REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: DA 7/2012

In the matter between:

SOUTH AFRICAN MUNICIPAL

WORKERS UNION (SAMWU) **Appellant**

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **First Respondent**

A.J. RYCROFT *N.O.* **Second Respondent**

ETHEKWINI MUNICIPALITY

(METRO FIRE SERVICES) **Third Respondent**

INDEPENDENT MUNICIPAL ALLIED

TRADE UNION (IMATU) **Fourth Respondent**

Heard: **03 September 2013**

Delivered: **13 February 2014**

CORAM: Tlaletsi DJP, Musi et Mokgoatlheng AJJA

JUDGMENT

TLALETSI DJP

[1] This appeal is about whether an email, containing an extract of an award yet to be issued, written and sent by the second respondent ("the Commissioner") to the parties' legal representatives for comment constituted his award and whether he could change the extract before issuing the award. In light of the narrow issue to be determined it shall not be necessary to set out in detail the factual background relating to the original dispute between the parties. The factual background will therefore be limited to the matters that led to the current issue between the parties.

[2] The appellant is the South African Municipal Workers Union (SAMWU), a representative trade union having duly acquired its status and rights in terms of the Labour Relations Act [1] (the Act) which was cited as the fourth respondent in the court *a quo*. The appellant together with IMATU[2] were applicants in a dispute referred to the first respondent against their employer, the third respondent.[3] The dispute was initially raised as a right dispute but the parties agreed to refer the dispute to arbitration as an interest dispute.

[3] The Commissioner was appointed to arbitrate the dispute under the auspices of the first respondent. The issue in dispute was a 29% exemption allowance, which was paid to those employees of the third respondent who worked in the Durban Central and Tongaat entities, which was withdrawn as from August 2003. The unions demanded that the employees concerned should continue to receive the aforesaid allowance until such time as the third respondent rationalised its terms and conditions of employment.

[4] The parties presented their evidence and written submissions to the Commissioner. The latter needed some time to prepare his award. On 4

[1] Chapter 11 of the Labour Relations Act 66 of 1995.
[2] Independent Municipal and Allied Trade Union.
[3] The South African Local Government Bargaining Council (SALGBC) a bargaining council established and registered under Part C of Chapter 111 of the Act.

December 2006, the Commissioner forwarded an email to the parties' respective legal representatives. In the email he wrote that:

> "*Dear Richard and Michael.*
>
> *I am about to issue my award in the Metro Fire exemption allowance arbitration.*
>
> *I am anxious to avoid an order which is difficult to implement or simply unworkable because of a lack of records. What I would like to do is to provide you both with the last part of my award and for you to give me feedback on any practical aspects which could make the award easier to implement. You'll realize, I hope, that I am not asking for comments on merits of my decision, just the implementation thereof.*
>
> *I'd appreciate your comment*
>
> *Regards*
>
> *Alan Rycroft"*

The email continued with what appeared to be an extract on what he called for feedback:

> "*61. To sum up: It is my view that:*
>
> *(a) there is no justification in the circumstances of this case to reinstate the exemption allowance;*
> *(b) the averaged working hours system does not include scheduled overtime;*
> *(c) with regard to unscheduled overtime, there is no legal obligation to exclude from overtime pay those employees earning in excess of the amount determined by the Minister from time to time in terms of s 6(3) of the BCEA;*
> *(d) I am not prohibited from considering the fairness of the consequences of the threshold on individual employees as there existed a long-standing practice to pay an allowance (which included overtime) regardless of the threshold earnings;*

(e) It was inequitable to move from the exemption allowance system which ignored salary thresholds to a system which is prejudicial to those earning in excess of the threshold.

62. A consequence of these views is that the Applicant's pray that I order that the exemption allowance of 29% be reinstated is refused. However with regard to those earning in excess of the threshold, I order that they be treated on the same basis as all other employees as regards overtime, night allowance, Sunday time and public holidays. This order is hereby made effective until such time as agreement has been reached in the rationalisation of allowances as referred to in the Staff Placement Policy.

63. I can see no reason why this rectification should not be made retrospective to August 2003. I am mindful that there may be difficulties in computing the arrear payments and, in accordance with the Respondent's request, Applicants are required to submit a list of individuals who are party to this dispute and a computation of their claims so that that list can be verified by the Respondent before the award is given effect.

AWARD

For the reasons set out above I make the order as set out in Paragraphs 62

and 63 of this award

_____

Professor Alan Rycroft "

[5] The two legal representatives replied by sending their written submission as requested by the Commissioner. The submission made on behalf of the third respondent which is vital for this appeal concluded thus:

"From the difficulties set out above, it is suggested that a retrospective award to the 1st August 2003 creates enormous practical problems and industrial relations concerns. As this is a dispute of interest, there is nothing preventing an award that is not retrospective or if it is to be to be retrospective for a short

period to lessen the administrative complications in implementing such an award.

In conclusion, the impact on those employees that have moved on from Durban Fire since August 2003 and on those employed after August 2003, make the implementation of the award an industrial relations nightmare."

[6] At the time the Commissioner issued his award after considering the submissions made on behalf of the parties, there were some changes to paragraph 62. It was now divided into two paragraphs and a new paragraph 64 was introduced. It read as follows:

"62. A consequence of these views is that the Applicant's prayer that I order that the exemption allowance of 29% be reinstated is refused. However with regard to those of the Applicants earning in excess of the threshold, I order that they be treated on the same basis as Applicants earning below that threshold for the purposes of overtime, night allowance, Sunday time and public holidays.

63. This order is hereby made effective until such time as agreement has been reached in the rationalisation of allowances as referred to in the Staff Placement Policy.

64. I am persuaded that the rectification should not be made retrospective.

AWARD

For the reasons set out above I make the order as set out in Paragraphs 62 to 64 of this award."

[7] The effect of the award published by the Commissioner was that the position in the email sent to the parties reflecting that the award would be retrospective to August 2003 had changed and the award was no longer made retrospective. IMATU was aggrieved by this development and instituted review proceedings in the Labour Court seeking an order to the effect that the ruling that the award is not retrospective be reviewed and set aside and be amended to read that the award is retrospective to August 2013 which would be in line

with the email communication received from the Commissioner on the previous occasion.

[8] The unions contended that the Commissioner had already decided that the award would be retrospective and communicated that decision to the parties by email and was thus *functus officio*. They contended that he was bound by his earlier decision that the award be applied retrospectively.

[9] In its judgment, the court *a quo* considered the provisions s 138(7) of the Act which it found to be peremptory and held that failure to meet them would mean that the award has no legal effect. The Labour Court further dismissed the argument that the Commissioner was *functus officio* on the retrospective application of the award on the basis that the statutory requirements for a final award had not been met. The application for review was consequently dismissed with no order as to costs.

[11] The appellant is appealing against the order of the Labour Court with leave of this Court, having failed to obtain leave in the court *a quo*. Mr Katz who appeared on behalf of the appellant in this Court structured his submissions on what he called three chapters namely, the language, the power and the fairness chapters. He submitted that all these points are interrelated and interwoven. As regards the first point, he submitted that the language used by the commissioner in the email showed that he had made an award which was final and determinative of the parties' rights. He referred to words such as "*my award",* that *"I am anxious to avoid an order which is difficult to implement or simply unworkable because of a lack of records"* that *"You'll realise, I hope, that I am not asking for comments on the merits of my decision and just the implementation thereof."*

[12] Counsel submitted further that the summary provided in the email might not be a full judgment but constitute an award with brief reasons as required, and further that there is nothing in the email to suggest that it was a preliminary or provisional award. He made an example of a fireman employed by the third respondent during the period covered by the disputed allowance gaining access to the email which would tell him on reading it to expect to be paid the

allowance for the retrospective period. Counsel contended that the only purpose of the email was to elicit assistance by way of perhaps a schedule which was to reflect when the employees joined or left so that the list could be verified before the award is given effect to. He mentioned that it was not about whether the rectification should be made retrospective as that decision had been made by the Commissioner already.

[13] With regard to the second point, counsel for the appellant contended that because in their view the Commissioner had already decided that his *order* was retrospective, it was not competent for him to later revisit that decision and change it when difficulties relating to implementation of the *order* were pointed out to him by the third respondent's legal representative. With regard to the third aspect, namely fairness, it was contended that the Commissioner, being an independent and impartial tribunal charged with the resolution of the dispute by application of law in a fair public hearing, acted unfairly towards the appellant by having decided the issue relating to retrospective effect of the award and later changing it and ordering that the award should not apply retrospectively.

[14] It is indeed correct that the award that was issued by the Commissioner on 17 May 2006 differed or was in conflict with the email correspondence to the parties' legal representative with regard to the retrospective effect of the award. What should be decided though is whether the email constituted an award of the Commissioner and the consequences of his actions in changing it.

[15] The first respondent's constitution, in terms of whereof the Commissioner arbitrated the dispute, provides in clause 10.7.10.1 that:

> *"Within 14 days of the conclusion of the arbitration proceedings the arbitrator must issue an arbitration award with reasons, signed by the arbitrator".*

These provisions are identical to s 138 (7) of the Act which also requires the Commissioner of the CCMA[4] to issue an arbitration award with brief reasons and signed by that arbitrator. Service of the award on each party to the dispute

[4] Commission for Conciliation, Mediation and Arbitration.

or their representatives at the arbitration is the prerogative of the Commission in the case of the CCMA or the Central Council or Division as the case may be if the arbitration was conducted under the auspices of the first respondent.

[16] For a commissioner to comply with clause 10.7.10.1 of the constitution of the first respondent and s 138(7)(a) of the Act, it is necessary for him/her to a) issue the arbitration award, b) provide reasons for the award and c) sign the award. The term "issue" is not defined in the Act or the constitution of the first respondent. The ordinary meaning of the term in *Shorter Oxford English Dictionary,*[5] is *inter alia, the way an action or course of proceedings turns out*; *the event*; *a result*; *consequence; be sent out officially or publicly, the action of issuing or giving or sending out officially or publicly*.[6] By this definition, it means that the Commissioner must have intended that what he sent out was made officially or publicly and was a result or the way the course of the arbitration proceedings turned out.

[17] There can be no doubt that the Commissioner when he sent that email to the legal representatives did not intend to issue an award. This is clear from the words he employed in the email itself that "*I am about to issue my award*" Saying that he was about to issue his award can only mean that he is not yet issuing his award. Furthermore, by stating that he is providing the legal representatives with the "*last part of my award and for you to give me feedback which could make the award easier to implement"* suggests that he is not making his full award available for issue as a final document but that he is inviting comments on the practical aspects of the last part of his award. Further, the paragraphs quoted in the email constituted only a small extract from the full award. It also did not contain brief reasons for the award but a summary of his conclusions.

[18] The third requirement that the award must be signed by the arbitrator was also not met. The submission that the fact that the Commissioner's names and address appear at the end of the award constitute an electronic signature is

[5] Volume 1, 6th Edition, Oxford, pages 1442-1443.
[6] See *Free State Buying Association Ltd t/a Alpha Pharm v SA Commercial Catering & Allied Workers Union and Another* (1998) 19 ILJ 1481 (LC) where Landman J held that an award, once it has been signed will be issued once it is made available for service and filing.

without merit. For there to be an electronic signature, there must be compliance with s 13 of the *Electronic Communications and Transactions Act*[7] which provides that:

1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

2) Subject to subsection (I), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if –

    a) method is used to identify the person and to indicate the person's approval of the information communicated; and

    b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.

5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that –

    a) it is in the form of a data message; or

[7] Electronic Communications and Transaction Act No. 25 of 2002.

b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred.

[19] It is evident from the email sent by the Commissioner that there is no electronic signature in compliance with s13 referred to above. Furthermore, sending the email to the parties' legal representatives by the Commissioner was not a method identified for the issuing and sending of the award. The ultimate award issued by the Commissioner is one that complied with all the statutory requirements of an award and was complete in all respect.

[20] As already pointed out, the Commissioner held a particular view with regard to making his award retrospective and changed that view when he issued the final award. In my view nothing prevented him from changing his view for as long as it was not what he presented as his final view. Of course it may not be advisable to do as the Commissioner did in this case as an expectation was or could be created in the minds of those who stood to benefit from his view, if it finally became his decision. However, it cannot be said on the facts of this case that the Commissioner was *functus officio*. The views expressed in his email cannot be said to be his intended final and determinative view of the matter. For the *functus officio* doctrine to apply it is a requirement that there be a final judgment or order. In that situation the Commissioner would have no power to correct, alter, or supplement the order because his jurisdiction in the case has been fully and finally exercised,[8]unless he/she acts in terms of s 144 of the Act.[9] This was not the case with the Commissioner in this matter. Since there was no award it can therefore not be said that the matter was not determined fairly and that the Commissioner must be held to his previous view. The appeal must therefore fail.

[8] *Firestone South Africa (PTY) LTD v Genticuro A.G.* 1977 (4) SA 298 (A) at 306; *West Rand Estates Ltd v New Zealand Insurance Co. Ltd*. 1926 AD 173 at 176,178,186-7.

[9] Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the *director* for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling -

a) erroneously sought or erroneously made in the absence of any party affected by that award;
b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
c) granted as a result of a mistake common to the parties to the proceedings.

[21] As regards costs, it is in my view that in the circumstances of this case that it would be according to the requirements of the law and fairness that there be no order as to costs.[10]

[22] In the result, the following orders are made:

i) The appeal is dismissed.

ii) There is no order as to costs.

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Tlaletsi DJP

Deputy Judge President of the Labour Appeal Court

Musi et Mokgoatlheng AJJA concur in the judgment of Tlaletsi DJP.

APPEARANCES.

FOR THE APPELLANT:	Adv Anton Katz
	Instructed by Tomlinson Mnguni James
FOR THE RESPONDENTS:	Adv G.O. van Niekerk SC
	Instructed by Shepstone & Wylie Attorneys

[10] S179 of the Act.