**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA 68/15

In the matter between:

**SOLIDARITY obo HENDRICK JOHANNES**

**GUSTAVUS SMOOK** **Appellant**

and

**THE DEPARTMENT OF TRANSPORT**

**ROADS AND PUBLIC WORKS** **Respondent**

**Heard:** **05 May 2016**

**Delivered:** **15 June 2016**

**Summary: Reinstatement of the appeal – court considering only prospects of success of the appeal – two awards issued by the arbitrator – court finding that arbitrator *functus officio* when issuing the first unsigned award, which was final as, served on both parties – requirement of signing award is directory and not peremptory. Labour Court correctly finding that employee entitled to relief in terms of the first unsigned award – no prospects of success – reinstatement of the appeal dismissed.**

**Coram: Tlaletsi AJP, Ndlovu JA *et* Murphy AJA**

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**JUDGMENT**

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MURPHY AJA

[1] The appellant, Mr. HJG Smook, appeals against part of the judgment of the Labour Court (Prinsloo AJ) in which it dismissed the respondent's application for review of an arbitration award, but, in the somewhat unusual circumstances described below, refused the appellant reinstatement and limited the relief to payment of compensation.

[2] The appellant has applied for condonation for non-compliance with various provisions of rule 5 of the Labour Appeal Court Rules and reinstatement of the lapsed appeal. The grant or refusal of condonation in the final analysis will depend on the prospects of success as assessed in light of the merits of the appeal. It is accordingly best to deal directly with the merits.

[3] The appellant was dismissed by the respondent more than 11 years ago, on 15 April 2005. He referred a dismissal dispute to the General Public Service Sectoral Bargaining Council. The referral resulted in two arbitration awards being issued by the arbitrator appointed by the bargaining council, Mr S Osman. Both awards are dated 18 July 2006. They are similar in all material respects except that they provide different remedies. The relief granted in the awards is materially different and there is no reference in the second award to the first. It is common cause that the first award was not signed whereas the second award was signed.

[4] In the unsigned first award, under the heading "Remedy", the arbitrator stated:

> 'The applicant initially sought retrospective reinstatement however amended the relief sought to maximum compensation. A lengthy argument was submitted for maximum compensation and various case law was cited. I have considered the argument before me and am of the opinion that compensation was to awarded (sic) as just and equitable and should not be seen to reward

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> the applicant for the alleged unfairness. In *Ferodo v De Ruiter* (1993) 14 ILJ 974 (LAC) the Court held that all relevant factors should be considered and outlined the factors. None of these factors were before me in order to consider the prejudice to the applicant. However in view of the dismissal being both procedurally and substantively unfair I am inclined to believe that the applicant had incurred minimal expense in view of him being a member of a union. There was no argument before (sic) as to his loss or current employment status. Neither did the respondent submit an argument to mitigate the compensation that I might award. In view of this I am inclined to make the award of six months' salary as compensation.'

[5] Having declared the dismissal to be both procedurally and substantively unfair, the arbitrator awarded the appellant an amount of R132 815, 50; being the equivalent of six months' salary. Although the reasoning suffers a measure of incoherence, it is clear that compensation was awarded on the basis of an amendment of the relief sought and after taking account of certain considerations, some of which, strictly speaking, might not have been relevant.

[6] The part of the signed second award dealing with remedy is notably different. It reads:

> 'The applicant sought retrospective reinstatement. In terms of section 193, a commissioner may compensate, reinstate or order employment. There was nothing before me that suggested that the employment relationship had become intolerable. I am therefore inclined to order reinstatement since the dismissal was found to have been both procedurally and substantively unfair.'

[7] The arbitrator ordered reinstatement with effect from 1 August 2006 and ordered the respondent to pay the applicant the amount of R265 629 as "retrospective pay".

[8] On 22 September 2006, the respondent filed an application with the Labour Court seeking to review and set aside both awards. It explained in its founding affidavit that it received the signed second award on 20 July 2006, the day after it received the first award on 19 July 2006. The circumstances in which that happened are not clear. However, the appellant admitted the relevant

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averments in his answering affidavit. Hence, it is common cause that the unsigned award was issued by the arbitrator before the signed second award.

[9] It is unnecessary to canvass the facts and circumstances related to the unfair dismissal or those which led to a considerable delay in the review being prosecuted. There is no challenge before us to the finding of unfair dismissal. However, on 26 April 2011, the appellant filed a notice of motion with the Labour Court in terms of rule 11 seeking an order dismissing the respondent's application for review due to the respondent's failure to comply with rule 7(A) and its failure to prosecute the review application expeditiously.

[10] When the matter came before the learned judge on 18 January 2013, she issued an *ex tempore* judgment in which she *inter alia* dismissed the respondent's application for review on the ground that it had not been prosecuted expeditiously. There is no appeal by either party against that order.

[11] The learned judge then faced the difficulty of deciding which award granting the appellant relief was the operative one. She reasoned as follows:

> 'I may state that there is no record filed, so it is impossible to determine from the two arbitration awards what relief was indeed sought by the applicant. In the one award it is stated that the applicant sought retrospective reinstatement, and in the other the commissioner stated that the applicant sought retrospective reinstatement but amended it to maximum compensation, and that a long argument ensued in respect of that. There is no record to assist this Court and to indicate which one of the two arbitration awards in fact captured the relief sought correctly.'

After dealing with the grounds for dismissing the review application, and trenchantly criticising the arbitrator for his conduct and failing to file an affidavit explaining it to the court, the learned judge continued:

> 'The fact that there are two conflicting awards definitely creates a serious problem in this matter. The commissioner initially awarded compensation, and in issuing that award the commissioner became *functus officio*. And subsequently, the same commissioner issued another award and the relief in

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the second award differed materially from the relief set out in the first award; it went from compensation to retrospective reinstatement.

This is a variation that is definitely not provided for in the rules of the bargaining council or in the provisions of the Labour Relations Act. In section 144 of the Labour Relations Act, provision is made for variation and rescission of arbitration awards and a commissioner may vary or rescind an arbitration award or a ruling erroneously sought or erroneously made in the absence of any party affected by that award. This is clearly not the case in casu; both parties were present and the award was not erroneously made in the absence of the parties.

The second provision for variation as set out in section 144 of the Labour Relations Act is if there is ambiguity or an obvious error or an omission, but only to the extent of that ambiguity, error or omission or an ambiguity. In my view what the commissioner did in the second award, was not merely correct something contained in the first award, but was to issue a completely different award with completely different relief to the applicant. Compensation was changed to retrospective reinstatement.

In my view, the first award should be accepted as the valid and binding award, as the commissioner became *functus officio* by issuing that award and he was by no means in any position whatsoever to vary that award. And by failing to provide any explanation, despite being cited as a party to these proceedings, leave me (sic) with no other option but to accept he became *functus officio*. He was never in a position to issue the second arbitration award. It is trite that the doctrine of *functus officio* applies to CCMA proceedings and awards issued by commissioners."

[12] The Labour Court accordingly made orders dismissing the review application and declaring that the appellant was entitled to the relief as set out in the first award. It is against this latter order that the appellant appeals. The learned judge made no mention in her judgment of the fact that the first award was not signed, nor therefore did she canvass the implications of that fact. There is no indication that the issue was raised with her in argument.

[13] Before dealing with the grounds of appeal, it will be useful to say something about the doctrine of *functus officio*. The rationale of the doctrine is founded

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on the principle of the rule of law which holds that individuals should be entitled to rely on governmental decisions, and to be able to plan their lives around such decisions, insulated from the injustice that would result from a sudden change of mind on the part of the functionary.[1] An official who has discharged his official function by making a decision is unable to change his mind and revoke, withdraw or revisit the decision, unless it is vitiated on acceptable grounds such as fraud or want of jurisdiction. The doctrine applies only to final decisions. And "finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it".[2] In order for the decision to be regarded as final, it must have been passed into the public domain in some manner.[3]

[14] The appellant in effect argued that the unsigned first award of the commissioner was not final. He relied in this regard on the provisions of section 138(7) of the Labour Relations Act[4] ("the LRA"). It reads:

> '(7) Within 14 days of the conclusion of the arbitration proceedings –
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> (a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;
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> (b) the Commission must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings; and
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> (c) the Commission must file the original of that award with the registrar of the Labour Court.'

The appellant submitted that these provisions are peremptory and until the requirements are met, an arbitration award will have no legal effect. Hence, because the first award was not signed it had no legal effect and thus presented no bar to the issue of the second signed award. The first award, it was contended, was accordingly not a final decision. There is no dispute that

[1] Hoexter: *Administrative Law in South Africa* (1 ed) (Juta 2007) 246-248.
[2] Ibid 247.
[3] Ibid 247-248; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 44.
[4] Act 66 of 1995.

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the first award was in fact served and thus conveyed to those affected by it. It passed into the public domain in that manner. The only question then is whether an award must be signed in order to assume the character of finality.

[15] It is trite that as a general rule, statutory requirements must be observed. But it is not always the case that non-compliance will automatically result in invalidity. The principles governing non-compliance with statutory requirements are well-established. The crucial enquiry is whether the legislature contemplated that the relevant failure should be visited with nullity.[5] No universal rule can be laid down as to whether enactments shall be considered directory only or mandatory, with an implied nullification for disobedience. The courts must ascertain the real intention of the legislature by studying the context and scope of the statute to be construed. Various factors must be considered, such as: the subject-matter of the prohibition, its purpose in the context of the legislation, the remedies provided in the event of breach, the nature of the mischief which it was designed to remedy or avoid, and any cognizable impropriety or inconvenience which may flow from invalidity. Then the court must ask whether it was truly intended that anything done contrary to the provisions in question was necessarily to be visited with nullity.[6] An important consideration is whether a declaration of invalidity would have capricious, disproportionate or inequitable consequences.[7]

[16] The appellant has relied on this Court's decision in *SAMWU v SALGBC*[8] in support of its contention that signature of an award is mandatory in terms of section 138(7)(a) of the LRA. The judgment is in fact not authority for that proposition. It was decided there that an unsigned e-mail provisionally disclosing the content of a proposed award did not constitute an award. The fact that the e-mail was unsigned was merely an indication that the arbitrator had not intended thereby to issue an award. Rather the practice in the Labour Court for some time has been to regard the requirement of signature of an

[5] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* [2011] 2 All SA 46 (SCA) at para 14.
[6] *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 885E-G; and *ABSA Insurance Brokers (Pty) Ltd v Luttig and Another NNO* 1997 (4) SA 229 (SCA) at 238J-239B.
[7] *Pottie v Kotze* 1954 (3) SA 179 (A) at 726 F-H.
[8] [2014] 7 BLLR 711 (LAC).

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award as directory rather than peremptory, because to insist on strict compliance would defeat the LRA's object to promote the effective resolution of disputes. The correct approach, in my view, is that which was articulated by Landman J (as he then was) in *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU and Another*[9] as follows:

> 'In my opinion section 138(7)(a) in so far as it relates to the signature and issuing of an arbitration award, is intended to be more of a guideline. It is not intended to be peremptory. It is quite clear that having regard to human nature a commissioner may not always be able to sign and issue an award within the 14-day period. If a commissioner were to sign or to issue the award after that period, it would not be in accordance with the aims of this Act to visit such an omission with invalidity. If that were to be done it would simply mean that the dispute had not reached finality and the arbitration proceedings would have to take place *de novo*. This could not have been intended.'[10]

Although the learned judge was primarily concerned with the 14 day period, the rationale underpinning his decision applies equally to non-compliance with the requirement of signature.

[17] To hold an award, which is valid in all other respects, to be invalid and a nullity on grounds of non-signature favours form above substance and would defeat the LRA's aim of effective dispute resolution. The purpose of the signature requirement is primarily to identify the arbitrator and secondarily to signify the completion of the award by him or her. The latter objective is achieved also by the issue of the award. Once an award, indisputably authored by the relevant arbitrator, is conveyed to the affected parties and has passed into the public domain, that act signifies completion and supersedes the necessity for signature. The seemingly contrary decision of the Labour Court in *Meyer v CCMA and Another*[11] to the effect that an unsigned award would normally be a nullity was qualified by the judge in that case by his explicit recognition that such would not be the case if "there is proof that it is in the form decided by the arbitrator".

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[9] [1999] 3 BLLR 223 (LC).
[10] At para 16.
[11] [2002] 2 BLLR 186 (LC) at paras 6 and 7.

[18] Consequently, the unsigned first award issued by the arbitrator in this case was a final award made final by its service upon the parties with the result that the arbitrator became *functus officio* when it was issued. Hence the Labour Court was correct to hold that the appellant was only entitled to the relief contained in that award and accordingly the application for condonation and the appeal must fail. There is no reason why costs should not follow the result.

[19] In the premises, the application for condonation and reinstatement of the appeal is dismissed with costs.

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JR Murphy AJA

I agree

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Tlaletsi AJP

I agree

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Ndlovu JA

APPEARANCES:

FOR THE APPELLANT: Adv S Swartz

Instructed by Haarhof Inc

FOR THE RESPONDENT: Adv C Tshavhungwa

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Instructed by Mjila and Partners

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