IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 62/20

In the matter between:

FAWU OBO MEMBERS **Applicant**

and

IMPERIAL LOGISTICS (PTY) LTD **First Respondent**

ELEANOR HAMBIDGE N.O. **Second Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **26 June 2024**

Delivered: **03 September 2024**

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] This is an application brought by the Applicant, Food and Allied Workers Union (FAWU) acting in the interest and on behalf of its members employed by the First Respondent, Imperial Logistics, (Pty) Ltd (Imperial) in terms of section 145 of the LRA[1] to review and set aside an arbitration award issued by the Second Respondent (the Commissioner) under the auspices of the Third Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) in case no HO4767-19 issued on 2 December 2019.

[2] The arbitration award that is the subject of review application pertains to a dispute relating to the interpretation and application of various collective agreements dealing with severance pay, which dispute was referred by the FAWU to the CCMA in terms of section 24(2) of the LRA.

[3] FAWU sought a determination from the CCMA that the correct interpretation of the relevant collective agreements, that Imperial was liable to pay FAWU members severance pay equal to an amount of 2 (two) weeks' remuneration for each completed year of continuous service. The Commissioner found that the relevant collective agreements do not support such an interpretation by FAWU.

[4] The review application brought by FAWU, is opposed by Imperial.

Background

[5] FAWU, a registered trade union represents the majority of employees in the bargaining unit at Imperial. Imperial was formerly known as the Gold Chain (Pty) Ltd, and underwent a series of name changes to Cold Logistics (Pty) Ltd, then Imperial Consumer Packaged Goods-Cold and lastly Imperial (Pty) Ltd. The collective agreements pertaining to this application will refer to different companies over the years.

[6] Over the period 2009 to 2019, a number of collective agreements were concluded annually between FAWU and Imperial regulating wages, other

[1] Act No.66 of 1995, as amended.

substantive terms and conditions and matters of mutual interest. The collective agreements were concluded over the following periods:

6.1. July 2009 to 30 June 2010;

6.2. July 2012 to 30 June 2013;

6.3. July 2013 to 30 June 2014;

6.4. July 2015 to 30 June 2016;

6.5. July 2016 to 30 June 2017;

6.6. July 2017 to 30 June 2018; and

6.7. July 2018 to 30 June 2019.

[7] There were some collective agreements for the missing periods which were not made available at the arbitration proceedings.

[8] In relation to severance pay, clause 8 of the wage agreement for the period 1 July 2009 until 30 June 2010 (the 2009 wage agreement) recorded as follows:

> '8 Severance Pay
>
> The Company agrees to pay 2 weeks' severance pay for each completed year of service for the following 12 months. The union agrees that if retrenchments take place within the period that no consultation will be held in terms of severance pay and that the two weeks' severance pay will be accepted by the union. All the other unions as per the LRA will be open for consultation.'

[9] There is no collective agreement for the period 1 July 2010 to 30 June 2012. Clause 7 of the collective agreement for the period 1 July 2012 to 30 June 2013 provides as follows:

> 'Whilst the severance pay will remain at two weeks per completed year of service, the Company agrees to consult with the Union on severance packages in the event of retrenchment.'

[10] At the end of the agreement in paragraph 11 it is recorded as follows:

> 'This agreement is the sole agreement in respect of the issues specified in the agreement and all the other terms and conditions will remain unchanged.'

[11] The subsequent collective agreements of 2012 did not specifically deal with the issue of severance pay. In 2014, FAWU referred a dispute of mutual interest to the CCMA. The dispute was settled in terms of the settlement agreement. The settlement agreement dealt with *inter alia,* the issue of severance pay and recorded that severance pay will be paid as per the *"Status quo".*

[12] The last paragraph of the wage agreement for the period 1 July 2017 to 30 June 2018 provides:

> 'This agreement is the sole agreement in respect of the issues specified in the agreement. All current/valid substantive agreements remain in place.'

[13] The second last paragraph of the wage agreement for the period 1 July 2018 to 30 June 2019 provides:

> 'Save where this agreement varies a previous practice, any other practice or agreements remain unchanged and in force.
>
> This agreement is the sole agreement in respect of the issues specified in this agreement.'

[14] Employees who were retrenched from 2012 were paid severance pay in an amount of 2 (two) weeks for each completed year of continuous service. Around 3 June 2019, Imperial embarked on a large-scale retrenchment exercise in terms of section 189A of the LRA. Imperial proposed 1 (one) week severance pay in accordance with the National Bargaining Council for the Road Freight and Logistics Industry Main Agreement.

[15] During the facilitation meetings, FAWU maintained that employees were governed by a collective agreement in terms of which 2 (two) weeks' severance pay is payable and produced the collective agreements. However, Imperial refused to honour the collective agreements on the basis that they had expired.

[16] FAWU then referred a dispute to the CCMA for interpretation and application of collective agreement in terms pf section 24(2) of the LRA.

Arbitration proceedings and award

[17] At the arbitration hearing held on 25 November 2018, the relevant wage agreements referred to above were handed over to the Commissioner and the parties did not call witnesses to testify under oath.

[18] The Commissioner ruled as it appears in the award that there was no need to tender any evidence as there was no ambiguity identified in the collective agreements. The Commissioner relied on the collective agreement submitted to arrive at her findings in the arbitration award.

[19] The Commissioner made the following findings in her award:

> '17.1 There was no need to tender any evidence as no ambiguity was identified in the collective agreements.
>
> 17.2 Since a variety of issues are negotiated in every wage agreement and although the implementation date, wage/salary/housing allowance are common to each other, there are other issues, such as severance pay, food money, stock take allowance and various other issues which do not feature in each and every collective agreement.
>
> 17.3 The clause relied by FAWU to substantiate that severance pay equal to two weeks' remuneration for every year of completed service must be paid premised on a clause referred to in only one wage agreement, whereas all of those collective agreements are of limited duration and only in two instances, the issue of severance pay was indeed negotiated and agreed upon, is simply not a sensible approach to interpretation.'

[20] The Commissioner reasoned as follows:

> 'In the event the issues of severance pay was negotiated and agreed upon in each and every wage agreement, under scrutiny, I would have been more inclined to adopt the approach as suggested by FAWU, or where the same or similar issues are negotiated every year. However, such is not the case. Only in isolated events (2009 wage agreement and 2012 wage agreement is mention made of severance pay in the amount equal to two weeks' remuneration for every completed year of service. It is also interesting to

note that the two weeks' severance pay issue as contained in 2009 wage agreement was limited for the following 12 months. I therefore reject the interpretation, as advanced by FAWU, that the clause in the wage agreement for the period 1 July 2018 until 30 June 2019 stating that previous practices or agreements will be revived, unless specifically varied, should be adopted to substantiate their claim. It is very clear to me that unique issues are negotiated annually between the parties and as such individual wage agreements are of limited duration. I am also of the view that the clause in the wage agreement in place for the period 01 July 2017 until 30 June 2018, that all current agreements remain in force does not support the arguments as advanced by FAWU either, since these collective agreements were of limited duration.

The proper interpretation of the clause that: *"Save where the agreement varies a previous practice or previous agreement, any other practice or agreements remain unchanged and in force"* does not support the contention that severance pay in an amount equal to two weeks' remuneration for each completed year of service must be paid. Neither does the clause in the wage agreement to place for 1 July 2017 to 30 June 2018, stating that all current/valid substantive agreements remain in force support such an interpretation, due to the limited duration of each collective agreement I was called to interpret.'

Grounds of review

[21] FAWU's first ground of review is that the Commissioner committed misconduct in relation to her duties as an arbitrator and /or committed a gross irregularity in the conduct of the arbitration proceedings.

[22] It was argued by FAWU that the crux of the dispute was for the Commissioner to determine whether the various collective agreements relied upon by FAWU support an interpretation that severance pay equal to an amount of two weeks for each completed year of continuous service is payable by Imperial; the aforesaid could only be properly ventilated through the leading of oral evidence under oath and cross-examination of Imperial witnesses. During arbitration, the

Commissioner dispensed with oral evidence and determined the dispute on the basis of documentary evidence only. Imperial did not call any witnesses.

[23] It was further argued by FAWU that the Commissioner laboured under the misconception that oral evidence was only necessary if there was ambiguity in the collective agreements. The Commissioner did not consider what the intention of the parties was at the time of entering into the collective agreements or call for oral evidence in this regard. This alone, FAWU argued, is evidence that the Commissioner misconstrued the nature of the enquiry she was called upon to determine.

[24] It was further submitted by FAWU that the Commissioner also committed misconduct in relation to her duties as an arbitrator and/gross irregularities in the conduct of the arbitration by failing to apply the helping-hand principle in that Imperial was represented by an attorney Mr R Orton and FAWU was represented by Mr T Kota, a trade union official who was not legally trained. The Commissioner failed to alert Mr Kota to the fact that because the interpretation relied on by FAWU did not appear *ex facie* in the collective agreements, this aspect could only be properly ventilated through oral evidence under oath and the cross-examination of Imperial witnesses.

[25] FAWU further argued that the Commissioner failed to caution the parties that witnesses are required to testify under oath specifically regarding Imperial's intention to be bound by the collective agreement and/or demonstrate how the agreements were interpreted and applied in practice; and had this evidence been led, it may have resulted in a different outcome, as the duty of the Commissioner is to assist representatives who are not legally trained or the so-called "helping-hand principle" found in clauses 20 and 21 of the CCMA Guidelines on Misconduct Arbitrations (the CCMA Guidelines)[2]. Reference was also made to Labour Appeal judgement in *Nkomati Joint Venture v Commission for Conciliation, Mediaton and Arbitration and others.*[3]

[2] CCMA Guidelines on Misconduct Arbitration.
[3] (2019) 40 ILJ 819 LAC.

[26] As no oral evidence was led and findings were made by the Commissioner based on documents referred to in the existing agreement reading severance pay, it was submitted and argued that the Commissioner erred in accepting the submissions of Mr Orton as to what occurred during the negotiations in question where he was not present during such negotiations. Even if the court were to accept that oral evidence was not necessary, the submissions of Mr Kota ought to have held more weight as he had personal knowledge of various aspects of these issues. On that light Mr Orton's answering affidavit to the review application is inadmissible hearsay evidence.

[27] The second ground of review is that the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings involving material errors of law, in that from the findings of the Commissioner and the outcome of the award as a whole, the Commissioner committed material errors of the law by failing to have regard to the provisions of section 23(4) of the LRA and also failing to have regard to the ordinary contractual principles when interpreting agreements. Reference was made to the judgements of *SA Municipal Workers Union v City of Tshwane and another*[4] *and Du Toit and Others in Labour Relations Law (6th Ed).*[5]

[28] FAWU submitted that the Commissioner would have concluded that the wage agreement varied the employees' contracts of employment to the extent that it provided for two weeks' severance pay and that the terms and conditions of the employment of the employees in so far as the severance pay is concerned, remained at 2 weeks until such time as it was varied again by agreement; and further that since such variation never took place, the obligation of Imperial to pay severance pay remained at two weeks for each completed service.

[29] FAWU also argued that the Commissioner did not have regard to the conduct of the parties and that in practice Imperial did pay two weeks of severance pay for many years after 2012 and this demonstrated that it considered itself bound by the obligation to pay 2 weeks' severance pay in the year 2009 and 2012 agreements. Parole evidence rules should have also applied in this case. It does not

[4] (2014) 35 ILJ 241 (LC).
[5] LexisNexis 2015 at page 315.

appear from the award that the Commissioner had regard to these principles in interpreting the collective agreements.

[30] Imperial argued and submitted that is now using the "modern" approach to interpretation of legal documents derived from the Supreme Court of Appeal (SCA) decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*[6] and *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others (Capitec)*[7].

[31] Imperial's arguments were that the context and purpose are therefore only relevant in so far as it determines the meaning of the provision being interpreted, and parties are only entitled to lead extraneous evidence regarding the context and purpose of a legal document if it is necessary to assist in discerning the meaning of said provision. A party that is desirous to lead such evidence must make its intentions clear so that the relevance and admissibility of such evidence can be determined by an adjudicator. The SCA in *Capitec* made it plain evidence of "prior negotiations"; *"what parties "intended … or understood the contract to mean"* and how parties conducted themselves after the legal document was prepared is very often irrelevant. The process of interpretation therefore does not allow parties to use extraneous evidence to construct a provision that must be read into the legal document; to use extraneous evidence to vitiate provisions that clearly appear in the text; or to interpret words and phrases in a legal document in a manner that cannot be objectively sustained by the actual words and phrases used.

[32] It is common cause that the wage agreements under consideration are collective agreements which are negotiated annually. FAWU themselves state as follows in their founding affidavit:

> 'Upon perusal of the collective agreements that were relied on in the arbitration one will note that the issues which are negotiated vary from year to year. Each collective agreement is different and contains different issues.'

[6] 2012 (4) SA 593 (SCA); [2012] ZASCA 13.
[7] (2022) 1 SA 100 (SCA); [2021] ZASCA 99.

[33] It does appear to be common cause on review that there is an expiry date in each wage agreement. FAWU however contends on review that this expiry date does not apply to severance pay provisions. This assertion will be dealt with below. The question that will first be addressed is whether an expiry date in a collective terminates a collective agreement.

[34] It was argued that a commencement and expiry date in a collective agreement, generally speaking, can have no other purpose but to express the parties' intention that the entire agreement, which consists of all the provisions therein, must take effect on a certain date and end on the certain date. This follows not only the ordinary principles of contract law, but by virtue of the application of Section 23(2) of the LRA which states that *"a collective agreement binds for the whole period of the collective agreement"*. It is therefore an indubitable legal reality, which cannot be changed by evidence extraneous to a collective agreement, that once a collective agreement reaches its negotiated expiry date it expires and is no longer of force and effect.

[35] Imperial argued that it is only the 2009 and 2012 wage agreements, that were submitted in the arbitration proceedings, that contain clauses that provide for the payment of two weeks' severance pay, and therefore FAWU asserts that all provisions of the 2009 and 2012 wage agreements expired, except for the provisions that provide for the payment of two weeks' severance pay.

[36] FAWU's contention that if a provision in a wage agreement regulates a matter of mutual interests, it will apply in perpetuity until it is amended in a subsequent agreement was rejected by Imperial on the basis that there is no merit in this assertion if it is accepted that the 2009 and 2012 wage agreements expired, as the only way to revive an expired agreement, or any of its provisions, is to enter into an agreement that specifically revives the expired agreement or any of its provisions. An objective reading of the provisions that FAWU relies on in the 2017 and 2018 wage agreements does not revive any expired agreements or any of its provisions. What it plainly conveys is that it does not amend any terms and conditions or agreements that regulate the employment relationship. This must by necessary

implication exclude provisions of agreements that in law no longer exist – like expired wage agreements.

[37] It was further argued by Imperial that the severance pay provisions in the 2009 and 2012 agreements are not identical. The 2009 wage agreement stipulates that two weeks' severance pay is payable if the employees are retrenched *"in the next 12 months"* and does not contain any provisions that allows for FAWU to negotiate for more severance pay during this time. The 2012 wage agreement provides that employees will be paid two weeks' severance pay if they are retrenched but contains a provision that permits FAWU to negotiate for a higher severance pay amount when the employees are retrenched. If the 2017 and 2018 wage agreements revive the severance pay provisions in the 2009 and 2012 wage agreements, then their conflicting provisions regarding severance pay will also be revived, which is clearly an insensible and unbusiness like result.

[38] It was Imperial's further arguments that FAWU contention's that Mr Kota, the official that represented FAWU, submitted at the arbitration that Imperial has in practice considered itself bound to the provisions of the severance pay provisions in the 2009 and 2012 agreements because it actually paid every employee that was retrenched after 2012 two weeks' severance pay was not correct as Mr Kota did not make such a submission.

[39] It was argued by Imperial that to the extent to which there is an obligation on a commissioner to extend a helping hand depends on the circumstances of each case and in particular whether the party concerned is a lay person who does not understand the nature of the proceedings, and that the assertion is made in *Imperial's* answering affidavit that Mr Kota is a seasoned union official from an established union with an experienced legal department whom he could have consulted at any time and that it is accordingly not the job the commissioner to tell him how to run his case.

[40] FAWU also do not insist in their heads of arguments that Mr Kota is a legal novice. Instead, they contend: *"Regardless of Mr. Kota's experience and qualifications, this duty still existed. It was submitted that on that basis there was*

also nothing in the proceedings that suggested that Mr. Kota did not understand proceedings or what an arbitration entailed".

[41] The third aspect that according to FAWU required the leading of oral evidence, and which the Commissioner was purported alerted to, was the Lion's Rest Document. According to Imperial, FAWU did not rely on this document during the arbitration, and it can therefore not be relied upon on review.

Evaluation

[42] The test for review is well-established, and for the applicant to be successful, the Court must be persuaded that the award or the decision arrived at by the arbitrator is one that a reasonable decision-maker would not have made in the light of the material presented to him or her. The enquiry is therefore not whether the decision is correct or not, but whether the arbitrator properly applied her mind to the issues before her, considered all the material and adopted an approach that gave effect to the purpose of the provisions of the agreement.

[43] As it was stated *in Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and others*[8]*:*

> 'The test is concerned with outcomes, not the process by which the outcomes were achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an arbitrator's reasoning, or inattention to mentioning every facet of relevance, or clumsiness in articulation are unimportant, unless they are causally to an unfair outcome.'

[44] In accordance with the provisions of section 23 of the LRA, collective agreements are binding on the parties. The purpose of section 24 of the LRA is to resolve disputes where a party to the agreement is alleged to have been in breach of the provisions of that agreement by failing to interpret or apply its terms either correctly or at all.

[8] [2018] 3 BLLR 246 (LAC); (2018) 39 ILJ 546 (LAC) at para 18.

[45] The principles applicable to resolution of such disputes have been restated in *Western Cape Department of Health v Van Wyk and others*[9]. Those principles are that:

45.1 When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement.

45.2 The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

45.3 A collective agreement in a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.

45.4 The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the courts or arbitrators to make a contract for the parties, other than the one they in fact made.

45.5 The "parole evidence" rule when interpreting collective agreement is generally not permissible when the words in the memorandum are clear. The process of interpretation therefore does not allow parties to use extraneous evidence to construct a provision that must be read into the legal document.

45.6 Collective agreements are generally concluded after protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

[9] (2014) 35 ILJ 3078 (LAC); [2014] 11 BLLR 1122 (LAC).

[46] I will start with the issue of whether the Commissioner committed gross irregularity in the conduct of the proceedings by dealing with the matter only on oral submissions and documentary evidence presented by both parties without oral evidence. The Commissioner stated in the award that there was no need to tender any evidence as there was no ambiguity identified in the collective agreements.

[47] A perusal of the transcript of the arbitration proceedings as well as the award given indicates that the Commissioner made a determination that the words used in the collective agreements were unambiguous, and she then resorted to deal with it without parties leading oral evidence. It is also clear that the Commissioner determined from the parties what the issues in dispute are, and from that she was able to find that she was required to interpret the collective agreement and determine whether or not the 2017 and 2018 wage agreements revive the severance pay provisions in the 2009 and 2012 wage agreements. The Commissioner therefore applied the proper test in first making a determination whether there is ambiguity contained in the provisions of the relevant collective agreements, and it was clear that there were no patent disputes of facts, which then warranted her to follow the approach she did in dealing with the interpretation of the collective agreements.

[48] If the Commissioner had found that there was ambiguity in the provisions of the collective agreements, it would have required the Commissioner to call for extrinsic evidence to assist her in determining what the intention of the parties was, which would require the parties who were actually part of the negotiations which culminated in the written agreement or in their absence, witnesses who had direct knowledge of what the intention of the parties could have been at that time. If that were the case, I would then agree that the Commissioner could not have interpreted the collective agreement devoid of the factual matrix without oral evidence. However, under the circumstances, I find the Commissioner's decision not to invite oral evidence from the parties capable of reasonable justification and not a reviewable irregularity.

[49] Regarding the submissions and arguments by FAWU that the Commissioner erred in accepting the submissions of Mr Orton as to what occurred during the negotiations in question where he was not present during such negotiations, and not

accepting the submissions of Mr Kota which carried more weight as he had personal knowledge of various aspects of these issues, it must be considered that Mr Orton was not giving oral evidence of his personal knowledge of the negotiations, which could have been hearsay evidence as it was common cause that he was not part of those negotiations, but was merely making submissions on behalf of the First Respondent to argue its position on how the Commissioner should interpret the relevant collective agreements. The Commissioner in her award did not merely rely on these submissions but also considered the relevant provisions of the collective agreements to be interpreted in the determination of the matter in order to arrive at her findings.

[50] As regards, the principle of a helping hand, this principle was addressed in *Lyttleton Dolomite (Pty) Ltd v National Union of Mineworkers on behalf of Lekgau and others*[10] and the Court held that Commissioners have a duty in terms of the CCMA Guidelines to lend a helping hand during the proceedings. It is important to note that there are circumstances to consider when it can become appropriate for the Commissioner to do that including those mentioned in Clauses 20 and 21 of the CCMA Guidelines. In this particular arbitration process, it is observed that Mr Kota was not a novice and was able to articulate FAWU's case clearly like a seasoned union official. Kota was not a lay person who needed a helping-hand as FAWU argued. The record reflects that the Commissioner asked Mr Kota what FAWU's case entailed and Mr Kota gave a response of the detailed explanation that was entirely based on the contention that the 2017 and 2018 wage agreements revived the provision in the severance pay provisions in the 2012 agreement. A reasonable Commissioner in the position of the arbitrator in this matter would not have extended a helping hand to Mr Kota as it was clear that he understood the arbitration proceedings and articulated the issues pertaining to the matter.

[51] Having perused the arbitration award, I am aware that the Commissioner stated the issue to be determined as:

> 'The interpretation from the arbitrator, as sought, is whether the various collective agreements relied upon by FAWU supports an interpretation that

[10] (2020) 41 ILJ 2871 (LC).

severance pay equal to an amount of two weeks for each completed year of consecutive service is payable by the Employer.'

[52] The Commissioner went on to consider the applicable rules of interpretation of collective agreements to come to her findings in order to give effect to the correct interpretation of the relevant collective agreements submitted by FAWU during the arbitration proceedings, as well as relevant clauses in the collective agreement under consideration for the years July to June of 2009/2010, 2012/2013, 2013/2014, 2015/2016, 2016/2017, 2017/2018 and 2018/2019.

[53] From the recorded transcript of the submissions made by parties at the arbitration, the Commissioner sought to ascertain jurisdiction of the CCMA, whether or not she was dealing with the correct nature of the dispute, and also sought clarity from the parties, which relevant collective agreements must be interpreted as well as the relevant clauses dealing with the issue of severance pay equal to two weeks' remuneration for each completed year of continuous service payable by the employer. I find that the Commissioner has sufficiently interrogated the issues before her with the parties before making a finding that there was no need to tender any evidence as there was no ambiguity identified in the collective agreements. Afterwards, the Commissioner summarised what she understood the parties wanted her to determine and to further look at the relevant wage agreements, in particular, whether the 2017 and 2018 wage agreements resuscitated the severance pay provisions in the 2012 agreement and that she was required to apply the rules of interpretation. She then checked with Mr Kota whether there was anything else she must consider and his response bears repeating: *"Commissioner, I really do not think that we need to write anything for me because I think these agreements are clear".*

[54] It became clear in my view that the arbitrator was alive to what was required of her. She considered all the relevant collective agreements, and correctly came to the conclusion that all the collective agreements referred to by FAWU dealt with a variety of issues including wages, allowances, severance pay and others and these agreements were all of limited duration; and that the one that FAWU relied upon to sustain it claim was the wage agreement for the period July 2017 to 30 June 2018, which specifically states that this agreement is the sole agreement in respect of the

issues specified in the agreement and that all current/valid substantive agreements remain in place. The Commissioner also further made a correct observation in all those collective agreements, the issue of severance pay was mentioned in only two instances, specifically 2009 and 2012 wage agreements, which was limited for the following 12 months. it appears in the award that there was no need to tender any evidence as there was no ambiguity identified in the collective agreements.

[55] It became clear that there is an expiry date in each wage agreement. This expiry date could not have excluded severance pay provisions, without express provisions in that regard. In my view, the fact that Imperial had a practice to pay the severance pay after 2012 was immaterial to the interpretation of the relevant severance pay provisions. A commencement and expiry date in a collective agreement, generally speaking have a purpose to express the intention of the parties that the entire agreement, with its provisions, must take effect on a certain date and must end on a certain date. By virtue of the application of Section 23(2) of the LRA which states that *"a collective agreement binds for the whole period of the collective agreement"*. It is therefore an unquestionable legal principle, which cannot be changed by evidence extraneous to a collective agreement, that once a collective agreement reaches its negotiated expiry date it expires and is no longer of force and effect.

[56] In interpreting the provisions of section 23 of the LRA, the Commissioner found that the 2017 and 2018 agreements were not capable of reviving the severance pay provisions in the 2009 and 2012 agreements, but could only do so for the duration of the 2017 and 2018 agreements which expired on 30 June 2018 and 30 June 2019 respectively. It therefore became clear that once the 2018 and 2019 wage agreements expired, it was legally incapable of reviving provisions in other agreements. By the time employees were retrenched there were no valid and binding collective agreement in place that could be interpreted to regulate the issue of severance pay.

[57] A collective agreement where applicable, may vary any contract of employment between an employee and employer who are both bound by the

collective agreement, and would remain as such for the duration of the collective agreement if period is specified or indefinitely if the agreement is for an indefinite period until amended by another collective agreement. It therefore follows that if the collective agreement lapses, the terms and conditions of employment that were created in a collective agreement terminates when the collective agreement terminates, unless there is a particular provision that is specifically excluded.

[58] Clause 7 of The Wage agreement for the period 1 July 2009 until 30 June 2010 specifically states that: *"The company agrees to pay 2 weeks' severance pay for each completed year of service for the following 12 months".* The interpretation of this clause is clear that the agreement for the payment of severance pay of 2 weeks was valid for the duration of that agreement.

[59] FAWU has not presented the Wage Agreement or Agreements for the period 1 July 2010 until 30 June 2012. It is therefore unknown if such a wage agreement is in existence or not. However, Clause 7 of the next Wage Agreement for the period 1 July 2012 until 30 June 2013 provides that:

> 'Whilst the severance pay will remain at two weeks per completed year of service, the company agrees to consult with the union on severance packages in the event of retrenchment. Thus far it clear that the issue of severance pay was never dealt with specifically by any of the subsequent Wage Agreements concluded by the parties, at the expiry of the 2012-2013 Wage Agreement.'

[60] In subsequent wage agreements, the issue of severance pay was never specifically dealt with. I, therefore, find no merit in FAWU's assertions that even though after 2012, the issue of severance pay was not specifically dealt with in the subsequent wage agreements, the agreement for the two (2) weeks' severance pay remained in force.

[61] The next wage agreement was concluded in 1 July 2013 to 30 June 2014. FAWU submitted an undated CCMA Wage Settlement Agreement which provides that in relation to severance pay, *"Status Quo".* Status Quo would have referred to a valid wage agreement at that time which has the provisions regarding the severance

pay. However, the Wage Agreement for the period 1 July 2013 to 30 June 2014 did not have such a provision.

[62] FAWU's arguments that the clause in the Wage Agreement for the period 1 July 2017 to 30 June 2018 providing that this agreement is the sole agreement in respect of issues specified in the agreement, and all current valid substantive agreements remain in force to include the clause on severance pay for payment of 2 weeks' severance pay for each completed year of service is clearly misplaced. Therefore, I align with the Commissioner's finding that this clause does not support the Applicant's arguments.

[63] In *Dioma and Another v Mthukwane NO and Others*[11], the Court restated the principle that in interpreting the collective agreements, the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement, and also take into account the primary object of the LRA as she/he derives his/her powers from the LRA in order to promote the effective, fair and speedy resolution of labour disputes. It is further required of the Commissioner to adopt an interpretation that is fair to the parties.

[64] I am satisfied that the Commissioner considered the primary objects of the LRA and the material placed before her by the parties and found that the clause in the wage agreement in place for the period 1 July 2017 until 30 June 2018, that all current agreements remain in force does not support the Applicant's claim that the severance pay will remain at two weeks per completed year of service since these collective agreements were of limited duration. The decision arrived at by the arbitrator is one that a reasonable decision-maker would have made in light of the material presented to her and thus not reviewable.

[65] In considering the law and fairness, no costs order will be made herein, as it cannot be said that either party was frivolously before this Court. In terms section 162 of the LRA, I consider it fair and just not to make a costs order in this case.

[11] [2020] ZALCJHB 138.

[66] In the premises, the following order is made:

Order:

1. The review application is dismissed.
2. There is no order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Prinoleen Naidoo of Cheadle Thompson & Hayson Inc Attorneys

For the First Respondent: Ruben Orton of Snyman Attorneys