**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

**CASE NO: D 247/07**

Not reportable
In the matter between:

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| **SOUTH AFRICAN MUNICIPAL WORKERS' UNION (SAMWU)** | Applicant |
| **and** | |
| **PROFESSOR A J RYCROFT N.O** | First Respondent |
| **THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL** | Second Respondent |
| **ETHEKWINI MUNICIPALITY** | Third Respondent |
| **INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION (IMATU)** | Fourth Respondent |
| **KWAZULU-NATAL MUNICIPAL PENSION FUND** | Fifth Respondent |

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JUDGMENT

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BHOOLA AJ:

Introduction

[1] This is an application for review of an arbitration award delivered by the first respondent on 5 April 2007 in an arbitration conducted under the auspices of the South African Local Government Bargaining Council ("the Bargaining Council").

Background

[2] A dispute arose between the applicant and the third respondent after the latter co-operated in the setting up of the fifth respondent ("KZNMPF"), a defined contribution pension fund. The dispute arose because the applicant contended that KZNMPF had been set up in contravention of a collective agreement containing a moratorium against the establishing of new pension funds in the local government sector.

[3] The dispute as to whether such a collective agreement had been concluded was resolved in the applicant's favour when the arbitrator delivered his first award on 11 October 2005. The first respondent found as follows:
*"A collective agreement was concluded in the SALGBC in terms of which no further retirement funds would be introduced and employees would not be able to transfer from one pension fund to another pending negotiation of the structure of pension funds in the Bargaining Council".*
The award was an interim award in respect of issues which had been separated for purposes of the arbitration. Given the finding of the first respondent that such a collective agreement was concluded the question that remained was what relief, if any, the applicant was entitled to.

[4] It is common cause that the third respondent breached the collective agreement by allowing the KZNMPF to be established and permitting members of the Durban Pension Fund to transfer to it. A significant number transferred after the arbitration award was made on 11 October 2005, but since then the third respondent has abided by the agreement in respect of existing employees by not permitting further transfers. The third respondent nonetheless persisted that new employees had to elect whether they joined the existing Provident Fund or the KZNMPF.

[5] The applicant then set down the arbitration for an order to enforce the provisions of the collective agreement and to direct the third respondent not to allow new members to join the KZNMPF, or other employees to transfer to it from an existing fund pending finalisation of the negotiation of the structure of Pension Funds in the Bargaining Council.

[6] The applicant elected not to lead any evidence at the arbitration. The third respondent led the evidence of Mr D Field, who was an employee of the third respondent and the Principal Officer and Trustee of the KZNMPF. The evidence led established that the Fund was viable with its current 6000 members, and that there was no urgency for it to acquire significant numbers of new members in the short term. He further testified that:

a) The Durban Pension Fund is a defined benefit fund many of whose members are pensioners;
(b) There was concern about the survival of the Durban Pension Fund because of some very high death and disability claims;
(c) There were several benefits to establishing a defined contribution fund including being able to retire early; being able to nominate a beneficiary; the benefit of a pension-backed guaranteed home loan facility; lower premiums and no accumulation of reserves;
(d) The KZNMPF was established in November 2001, as a defined contribution fund, and as at April 2007 had 6132 members;
(e) Its membership is constituted by new staff members and by current employees who transferred from the Durban Pension Fund and the Natal Joint Pension Fund (which is a Provident Fund);

(f) A freeze on membership of the KZNMPF will not only affect the costs of administration of the fund but withdrawals by reasons of resignation and death will also negatively affect it.

[7] The KZNMPF was established in collaboration and consultation with SAMWU and IMATU, unlike the situation which arose in the Johannesburg and Cape Town local government structures where unilateral transfers to new pension funds occurred.

Applicant's submissions

[8] The first respondent recognised that the promotion of collective bargaining and collective agreements was one of the central themes of the Labour Relations Act, 66 of 1995 ("the LRA"). He also recognised the primacy of collective bargaining and that collective agreements should only be departed from in the most exceptional circumstances.

[9] The first respondent considered the question of whether there were exceptional circumstances present in this dispute which would justify a departure from the effect of the collective agreement. He concluded that there were and set out several reasons why he considered he could do so and decline to order the third respondent to freeze membership of the KZNMPF. He delivered an arbitration award on 5 April 2007 where he declined to make any order, not even in respect of maintaining the *status quo* in relation to transfers. Paragraph 16 of his award states as follows:
*"The Respondent has tendered to freeze further transfers of members of the Durban Pension Fund until such time as a national collective agreement is concluded. I take that to be a voluntary decision by the Respondent and I will not interfere with it, save to say I would not have required that action. Clause 10.7.9. of the Constitution of the South African Local Government Bargaining Council empowers me to make any appropriate arbitration award. In this case I am persuaded that it is appropriate that no order be made compelling the Respondent to freeze new or existing employees becoming members of the Kwazulu-Natal MPF".*

[10] In effect, the applicant submitted, the first respondent found that the third respondent was entitled to breach the collective agreement with impunity on the basis, it seems, that it had already done so in relation to approximately 6000 employees and therefore it was unfair to the other employees to treat them differently notwithstanding the binding collective agreement.

[11] In his award the first respondent sets out the list of the exceptional circumstances he found to exist as follows:
(a) He found that the delay in reaching consensus at national level had not been what was contemplated originally when the moratorium on new funds was put in place.
(b) He found that the fact that an audit/inventory had not been conducted as had been agreed was evidence of the fact that a negotiated settlement was probably incapable of being achieved.

(c) The KZNMPF is a viable fund and he found that it was not in the employees' interests that the fund be stunted by the effects of an Arbitration Award.
(d) A legally competent agreement concluded at divisional level (the SAMWU and IMATU agreement) was treated on the basis that although it was not binding it indicated an expression of the local authority's intention.
(e) The relief that had been sought was less than originally contemplated in the prayer and adjusted because no relief could be sought against the Pension Fund itself with the result he found that the order that was sought was merely symbolic and had to be scrutinised in a special way in case it was inequitable.
(f) He found that there were important societal values providing for equality in the workplace, and that to have permitted some employees to join and then prevent others from joining the new fund was inequitable.
(g) He took into account the argument that there is a discretion conferred upon an arbitrator or court in granting specific performance, to decline to do so where the order would be unreasonably harsh or inequitable in the circumstances, and found this to be so in the present case.

Grounds of review

*Failure to order specific performance*

[12] One of the applicant's main contentions was that the only rational and appropriate award was for the arbitrator to have directed that the collective agreement should be complied with. This is clearly incorrect, as was submitted by the third respondent, in that an arbitrator has the discretion to "*make any appropriate arbitration award".* The third respondent submitted that the fact that the quoted phrase is linked to the words *"... in terms of the Act that gives effect to the collective agreement"* does not detract from the validity of this submission. The reason for this is as follows:

(a) The applicant sought an order for specific performance for the enforcement of the moratorium contained in the collective agreement. It is trite that an order for specific performance is discretionary and that although such a discretion must be exercised judicially, it is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged on its own merits. In *Heynes v King Williams Town Municipality* (1951) 2 SA 371 (A) at 378G, the court gave as examples of good and sufficient grounds for refusing specific performance:

> *"where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances".*

This *dictum* has been followed in : *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (AD) at 781; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) at 440; *Santos Professional Football Club (Pty) Ltd v Igesund & Another* 2003 (5) SA 73 (C) at 80; *Barclays*

*National Bank Ltd & Another v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd & Others* 1982 (4) SA 650 (D); *Unibank Savings & Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at 208.

(b) Clause 10.4.9 of the Bargaining Council's Constitution cannot be so interpreted that an arbitrator's discretion is circumscribed to the extent that he may only make an award which gives effect to the collective agreement. Such an interpretation is absurd because it would mean that an arbitrator would be obliged to make an award that gives effect to the collective agreement even in cases of impossibility of performance, injustice or where the effect of the award would be morally repugnant.

[13] The applicant conceded that while *Heynes* was relevant to specific performance, the present circumstances did not fall into the kind of conduct contemplated therein, where an entire community would have been deprived of water during a time of drought. In the present case the relief sought was partially conceded in terms of a tender. In the present matter there was no reason why specific performance should not have been enforced, and there was no basis for the finding that, in the light of the tender, it was unduly harsh or inequitable to grant this relief. It was not unduly harsh, the applicant submitted, to enforce the collective agreement in relation to new employees either. Simply to speculate what would be unduly harsh or in equitable is not to establish that such facts exist. The award did not establish that it would be unreasonably harsh or inequitable to prevent employees from joining the new pension fund during the moratorium which, after all was binding upon them under the collective agreement and they had no rights to join that fund prior to them seeking employment with the third respondent. Although the applicant sets out the approach to be taken by a court in a claim for specific performance as articulated in *Benson vs SA Mutual Life Assurance Society* (supra), and conceded that a court has the discretion to refuse specific performance when the order would be unreasonably harsh or inequitable, it submitted that such circumstances did not exist in the present matter.

[14] The third respondent submitted that the arbitrator was entirely correct in treating the third respondent's tender to freeze further transfer of members until a national collective agreement is concluded, as a voluntary decision which he would not have ordered. There was no doubt that such a freeze would cause inequity as far as these employees are concerned. More importantly however, the applicant seeks an order not only to freeze transfers but also to prohibit any new employees from joining the KZNMPF. This will clearly cause hardship and inequity to new employees will now have no option but to join the Provident Fund (the only one they can join is the Natal Joint Pension Fund). I agree that the first respondent's conclusion, as set out in his award, that this was not an exceptional circumstance that would justify specific performance, was a reasonable conclusion in the circumstances given the history of this matter. In any event the decision of the first respondent, in the context of the voluntary tender, constitutes preservation of the status quo and cannot be said to be inappropriate. Moreover, given the

history of the matter and the length of the delays, it cannot be said that his award is unreasonable, or that in exercising his discretion to refuse specific performance he misdirected himself or committed a gross irregularity.

Inequality

[15] Another of the applicant's main contentions was that it was not rational for the first respondent to hold that employees who would not be permitted to join the KZNMPF were being discriminated against and not treated equally. The finding that it is in equitable to deny new or existing employees the right to join the KZNMPF as over 6000 existing members have done, is indeed, it was submitted by the third respondent, an important factor that was properly borne in mind in exercising his discretion. Mr Fields testified that he received eekly requests from employees who elong to the Natal Joint Pension Fund and even from councillors who belong to the SALGA Fund to join the KZNMPF.

[16] The plight of new employees demonstrates, the third respondent third submitted, the inequality complained about. They have no choice other than to join the Natal Joint Pension Fund, a Provident Fund, because the Durban Pension Fund is closed to new membership. This situation is likely to continue bearing in mind that the moratorium has already been in place for a decade and no evidence was adduced by the applicant that any breakthrough has been made or is expected to be made in the Bargaining Council. No evidence whatsoever was placed before the first respondent explaining why the moratorium, which was anticipated to last only three months, is still in place after many years.

[17] The applicant contends that there was insufficient evidence before the third respondent to enable him to have come to the conclusion, as he appears to have done, that collective bargaining in the Bargaining Council is not capable of delivering a negotiated and consensual solution to the establishment of pension funds applicable within the industry. The applicant submitted that if local authorities were all allowed to go their own way, as the award permits, such a consequence may well be the result of what was a serious misdirection on the part of the first respondent. It was submitted that insofar as he referred to "*little evidence*" it may well be that the first respondent did not make a finding but rather he considered there was an onus on someone to prove that a negotiated and consensual solution could be found. The applicant submitted in this regard that a party seeking to enforce an agreement does not bear an onus that goes beyond proving the agreement.

[18] I agree with the third respondent’s submission that this ground of review is simply incorrect. The first respondent drew an inference, as he was entitled to do, from the facts set out in paragraph 15b of the award. The fact that not even the preliminary audit of pension funds in local government was not performed, which was anticipated would be completed within three months from the resolution dated 6 February 1998, indicates that there was little prospect that collective bargaining was capable of delivering a

consensual solution. In the absence of some explanation for the failure to find a consensual solution, the third respondent submitted, the inference is compelling that a negotiated solution is not capable of being delivered after a delay of a decade.

Prejudice

[19] The applicant submits that the first respondent found that employees who joined the KZNMPF had not been prejudiced. The finding that the first respondent made in fact, as the third respondent submitted, is that there was no evidence that the establishment of the fund caused any prejudice. This is correct and it is patently clear from the evidence of Field that the establishment of the fund in fact benefited the employees who decided to join it. These benefits are not available to employees who have not been able to join the fund.

[20] The applicant also submits that there was no evidence that the KZNMPF would be stunted by the arbitration award, preventing growth in the short term, unless the first respondent was referring to potential long-term growth in respect of which there were no guarantees. The applicant submitted that "*stunted growth*" was not an exceptional fact that necessitated condoning ongoing breaches of the collective agreement. It was illogical for the first respondent to state that since the agreement had been breached and the persons who had breached the agreement may possibly not achieve as strong a growth over the years if further breaches are prevented, the first respondent should encourage further breaches in order to facilitate such growth. In fact, as the third respondent submitted, and I agree, the evidence of Field was that a freeze on membership will have a detrimental effect because it is inevitable that there will be withdrawals of membership from the fund which will affect the cost of administration. Any cost of increased administration will detrimentally affect the contributions that are made, and, in the long term the payouts from the fund. This is clearly an important factor to have borne in mind in terms of the proper exercise of the first respondent's discretion. To simply have discounted it, as the applicant submits, will inevitably lead to prejudice to employees who are members of the KZNMPF.

[21] The applicant submitted that it was irregular and constituted misdirection for the first respondent to take into account an agreement that is void. The arbitrator was referring to an agreement between SAMWU, IMATU and the third respondent to establish the KZNMPF. However, the first respondent did not give effect to a void agreement. What he did was to exercise his discretion not to grant the order sought by the applicant. It was not wrong in that context, the third respondent submitted, to take into account the conduct of the local branches of the various trade unions and their members, which led to the agreement to establish the KZNMPF. It is not correct to suggest, as the applicant does, that in exercising this discretion the first respondent undermined the constitution of the Bargaining Council and in so doing committed a serious and gross misdirection.

Symbolic order

[22] The applicant further takes issue with the first respondent's concern that freezing further transfers and preventing new employees from joining the KZNMPF in breach of the collective agreement was merely symbolic. The applicant submits that it was not symbolic but constituted substantive relief that had an unfair impact on new employees and those who had not yet chosen to transfer, and accorded with the obligations under the collective agreement. The third respondent submitted that it was irrelevant whether this was symbolic or substantive relief and the important issue was the potential inequitable effect of the order, which the first respondent was justified in scrutinising in the proper exercise of his discretion.

Conclusion

[23] I cannot agree with the applicant's submissions that the first respondent misdirected himself in relation to most of the reasons which have been cited as creating exceptional grounds that would justify a departure from the primacy of collective bargaining, or adopted an approach that was inappropriate having regard to the duty imposed upon him by the Labour Relations Act and the Constitution of the Bargaining Council. I agree with the third respondent that in empowering the first respondent to make "*any appropriate to award to give effect to the collective agreement"* the Constitution of the Bargaining Council does not prevent him from exercising his discretion, on the basis of the evidence before him, in determining on a balance of probabilities that it would not be appropriate to issue the order that was sought. To take into account considerations of fairness and equality, and exercise his discretion, as he was in law required to do, to determine that it was equitable to issue the order, did not constitute a misdirection or gross irregularity. In my view therefore, applying the by now trite applicable test in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC), it cannot be said that the order is one which a reasonable decision-maker, applying his mind properly to the issues before him, could not have reached.

[24] In the premises, I make the following order:

The application is dismissed, with costs.

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Date of hearing: 15.05.09
Date of judgment: 08.07.09

Appearance:
For the Applicant: Advocate M Pillemer SC instructed by Shanta Reddy Attorneys
For the Third Respondent: Adv G Van Niekerk SC instructed by Shepstone & Wylie