IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO: P 36/08

In the matter between:

MEC: DEPT OF HEALTH (EASTERN CAPE) **APPLICANT**

and

ADRIAAN VAN DER WALT N.O **1ST RESPONDENT**

DR JLM TAYLOR **2ND RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside a decision made by the first respondent ('the arbitrator'), who was appointed to arbitrate a dispute between the applicant and the second respondent (Dr Taylor) in terms of the Arbitration Act, 42 of 1965. The dispute concerned Dr Taylor's claim to certain annual increases. The arbitrator upheld the claim, but without quantifying the amount.

The facts

[2] The material facts are recorded in the papers, and there is no need for me to repeat them here, save to state that in July 2005, the applicant and Dr Taylor agreed to refer certain disputes between them to private arbitration. The dispute that is the subject of the present proceedings has it roots in a moratorium

imposed by the applicant in 1996 on all salary adjustments and increases for district surgeons in the Eastern Cape. Prior to that, Dr Taylor, a district surgeon, had received regular increases in remuneration. The moratorium was occasioned by an investigation into suspected fraud amongst certain district surgeons in the Eastern Cape. It is common cause that the investigations initiated by the applicant revealed no misconduct or impropriety on the part of Dr Taylor.

[3] Dr Taylor's assertion, in essence, was that he was a public servant and that he was in consequence entitled to the benefit of increases in remuneration afforded public servants over the years. His difficulty was determining what those increases were (or should have been) was occasioned by the fact that many of the relevant collective agreements afforded increases by reference to specific grades or ranks whereas at the relevant time, district surgeons were not specifically integrated into the public sector post-establishment.

[4] The parties agreed to refer a number of disputes between them to private arbitration, but only the dispute relating to salary increases is relevant to the present proceedings. The terms of the dispute are set out in clause 2.3 of the arbitration agreement records that the arbitrator was to determine the following:

> *Whether or not the Applicant is entitled to the benefit of the annual salary increases that were applied to civil servants since the time when the applicant last received the benefit of such an increase in 1995.*

The arbitration proceedings

[5] Only two witnesses testified at the arbitration hearing, a Mr. Wiggill, the CEO of the Humansdorp hospital and employed by the applicant, and Dr Taylor himself. The applicant did not call any witnesses. I do not intend to repeat or even summarise the evidence here, save to say that Wiggill gave evidence on the calculations used to reach the numerical figures that comprised Dr Taylor's

claim, and the percentage increase that in his view ought to have been applied annually to Dr Taylor's salary. Wiggill explained the basis on which district surgeons were remunerated (by session, according to a sessional tariff), and the manner in which the sessional tariffs had been increased over the years by reference to salary increases agreed in the bargaining council. This was achieved by what Wiggill referred to as a translation key. In essence, the increased rate for a principal medical officer was converted into a sessional tariff, and that tariff applied to sessions conducted. Wiggill conceded that the collective agreements did not provide for a category labeled 'district surgeons', but that he had used the category of principal medical officer as an analogous category. Wiggill further conceded that the tables on which he had relied were complied by a third party, and that he had not personally checked whether the calculations correlated with the collective agreements.

[6] Dr Taylor gave evidence about the basis in which he and other district surgeons were remunerated. In essence, they performed 'sessions' and were paid for each session performed rather than uniformly according to a pay scale. In other words, they were paid for work done, not for their availability to work. Dr Taylor claimed the benefit of the percentage annual increases for categories of employees in the public service, contending that these agreements gave him (and other district surgeons) a right to the agreed increases, even though they were not acknowledged or referred to as a discrete category in any of the agreements.

[7] The applicant's defence, which was never articulated through any witnesses but can be discerned from the cross-examination of the witnesses who did testify and the submissions made to the arbitrator, was first that district surgeons were not covered by the collective agreements, since they were not graded, nor integrated into the departmental organogram. The annual percentage increases were linked to specific posts in recognised grades and to salaries earned. Dr Taylor's salary did not match any salary recorded in the

relevant tables. Secondly, the applicant claimed that even if the collective agreements applied to district surgeons, that Dr Taylor had failed to prove the quantum of his claim.

The arbitrator's award

[8] One of the issues that arose before the arbitrator was whether Dr Taylor was employed in the public service. This matter was disposed of in a concession made by the applicant's representative in his closing address to the arbitrator, when he said: '*Mr. Arbitrator you can take it from the respondent that Dr Taylor was a member of the public service.'* In essence, that left the issues of prescription (which had been raised in the pre-arbitration minute) and the application (if any) of the collective agreements as the basis for Dr Taylor's claim to be determined.

[9] In his award, the arbitrator dealt first with the issue of prescription raised in the proceedings by the applicant, and concluded that those of Dr Taylor's claims (which were by their nature severable, being claims to annual increases) that had arisen more than three years before his referral of the dispute to the CCMA had prescribed. This conclusion is of no consequence in these proceedings, and no more need be said about it.

[10] The arbitrator then turned to consider whether Dr Taylor was covered by the respective resolutions of the bargaining council, the basis on which Dr Taylor had asserted his claim. The arbitrator found that the objective of each resolution adopted by the bargaining council (that provided for wage increases) was to improve salaries and other conditions of employment for employees in the public service. The resolutions applied to all employees who fell within the registered scope of the council. Since Dr Taylor was an employee, he was not excluded from the application of the resolutions. The evidence of Wiggill was to the effect of how he made calculations as to Dr Taylor's increases by referring to what was

termed the ‘translation key’ of each collective agreement. While there was no category in the collective agreement that applied specifically to district surgeons, the category of principal medical officer had been used as an analogous category, and the benefit of the increases claimed by Dr Taylor calculated accordingly. On this basis, the arbitrator held that Dr Taylor was entitled to those increases claimed that had not prescribed. While Wiggill’s evidence did not provide a basis for determining the exact amount to which Dr Taylor was entitled, the arbitrator considered that the claim should not fail as a result. Rather, the parties should attempt to reach agreement on the quantum of the claim, failing which further evidence should be presented so as to enable the arbitrator to quantify the claim.

[11] In the result, the arbitrator made the following award:

> *The portion of the claim of the applicant that arose prior to 2002 is prescribed.*
> *Regarding the portion that has not prescribed the applicant must be paid an amount calculated on the basis of increases agreed upon annually by the respective Pubic Sector Coordinating Bargaining Council resolutions. There is insufficient evidence for me to quantify this claim. Should the parties dispute the quantum evidence should be presented for me, as arbitrator, to quantify the claim.*
> *There is no order as to costs.*

Points *in limine*

[12] At the arbitration hearing, it was argued that the private arbitration agreement reached by the parties was inconsistent with the provisions of the Labour Relations Act, 66 of 1995, and thus invalid by reason of the fact that the parties cannot agree to ‘contract out’ of a collective agreement, in this case a collective agreement concluded under the auspices of the bargaining council that

establishes a negotiated dispute resolution procedure. This point was not canvassed by the arbitrator in his award, possibly because the issue was faintly pursued (if it can be said that it was pursued at all) in the closing address made on the applicant's behalf. But since the issue was resurrected in these proceedings and pursued with some vigour, I deal with it below.

[13] The applicant's contention that the arbitration agreement was invalid rests on the interpretation of a number of provisions of the LRA. Section 23 (3) of the LRA provides:

> *Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement*

Section 24 of the Act requires parties to a collective agreement to determine a procedure for the determination of disputes concerning the interpretation or application of a collective agreement. Resolution 3 of 2001, concluded in the Public Service Co-ordinating Bargaining Council establishes such an agreement. Finally, s199 reads as follows:

> *(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not -*
>
> *a) permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;*
>
> *b) permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award;*
>
> *c) waive the application of any provisions of that collective agreement or arbitration award.*
>
> *(2) A provision in any contract that purports to permit or grant any*

payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid.

[14] I understand the applicant's contention to be the following: the LRA seeks to encourage self-regulation and collective bargaining, and therefore seeks to ensure, through the mechanism of the provisions referred to above, that parties do not undermine collective agreements by 'contracting out' and resorting to private arbitration in circumstances where a collective agreement applicable to the parties establishes a dispute resolution procedure.

[15] In my view, there is no merit in this contention. First, whether or not the arbitration agreement was valid is not a ground for review. Section 3 of the Arbitration Act provides that an arbitration agreement is not capable of termination except by consent of all the parties to the agreement, or by a court in the circumstances set out in s 3 (2) (a) to (c). The applicant has not approached this court for an order in terms of s 3. Secondly, none of the statutory provisions on which the applicant relies imply that a dispute between parties subject to a collective agreement that establishes its own dispute resolution procedure may not elect to have their dispute determined by private arbitration. In other words, the relevant statutory provisions beg the question whether the LRA (or the applicable collective agreement) obliges a party to refer a dispute, in this case, to the bargaining council. In my view, it does not.

[17] The submission based on s 199 finds some support in the recent decision by this court, *SACWU obo Stinise v Dakbor Clothing (Pty) Ltd & others* (2007) 28 *ILJ* 1318 (LC). In that case, Nel AJ held that a private arbitration clause in a contract of employment constituted less favourable treatment and thus a waiver of a provision of a collective agreement in terms of s 199 (1) (c), and that the clause was accordingly invalid. I recently had occasion to observe in *Carlbank Mining Contracts (Pty) Ltd v National Bargaining Council for the Road Freight Industry* (JR 1592/07) that I do not read the judgment to establish a

generally applicable principle to the effect that a collective agreement concluded by a bargaining council that regulates dispute resolution necessarily precludes parties from agreeing to refer to a dispute to private arbitration. The conclusion reached by Nel AJ and its application to the circumstances of the present case must be evaluated in the light of the wording of s 199. Nel AJ appears to have accepted that the arbitration agreement that was the subject of challenge in the matter before him treated the affected employee in a manner that was less favourable than the terms of the collective agreement. Section 199 contemplates the protection of employee interest at three levels. The first, not relevant in these proceedings, relates to minimum wages – ss (1) (a) prohibits any term of an employment contract that provides for an employee to be paid remuneration in an amount less than that prescribed. Subsection (1) (b) prohibits any contractual term that permits an employee to be treated in a manner, or to be granted any benefit, so as to be less favourably treated than the terms prescribed by a collective agreement. Thirdly, ss (1) (c) prohibits the waiver of the application of any provision of a collective agreement. I deal first with the issue of waiver. In the absence of any right to refer a dispute to the council, there can be no question of any waiver of that right. Put another way, if the collective agreement does not establish a provision in terms of which a party is compelled to refer a dispute to the council and only the council, then by agreeing to refer a dispute to private arbitration, there can be waiver of the application of the council's agreement.

[18] In so far as any less favourable treatment is concerned, on the facts of this case, Taylor has not been subjected to less favourable treatment as contemplated by ss (1) (b). The benefit or treatment for the purposes of s 199 (1) (b) is not to the right to refer a dispute to a bargaining council – it is to have an employment dispute expeditiously determined by an independent third party. In these circumstances, I fail to appreciate how it can be said that 199 (2) precludes the parties from agreeing to refer disputes to private arbitration. As I observed in *Carlbank Mining, s* 199 is intended to protect employees' substantive rights. It

would be absurd that every private arbitration process (and the ensuing award) is invalid to the extent that a bargaining council agreement by which parties are bound provides for the dispute in issue to be referred to arbitration by the council itself, or by an accredited agency. On the contrary, the LRA promotes the resolution of disputes by private means. At paragraph 12 of the Explanatory Memorandum to the draft Bill, the authors say the following:

> *One of the Bill's central themes is its recognition of privately agreed procedures. If these exist, the parties are not required to follow the statutory procedures. A dispute will proceed through the mechanisms agreed to by the parties.*

Agreements to refer disputes to private arbitration clearly fall into this category.

[19] In short, neither s 23 nor s 199 is bar to the applicant and Dr Taylor agreeing to their respective advantage to refer their dispute to private arbitration. The jurisdictional challenge therefore has no merit. It follows from this conclusion that the 'contractual argument' (i.e. that Dr Taylor is barred from contracting out of a collective agreement) and the issue of the failure to join the bargaining council as a party to these proceedings need not be pursued.

The relevant legal principles

[20] Despite some initial uncertainty, it is now well-established that in terms of s 157(3), the more restrictive grounds of review under the Arbitration Act apply to private arbitration awards sought to be reviewed by this court (see *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* [2002] 3 BLLR 189 (LC)). More recently, and in relation to the approach that should be adopted in applications such as the present, O'Regan J, writing for the majority in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (6) BCLR 527 (CC), said the following:

Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33 (1), the goals of private arbitration may well be defeated (at paragraph 236 of the judgment).

[21] This cautionary sentiment is reflected in the conclusion reached by Van Dijkhorst AJA in *Stocks Civil Engineering (supra)*:

A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. if he does this, but reaches the wrong conclusion, so be it. but if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable… An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reason leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.

[22] In *Academic and Professional Staff Association v Pretorius SC N.O & others* [2008] 1 BLLR 1 (LC) this court observed:

The courts have, in dealing with reviews of private arbitrations, adopted a

narrow approach. This approach confines itself to mainly issues related to procedural aspects of the arbitration. This approach is mainly informed by the fact that private arbitrations flow from the consent of the parties, who, through an agreement, determine the powers of the arbitrator (at paragraph [59]).

With that background, I turn to the applicant's grounds of review.

Grounds of review

[23] The first ground for review raised in the papers is that the arbitrator failed to give any proper consideration to the fact that the evidence demonstrated that the collective agreements did not apply to Dr Taylor, and that this was fatal to Dr Taylor's case in that his cause of action was based solely on the collective agreements. The applicant contends further that having found that the translation keys contained in the collective agreements were inapplicable, had the arbitrator given proper consideration to this fact, he would have concluded that Dr Taylor had no cause of action. Secondly, the applicant contends that the arbitrator had no mandate to decide quantum in terms of the arbitration agreement, and that he was empowered to do no more than issue a declarator. Thirdly, and in the event of the court finding that it was within the arbitartor's mandate to make a decision on quantum, the applicant contends that given the fact that the evidence led on behalf of Dr Taylor was unsatisfactory to the point where the arbitrator was not in a position to make an award as to quantum, the claim should have failed for this reason alone.

[24] Prior to dealing with each of these grounds in turn, I would note that the applicant's grounds for review must necessarily be assessed against the background of the case advanced by the applicant at the arbitration hearing. The arbitrator was required to consider the following when applying his mind to the collective agreements:

- whether Dr Taylor fell within the ambit of the collective agreement
- if so, whether he became entitled to an increase on application of the terms of the agreement
- if so, the quantum of that increase.

As I have noted, there was no dispute that Dr Taylor was engaged in the public service. This being so, the conclusion being that he was therefore included within the ambit of the relevant collective agreements cannot, on the applicable test, be called into question. To the extent that the applicant challenges the arbitrator's finding consequent on a decision by him that the translation keys were inapplicable, it is not clear to me that the arbitration made such a finding. That part of the award in which the arbitrator's reasoning on this issue is regrettably terse, but he states that '*I am not convinced that the translation key is the correct manner to determine the amount.*' This does not appear to represent a rejection of the basis of Wiggill's calculations rather than an expression of uncertainty as to whether any amount owed to Dr Taylor ought correctly to be determined on this basis. It does not necessarily follow from the arbitartor's reasoning that the only logical conclusion open to him was that Dr Taylor had no cause of action. It follows from the fact that the arbitrator had before him a succession of collective agreements, some of which created an entitlement that had prescribed, that the calculations performed by Wiggill would need to be revisited for the purposes of determining quantum. Moreover, the succession of collective agreements and the variation in their terms raised the possibility that the arbitrator could find that some of them created a right to an increase while others did not. It could not in these circumstances sensibly be expected of the parties to produce calculations catering for all possible permutations that could emerge during the arbitration proceedings. For all of these reasons, there is no merit in the first ground of review.

[25] Turning to applicant's second ground for review (i.e. that the arbitrator had

no mandate to decide quantum and was empowered only to grant declaratory relief), it is clear from the record that this was not the understanding of the parties and that the issue of quantum was specifically placed in issue in the arbitration proceedings. In the course of his closing address, the applicant's representative said as much when he urged the arbitrator to dismiss the claim on the basis that there was insufficient evidence on which to determine quantum -

> *The arguments on the merits of the claim is two fold* – [the first] *is whether the relevant collective agreements on which Dr Taylor relies are applicable to district surgeons such as Dr Taylor, and* [secondly] *whether or not in any event Dr Taylor has proved the amount of money which he seeks to claim. I think I can emphasise I think in response to a question by you, you asked well what about, does my brief include deciding quantum, I do not think it is in dispute, yes, but my point is that we have now had an opportunity, and my Learned Friend must no strand and fall by the evidence he has placed before you, has he put you in a position to be able to make a decision on quantum.*

[26] What is readily apparent from this extract, in the context of a submission that the arbitrator should apply his mind to the issue of quantum, and dismiss the claim on the basis of insufficient evidence, is the parties' understanding that the issue of quantum would be dealt with. In any event, the arbitration agreement, read in its proper context, contemplates the final determination of the substantive merits of the dispute concerning Dr Taylor's entitlement to the benefit of annual salary increases. The requirement that the arbitrator must 'finally' determine the disputes is implicit recognition of the fact that the parties desired the arbitrator to render a final and binding award.

[27] The applicant's third ground for review, based on what it claims is the arbitrator's failure to determine quantum (more accurately, the assertion that the arbitrator should have considered the evidence on quantum and then rejected it

for insufficiency of proof tendered) overlooks the wide powers conferred on the arbitrator to afford the parties the opportunity to reach agreement on the issue. The arbitrator had plainly found that Dr Taylor was entitled to increases, and could be excused for believing that the parties might maturely and sensibly seek to reach agreement on what Dr Taylor was owed, given the primary finding. All that the arbitrator did was to separate the issues of Dr Taylor's entitlement to the benefit that he claimed and the determination of the quantum. I see nothing objectionable in that.

[28] In summary: In the words of Harms JA in *Telcordia Technologies v Telkom SA Ltd* [2006] SCA 139 (RSA), an arbitrator has the right to be wrong on the merits – for the reasons stated above, I do not think that in the present matter it can be said that the arbitrator misconceived the whole nature of the enquiry, nor did he misconceive his duties in connection with that function. It follows that the application stands to be dismissed.

[29] There is no reason to depart from the generally applicable rule that costs should follow the result. Finally, I should mention that in my view, the exchange of heads on the issue of a punitive order for costs was entirely uncalled for. The conduct of parties who litigate in this court in this court ought not to be characterised by mutual recrimination – the court expects and is entitled to require conduct that promotes the orderly, courteous and respectful resolution of labour disputes.

I accordingly make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application 20 May 2010

Date of judgment 27 September 2010

Appearances:

For the applicant: Adv P Kroon, instructed by the State Attorney

For the second respondent: Adv R Wade, instructed by Francois Le Roux Attorneys.