REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Case no: DA 06/09

In the matter between:

THE SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU)	**Appellant**
and	
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
ETHEKWINI MUNICIPALITY (METRO FIRE SERVICE)	**Second Respondent**
A.J RYCROFT N.O.	**Third Respondent**
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION (IMATU)	**Fourth Respondent**

Heard: 3 March 2011

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Delivered: 29 November 2011

Summary: Labour Law – Review of Bargaining Council award – interpretation and application of collective agreement - permissible to consider process leading to making of award – considerations of fairness and equity in line with purposive interpretation – award one which reasonable decision maker would have made

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JUDGMENT

MLAMBO JP

1. This is an appeal arising from a failed review of an award made by the third respondent, sitting as a Commissioner under the auspices of the first respondent, a bargaining council[1] (the council). In dismissing the review application, the Labour Court (Moshoana AJ) found that the award did not suffer from any of the defects contemplated in Section 145 (2) (a)[2] of the Labour Relations Act, as amended, (LRA),[3] and was as such not susceptible to be set aside on review. The learned judge however granted the appellant leave to appeal hence this appeal.

2. At issue in the appeal is the interpretation and application of a collective agreement[4] regarding the calculation of annual leave for the Second Respondent's (Ethekwini) employees employed in the Fire and Disaster Management Department, rendering emergency services. The collective agreement[5] which regulates annual leave amongst other conditions of employment, was promulgated by the Minister of Labour

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[1] Established in terms of section 27 of the Labour Relations Act, Act no 66 of 1996 as amended.
[2] A defect referred to in subsection (1), means (a) that the commissioner (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers.
[3] 66 of 1995.
[4] In terms of section 213 of the LRA, a 'Collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) One or more employers;
(b) One or more employers' organisation; or
(c) One or more employers and one or more registered employers' organisations.'

[5] South African Local Bargaining Council: Extension of conditions of service to non parties published in Government Gazette No.R. 718 of 18 June 2004.

after it was collectively bargained and agreed by Ethekwini as employer, appellant, the South African Municipal Workers Union (SAMWU) and fourth respondent, the Independent Municipal and Allied Trade Union (IMATU), who are trade unions representing their members employed by Ethekwini.

3. Central to the dispute between the parties is the meaning of the phrase “working day” in the collective agreement in the context of the annual leave entitlement of employees. The collective agreement provides that: ‘all reference to days shall be to working days’.[6] It provides for 24 days annual leave for a five day worker and 27 days for a six day worker in a leave cycle[7]. Significantly the agreement contains no annual leave provision applicable to the employees rendering emergency services.

4. The employees rendering emergency services work according to a shift system in terms of an annual roster. The shift system basically follows the pattern of two night shifts and two day shifts over four days followed by a four-day rest period, where after another four-day work cycle resumes. This shift system is such that it is not confined to an ordinary five-day Monday to Friday working week. In terms of this system, a work day is just that, irrespective of whether it falls on a weekend or holiday.

5. It is common cause that as early as January 2001, after consultation, the annual leave entitlement of all employees working according to an ordinary five-day week and those working according to a shift system was 24 days. This was acceptable to all concerned. This was done by debiting working days and excluding weekends for non shift employees when they take leave. With regard to shift employees, leave was debited for the four days they worked and an additional two days of their rest days, whether these fell on a weekend or a holiday. Two of the four rest days were therefore treated as working days for purposes of calculating the annual leave of the shift workers. The shift employees however, enjoyed all their rest days irrespective of whether these were treated as working days for purposes of their annual leave. The

[6] Clause 2.3 of the collective agreement.

[7] Clause 7.1 reads as follows: An employer shall grant an employee the following annual leave in a leave cycle:

7.1.1 Twenty-four (24) days for a five (5) day worker; and

7.1.2 twenty-seven (27) days for a six (6) day worker.

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shift employees work an average of 42 hours over a five week cycle, while the normal five day week non-shift employees work an average of 40 hours per week.

6. Ethekwini continued calculating the annual leave entitlement of the non-shift and shift employees in this manner after the conclusion and promulgation of the collective agreement in 2004 which, as mentioned, has no provision relating to shift workers. However, this time the unions raised objection to this manner of calculating the annual leave of shift workers. The unions insisted that only the four working days were to be considered by Ethekwini in calculating the annual leave of the shift workers. Their view was that a day's leave deducted must be equivalent to a shift worked, i.e. leave should not be deducted for/on rest days of a shift worker.

7. Ethekwini continued with the practice, stating that it was a fair manner of calculating annual leave as no provision applicable to shift employees regarding the computation of their annual leave. In view of the resultant impasse, IMATU referred the dispute to the council for resolution. The request for conciliation identified the dispute as one relating to the interpretation and application of a collective agreement. In its summary of the facts of the dispute, IMATU stated that 'the collective agreement was not implemented or correctly interpreted'. Conciliation failed and arbitration followed. I pause here to mention that the appellant was only cited in those proceedings due to the interest of its members in the matter. It became a co-applicant in the arbitration proceedings and in the review proceedings before Moshoana AJ. It is the appellant that sought and was granted leave to appeal to this Court after IMATU decided not to pursue the matter further after the dismissal of the review application. IMATU however remains in the matter as a respondent due to the interest it may still have on behalf of its members. I mention this in view of the appellant's supplementary heads of argument dealing with a condonation application filed by the appellant regarding the late prosecution of the review application. I propose to deal with the matter on the same basis as Moshoana AJ (i.e on the merits).

8. The third respondent (the commissioner), who was appointed to arbitrate the dispute, approached the matter on the basis that in the absence of a statutory provision

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and guidelines as well as other documents regarding the issue of annual leave for shift workers, he could only resolve same on considerations of fairness between the parties. He was mindful that on the approach adopted by the unions, shift employees would end up with far more leave days i.e. even more than the six day workers. In view of this, he acknowledged that shift employees worked differently to other employees but were treated as five day employees for purposes of their annual leave, thus receiving the same number of annual leave days as other five day week employees. He reasoned that such treatment was fair and in keeping with the equality principle and as such, no deviation by way of granting shift employees extra leave could be justified. His view was that equality of treatment was a guiding principle in the workplace and further that the Employment Equity Act[8] allows no unfair discrimination between similarly placed employees. He rationalised further that if one factored in the averaging out to the 42 and 40 hour working week by both categories of employees, the principle of equality was preserved. In his view, the collective agreement made the justifiable distinction between five day workers who are entitled to 24 days annual leave and six day workers who are entitled to 27 days annual leave in each leave cycle. He reasoned that if there was any inconvenience to the shift workers due to working according to a shift system, this did not justify extra leave but was adequately compensated by the four rest days. He therefore concluded that Ethekwini's manner of calculating the annual leave of shift workers was fair and in keeping with the collective agreement.

9. That is the conclusion that was sought to be overturned in the review application initiated in the Labour Court. Moshoana AJ essentially found that the whole basis of the application was that the commissioner had come to the 'wrong' conclusion. His view was that it was not for him to pronounce on the correctness or otherwise of the award; that he was satisfied that the commissioner had performed the task required of him and could not fault him in any way; and finally, that the award was not one that 'a reasonable decision maker tasked with the interpretation of that collective award would not have

[8] 55 of 1998.

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arrived at' in keeping with the test enunciated in *Sidumo and Another v Rustenburg Platinum Mines and Others.*[9]

10. The question we must answer in this appeal is not whether the award in issue is correct, as pointed out by Moshoana AJ, but whether the commissioner acted fairly, considered and applied his mind to the issues before him. This is in view of the whole basis of the appellant's attack of the award i.e. the manner in which the commissioner arrived at his award. It is indeed so that it is in keeping with the reasonability requirement of LRA arbitration awards to also focus on how the commissioner approached the material before him as well as the analytical process he subjected that material when making the award. This is self evident in *Sidumo and Another v Rustenburg Platinum Ltd and Others,* where the Constitutional Court said:

'Thus construed, the commissioners are required to act fairly in the determination of unfair dismissal disputes. If a commissioner fails to do so he or she commits a gross irregularity in the conduct of the arbitration proceedings and the ensuing arbitral award falls to be reviewed and set aside. Similarly, if a commissioner makes an award which is inconsistent with his or her obligations under the LRA, he or she acts in excess of the powers conferred by the LRA and the award falls to be reviewed and set aside.'[10]

And further

'It follows therefore that, where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate.' [11]

11. Subsequent to the decision in *Sidumo,* the Constitutional Court has given further guidance to courts in assessing the reasonableness of awards rendered in terms of the LRA. See *CUSA v Tao Ying Metal Industries and Others*[12] where it was stated:

[9] 2008 (2) SA (CC); (2007) 28 ILJ 2405; [2007], 12 BLLR 1097.
[10] *Sidumo and Another v Rustenburg Platinum Ltd and Others* at para 165.
[11] *Id* at para 268.
[12] (2008) 29 ILJ 2461 (CC); 2009 (2) SA 204 (CC).

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'It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside.'[13]

And further

'It is clear, as Ngcobo J holds, that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'[14]

Van Niekerk J in the Labour Court has also forcefully made the point in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others,*[15] that:

'In summary, section 145 requires that the outcome of the CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

12. The issue squarely before us therefore is whether Moshoana AJ was correct in upholding the commissioner's interpretation and application of the phrase 'working day' as he did in relation to the calculation of the annual leave of shift workers. The *fons et origo* of the dispute here is the meaning of 'working day' in relation to the rest days of shift workers in their context of working in an eight-day cycle as compared to employees working a normal Monday to Friday working week in a seven day cycle.

13. The appellant argues in essence that the commissioner had misconceived the approach to the matter in resorting to considerations of fairness and equity when interpreting the collective agreement. The argument in this regard was that the

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[13] *Above n 12* at para 76.
[14] *Id* at para 134.
[15] [2009] 11 BLLR 1128 (LC) at para 17.

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interpretation of a collective agreement was a matter of law and that fairness and equity considerations were irrelevant to that enquiry. It was argued further that the commissioner was wrong in deeming a rest day to be a working day for purposes of calculating the annual leave of shift workers and that doing so introduced an unfavourable treatment element to shift employees. It was argued that the only manner a working day of a shift worker should be treated is that it is any day that they are at work, including holidays, Saturdays and Sundays and that the term cannot be given its ordinary or more usual meaning within a normal Monday to Friday working week. Those were the only days to be considered in calculating the annual leave of shift workers and that their rest days were irrelevant in this regard, so the argument went. The essence of the argument is that a working day is incapable of being construed as anything else and that only the four working days can be taken into account to calculate the annual leave of shift workers. For this reason, it was argued that the commissioner had misdirected himself in this regard and that the award he rendered is therefore not one a reasonable decision maker would have made.

14. The appellant relies on the decision of this Court in *Intercompany Security Services (Cape) (Pty) Ltd v Transport and General Workers Union* ,[16] in support of the argument that the interpretation of a collective is argument is a matter of law not involving questions of fairness and equity. Reliance on this decision is in my view misplaced as it provides no sustenance to the appellant's case. There the simple issue before the court was whether the interpretation of a recognition agreement was a point of law and the court ruled that it was and proceeded to decide the matter in terms of Section 17A(3)(e) (ii) of the now repealed Labour Relations Act no 28 of 1956 as amended. That decision was influenced by the dictates of that Act specifically with regard to the decision making powers of the LAC at the time regarding certain issues brought to it. This Court has moved away from that manner of deciding matters in keeping with the LRA and has embraced purposive interpretation to agreements and legislation where this is called for which approach has the *imprimatur* of the Constitutional Court.

[16] 1995 (4) 16 ILJ 854(LAC).

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15. In *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*,[17] Froneman DJP (as he then was) stated that a collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the 'effective, fair and speedy resolution of labour disputes'.[18] In *Ceramic Industries Ltd t/a Beta Sanitary Ware v NCBAWU (2)*[19] this Court, remarked, *inter alia,* that:

'[w]here constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in s 1) and the more specific purpose of a particular section, should be followed.'

In *National Education Health and Allied Workers Union v University of Cape Town and Others,*[20] the Constitutional Court stated:

'The declared purpose of the LRA "is to advance economic development, social justice, labour peace and the democratisation of the workplace". This is to be achieved by fulfilling its primary objects, which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution.'

16. That is the approach adopted by the commissioner in this case. Perusal of the award shows that the commissioner clearly understood the issues before him and the task he was expected to perform. He understood that there was a *lacuna* in the collective agreement in so far as the annual leave situation of shift employees was concerned and that his task was to interpret and apply the collective agreement in a manner that encompassed these employees. He identified the purpose of the collective agreement i.e. the provision of an annual leave benefit to Ethekwini's employees, in particular those working according to a shift system. He then proceeded to interpret the

[17] (1997) 18 ILJ 971 (LAC).
[18] *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union at 980 C.*
[19] (1997)18 ILJ 671 (LAC) at 675G-H.
[20] [2002] ZACC 27**;** 2003 (3) SA 1 (CC) at para 41. See also *Department of Land Affairs and Others v Gooedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 51.

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agreement in a practical manner that he deemed was fair and equitable in those circumstances and which would cater for shift employees as well. He rationalised that the shift workers worked an average 42 hours in an eight-day cycle which was not very dissimilar to the 40 hours worked by five-day employees over a seven-day cycle. Based on considerations of fairness and equality of treatment, he reasoned that it was proper to interpret the collective agreement as if the shift employees worked a normal five-day cycle as was done by Ethekwini.

17. The appellant could not point out any unfavourable elements, as argued by it, in the conditions of employment of shift workers introduced by deeming a rest day as a working day in this manner other than the fact that rest days were being used to achieve that eventuality. This, as I've stated, ignores the fact that deeming a rest day to be a working day for purposes of calculating annual leave did not affect the entitlement of those employees to rest on those days. I have further not been able to identify any indication in the appellant's argument on how many annual leave days would be due to the shift workers based on their approach. The appellant has in fact not disputed Ethekwini's argument that interpreting "working day" as contended by the appellant would lead to shift employees being granted in the order of 48 days annual leave. This, as correctly pointed out by Ethekwini, would lead to shift employees receiving a lot more annual leave days than say, six day workers which the commissioner found would amount to an unjustified deviation and would be inequitable as well as not in keeping with the LRA and the Employment Equity Act.

18. It is important to point out, as stated by the court *a quo* that the essence of the appellant's argument is that the commissioner came to the wrong conclusion. This is clearly an argument that presupposes an appeal, rather than a review. It has been emphasised in a number of decisions that it is impermissible for the Labour Court to resort to appeal considerations when tasked with the review of an award made in terms of the provisions of the LRA. In *Bestel v Astral Operations and Others*,[21] this Court stated:

[21] [2011] 2 BLLR 129 (LAC).

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'It is important to emphasise, as is exemplified from Carephone, and in **Schwartz,** *supra,* that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'[22]

19. I am satisfied therefore that the commissioner properly applied his mind to the issues before him, that he considered all the material before him and adopted an approach that gave effect to the purpose of the collective agreement in a manner that achieved equity and fairness amongst Ethekwini's employees. If one interprets the collective agreement within the context of the shift workers, considering one of the purposes of the LRA which is to promote fair labour practices, then without doubt the commissioner's approach of fairness cannot be said to be unreasonable. The award of the commissioner is clearly one that a reasonable decision maker would have made. The court *a quo* was correct in refusing to interfere with the award. In the circumstances, the appeal must fail.

20. Consequently the appeal is dismissed with costs.

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MLAMBO JP

Jappie JA and Mailula AJA concurring in the judgment of Mlambo JP.

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[22] *Id* at para 18 as expressed in *Sidumo* at para 244. See also *Fidelity Cash Management Services v CCMA and Others* (2008) 3 BLLR 197 at para 98.

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