REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C526/2020

In the matter between:

MAFUBE LOCAL MUNICIPALLITY Applicant

and

SOUTH AFRICAN LOCAL BARGAINING COUNCIL (SALBC) First Respondent

COMMISSIONER THEM GODFREY CHOBOKOANE N.O. Second Respondent

IMATU obo MJ DLAMINI & 11 OTHERS Third Respondent

Heard: 11 August 2022

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

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside an award under case number FSD072003, dated the 27 October 2020. There is also an application for condonation for the late filing of the reply before me, following an objection to the reply. I grant the condonation application and decide the matter on its merits for the reasons evident below. In terms of the Award the second respondent (the Arbitrator) found as follows:

> "28. The Applicants, Mabele John Dlamini and 11 others were dismissed by Respondent, Mafube Local Municipality, and their dismissal was both procedurally and substantively unfair.
>
> 29. The Respondent is ordered to retrospectively reinstate Applicants to indefinite Security Guard positions The Applicants must report for duty on 1 December 2020.
>
> 30. The Respondent is further ordered to pay the Applicants total back pay from the date of dismissal, amounting to (R46 073.20 X 12) = 552 878.40 (Five hundred and fifty two thousand eight hundred and seventy eight rand forty cent)….."

[2] The Award proceeds to set out the amount to be paid to the individual applicants.

[3] In its answering affidavit and submissions before me, the third respondent (IMATU), asks that the Court find that the review application is deemed withdrawn and be dismissed on that basis. IMATU did however 'plead over' and the review is ripe for hearing. The applicant did not file an application for condonation for the late filing of the transcribed record or seek the reinstatement of the review, nor did it obtain the consent of IMATU to do so. An application to the Judge President for an extension was also not made.

[4] The Notice in term of Rule 7(A) 5 was issued by the First Respondent (the bargaining Council) on the 3 December 2020 and such Notice sent by the Registrar to the parties on the 7 December 2020. On the 19 February 2021, a supplementary Rule 7A(5) Notice was filed by the Bargaining Council containing a substantial documentary record which served before the second respondent (the arbitrator). Again, the registrar sent out a Rule 7A(5) notice to the parties, on the 22 February 2021. The record, comprising two portions,

transcribed and documentary, was filed on the 7th April 2021. At the hearing of the matter it was argued on behalf of the applicant that because it had filed documents which served before the Arbitrator, which had been made available at a later stage than the CD of the record, the 60 day period was only applicable from the 22 February 2021, when the Registrar had issued a second Notice in terms of Rule 7A(5) and that the Court had jurisdiction to hear the review. I informed the parties that I would consider the point *in limine* in my judgment.

[5] IMATU relies on Clause 11.2.3 of the Practice Manual to submit that the review application has been deemed withdrawn, and argue that it should be dismissed on that basis. However, as the Court in *MJRM Transport Services CC v Commission for Conciliation, Mediation & Arbitration & others*[1]

"[18] A further misconception that needs to be dispelled in this court is that whenever the provisions of clause 11.2.3 of the Practice Manual are to be invoked, the respondent party can by necessity implore the court to dismiss the main review application. It could never have been the intention of the provisions of the Practice Manual to allow parties to by-pass the other provisions of the rules of this court where there is an allegation of a failure timeously to prosecute a review application…..

[20] ….. there is nothing in the Practice Manual that enjoins the court to dismiss a review application where the provisions of clause 11.2.3 are invoked. It is still open to the other party to the review application to bring an application to dismiss in terms of rule 11 of the rules of this court. The provisions of clause 11.2.3 were not meant to circumvent those of rule 11 of the rules of this court."

[6] No application to dismiss was filed and I am of the view that the review must be heard in the interests of speedy resolution of disputes, which both the Practice Manual and the jurisprudence of this Court enjoins. It is not necessary for me to decide whether in the circumstances of the two portions of the record filed at different dates, the record was in fact filed outside the 60 day period.

[1] *2017) 38 ILJ 414 (LC)*

[7] The applicant Municipality has submitted, inter alia, that the Arbitrator ignored relevant evidence, made mistakes of law, failed to identify the nature of the dispute before him and exceeded his powers. It seeks the setting aside and substitution of the Award.

[8] The background to the dispute is set out by the Arbitrator as follows:

"8. The Applicants were employed as Security Guards. The Applicant (sic) were employed on three fixed term contracts renewed from 2019, and some from 2018. They were issued with a six months fixed term contracts which expired on 30 June 2020, both parties agreed that the letter of termination was received on 1 July 2020 and some on 2 July 2020, both parties agreed that the termination was on 1 July 2020. The Applicant (sic) were paid R120.00 per day and the permanent Security Guards were paid R9 286.15 per month……

10. It must be noted that Commissioner Van Der Berg had issued an award concerning the same parties before me. The award related to section 198B, and deemed the Applicants contract permanent. I will not deal with the matter relating to section 198B because it has already been determined and the Applicant (sic) were deemed to be permanent, if the Respondent is not pleased with the award, can deal with the award in terms of section 144 or 145 of the Labour Relations Act, 66 of 1995 at (sic) amended ("the Act") Where I refer to section 198B in my findings I am not doing so to vary or rescind the decision of the Commissioner, it will be to decide on issues raised during evidence before me."

[9] In relation to the Van Der Berg Award, which is part of the record before me, the Arbitrator made the following remarks in his evaluation of the dispute before him:

"22.The Applicant referred me to the award of Commissioner Van Den Berg under case number FSDO12006 between Imatu obo Dlamini and 11 others v Mafube Local Municipality and 1 other. The Commissioner made a determination that the Applicants were employed in contravention of 198B

and their contracts and in paragraph 61 states that the deeming provisions of section 198B(5) find application. The commissioner in his award states that subsequent to the referral of the dispute relating to section 198B of the LRA, the Applicants contracts were terminated and he was not empowered to deal with the dismissal dispute under section 186(1)(b) of the LRA. I fully agree with the conclusion that he was not empowered to deal with the dismissal dispute, because it was not properly before him I will therefore deal only with dispute in relation to section 186(1)(b) of the LRA. The Commissioner had the same parties before him and dealt with the provision of section 198B of the LRA and made his finding in paragraph 60 of his award. I partly agree with the Respondent that I was not bound by the award of another commissioner, however this award was in relation to the parties before me, there was a determination relating to the deeming provision in paragraph 60 and 61. The Applicant's contract (sic) were deemed as indefinite contract of employment The award was not rescinded or reviewed and the findings are still binding on parties. If the matter involved deferent (sic) parties, I would fully agree with the Respondent that the award of the other commissioner had no binding effects on me. The issues before me the same issued (sic) that were before Commissioner Van Der Berg. If I contradict the findings of Commissioner Van Der Berg my decision will amount to review of his decision I will therefore only limit myself to section 186(1)(b) of the LRA."

[10] In fact the Arbitrator misconstrued the Award of Van Den Berg. It is to be found in paragraph 67 thereof, in which he states as follows:

"Award

67. The contracts of employment were terminated after the dispute regarding section 198B was referred to the SALGBC. There must be an ongoing relationship between the Applicants and the 1st Respondent when a decision is made during arbitration about section 198B and D. No section 186(1) dispute was referred to the SALBC and therefore the termination of the contract (sic) of employment on the 30th June cannot be entertained in this arbitration as the SALGBC has no jurisdiction to decide over the termination of employment until it is referred to the SALGBC. *Neither can a binding decision be made on section 198B(5) of the LRA*." (emphasis mine)

[11] Section 198B(5) of the LRA reads as follows:

"(5) Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration."

[12] It is evident that the Arbitrator in this matter considered himself bound by a purported decision by another Commissioner, that the contracts of the employees had become permanent in terms of section 198B of the LRA, when no such decision had been made. He then proceeded to retrospectively reinstate IMATU's members to 'indefinite Security Guard positions'. The payment ordered to be made by the Municipality, as back-pay, was at the rate of a permanent security guard.

[13] The above constituted a material mistake of law. It is not the only mistake of law contained in the Award. The Arbitrator found, in the situation in which the Municipal staff establishment did not cater for positions that the applicants could fill, the following:

"The section 66 of MSA clearly states that without a council approved structure the Applicants cannot be employed indefinitely if there (sic) are not catered for in the staff establishment (structure). But the provision of section 186(1)(b) empowers the decision maker to deal with the issue of expectation for employment of the employee on an indefinite basis. It is my understanding that the provisions of section 66 of the MSA must not prevail as stated in s210 of the LRA."

[14] The reasoning of the Commissioner above reflects his error of law regarding the test to be applied by a decision-maker when deciding a section 186(1)(b) dispute. It is trite that in coming to a decision an arbitrator must first determine whether an employee in fact expected her contract to be renewed, which is the subjective element. But secondly, if she did have such an expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element.[2] The objective facts herein include that the employer is a Municipality and did not have posts available for the applicants

[2] De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others (2013) 34 ILJ 1427 (LAC)at paragraph 29.

on the establishment. These facts should have been taken into account in assessing the expectation of the employees to have their contracts renewed on a permanent basis.

[15] The Arbitrator was further oblivious to the principle that the question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)(b), involves the determination of the jurisdictional facts.[3] This before the decision on the fairness of the dismissal is considered.

[16] Both the arbitrator and the representatives of the parties at the arbitration labored under various misconceptions of the law. The Award is incorrect on various points of law. This Court cannot allow it to stand. The dispute must be remitted to the first respondent for a due arbitration in terms of s186(1) (b) of the LRA. I therefore make the following order, taking the relationship between the parties into account in deciding on costs:

Order

1. The Award under case number FSD072003 is reviewed and set aside.
2. The dispute is remitted to the first respondent for re-hearing before an arbitrator other than second respondent.
3. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

[3] De Milander supra at para 24

Appearances

Applicant: M.C. Louw instructed by Peyper Attorneys

Third Respondent: Union Official