THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 316/18

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

MATEE TDK N. O **Second Respondent**

IMATU OBO JOSEPH MACHETE **Third Respondent**

Heard: **12 May 2020**

Delivered: **15 May 2020 (This judgment was handed down electronically by emailing a copy to the parties. The 15th May 2020 is deemed to be the date of delivery of this judgment).**

Summary: Due to Covid19 lockdown, this application was decided without oral hearing and the parties agreed to this arrangement. Review – alleged unfair labour practice – no unfair labour practice committed. Held: (1) Condonation granted. (2) Award reviewed and set aside and replaced with an order of this Court. (3) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a review application in terms of which the City of Ekurhuleni Metropolitan Municipality (CEMM) seeks to review and set aside an arbitration award issued by Panellist David Matee (Matee). In terms of the award Matee found that the CEMM has committed an unfair labour practice in relation to provision of benefits against Joseph Mashao Machete (Machete). Matee ordered the CEMM to pay Machete remuneration on salary level T16 effective 1 July 2010 as per a letter dated 12 November 2010. He directed the parties to discuss the figures as no figures were presented during arbitration. The amount arrived at must be paid to Machete on 30 January 2018. He ordered the CEMM to pay the wasted cost for the alleged unfair and unreasonable delay caused in the arbitration. Aggrieved by the award the CEMM launched the present application outside the prescribed time period. The application stands opposed.

Background facts

[2] In the year 1997, Machete was employed by the CEMM as a Deputy Director in the CEMM Police Department (EMPD). He was appointed at salary grade X08. During the year 2009/2010, the CEMM embarked upon a job evaluation exercise. The outcome of that exercise was that positions were upgraded, salary scales and titles of positions were changed. In respect of Machete, his title was to change from a Deputy Director to a Senior Manager. His salary grade was to change from X08 to T16. At grade X08, Machete's salary was R272 088.00 per annum. At the new T16 grade, his salary was set as R312 540.00 per annum.

[3] The outcomes of the job evaluation exercise were presented to the council of the CEMM through a report prepared by the Human Resources Management and Development (HRMD) department. On 01 June 2010, the council resolved to approve the report of HRMD. On 12 November 2010, a letter was addressed to Machete by the Executive Director (ED) of HRMD advising him of the job evaluation results in respect of his position. The letter advised Machete of his rights to appeal should he be unhappy with the results. Further, the letter advised him that the implementation would be done in terms of the Wage Curve Collective Agreement (WCCA). He was further advised that the CEMM may also appeal the results. In addition, he was advised of possible errors in the results, which the CEMM reserved the right to rectify.

[4] As advised, Machete lodged an appeal against the results. The appeal was an indication that Machete does not accept the results. Owing to that implementation did not happen. The appeal was governed by the Task Job Evaluation Agreement (TJEA). The appeals authority was not put in place, as a result the appeal could not be entertained by the bargaining council.

[5] In the meanwhile, the trade Unions declared disputes around the WCCA. Such culminated in a litigation in the Labour Court, which litigation saw the upholding of the WCCA by the Labour Court, which upholding was overturned on appeal by the Labour Appeal Court. Leave to appeal was refused by the Constitutional Court. Besides the litigation process, the parties engaged each other at the national bargaining level. The issue in dispute was the implementation date of the WCCA. The unions contended that the date was 1 July 2010 for the implementation of the new salary scale. On the other hand, South African Local Government Association (SALGA), an organisation representing the CEMM, contended that no implementation date was agreed upon. Later on the date of 1 July 2011 was unilaterally introduced and unaware of that change, on 21 April 2010, a collective agreement was signed. On becoming aware of the unilateral amendment, the trade unions approached this Court to obtain a declaratory order. The outcome of such a

litigation was spelled out above. Given the stalemate, the implementation in terms of the WCCA could not happen.

[6] As a results on 26 February 2016, IMATU on behalf of Machete referred a dispute to the bargaining council alleging an unfair labour practice. Machete summarised the dispute thus:

> 'Employer has unfairly failed and/or refused to pay benefits due to employee in accordance with job evaluation results.'

[7] After conciliation failed to resolve the dispute, Machete and his trade union requested that the dispute be resolved through arbitration. Matee was appointed to resolve the dispute. He resolved the dispute in favour of Machete. Aggrieved thereby, the applicant launched the present application.

Evaluation

The issue of condonation

[8] The review application was launched on or about 23 February 2018. The impugned award was issued on 13 December 2017. The deponent to the founding affidavit in support of the review application, Mr Xolani Prince Nciza, the Divisional Head: Employee Relations, testified that he does not recall as to when was the arbitration award served onto the CEMM. However, when it came to his attention he took the necessary steps to have it impugned. On the assumption that the award was served on the CEMM on 13 December 2017, the prescribed six weeks period expired on or about 17 January 2018. The application having been filed on 23 February 2018, it means that the period of delay is about four weeks and couple of days. Generally where the delay is minimal, the explanation of the delay need not be strong. In this matter the explanation provided is vague in that the deponent does not know precisely when the award was served on the CEMM, he does not take the Court into his confidence and provide a date on which the award came to his attention.

Again he does not take the Court into his confidence by providing a date on which he was able to discuss the matter with his Head of Department.

[9] As it is trite that applications of this nature are decided by weighing factors and no one factor is decisive. I consider the explanation provided to be bereft of the necessary details and accordingly unacceptable. However, I take a view that this poor explanation is compensated by strong prospects of success. Thus, it would be in the interest of justice to condone the late filing of this application. One aspect to clear. In the notice of motion, the applicant did not specifically pray for condonation. Instead it had the catch-all phrase of further or alternative relief. The principle is that if the evidence presented justify a relief, a Court should grant such a relief. In the founding affidavit a case for the relief of condonation was made.

Grounds of review

[10] The applicant contends that Matee had prejudged the dispute before hearing evidence. He failed to apply his mind to the merits in an independent fashion as his mind was already polluted by the award made in another matter. He misconstrued the dispute to be arbitrated by him. The true dispute was about the failure to implement the job evaluation results. With reference to the body of the award, the applicant pointed to the vacillation by Matee on the exact issue to be decided by him which demonstrated lack of appreciation of the nature of the dispute. Above all, the applicant contends that the award is not one that a reasonable decision could make due consideration being accorded to all the evidentiary material placed before Matee.

Evaluation of the merits of review

[11] The head and tail of this dispute lies in the letter of 12 November 2010. It is apparent that Matee mistook this letter to be a contractual basis to pay Machete an increased salary. It is not. With reference to the Labour Appeal Court (LAC) judgment of *Apollo Tyres SA v CCMA and others*[1], he mistook

[1] [2013] 34 ILJ 1120 (LAC).

the claim of Machete to be one relating to benefits. A claim for a higher salary is not a claim relating to provision of benefits. Had Matee carefully considered the contents of the letter of 12 November 2010, he would have emerged with the following critical facts:

11.1 That the letter serves as a feedback of the job evaluation results of 11 September 2009 – The heading of the letter says it all.

11.2 That Machete had an option to appeal the outcome – the evidence revealed that Machete indeed appealed.

11.3 That, most importantly, the implementation of the results would be implemented in terms of the WCCA.

11.4 Lastly that the CEMM reserved the right to rectify possible errors.

[12] Clearly, even if *Apollo, supra* may be applied, which in the Court's view is not applicable, the letter does not give rise to a contractual right nor a legitimate expectation. An expectation, if any, was thwarted by Machete's conduct in launching an appeal. Logically, the launching of an appeal is a clear indication of the rejection of the results. Having rejected the results, such an act is an antithesis of a legitimate expectation to the salary increment, assuming for now that it is a benefit proper. Nonetheless, even if Machete had not appealed, as it appears that there is subtle dispute around that issue, the fact that the WCA was not finalised suggests that there is no complete right to the proceeds of the job evaluation exercise.

[13] I am in agreement with the applicant that Matee misconstrued the true nature of the enquiry. A commissioner who misconstrues the true nature of an enquiry quintessentially arbitrates a wrong dispute – a misconduct on his or her part.[2] It remains the duty of a commissioner to determine the true nature of a dispute. In truth, Machete's dispute is not about provisions of benefits – an unfair labour practice – it is a dispute about a claim for an increase of a salary. Effectively, Matee lacked the necessary jurisdiction to arbitrate such a dispute. An award issued without a necessary jurisdiction is a *brutum fulmen*.

[2] See: *Masoga and another v Pick n Pay Retailers and another* [2019] 12 BLLR 1311 (LAC) para 37.

[14] Where a commissioner commits an error which has the effect of distorting the outcome, his or her award is axiomatically not one that a reasonable decision maker would arrive at and thus reviewable in law.[3] Having not identified the true dispute it can hardly be said that Matee dealt with the principal issue with all the parties being afforded a fair opportunity.[4] In the final analysis, the award issued by Matee falls way outside the bounds of reasonableness and cannot stand. Another misgiving this Court has with the award is the direction that the parties must discuss as figures were not presented at arbitration. This is a classic case of abdication of duties. Bargaining Councils exist to resolve disputes and not throw the warring parties into a further quagmire, particularly out of an arbitration process. This is also a reviewable irregularity.

[15] For all the above reasons, the review application must succeed. The award is not one that a reasonable decision maker would reach and it is incapable of any justification in law. It is unnecessary to consider other remaining grounds of appeal.

[16] In the result the following order is made:

Order

1. The late filing of the review application is condoned.
2. The award issued by Matee dated 13 December 2017 under case number GPD 021617 is hereby reviewed and set aside. It is replaced with an order that Machete was not subjected to an unfair labour practice in related to the provision of benefits.

3. There is no order as to costs.

[33] See*: Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC).
[4] See: *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC).

_____

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

No appearances.