THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: C276/17

In the matter between:

THE MEC OF THE WESTERN CAPE PROVINCIAL

GOVERNMENT HEALTH DEPARTMENT **Applicant**

and

PROFESSOR COETZEE

AND 49 OTHERS **First to Fifty NinthRespondents**

UNIVERSITY OF CAPE TOWN

AND OTHERS **Fifty Second to Fifty Seventh**

Respondents

Heard: **8 November 2017.**

Delivered: 30 November 2017

Summary: An application to review a demarcation award. In demarcation disputes, the CCMA performs a privileged task, which given the manner it is performed becomes difficult to review and

set aside. The provisions of section 62 of the LRA considered and applied. The review test for section 24 disputes remains that of a reasonable decision maker. Held: (1) The review application is dismissed. Held: (2) The applicant to pay the costs of the application.

JUDGMENT

MOSHOANA, J

Introduction

[1] This dispute has a chequered past that spurns a period of over a number of years. It served before two judges of this Court as well as the Labour Appeal Court. It is an application to review and set aside a demarcation award issued by Commissioner Wilson. In terms of that award, the commissioner found that Professor Coetzee (Coetzee) and 49 others are employees within the public service and fall within the jurisdiction of the Public Health and Social Development Sector Bargaining Council (The Health Council). He further found that the Scare Skills Allowance provided for in Agreement[1] (The collective agreement) of the Health Council is applicable to Coetzee and others who are entitled to receive the allowance for the period 1 July 2003 to 30 June 2009 together with interest. The application is opposed by Coetzee and 49 others only. The other respondents would abide by the Court's decision.

Background facts

[2] The onset of this dispute is the conclusion of a collective agreement on 28 January 2004. In terms of that collective agreement certain employees were to be paid what was termed a Scare Skills Allowance. Coetzee and others were appointed by the University of Cape Town and the University of Stellenbosch respectively. As far back as 1967, the Universities and the then Administration of the Province of the Cape of

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[1] No.1 of 2004.

Good Hope entered into an agreement known as the joint staff agreement. The agreement regulated a number of aspects. Broadly, it provided for staff to be appointed to serve both the Universities and the Administration. The applicant contended that because of clause 9[2] of this agreement Coetzee and others were appointed under the conditions of service of the Universities and therefore not Public Servants.

[3] Suffice to mention that in terms of the agreement, appointment of joint staff is done with the approval of another.[3] It is common cause that Coetzee and others performed clinical services to Academic hospitals, which hospitals fall under the control of the applicant. Pursuant to the conclusion of the collective agreement, Coetzee and others staked a claim that since they are covered by the collective agreement, they are entitled to the allowance arising therefrom. Since that stake, the parties were in perennial litigation over the issue. After a sojourn to this Court and to the Labour Appeal Court (LAC), the parties found themselves before the Commission for Conciliation, Mediation and Arbitration (CCMA).

[4] At the CCMA, the issue was about a demarcation dispute. However, there was a further referral in terms of section 24 of the Labour Relations Act[4].(LRA) The two disputes were consolidated to be heard together. They were indeed heard together. The award under attack deals with the two disputes, however the award is conveniently referred to as the 'Demarcation Award'.[5]

[5] The applicant was aggrieved by this award and it instituted the present proceedings on 10 August 2017. Due to the history of this matter, the application was enrolled on an expedited basis. On 8 November 2017,

[2] 9 Unless it is otherwise agreed to by the University and the Administration the incumbents of posts on the joint staff are appointed-

(a) under conditions of service of the Universities…

[3] Clause 32 (a)-(c)-Adverting of posts.

[4] Act 66 of 1995 as amended.

[5] The award was published on 29 March 2017.

the matter came before me. I must state that argument was listened to way beyond the ordinary court hours.

Grounds of Review

[6] Perusal of the founding affidavit reveals that the applicant contends that many of the findings by the commissioner are wrong in law. Effectively the ground is that of error in law. In argument, Mr Oosthuizen SC, appearing for the applicant placed reliance on the LAC judgment[6]. He specifically placed reliance on the following paragraph:

> '[22] To recap, Navsa AJ said in *Sidumo* at par 105 that the review powers in terms of section 145 'must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair. Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case.
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> [23] However, for reasons which are advanced below, it is not strictly necessary for this court to make a final decision with regard to the role of error of law in this case.' [My own Emphasis]

[7] So before me there was only one ground of review, that is that, the commissioner committed an error of law. In argument, Mr Oosthuizen clarified the error of law to be in respect of three issues which can be summarized thus:

7.1 The entire dispute was about terms and conditions of employment. The finding that Coetzee and others were public servants was a material error in law.

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[6] *DENOSA obo Du Toit and Another v Western Cape Department of Health and Others* [2016] 37 ILJ 1819 (LAC).

7.2 In extending the terms and conditions of the public servants to the University employees, the commissioner committed an error of law.

7.3 Extending the collective agreement to parties falling outside the registered scope of the Health Council constitutes an error of law.

Argument

[8] Both parties filed very extensive and well researched heads of argument. Both heads ran into several pages. In addition, applicant's counsel made reference to authorities dealing with the definition of an employee. He submitted that *SA Municipal Workers Union v SA Local Government Bargaining Council and Others*[7], is not authority for the proposition that a court may, because it is fair to do so, extend the registered scope of a bargaining council, or ignore the very clear provisions of sections 35, 36 and 37 of the LRA which stipulates that bargaining councils in the Public service exercise their function within the Public service. He further submitted that nonetheless, the fact that the Professors were employed on the terms and conditions of the Universities does not yield unfairness. They could negotiate the terms applicable to the Public servants. The bulk of the applicant's heads of argument deal with the provisions of the Public Services Act[8] (PSA) and the Regulations juxtaposed with some of the provisions of the LRA dealing with bargaining councils and the powers thereof. A considerable effort was placed on interpreting the 1967 agreement. However, the applicant's submission simply suggests that the commissioner performed his task wrongly. According to the applicant's counsel, since Coetzee and others were appointed on the conditions of services of the Universities, they cannot be held to be employees of the Department of Health. Holding otherwise constitutes a material error of law which vitiates the award.

[9] Further issues argued related to the furnishing of security and the interpretation of the provisions of sections 145(7) and (8) of the LRA, the issue of the legality of the writ of execution and the payment of interest

[7] [2012] 33 ILJ 353 (LAC).

[8] Act 38 of 1994 as amended.

aspect. Given the view, I take that at the end, it is not necessary to decide these issues. Suffice to mention that in my view, the furnishing of security issue has been overtaken by events. On the issue of the legality of the writ, Mr. Stelzner SC appearing for Coetzee and others conceded that should the need arise to have the writ re-issued there will be compliance with the procedural requirements of the State Liability Act[9], therefore, it is not necessary to determine this issue. I shall later on briefly deal with the issue of the payment of interest argument.

Evaluation

[10] Much as the parties made this matter to look complicated, to my mind this is but one of the run of the mill reviews occasionally dealt with in this Court. As correctly submitted by Mr. Oosthuizen SC a demarcation award is just another arbitration award. The commissioner correctly identified the issue in dispute as one involving whether Coetzee and others fall within the jurisdiction of the Health Council and are subject to the collective agreement. To steal from the *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [10] judgment, that was the principal issue. To my mind that principal issue was dealt with and both parties were afforded a fair opportunity to deal with the principal issue.

[11] At issue here are the provisions of section 62 of the LRA. The section affords the commission a special privilege as it were to determine for the parties whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area. In addition to also determine whether any provision in any collective agreement is or was binding.

[12] The task of a commissioner appointed within the context of this section is a very simple one. What he or she has to determine is whether there is employment and or engagement in a sector. The LRA does not define

[9] Act 20 of 1957 as amended.

[10] (2014) ILJ 943 (LAC).

the word employed or engaged. However, section 213, provides a definition for an employee. It defines an employee thus:

> 'Employee means-
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> (a) Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration, and
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> (b) Any other person who in any manner assists in carrying on or conducting the business of an employer,
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> And "employed" and "employment" have meanings corresponding to that of "employee".'. [My underlining]

[13] Therefore, where the word employed is used by the legislature, it must mean working for another person or the State and assisting in any manner. Accordingly, the commissioner was required to determine whether Coetzee and others were working or assisting the applicant.

[14] In his award, he recorded that it was common cause that Coetzee and others are employed in provincial hospitals, and at least part of their duties (the clinical duties at least) are performed for and on behalf of the Department of Health. At first the applicant's counsel submitted that the recordal is wrong as the issue was not common cause. He watered down the submission to be that although it is not disputed that they performed clinical duties at the provincial hospital they did so consequent upon the 1967 agreement under the terms and conditions of service of the Universities.

[15] In all honesty, I fail to understand this watered down submission. Fact is that Coetzee and others performed duties whether under whose conditions of employment, such is of no moment. The question whether one was employed is one of fact. If for any reason, Coetzee and others were not employed then they must have been engaged. The dictionary

meaning of the word engaged is 'employed, occupied, or busy, to become involved with, do or take part in something'[11].

[16] Given the joint staff agreement, it must follow that Coetzee and others were employed or engaged with the Department[12]. I find no basis upon which it can be said that Coetzee and them were not employed or better still engaged in the applicant's hospitals. There can be no doubt that the teaching hospitals fall under the Public sector. In fact, I did not understand Mr. Oosthuizen SC to be at odds with such a patently clear fact. The whole exercise of looking at the provisions of the PSA was and is not necessary. One is not to determine whether there is a legal or lawful employment. It was never contended before me that the engagement or employment of Coetzee and others was in any manner or form unlawful. Whether Coetzee and others were on the fixed establishment or not is also of no moment. If they work or assist, that's enough for the purposes of section 62.

[17] On the common cause facts, the (a) part of the section has been established. That much Mr. Oosthuizen SC conceded. He argued that the real bone of contention is the (b) part of the section. Truly the (b) part is not difficult to deal with in the context of the factual matrix of this matter. What ought to be determined was whether the collective agreement was binding on Coetzee and others. In terms of section 23(1)(d) of the LRA, a collective agreement binds employees who are not

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[11] Collins Dictionary.

[12] Duties of Joint Staff

8. The joint staff shall-

(a) with the assistance of medical Interns employed by the Administration, provide and administer services in all branches of medicine to patients at the teaching hospitals.

(b) provide all formal and clinical teachings in all branches medicine, including anatomy, physiology and pharmacology students of the University.

(c) provide pathological and other specialised services for teaching hospitals and the associated teaching of student of the University.

(d)…

(e)…

(f)…

members of the registered trade union or trade unions party to the agreement if the employees are identified in the agreement, expressly binding on them and the union party or parties that are in the majority. The collective agreement is specific; it binds employees in the Public Health Sector as managed by the health employer or those who fall in the registered scope of the Health Council. Coetzee and others are in that sector.

[18] To my mind the above concludes the statutory functions of the commissioner within the contemplation of section 62. Reading of the award suggests that he did all of the above. Therefore, it can hardly be said that he performed his task wrongly. Any argument that the commissioner committed an error of law is without merit. To my mind even if the commissioner committed an error that Coetzee and others were Public servants when they are not, such an error is immaterial taking into account that what is required is for them to work, assist, be busy, be involved or take part at the provincial hospitals to bring them to the fold. Mere errors of law are not enough to vitiate an award; something more is required.[13]

[19] The test for review of a demarcation award remains that of a reasonable commissioner enunciated in *Sidumo and Another v Rustenburg Platinum mine* [14]. As I have pointed out above the task is a privileged one. In a normal arbitration, a commissioner resolves a dispute, be it of alleged unfair labour practice or alleged unfair dismissal. In a demarcation award, a commissioner determines or hears an application. In doing so, hearing or determining the application, the legislature allows a commissioner to adopt the procedure contemplated in section 138 applicable to a normal arbitration.[15] A commissioner is obliged to call for representations of non-parties and to consult NEDLAC.

[13] *Head of Department of Education v Mofokeng and Others* [2015] 36 ILJ 2802 (LAC).

[14] [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC).

[15] Section 62(4) of the LRA.

[20] Given what may potentially find itself in the award, I agree with Mr. Stelzner SC, that it may be an uphill to seek a review against a demarcation award. In the procedure contemplated in section 138, the commissioner retains a discretion to allow parties to lead evidence, call witnesses and allow questioning. In a demarcation process, if a believe is formed by a commissioner that the question to be determined is of substantial importance, the application will go public and invite representations not from the parties before him or her but from outsiders.[16] He is obliged to consider those representations.

[21] Clearly, much as I agree that a demarcation award is just another award, it is an award *sui generis*. What a reviewing court has to contend with is not only the reasoning of the arbitrator but the representations by non-parties and the views of NEDLAC. For that reasons it becomes extremely difficult to suggest that a reasonable commissioner would ignore and or reject a representation or a view of NEDLAC. To do so a reviewing court would be limiting statutory functions inappropriately in my view.

[22] Therefore, the task of a reviewing court seems to be very limited. As pointed out earlier, the question in (a) is more factual than legal. The question in (b) simply requires an interpretation of the collective agreement to solely determine the question whether the collective agreement is binding on employees. In *Coin Security (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[17], Francis J said the following:

> '[56] The question whether an employer is engaged in a particular trade or industry is one of fact to be decided in the light of all the surrounding circumstances and having regard to any relevant evidence which is put before the court.'

[23] In *Coin Security*, Francis J accepted the method to determine whether a class of employees are engaged in a particular industry as summarized

[16] Section 62(7) of the LRA.

[17] [2005] 26 ILJ 849 (LC)

by Jansen J in *Greatex Knitwear(Pty) Ltd v Viljoen* [18]. Fortunately, in *casu* there was no need to apply any method. Parties were *ad idem* that the sector is one in the Public Sector covered in the collective agreement. The only issue that required determination was whether Coetzee and others are employed or engaged in that sector or not. Therefore, his task did not require consideration of various available methods discussed in *Coin Security*[19]. All he needed to do and did was to have regard to the definitions in the LRA. Without overly belabouring the point, Coetzee and others were employees of the Department of Health.

[24] Turning to the interpretation and application dispute referred in terms of section 24, the task of the commissioner is yet again a simple one. To my mind this task is performable even under section 62(b). Nonetheless, it seems the parties *ex abudandi cautela* had to refer a section 24 dispute. One can understand this position given the ping pong that characterized this dispute. At paragraphs 65 to 69 of the award it is plain that the commissioner performed his task. In *SAMWU v SALGBC and others*[20]*,* the LAC per Mlambo JP, writing for the majority had the following to say:

> '[10] The question we must answer in this appeal is not whether the award in issue is correct, as pointed out by Moshoana AJ, but whether the commissioner acted fairly, considered and applied his mind to the issues before him… It is indeed so that it is in keeping with the reasonability requirement of LRA arbitration awards to also focus on how the commissioner approached the material before him as well as the analytical process he subjected that material to when making the award'.

[25] Further the LAC found that:

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[18] 1960 (3) SA 338 (T).

[19] *Supra.*

[20] Case DA06/09 delivered on 29 November 2011 marked reportable.

> '[18] It is important to point out, as stated by the court a *qou* that the essence of the appellant's argument is that the commissioner came to the wrong conclusion. This is clearly an argument that presupposes an appeal, rather than a review.'

[26] In the light of the above, the issue is not about correctness. I cannot fault the commissioner's findings in paragraph 68 that on a plain reading of the agreement, once it has been established that the applicants (Coetzee and others) fall within the jurisdiction of the Health Council, the agreement must apply to the applicants as they meet all the criteria set out in the agreement. He found support in that conclusion from the respondent's (applicant before me) own letter of 11 February 2004. I cannot agree with Mr. Oosthuizen SC that by referring to the letter the commissioner was deferring as it were to the interpretation by the Chief Negotiator. The paragraphs before 68 reveal his own analytical thinking around the interpretation issue.

[27] For the reasons set out above, I find no basis to interfere with the award dealing with interpretation and application of the collective agreement. It must follow axiomatically that the applicant has failed to demonstrate that the award falls outside the bounds of reasonableness.

[28] I now turn to the payment of interest review. The first difficulty I have is that in the notice of motion, the attack is directed at the award of 29 March 2017 and the variation ruling of 10 April 2017. The applicant does not seek a review against the determination of 15 May 2017. It is in that determination that the commissioner determined that Coetzee and others are entitled to be paid interest at the rate of 15.5%.

[29] It was only in argument that counsel for the applicant sought an exercise of discretion in terms of section 1 (1) of the Prescribed Rate of Interest Act[21]. As a court of review I am not at large to determine an issue arising out of an award that is not being assailed. Further the issue whether

[21] Act 55 of 1975.

special circumstances arise and or arose is not a matter properly before me. Accordingly, I decline to exercise any discretion in that regard.

Issue of costs.

[30] Both parties argued that costs should follow the results and I am not averse to such an argument. Mr. Stelzner SC argued that this matter is deserving of punitive costs given the conduct of the applicant. Given the chequered history of this matter, I was tempted to favourably consider the argument, given the view I take at the end. However, I considered that the application was not frivolous and vexatious. The matter was of some considerable importance to the applicant as it was to Coetzee and others. It was deserving of the attention of this court. Therefore, the appropriate order to make is that of costs on a party and party scale.

Conclusion

[31] For all the above reasons, I come to the conclusion that the award is free from any defects that vitiates it. Accordingly, the application for review falls to be dismissed with costs.

[32] In the results I make the following order:

Order

1. The review application is dismissed.

2. The applicant to pay the costs of this application.

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GN Moshoana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant:	Mr A Oosthuizen SC with him B Joseph
Instructed by:	State Attorney Cape Town.
For the Respondents:	Mr RGL Stelzner SC.
Instructed by:	MacRoberts Inc, Cape Town.