IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C99/2020

In the matter between:

SALDANHA BAY LOCAL MUNICIPALITY **Applicant**

and

MATUSA OBO R HENDICKS **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC) **Second Respondent**

ORLANDO MOSES N.O. **Third Respondent**

GERHARD BOTHA **Fourth Respondent**

Heard: **09 March 2022**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 March 2022.**

Summary: **Review application – arbitrator descended into the arena and as result deprived the parties a fair hearing. The outcome of the award is irrelevant because the arbitration proceedings were tainted by the Arbitrator's officious interferences.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The Applicant (Municipality), seeks an order reviewing and setting aside the arbitration award issued by the Third Respondent (Arbitrator) under case number WCP051812, dated 27 January 2020, under the auspices of the second respondent (SALGBC). The Arbitrator made the following order:

’64 The Applicant was subjected to unfair labour practice related to promotion in terms of section 186(2)(a) of the LRA.

65. It is ordered that the appointment of Mr G Botha in the position of Senior Manager: Human Resources are set aside.

66. It is ordered that the recruitment and selection process be re-opened in order to allow the Applicant Mrs R Hendricks a fair opportunity to be interviewed.

67. The Applicant must be interviewed and the outcome conveyed to the parties by no later than 31 March 2020.

68. It is ordered that the Applicant, Mrs R Hendricks, must be invited for an interview for the position of Senior Manager: Human Resources and that the interview score of Mr G Botha, used to determine his competency for appointment, shall be compared with the outcome of the interview of the Applicant, Mrs R Hendricks, to determine the appropriate candidate for appointment.’[1]

[2] The Municipality impugns the award on several grounds and, pertinently, that the Arbitrator committed gross irregularities which tainted the fairness of the hearing and, alternatively, led to him coming to a decision that a reasonable decision maker could not have come to. The First Respondent (MATUSA), acting on behalf of Ms R Hendricks, is the only respondent defending the award.

Factual Background

[3] The facts in this matter are mostly common cause. Ms Hendricks had applied for the position Senior Manager: Human Resources and was unsuccessful. She referred a dispute of unfair labour practice in relation to promotion in terms of section 186(2)(a) of the Labour Relations Act[2] (LRA).

[4] The crux of Ms Hendrick’s case was that the Municipality unfairly deviated from its recruitment policy and as a result she was not appointed to the position of Senior Manager: Human Resources. That was so despite the recommendation

[1] See: the arbitration award, page 32 of the pleadings bundle.
[2] Act 66 of 1996, as amended.

by staffing committee to retain her in the pool of applicants when the position was re-advertised and be sent for a competency assessment. In essence, the Municipality decided to utilise the score that Ms Hendricks had acquired during the first round of interviews which was 58.33%. It was not in dispute that the minimum for competency was a score of 60% and above.

[5] The only thorny issue was whether the final competency mark included or excluded the employment equity mark of 5%. The Arbitrator found that it included the employment equity mark and as such Ms Hendricks' final score was 61.5% which meant that she was competent for appointment. Accordingly, the Arbitrator upheld Ms Hendricks' claim of unfair labour practice.

[6] In these proceedings, the Municipality takes issue mainly with the manner in which the Arbitrator conducted the arbitration proceedings. He is accused of unfairly descending into the arena to the prejudice of the Municipality.

[7] Having read the transcribed record in its entirety, I agree with the Municipality as the transcript is replete with instances where the Arbitrator, *inter alia*, interfered with the cross-examination of the witnesses, distorted the evidence that was common cause and cross-examined the Municipality's main witness, Mr Mbaliswana. The following is one of the instances where the Arbitrator-interfered with Ms Hendricks' cross-examination:[3]

> 'MR STANSFIELD: You were applying for a position that did not have funding, correct?
>
> MS HENDRICKS: Hmm.
>
> MR STANSFIELD: Sorry I want a yes or no answer.
>
> MS HENDRICKS: Yes.
>
> MR STANSFIELD: Thank you.
>
> COMMISSIONER: Don't get excited, okay.
>
> MR STANSFIELD: That is exactly where we ended up last time.

[3] Transcript pages 39 lines 19-25 and 40 lines 3-25.

COMMISSIONER: Ja, no but again the issue is I think the Applicant is entitled to have a view and again as much as it is part of Council and part of the Union to try and (indistinct) for an answer. I think there are couple of things that she is entitled to and she is entitled to disagree with you.

MR STANSFIELD: But she has agreed with me Mr Commissioner.

COMMISSIONER: If it is, hold on, she is entitled to disagree with you and she is entitled to have her opinion. I agree with you that this is what she said, that at the time of the advertisement there was no funding available except to answer for what it is.

However, she is stating well but there is a potential for funding and this is why I am saying, that may be an issue that you need to deal with to say "you know the Applicant conceded that there was no funding available, show however stated that there was a potential funding" and in your argument you should the argue but "this is not a reasonable assumption to make," either in terms of legislation or whatever.

Accept it for what it is otherwise you are going to get stuck on this particular point until kingdom come…

MR STANSFIELD: No, but I have got it. The concession is made that at the time she applied for the position it was not funded. I am happy with that.

COMMISSIONER: My question then is, why do you still want to retain that and this is what I am saying. If that may be an issue that needs to be argued, there is a concession but the Applicant disagree for some or other reason with regards to it and in your argument deal with that in terms of whether agrees or disagrees, in terms of

legislation, in terms of argument, in terms of facts I think and move on from that point.

MR STANSFIELD: Mr Commissioner with respect, I had moved on. What concerned me was your recall of your evidence where she said she had not conceded that the position was not funded at the time of the application. I had to clarify that again…'

[8] It is obvious that the Arbitrator was distorting the evidence. Ms Hendricks had conceded that the post was not funded when it was advertised internally. As if it was not enough, the Arbitrator stopped the cross-examination and gave his own opinion on the evidence of Ms Hendricks and questioned the rationality for the Municipality's decision to include her previous score during the second interviews. In fact, he even took over and gave evidence in support of Ms Hendricks' case during her cross-examination:[4]

'MR STANSFIELD: Mr Commissioner can we stand the matter down, it is twenty past four…if we could do it on that basis and then I could finalise the cross examination that morning.

I think I have canvassed everything but there has been a lot raised now in the last 10 minutes which… (intervention).

COMMISSIONER: Because I think you need to … (intervention).

MR STANSFIELD: If I could just go away and consider that? If I could be afforded that indulgence?

COMMISSIONER: And just in terms of, since we – I think I want to raise this issue and I think the employer needs to deal with the issue of what the Applicant says of – and consider whether it was fair to exclude the Applicant from participating in the interview despite the fact that she was deemed suitably qualified, I would say

[4] Transcript pages 80 lines 9-25 and 81 lines 1-19.

to participate in the interview or she was deemed to probably be one of those candidates which should be shortlisted for interview.

MS HENDRICKS: For interviews, competent… (intervention).

COMMISSIONER: No, no, no, remember the interviews. This is my consideration. Remember you said that if – they informed you that "sorry Ma'am we do not find that you are the person to be appointed" because there would be another round of interviews and you would have re-applied.

Which means you would have become, if shortlisted you, you would have become entitled to attend the interviews and maybe better your score. I think the employer needs deal with that particular (indistinct). And with regards to just the employer as well.

Does the policy make provision for the transfer of the scoring in general and if it does, under what circumstances can that happen? Obviously if that is allowed my previous questions would in all probability go up in smoke…'

[9] It is telling that the same assistance was not afforded to Mr Mbaliswana. Instead he was unpityingly cross-examined which led to a protest by the Municipality's attorney, Mr Stansfield, who also appeared on its behalf in these proceedings:[5]

'COMMISSIONER: Hold on, hold on before that I want to get these things in line. So those employees informed unsuccessful were entitled to apply again at the second advertisement, okay. So if they, my question then they were entitled to advertise it a third time.

[5] Transcript pages 170 lines 1-25 and 171 lines 1-25.

So if on the third time they were then identified on the long list and were identified to be shortlisted, would they be requested to come for an interview again?

MR MBALISWANA: The principle would be that, why would you invite them once again, they have presented themselves to you why would you have them again. They came to present; you have assessed them.

So the principle would be you do not need to invite them even though you have interviewed them. So that is the general principle. You do not discriminate but is a general principle.

COMMISSIONER: Okay the question is, but isn't this then now a new process? Remember the old one you said by telling them "sorry tough nuggets you did not make it but you are entitled to come."

So let us say for argument sake they were part of the long list and they were then determined to be part of the shortlist again, they would not be invited.

MR MBALISWANA: Then the purpose, what is the purpose of the interview?

COMMISSIONER: No, no, the question is would they be invited again or not invited?

MR MBALISWANA: The answer is no because on the same principle with…(intervention).

COMMISSIONER: Okay.

MR MBALISWANA: With Ronel. The purpose of the Chairperson is to determine the suitability and the competency; you have already done to this candidate Sir.

COMMISSIONER: You say they would not be invited to the interviews even if they were shortlisted.

MR STANSFIELD: No sorry Commissioner I have a concern here. The witness has been clear, he has said they would not have been shortlisted; he gave an answer about four minutes ago. You asked him three …(intervention).

COMMISSIONER: The question (intervention).

MR STANSFIELD: Follow up questions. The witness's answer is definitive and I am very uncomfortable with the extent in which you setting into …(intervention).

COMMISSIONER: I know.

MR STANSFIELD: It is beyond questions of clarification.

COMMISSIONER: I know, no, but the issue is …(intervention).

MR STANSFIELD: I have a real concern as I sit here and listen to this; I must place that on the record.

COMMISSIONER: I take notice.'

[10] In *Satani v Department of Education, Western Cape and Others,*[6] while affirming the arbitrator's discretion to intervene and afford the parties a process guidance, the Labour Appeal Court (LAC) was stern in its warning against overstepping the mark of fairness. It observed that:

> 'It is accepted that commissioners are not expected merely to sit back and allow the parties to present their cases and not guide them to the real issues that are to be determined. There will be instances where intervention on the part of the commissioner would be necessary, whether an adversarial or inquisitorial approach has been adopted. However, commissioners must guard against an intervention that is likely to suggest bias or a perception of bias in favour of a particular party to the dispute. He/she must refrain from assisting a party to the detriment of the other, cross-examining witnesses by, inter alia, challenging the consistency of a witness, expressing doubt about the credibility and

[6] (2016) 37 ILJ 2298 (LAC) at para 18.

reliability of a witness; putting leading questions to witnesses; answering questions for witnesses; showing disrespect to the parties' representatives; not allowing representatives to present their cases without undue interference; doubting the capacity of a party's chosen representative to represent a party and appearing to be an expert who knows everything and evincing a mind not open to persuasion. The list is not exhaustive.' (Emphasis added)

[11] It is clear from the above extracts from the transcript that the Arbitrator's intervention in the present instance exceeded the boundaries of acceptable inquisitorial approach and evoked a perception of bias in favour of Ms Hendricks. Mr Montzinger, counsel for MATUSA, attempted to make light of the Arbitrator's conduct by contending he was merely talkative, but in the end he arrived at a reasonable outcome. I disagree. The test in the present instance is not one of reasonableness but whether the Arbitrator misconceived the nature of the enquiry and consequently denied the parties a fair hearing.[7] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,*[8] LAC underscored this point as follows:

'[15] …the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision-maker could reach on all the evidence that was before him or her.

[16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court *in Head of the Department of Education v Jonas Mohale Mofokeng and Others*, 'for a defect in the conduct of the proceedings to amount to a gross

[7] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79; *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

[8] [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at paras 15 -16.

irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result'. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the inquiry or undertake the inquiry in a misconceived manner', as this would not lead to a fair trial of the issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

> 'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.' (Emphasis added)

[12] I accept that Arbitrators are not necessarily obliged to follow the rules of procedure applicable to the Courts of Law as they are expected to 'determine the disputes fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities'[9]. Even so, the Constitutional Court's decision in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[10] shed light on the exercise of that discretion. It was

[9] Section 138(1) of the LRA.
[10] 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC) at paras 64-97.

stated that Arbitrators '…must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously, and, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do'[11].

[13] Notwithstanding the above, one cannot shy away from the reality of the fact that, in practice, the arbitration proceedings are generally conducted in line with the rules of civil procedure and the standard of proof is the same, that is the balance of probability. Even though the Arbitrators are allowed a degree of flexibility in terms of the process they adopt, the rules of civil procedure do provide valuable guidelines, at the very least.[12]

[14] Likewise, it cannot be denied that cross-examination is still the greatest legal tool for the discovering of truth. In *Carroll v Caroll,*[13] it was stated that the '…objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party'.

[15] Accordingly, disallowing proper questions or interference during cross-examination constitutes an irregularity. However, the Court must determine whether such irregularity was prejudicial. Put differently, the mere fact that the Arbitrator committed an irregularity does not necessarily vitiate the award unless it could be shown that failure to conduct the arbitration proceedings in a fair manner has deprived one of the parties a fair hearing of their case.[14] That is precisely the case in the present instance.

[16] MATUSA's contention that the Municipality's attorney failed to object to the manner in which the Arbitrator conducted the arbitration proceedings is untenable and was equally rejected in *Satani*. In that matter, the LAC stated that:

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[11] Ibid.
[12] See: *Leboho v Commission for CCMA and Others* (JR689/2004) [2005] ZALC 65 (14 April 2005) at paras 7-8.
[13] 1947 (4) SA 37 (W), at page 40.
[14] *Palluci supra* n 8 para 16.

> ‘Failure to object by a party or its legal representative cannot render an unfair pro’s contention that cess or conduct fair or acceptable. The test for reasonable apprehension of bias is not premised on whether the representative objected to the process or not. It is an objective test which is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the commissioner has not brought an impartial mind to bear in the adjudication of the dispute. In any case, it has been shown above that an attempt by the respondent's representative to stop the arbitrator from her conduct I failed to yield any positive results.’[15]

[17] The same applies in the present instance, as shown above, Mr Stansfield did try to stop the Arbitrator from his conduct with no success. To my mind, the Arbitrator’s conduct gave rise to a reasonable apprehension of bias which obviously vitiate the award.

Conclusion

[18] In all the circumstances, the award stands to be reviewed and set aside on this ground alone as the arbitration proceedings were tainted by the Arbitrator's officious interferences which were to such an extent that the parties were denied a fair hearing.

[19] As stated in *Satani,* ‘the outcome of the award is irrelevant because there is no material that can be said to be properly before the arbitrator to determine whether the outcome is reasonable’[16]. For that reason, the submissions by the representatives of both parties that this Court is in a position to substitute the award are untenable. The matter accordingly stands to be remitted back to the SALGBC for a hearing *de novo*.

Costs

[20] In accordance with the requirements of the law and fairness, each party must carry its own costs.

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[15] *Satani supra* n 6 at para 36.
[16] Ibid at para 39.

[21] In the result, I make the following order.

Order:

1. The arbitration award dated 27 January 2020, issued under case number WCP051812, is reviewed and set aside.

2. The matter is remitted back to the SALGBC for a hearing *de novo* before an Arbitrator other than the Third Respondent.

3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr G Stansfield of Mcaciso Stansfield Inc. Attorneys
For the First Respondent:	Advocate A Montzinger,
Instructed by:	Hannes Pretorius & Bryant Attorneys