IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No: D505/06

REPORTABLE

In the matter between:

IMATU	Applicant
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	First Respondent
ETHEKWINI MUNICIPALITY	Second Respondent
A J RYCROFT N.O.	Third Respondent
SAMWU	Fourth Respondent

JUDGMENT

MOSHOANA AJ

INTRODUCTION

[1] There are two applications before court. The first application relates to condonation of the late filing of the Review Application. The second one relates to the Review Application. Both applications are opposed.

BACKGROUND FACTS

[2] On or about 2 April 2004, the Applicant, IMATU, referred a dispute to the First Respondent, which was characterised by it as one relating to the interpretation and application of a Collective Agreement. In the summary of facts, IMATU stated that the Collective Agreement was not implemented or correctly interpreted. On or about 07 July 2005, after the matter was setdown for arbitration, the South African Municipal Workers Union (Durban Metro branch) applied to be joined as a party to the arbitration proceedings. It is apparent that this application to join was not opposed, accordingly SAMWU became a party to the arbitration proceedings. The Third Respondent was appointed by the First Respondent to arbitrate the dispute. The arbitration took place at the offices of Durban Metro Fire on 15 February 2006. It is apparent that on 03 March 2006, the Third Respondent made his award known to the parties. The award was to be challenged within six weeks, which had expired on 18 April 2006,

that necessitated an application for condonation. The Applicant was aggrieved by the award and then launched a review application on 01 August 2006, approximately four (4) months after the award was issued. In the review application, SAMWU was cited as the Fourth Respondent. It decided not to oppose the application probably because it had joined as a party at the commencement of the arbitration proceedings. Nonetheless the Second Respondent opposed the applications.

THE GROUNDS FOR REVIEW

[3] In its founding papers, the Applicant stated that the arbitrator misdirected himself, wrongly and irrationally, he concluded that Fire and Disaster Management Personnel working on average 42 hours a week on a shift pattern over an 8 day week of two days on a nine hours each and two nights on a fifteen hours followed by four days rest must be equated with a standard five day forty hour working week with weekends off. Further the Applicant submitted that it is not a rational interpretation of the Collective Agreement, to deem a rest day to be a working day and to regard the shift pattern as identical to an ordinary week.

[4] The Applicant further submitted that the arbitrator, had he properly applied his mind to the aspects regarding the correct interpretation, he would have found that the Second Respondent was not correctly applying the Collective Agreement, because it was deducting as leave days, days that are not working days when only working days are to be taken into account.

[5] The Applicant sought that the award be reviewed and be substituted with an order that in respect of workers in the Fire and Disaster Management Department they will work a shift of two days on and two nights on followed by four days off, leave taken over the period when they would not otherwise be required to work on as the shift roaster does not constitute a leave day in terms of clause 7.1.1 of the Collective agreement.

[6] Further the Applicant submitted that it is not justifiable nor rational to have interpreted the Collective Agreement so as to reflect rest days as working days and that had the arbitrator applied properly his mind to the matter he would have found that the rest days are not working days and are not to be taken into account for the purposes of leave for the Collective Agreement.

THE AWARD

[7] The arbitrator raised the issue to be decided as whether the employer's current method of deducting leave is consistent with the relevant Collective Agreement? In essence he was asked to interprete a Collective Agreement and to ascertain if that interpretation has been correctly applied in the employer's policy. From the body award it is clear to the Court that the arbitrator in the survey of evidence and argument went on to place his interpretation of certain clauses in the Collective Agreement. It is also clear that he then came to the conclusion that the Collective Agreement is been correctly applied by the employer.

ARGUMENT

[8] In court Pillimer SC, appearing for the Applicant argued that the arbitrator approached his task in a wrong way. He exceeded his powers, in that instead of interpreting the Collective Agreement, he determined the issue on the basis of fairness. He further argued that if the court is to give a different meaning to certain clauses in the Collective Agreement, it therefore follows that the arbitrator failed to interprete the Collective Agreement in terms of the provisions of

section 24 of the Labour Relations Act. On the other hand, Mr Maseo appearing for the Second Respondent, firstly submitted that the condonation application should fail. He further submitted that at the commencement of the arbitration proceedings the powers of the arbitrator were extended by agreement to mean that he should also consider the issue of fairness in the event he is unable to find in favour of any of the parties' interpretation. To be exact the terms of reference were:-

1. To interprete what is meant by clause 7.1.1 of the Collective Agreement;
2. To decide whether there has been compliance with the Collective Agreement;
3. If there has not been compliance what is a fair resolution.

THE CONDONATION APPLICATION

[9] The explanation furnished by the Applicant was that there were issues relating to the interpretation of the award. Due to the ambiguities in the award, there were discussions between various parties as to what the award meant, as a result of which various emails were exchanged in an attempt to find a solution. These exchanges delayed the bringing of the Review Application. In fact the

Applicant allege that there was an agreement that the status *quo* will remain pending further negotiations and discussions between the parties.

[10] In opposing the application for condonation, the Second Respondent disputed that the award contained certain ambiguities. Specifically it was disputed that it was ever agreed that the effect of the award will be stayed pending an application. Further the prospects of success on the review were placed in dispute. In court Pillimer SC contended that if the Court finds that the award is reviewable, it then follows that there were good prospects and ordinarily the condonation should be granted as a matter of cause. This he only raised in court having not made any submissions in his Heads of Argument relating to condonation.

ANALYIS

[11] Given the view I propose to take in this matter, I deem it not necessary to analyse the explanation given for the delay of the Review Application. I would depart from the premise that the explanation is accepted as being reasonable. I however believe that there are no prospects of success on review and accordingly I shall

deal with the merits of the Review Application, which would dispose of the issue whether condonation should have been granted or not.

[12] I need to point out that this being a Review Application, I am not concerned with the correctness of the award by the arbitrator but with the process that was followed and also whether a reasonable decision maker would not have made the award made by the arbitrator in this case. What the parties asked the arbitrator to do was to interprete the Collective Agreement. The arbitrator performed his task to the best of his abilities and interpreted the Collective Agreement. However, the Applicant seeks to review simply because the interpretation that it had favoured was not adopted by the arbitrator. It is incorrect to argue that the arbitrator had approached his task in a wrong way. The task of the arbitrator was a simple one. He had to interpret the Collective Agreement and to establish whether it is correctly applied. It is common cause that the Collective Agreement was being applied by the Second respondent. The only issue that came for decision was the interpretation part of it, in particular certain clauses in the Collective Agreement. It therefore follows that in terms of Section 24 all what the arbitrator had to do was to interpret since the application of the Collective Agreement was in place albeit according to the Applicant wrongly so, as their own

interpretation is not the same as that of the Second Respondent. I accordingly find no basis upon which I can conclude that he did not perform his task. Sitting as court of review, I may find that his interpretation is incorrect, however it is not for the reviewing court to determine the correctness of the arbitrator's interpretation. If the Court were to take that approach, it is as good as being clothed with appealing powers, which this Court does not have against the arbitration award. **(**See **section 24(7) of the LRA**, in respect of which awards this Court can exercise appeal powers**)**.

[13] As a matter of fact, it is not clear to the Court why the Applicant did not bring an application to the Labour Court to declare that its interpretation is correct or that the employer is applying the Collective Agreement incorrectly. Probably they could have been met with an objection that the dispute is about the interpretation and application of a Collective Agreement, therefore Section 24 applies. Nonetheless that is not the basis upon which I refuse to review the award.

[14] Insofar as the argument that the arbitrator failed to apply his mind, I find no merit in such, in that if one has regard to the award itself, it is very clear that the arbitrator took his time in considering each of the

clauses placed by the respective parties. Failure to apply mind simply entails taking into account irrelevant considerations and ignoring the relevant ones. According to the Applicant the failure to apply mind is envinced by the different outcome than the one it had anticipated. This is in my view does not amount to a failure to apply mind and cannot be a ground for review.

[15] The Applicant also made a submission that the interpretation arrived at by the arbitrator is irrational and not justifiable. In its view, that may be so and possibly in the view of the court that may also be so, but the test has since been developed in review matters to be that of whether a decision arrived at is one that a reasonable decision maker would not have arrived at.

[16] In my view the decision contained in the award is not a decision that a decision- maker tasked with an interpretation of a Collective Agreement would not have arrived at.

CONCLUSION

[17] Having considered the matter, in particular the grounds raised for review, I come to the conclusion that the Applicant had no prospects

of success and actually would have failed in the Review Application, since there is no basis to interfere with the interpretation of the Collective Agreement. The arbitrator did what he was tasked, by interpreting the Collective Agreement. The fact that interpretation does not favour the applicant does not render his award reviewable.

[18] In the result I make the following order:-

1. The condonation application is dismissed;
2. The Review Application is dismissed;
3. The Applicant to pay the costs of the Respondents.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 10 November 2008

Date of Judgment: 18 December 2008

APPEARANCES

For the Applicant: Adv Pillimer SC

Instructed by Santa Reddy Attorneys

For the Second Respondent: Mr Maeso from Shepstone & Wylie Attorneys