THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C161/16

In the matter between:

THE NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT AND LOGISTICS INDUSTRY **Applicant**

and

ANDERSON TRANSPORT (PTY) LIMITED **First Respondent**

SOUTH AFRICA TRANSPORT AND ALLIED

WORKERS UNION (SATAWU) **Second Respondent**

JJ KITSHOFF NO **Third Respondent**

Heard: 23 March 2017

Delivered: 23 May 2017

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside an arbitration award under case number CTTU100008/4048/15. The third respondent (the Arbitrator) set aside a compliance order issued by the applicant on 11 August 2015. The applicant also seeks an order condoning the late delivery of the application. I have decided to grant condonation and deal with the merits of the review.

[2] On the 11 August 2015, following an investigation into a complaint by SATAWU the applicant issued the first respondent (the company) with a compliance order under section 33(A) of the LRA. The order was issued on the basis that the company's incentive scheme did not comply with clause 35 of the applicant's Main Agreement. The Main Agreement bound parties and non-parties in the sector from its inception on 16 January 2012 until 29 February 2016. The Arbitrator found that the Company had not breached clause 35 of the Main Collective Agreement.

[3] Clause 35 of the Main Agreement provides as follows:

"35. Incentive Work

(1) An employer may introduce an incentive scheme in terms of which an employee's remuneration is based on the quantity of work done or the employee's output, if –

(a) the scheme complies with this clause and has the approval of the Council;

(b) the registers prescribed in Clauses 50 and 51 of this Agreement are properly kept;

(c) an employee who is part of the scheme, is not paid less than the amount that employee would otherwise be entitled to in terms of clauses 11, 14, 15 and 36 and Schedule 5.

(2) An employer who wishes to introduce an incentive scheme must set up a committee consisting of an equal number of representatives of management and elected representatives of employees to negotiate and agree the terms of the scheme.

(3) The terms of an incentive scheme –

(a) must be reduced to writing and be signed by all the members of the joint representative committee; and

(b) may not be varied or terminated by any party to the scheme unless that party –

(i) has given all other parties notice in writing as may have been agreed upon by the parties who entered into the scheme;

(ii) has complied with any other obligations set out in the scheme for varying or terminating the scheme."

[4] The company's case before the arbitrator was that it was not required to comply with Clause 35 of the Main Agreement. It alleged that:

4.1 The incentive scheme was contained in its employees' contracts of employment, alternatively, that the incentive scheme was operated in terms of an existing practice.

4.2 Since these contracts of employment (or practice) pre-dated the promulgation of the Main Agreement, clause 35 had no application to the company's incentive scheme.

[5] The Arbitrator reasoned as follows in his Award:

"4. Collective agreements entered into by the Council to regulate the remuneration and benefits negotiated by the Parties to the Council are governed by the Constitution of the Council. Clause 3 – EXCLUSIONS of the Constitution of the Council reads:

3.1 The Bargaining Council shall <u>not regulate</u> (my emphasis) or conclude agreements on:

3.1.1 ……

3.1.2 …….

3.1.3 Bonus or incentive schemes that are directly linked to profit or productivity or both, provided that these schemes are negotiated with employee representatives or representative trade unions and that these schemes will not detract from agreements reached in Clause 2.1 above[1].

The meaning of the word representative in sub-clause 3.1.3 is the ordinary meaning of 50% plus one of the employees employed by an employer or a trade union, whether a Party to the Council not, which has as its members 50% plus one of employees employed by an employer.

It was common cause that the employees who were members of the Union had all signed contracts of employment embracing the Incentive Scheme at issue. The Union represented 32% of the employees of the 1st Respondent.

It was common cause that the Council had carried out bi-annual audits at the 1st Respondent and that the 1st Respondent was found to be compliant.

Despite the provisions of clause 3 of the Constitution, the Council had included clause 35 in the Main Collective Agreement to regulate the **introduction** of incentive schemes negotiated by an employer and its employees. In my opinion clause 35, rightly or wrongly was intended to regulate incentive schemes which the Constitution specifically excluded from regulation. It follows that sub-clause 3(b)(i) regulated how an incentive scheme must be terminated. The Main Collective Agreement is subordinate to the provisions of the Constitution of the Council and to regulate how incentive schemes must be terminated was not intended by the Constitution.

I find that the 1st respondent had a compliant incentive scheme in place. It was established or "introduced" prior to the promulgation of the current Main Collective Agreement of the Council. The employees have signed employment contracts which embrace the provisions of the Incentive Scheme."

[1] Clause 2 of the Constitution deals with the objects of the Council and clause 2.1 reads that one of these is: "To negotiate, conclude and enforce collective substantive agreements on wages, benefits and other conditions of employment. By decision of Council, regional and sectoral differences shall be accommodated where conditions dictate;"

[7] It was submitted by Mr Leslie who appeared for the applicant that the fundamental flaw in the Arbitrator's reasoning is that it disregards the legal effect of a binding collective agreement as provided for in section 23 of the LRA. In terms of section 23(3) of the LRA a collective agreement varies any contract of employment.

[8] Furthermore, the provisions of section 199 of the LRA must be taken into account. These read as follows:

"199 Contracts of employment may not disregard or waive collective agreements or arbitration awards

(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; or

(c) waive the application of any provision 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." *(emphasis mine)*

[9] The Arbitrator accepted that the employment contracts in question trumped the collective agreement without enquiring into whether as alleged in argument, it was in fact the case that the employees' terms and conditions of employment were better than those provided for in the collective agreement. I agree with the submission that in doing so he committed a material misdirection.

[10] It was submitted on behalf of the Company that the matter before the Arbitrator was simply whether the incentive scheme in question had been introduced after the promulgation of the collective agreement. The company submits that this

Court cannot examine whether the interpretation of the word ‘introdution’ by the Arbitrator Commissioner is correct law, but must confine itself to considering whether he reached a reasonable conclusion. The Labour Appeal Court has stated per Sutherland JA in **MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others**[2], a case dealing with a review of a Commissioner’s interpretation of a union’s constitution, as follows:

> “[26] Is a 'reasonable' arbitrator entitled to be wrong on the law? In Herholdt, the court held at para 25:
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> 'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the C conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'
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> [27] Part of the 'material' alluded to in Herholdt must be the text of the constitution which, logically, must be properly read and properly understood. Davis JA in DENOSA postulated that the 'law' is a dimension of the factual matrix (in the peculiar sense used to circumscribe what it is to which an arbitrator must apply his mind). When the arbitrator read the document, he misunderstood its objective meaning. Can it be said that such a finding caused a wrong, and axiomatically, therefore an unreasonable, result as contemplated by Sidumo, more especially if proper weight is to be given to the requirement, among others, that decisions be 'lawful' mentioned by Navsa AJ in Sidumo?
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> [28] In Telcordia Technologies Inc v Telkom SA Ltd, the court held that in a private arbitration, subject to the Arbitration Act 42 of 1965, there was no room to

[2] (2016) 37 ILJ 2593 (LAC)

complain that the arbitrator was wrong on the interpretation of a contract, and provided the arbitrator understood the task presented to him, such an error was irreparable on review. However, in Hira & another v Booysen & another, Corbett CJ H famously held:

'To sum up, the present-day position in our law in regard to common-law review is, in my view, as follows:

(1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review. (See the Johannesburg Consolidated Investment case supra at 115.)

(2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it "the tribunal") has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the Johannesburg Stock Exchange case supra at 152A-E.

(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is

not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of F some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute"; and that as a result its decision should be set aside on review.

(6) In cases where the decision of the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or to express a decisive view.'

[29] In this case, it seems to me problematic to construe the conduct of arbitrator as not applying his mind to the task at hand. He knew he had to interpret the constitution. He just got it wrong. This looks more like the situation contemplated in the third point made by Corbett CJ in Hira. Does the LRA contemplate that an arbitrator in the CCMA or in a bargaining council forum, both statutory roles, has the last word on the proper interpretation of an instrument? If it is, the necessary implication would have to be that a patently wrong interpretation would have to be upheld on review. Such a result, in my view, would be absurd.

[30] In my view, there is much to be said for the proposition that an arbitrator in the CCMA or in a bargaining council forum who wrongly interprets an instrument commits a reviewable irregularity as envisaged by s 145 of the LRA; ie, a reasonable arbitrator does not get a legal point wrong. If so, the reasonableness test is appropriate to both value judgments and legal interpretations. If not, 'correctness' as a distinct test is necessary to address such matters. However, on either basis, the ruling in this case must be set aside."

[11] On this authority the Company's argument is without merit. I find that the Arbitrator made a gross error of law and his patently wrong interpretation of the collective agreement leads him to a decision that that a reasonable decision-maker could not make. The Arbitrator was bound to take cognisance of the provisions of section 23 and 199 of the LRA in his exercise of interpretation of the Main Agreement. In particular, I emphasise the wording of section 199(1) i.e. : **(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not-….**". This wording puts pay to any submission that the word "introduction" as used in the Main Agreement should be understood to mean that the Collective Agreement cannot trump a previously concluded employment contract.

[12] The Arbitrator also grossly misdirected himself in failing to have regard to the actual contents of the existing incentive scheme contained in the contracts of employment.

[13] In the premises, I consider that this Award must be reviewed and set aside. I consider it proper that the matter be remitted for re-hearing. I make the following order:

Order

1. The Award under case number CTTU100008/4048/15 is reviewed and set aside.
2. The dispute is remitted back to the Applicant for hearing anew before an arbitrator other than third respondent.
3. The first respondent is to pay the costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: G. Leslie instructed by Herold Gie Attorneys (Heads drafted by LW Ackermann)

First Respondent: RGL Stelzner SC instructed by Maserumule Inc

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