for the third respondent to enforce it is to "take the matter to the streets" by invoking section

64 of the Act.

[13] The issue is whether the decision is justifiable in relation to the reasons given for it. Section 142A deals with settlement agreements and not collective agreements. The enforcement of collective agreements is dealt with under section 24 of the Act. Both parties' representatives are *ad idem* that we are here concerned with a collective agreement and that the second respondent erred in dealing with this matter under the provisions of section 142A which deals with settlement agreements. A decision based on an error of law is reviewable (see *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* (2002) 23 *ILJ* 358 (LAC) at paragraph [28]; *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 85A-95F and the authorities referred to therein).

[14] Ms Edmonds for the third respondent urged in argument that, while the agreement is a collective agreement and not a settlement agreement, I should nevertheless find that the second respondent still reached a correct decision but through a wrong provision of the Act. She submitted that section 138(9) is the provision the

second respondent should have used. That section provides, among other things, that the commissioner may make any appropriate arbitration award that gives effect to any collective agreement. I cannot accept that argument because in review proceedings it is the basis for the decision that is under scrutiny. Since the basis for the second respondent's decision was the application of the wrong provision of a statute, and the error goes to the substance of the decision, the decision falls to be reviewed and set aside.

[15] The applicant has not asked that the matter be remitted to the first respondent for a *de novo* determination. I am satisfied that I have enough material to determine the matter.

[16] In the result:

[a] the second respondent's award is hereby reviewed and set aside;

[b] the third respondent is ordered pay the costs of this application.

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Ngalwana AJ

Appearances

For the applicant: *Mr P Motaung*
Instructed by: *Motaung Inc.*

For the third respondent: *Ms R Edmonds*
Instructed by: *Ruth Edmonds Attorneys*

Date of hearing: *06 June 2007*

Date of judgment: *12 June 2007*