REPUBLIC OF SOUTH AFRICA

Not Reportable

Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D350/09

In the matter between:

INDEPENDENT MUNICIPAL AND	
ALLIED TRADE UNION obo D GURRIAH	**Applicant**
and	
ETHEKWINI MUNICIPALITY	**First Respondent**
SOUTH AFRICAN MUNICIPAL WORKERS'	
UNION	**Second Respondent**
SOUTH AFRICAN LOCAL	
GOVERNMENT BARGAINING COUNCIL	**Third Respondent**
B S HLEHLA N O	**Fourth Respondent**
Heard:	**26 April 2011**
Delivered:	**14 April 2012**

Summary: This is a Review of an arbitration award. The commissioner, having spent three hours on an attempt to conciliate the dispute, then proceeded to arbitrate the dispute. He interfered more than was required. Furthermore, it was alleged that the commissioner was not properly accredited in terms of arbitration qualification at the time of the hearing.

JUDGMENT

PATHER A.J.

Introduction

[1] This is an application:

1.1 to review, set aside and remit to Arbitration before a different Commissioner, the Arbitration Award issued by the Fourth Respondent ("the Commissioner"), as a commissioner of the Third Respondent; alternatively

1.2 for the Fourth Respondent's Arbitration Award to be substituted with an Award, granting to the Applicant ("the employee"), protected promotion; and

1.3 for condonation of the late filing of the Review application.

[2] The First Respondent (the Municipality) opposes the application. Despite being invited to make submissions, the Third Respondent has failed to do so.

[3] The Commissioner found that the employee had failed to prove that in failing to promote him, the employer had committed an unfair labour practice.

Background and common cause facts

[4] The employee has been employed by the employer, the First Respondent since 1991. At the time of the arbitration hearing before the Fourth Respondent (the Commissioner), he held the position of Subsidy

Administrator. During or about March 2008, the employee applied for the post of Administrative Officer. His application was unsuccessful. He was unhappy about not being appointed, and filed this dispute claiming that in not appointing him to the post, the First Respondent had committed an unfair labour practice.

The arbitration

[5] According to the record, the arbitration hearing was preceded by the Commissioner's unsuccessful attempt to resolve the dispute by conciliation. Such attempt lasted approximately three hours, from 9.00 a.m. to approximately 12.00 p.m. on 12 February 2009, that is, the day the arbitration hearing was scheduled to take place. As the dispute could not be resolved, the arbitration hearing presided over by the Commissioner, commenced. This appears from page 2 of the record at lines 20 to 25. However, page 105 of the record, Section A, which has been completed by the Commissioner, indicates that the attempt at conciliation lasted only one and a half hours. Page 105 is the Third Respondent's Result Sheet, as it contains details of the hearing and the eventual outcome. Nothing turns on this contradiction, although it is difficult to understand why the Commissioner would understate the time spent on trying to resolve the dispute, in his reporting to the Third Respondent. There is no doubt that in his introduction when the arbitration proceedings commenced, the Commissioner correctly reflected the time spent on his unsuccessful attempt to resolve the issue, as the record reflects that he sought confirmation from the parties of his summary of what had transpired, before the arbitration proceedings began.

[6] Only the employee testified. His evidence was that he had been interviewed by a panel comprising three persons from the Municipality. Despite having met the essential requirements of the position, he was not appointed. In his opinion, the interview went well. However, he believed that he had not been given an opportunity and that the Municipality's management had selected a candidate for the position prior to the interview. When the Commissioner asked him to explain his statement about not having been given an opportunity, the employee stated that he may have been marked down. The

record indicates that the mechanical recording of the arbitration proceedings had been turned off at this point. On resumption and in response to the Commissioner's question as to whether he wished to pursue the point about underscoring, Mr Chetty who represented the employee stated that they (presumably he and the employee) would "check that question".

[7] This concluded the employee's case. Mrs Callahan, an officer in the employ of the Municipality at the time and who represented it at the arbitration hearing, began her cross-examination of the employee. Before she could phrase her first question, the Commissioner requested that the matter be stood down. The record reflects that on resumption, the Commissioner explained that during the interlude he had "advised" the Applicant that it had not raised the issue of demographics. This, despite the Municipality having indicated, during the attempt at conciliating the dispute, that one of its defences to the Applicant's claim was that of the demographics. (By this, it is presumed that the Municipality would plead that the Interviewing Panel had considered gender and race as criteria as well, in filling the vacancy).

[8] During a not-too-lengthy cross-examination, the employee conceded that contrary to his evidence in chief, he had been notified by the Human Resources Department that he had not been successful. In response to the question of whether he had been short-listed for the position, the employee stated that he had been. An extract from the record and quoted below, indicates the dialogue that ensued:

> 'COMMISSIONER: I think that was retracted.
>
> MRS CALLAHAN: No, he retracted the part where he said that somebody had already…
>
> COMMISSIONER: He retracted all three.
>
> MRS CALLAHAN: You retracted all three?
>
> COMMISSIONER: That he was not given an opportunity, that someone pre-empted and that…

MRS CALLAHAN: Okay, I understood it that only the one part was. David, if I …'

[9] At this stage, Mrs Callahan completed her cross-examination. The Commissioner then asked Ms Benn, who had appeared on behalf of Mrs N C Mthimkhulu, the latter being the successful candidate, whether she wished to cross-examine the employee. (Mrs Mthimkhulu had been cited as the Second Respondent in the dispute before the Bargaining Council). When Ms Benn stated that she did not so wish, the Commissioner took the unusual step of placing on record her response, even though this was audible enough for the purpose of the mechanical recording device. The Commissioner then sought Ms Benn's confirmation, also apparently for the record. Not content, he proceeded to address Mrs Mthimkhulu directly, asking whether she had understood what her "representative has just done…" Mrs Mthimkhulu answered in the affirmative. Clearly perplexed, the Commissioner asked Mrs Mthimkhulu whether this (Ms Benn's electing not to cross-examine the employee) was in accordance with her instruction.

[10] During a subsequent re-examination, yet another exchange took place between the Commissioner, and, this time Mr Chetty, the employee's representative. This discussion related to whether Mr Chetty was entitled to ask the employee whether he had been given the reason as to his non-appointment. According to the Commissioner, Mr Chetty was not permitted to ask that question, as the cross-examination of the employee had been confined to whether he had been informed that he had been unsuccessful in his application. The record reveals the conversation thus:

'COMMISSIONER: You can ask the question, but just remove the reason part of it

MR CHETTY: But that's what I want to know, the reason part.

COMMISSIONER: Oh, okay, then you cannot ask the question, because cross-examination wanted whether he was not informed, not whether reasons were given why he was not appointed. Yes, any more re-examination?'(sic)[11] After a break and on

resumption of the hearing, the parties arranged the dates for the submission of their respective closing arguments which were to be in writing.

The application for condonation

[12] The grounds upon which the condonation application is based are set out in paragraphs 15 to 17 of the Founding Affidavit, page 8 of the Applicant's indexed documents. The application for review was made seven weeks outside of the period provided in the rules. In summary, these are that the Applicant's Internal Dispute Resolution Committee had decided at a meeting, that there was merit in an application to have the Commissioner's Award dated 9 March 2009 reviewed. A consultation with the employee had been arranged for 14 May 2009. In the interim, on 11 May 2009, the Applicant became aware that the Commissioner was not properly accredited in terms of the Bargaining Council's Policy document. This document, a copy of which appears at page 27 of the Applicant's indexed documents, sets out the Bargaining Council's policy and procedure for the appointment of external panelists to conduct its dispute resolution function. As a consequence of this information becoming known to it, the Applicant submitted as a further ground of review, that the Commissioner had exceeded his powers by arbitrating a dispute at a time when he was not properly accredited to do so.

[13] In this regard, Ms S Jikela, who appeared for the Municipality, argued that the application was lacking in that it failed to address:

- the question of whether there had been fault on the part of the Applicant;
- the degree of lateness adequately; and
- prospects of success.

[14] Given that strong prospects of success exist which will be dealt with later in this judgment, condonation for the late filing of the review is granted.

The grounds of review

[15] In the main these are that the Commissioner had:

15.1 misdirected himself by discussing the matter for approximately three hours prior to the commencement of the arbitration hearing. It is further submitted that the Commissioner had, during such discussion, advised the Applicant of the possible consequences it would face should it have raised the issue of "demographics", seemingly, contrary to the Commissioner's advice;

15.2 committed a gross irregularity in not accepting the employee's version of the dispute, given that such version was the only one presented at the arbitration hearing; and

15.3 exceeded his powers in that as at the date of the arbitration hearings, the Commissioner lacked the required CCMA accreditation to arbitrate the dispute. It was submitted further that according to the Bargaining Council's policy, the Commissioner had to have been accredited by the CCMA.

Evaluation

[16] For reasons that will become clear, I will confine myself to the grounds of review based on the contentions that the Commissioner had misdirected himself and that he had exceeded his powers.

[17] On behalf of the Municipality, Ms Jikela argued that the pre-arbitration proceedings, referred to on page 2 of the record, had been recorded manually. According to her, this had been an attempt at resolving the dispute through conciliation. Ms Soni, appearing for the Applicant, argued that the discussions that preceded the arbitration were conducted off the record. Ms Jikela's argument cannot be sustained, for the reason that a pre-arbitration discussion is usually aimed at narrowing the issues for adjudication. Furthermore, the parties to any pre-arbitration discussion, where agreement on the issues is reached, may conclude a written document incorporating such terms. Such document then forms part of the record. An attempt at resolving a dispute through conciliation on the other hand, is conducted entirely off the record, with no notes being taken or discussions recorded. Furthermore the processes of pre-arbitration discussions and conciliation, and

their respective outcomes are different. Therefore, the discussions which went on for approximately three hours on the day of the hearing could not have been a pre-arbitration hearing as contended by the Municipality. If in fact a pre-arbitration proceeding was held and which was recorded manually, as Ms Jikela contended, such record would then have been filed. In any event, the Commissioner himself was clear that the discussions were conducted in an attempt to resolve the dispute.

[18] There is no dispute that the Commissioner spent approximately three hours in attempting to resolve the dispute. That he invested all that time in the discussions that preceded the arbitration indicates that he must have put great effort into the attempt to resolve the matter. After all, the issue in dispute eventually turned out to be a simple factual dispute, judging by the time spent on the arbitration hearing. While commissioners are entitled in terms of section 138 (3) of the Labour Relations Act No.66/1995 as amended, if all the parties consent, to suspend the arbitration proceedings and attempt to resolve the dispute through conciliation, in my view the Commissioner in this case ought to have exercised caution. This is because having invested much time and effort in trying to resolve the issue, one or some or all of the parties stubbornly refused to budge from her/his original position. It is probable that the Commissioner was fatigued after such effort. In my view, the Commissioner entered the arena all too often during the subsequent arbitration hearing. In this regard, the record contains several instances where his interventions and comments are found to be inappropriate. Not only are his comments inappropriate, but there are instances where his prior knowledge of the issue is evident and is inconsistent with the evidence presented. In addition to the extracts quoted above, the record discloses the following comments:

> 'MR CHETTY: Mr Gurriah, one of the documents that was presented by Respondent, (inaudible) your statement, where it shows, IMATU's bundle, page 13, it shows …
>
> COMMISSIONER: Did we not agree that that document is incorrect, that the document to be used is this one?'

Nowhere in the evidence was any agreement recorded as to which documents were to be used or not to be used. This intervention seems to be based on the discussions that were held prior to the arbitration hearing. It is difficult to escape the conclusion that the Commissioner had pre-judged the issue and had decided which documents would lend itself to such an outcome.

[19] Yet another extract from the record discloses the following comments:

> 'COMMISSIONER: I stood the matter down and advised the Applicant that they have not said a word about demographics. Earlier on when we conciliated the matter the employer raised the defence that one of the things, or one of the things that they relied on was demographics. You may continue with your cross-examination."
>
> It was not necessary for the Commissioner to have given this advice to the applicant, and especially not, to have done so off the record. The Applicant after all is a registered trade union whose officials are skilled in the practice of presenting cases at arbitration hearings on behalf of its members. While a Commissioner is entitled to ask questions for clarity, such questions should not be aimed at showing inconsistencies, as is apparent in this case. An example of such conduct is evident in the following exchange, already referred to above:
>
> 'COMMISSIONER: You said that you were not given an opportunity, I want to know why do you say you were not given an opportunity? That may assist me in arriving at an informed award.
>
> MR GURRIAH: Perhaps in the scoring.
>
> COMMISSIONER: In the scoring.
>
> MR GURRIAH: They down-scored me, perhaps with the …
>
> COMMISSIONER: How did they down-score you?
>
> MR GURRIAH: I don't know, they put (inaudible) that's why …'

At this point the tape was turned off. On resumption of the hearing, the record discloses the following:

> 'COMMISSIONER: go on record, yes, I stood the matter down because the statement was made that the Applicant was not given an opportunity,

someone pre-empted the results and that the Applicant was under-scored. Do you still want to pursue that?'

That Mr Chetty who represented Mr Gurriah then appeared to retract the question, although the record quotes him as saying that they would "check" the question, supports the inference that some badgering by the Commissioner had taken place prior to the arbitration proceedings. In my view, the badgering by the Commissioner appeared to continue throughout the arbitration proceedings. This is evident from the manner in which the tape was turned off at times while Mr Chetty was leading Mr Gurriah. Against the background of the Commissioner's involvement in the earlier, protracted discussions aimed at attempting to resolve the matter, it was improper for the Commissioner to have disclosed any aspect of those discussions. The discussions had in any event taken place entirely without prejudice to either party's rights in the subsequent arbitration hearing. Once again, it indicates that the Commissioner had pre-judged the matter and as a consequence of having being involved in the attempted resolution of the dispute.

[20] Given the Applicant's submission that the Commissioner had advised it of possible consequences should it have raised the issue of "demographics" coupled with the Commissioner's own comments in this regard, it is clear that the First Respondent's demographic profile was of significance to one or more of the parties. For the Commissioner to have turned off the tape and, when the hearing resumed, to place on record that he had "advised" the Applicant about the matter, creates a further inference that he preferred not to have had the full conversation recorded.

[21] From the conversation referred to in paragraph 9 above, between the Commissioner, Ms Benn and Mrs Mthimkhulu, it appears that the Commissioner was dissatisfied with their responses. It was improper for him to have gone further and to have sought confirmation from Mrs Mthimkhulu that those were indeed her instructions. In my view, this is insulting to Ms Benn as the Commissioner seemed to be suggesting, for no apparent reason that she was not acting in the best interests of her member. In the result, the Applicant's submission that the Commissioner had misdirected himself in the

conduct of the arbitration proceedings is well-founded and reasonable. On this ground alone, the application stands to be granted.

[22] Turning to the question of the Commissioner's qualification as an arbitrator, it was contended on behalf of the First Respondent that the Commissioner had at the time, yet to complete "the conciliation arbitration course" but that he had been accredited for both "conciliations and arbitrations" for a period of one year. It is difficult to understand this reasoning. If the Commissioner had yet to complete the course, he surely would not have been accredited to perform the functions of a commissioner. The ground upon which it was submitted that the Commissioner exceeded his powers relates only to the lack of accreditation in respect of the functions of an arbitrator. Therefore, and supported by the First Respondent's contention, the Commissioner is found not to have been accredited to arbitrate disputes at the time. Although reference was made to the Third Respondent's Policy document in regard to the appointment, review and re-appointment of its panel of Conciliators and Arbitrators at page 27 of the Applicant's Indexed documents, no evidence was presented as to whether the Commissioner falls within the ambit of Clause 3 or Clause 4 thereof. In summary, Clause 3 of the document relates to the Third Respondent's criteria for the initial appointment of a candidate, whereas Clause 4 deals with the re-appointment of a panelist. It is a requirement in terms of Clause 3 that the candidate must be accredited by the CCMA as a "conciliator/arbitrator". Clause 4 however, contains no such requirement. However, as the Commissioner's status as an arbitrator was placed in issue and as it was not disputed that such an issue existed, it may therefore be concluded that the Commissioner was in the initial stages of his appointment to the Third Respondent's "External Panel". It is unfortunate that the Third Respondent did not respond to the court's invitation to make submissions on the matter. In any event, no evidence was presented either as to whether the Commissioner was aware or could reasonably have been aware of his lack of accreditation in respect of arbitration hearings. In this regard, the Third respondent must surely take responsibility for having allocated a matter for adjudication to a Commissioner who did not have the necessary qualification at the time. Section 52 (1) of the LRA provides as follows:

> '(1) With a view to performing its dispute resolution functions in terms of section 51 (3), every council must –
>
> (a) apply to the governing body of the Commission for accreditation to perform those functions; or
>
> (b) appoint an accredited agency to perform those functions referred to in section 51 (3) for which the council is not accredited.'

In my view, the LRA places the duty on the council, therefore the Third Respondent, to apply to the Commission for accreditation to perform the functions that its external panelists perform as conciliators and arbitrators. In the ordinary course of events, the matter had been allocated to the Commissioner; he had simply done what was required of him as an external panelist of the Third Respondent. However, in view of the finding that the Commissioner did not have the necessary qualification at the time to perform the duties of an arbitrator, by arbitrating the matter he had exceeded his powers. Therefore the application stands to be granted on this further ground.

Order

[23] In the premises, I make the following order:

1 The arbitration award dated 9 March 2009 is reviewed and set aside;

2 The matter is remitted to the Third Respondent to be arbitrated by a commissioner other than the Fourth Respondent being the Commissioner.

3 There is no order as to costs.

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Pather A.J.

APPEARANCES:

FOR THE APPLICANT: Ms C H Soni

FOR THE FIRST RESPONDENT: Ms S Jikela