



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

CA 01/2014

Reportable

In the matter between:

IMATU

Appellant

and

DRAKENSTEIN MUNICIPALITY

First Respondent

SALGBC

Second Respondent

C DE KOCK N.O.

Third Respondent

Heard: 24 March 2015

Delivered: 15 April 2015

Summary: Review of arbitration award – union contending that agreement entered into with the municipality concerning the implementation of the payment of allowances to employees – arbitrator ordering the payment of the allowances – Appeal limited on the sole ground whether an agreement was concluded – evidence showing that only issue under consideration at the meeting and in the Municipal Manager’s statement was the compilation of the list of employees eligible for the allowances. Contention that the Municipal Manager concluded an agreement for the payment of allowances not borne out by the facts – arbitrator misconstruing the facts in finding otherwise and rendering unrealistic order which necessitating the setting aside of the award. Labour Court correct to the extent that it set aside the award but incorrect in remitting the matter to be heard *de novo* – issue for which matter remitted not

pleaded by union – Labour Court’s judgment substituted with an order that the review application is set aside - Appeal dismissed with costs

Coram: Tlaetsi DJP, Davis et Sutherland JJA

JUDGMENT

SUTHERLAND JA

Introduction

- [1] This appeal is against a judgment of the Labour Court (Visagie AJ) which reviewed and set aside an award of an arbitrator of the South African Local Government Bargaining Council (SALGBC). The arbitrator had ordered the first respondent, the Drakenstein Municipality (the municipality) to implement the municipality’s “Scare Skills Policy” and in terms thereof to make payments of allowances to certain members of the appellant trade union (IMATU), who were employees of the municipality.¹ The Labour Court, upon setting the award aside, ordered that the dispute be remitted for fresh adjudication, an aspect which is addressed discretely hereafter.
- [2] The claim made by IMATU on behalf of its members was that a collective agreement exists which confers the benefit of money allowances on employees of the municipality which the municipality wrongfully refuses to pay. The case of IMATU is unequivocally based on a contract allegedly concluded on 28 April 2009, in which, the municipality was represented by its Municipal Manager, Dr Sidama Kabanyane, and the employees were represented by their union representatives in the Local Labour Forum (LLF).

¹ The text of the award is thus:

[19.1] The respondent is ordered to implement the scarce skills policy with effect from 1 September 2010 back dated to 1 November 2008. Any payments due to the applicants for the period 1 November to 30 August 2009 must be made to the applicants by no later than 30 September. Interests on [sic] the appropriate legal rate (section 2 of the Prescribed Rate of Interest Act of 1075) must also be included in the amounts due and payable to the applicants as from the date that each monthly allowance became due and payable to each applicant up until date of payment.

[19.2] In the event that the parties are unable to agree on the amounts due and payable to each of the individual applicants either party has the right to request that this matter be re-scheduled for evidence ad or argument to be led and fir a decision to be made regarding the amounts due and payable to reach applicant.”

- [3] In argument, the reliance on this “agreement” wavered as to its collective character and also in its reliance on an “agreement” of 28 April, contending that an alleged earlier “agreement” supposedly concluded on 25 February 2009, which, though superseded by the 28 April agreement, somehow survived in part. These contradictions in the argument contributed to weakening the thesis of an agreement existing, rather than broadening the basis of support for it.
- [4] The critical point, however, on which the case turns, is whether a contract entitling employees to money payments, was concluded. Despite the issue being that crisp, an odyssey of huffing and puffing around this issue produced a weighty record. This judgment shall decline the invitation to explore the several tangential issues and shall deal only with the point dispositive of the case.

What is the contract relied upon by IMATU?

- [5] The claim is based on a resolution of the LLF on 28 April 2009, minuted as follows:

‘2. SCARCE SKILLS

The municipal manager read his statement regarding the implementation of the scarce skills policy (attached hereto) to the house. A proposed list of the most critical skills posts, as updated on 17 April 2009 (attached hereto) is handed to the house.

The employer’s budget will naturally have an effect on the implementation of scarce skills allowances and therefor will have to be taken into consideration.

RESOLVED

- (a) The employer will implement the revised list (updated 17 April 2009) of employees that qualify for a scarce skills allowance by 1 May 2009.
- (b) IMATU fully reserves its right with regard to their members who were identified and informed that they qualify for scarce skills as per the original list.

- (c) The employer will meet with individuals referred to in paragraph 2 [sic] (*the reference should be (b)*) with a view to explain the reasons why they were taken off the list.
- (d) The implementation of scarce skills allowances is not a permanent arrangement and will be revised from time to time.²

[6] The critical passage founding the alleged obligation to make payment is clause (a). Read alone, this minute is unintelligible. It cannot, *per se*, support the appellant's contention that money payments were due. What does it mean to commit to "implement the revised list"? The context for that is common cause; at an earlier time, 25 February, a longer list of eligible employees had been drawn up. It had been pruned, and the pruning, which was not well received, was, as the text of the resolution indicates, the focus of the discussion.

[7] Importantly, two other documents are alluded to in the minute; the scarce skills policy itself and the "statement" of the Municipal Manager, read to the meeting. On the standard principles for the interpretation of a contract, regard must be had to these documents to make sense of the text of alleged agreement. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,³ Wallis JA held thus:

'[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

² Record vol I: 126.

³ 2012 (4) 593 (SCA) at para 18.

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' [Footnotes omitted]

- [8] The adoption of the scarce skills policy is a decision of the council of the municipality adopted by resolutions in meetings of the council on 3 September 2008 and 2 October 2008.⁴ That policy document and the statement read to the meeting of 28 April 2009⁵ despite their length need to be cited, save for the tables annexed to the statement, and obviously immaterial passages. The reason to belabour this judgment with these citations is to relate what was ordered to be "implemented" in the award.

- [9] The policy reads thus, passages of significance being underlined:

'SCARCE SKILLS AND RETENTION POLICY

- 2.1. There is a nationwide skills shortage, mostly in technical fields.
....
- 2.4. Addressing remuneration challenges will be short-term, the policy will be annually reviewed to address issues leading to retention and mass exit, broader/holistically. In order to

⁴ Record vol 1: 58- 65.

⁵ Record vol 2:102- 107.

achieve this, the strategies a listed in par 5.1 hereof, will be researched and developed for implementation.

5. STRATEGIES TO ATTRACT AND RETAIN SCARCE AND STRATEGIC SKILLS

5.1. Strategies to attract and retain scarce and strategic skills may include the following:

- Payment of allowances for the attraction and retention of scarce skills.
- Payment of allowances for the retention of strategic skills.
- Performance related notch increments.
- Staff career planning and development.
- Maintaining of remuneration strategies.
- Attraction of pre-identified individuals.
- Maintaining a positive work environment and climate.

6. TECHNICAL REMUNERATION COMMITTEE

6.1. The Municipal Manager in terms of the Municipality Systems Act (Act 32 of 2000) as amended, is responsible, inter alia, for the appointment of staff other than those referred to in section 56 of the said Act. This duty include the remuneration of staff in accordance with national bargaining approved systems and Council's policy direction. In order to assist the municipal manager in performing these duties, a Technical Remuneration Committee must be established to:-

- advise the Municipal Manager on the implementation of strategies in terms of this policy;
- conduct surveys and submit proposals for consideration by the Municipal Manager and MAYCO;
- facilitate the development, implementation and review of remuneration-related strategies;
- give guidance, technical support and make recommendations to the Municipal Manager on remunerations issues;
- develop and implement a communication strategy for remuneration-related issues; and

- to advise the Municipal Manager on financial implications of the strategies being proposed and to ensure the necessary financial planning.

7. IDENTIFICATION OF SCARCE SKILLS

7.1. The Technical Remuneration Committee shall, identify occupational groups affected by a scarce skills challenge, using the following criteria.

.....

7.3. On receipt of recommendation from the Technical Remuneration Committee for the designated of an occupational group/s as a scarce skills, the Municipal Manager shall consult with the Local Labour Forum before a final decision is taken by the Municipal Manager.

7.4. All designations determined in terms of clause 7.2 above shall be reviewed annually to allow relevant adjustments, based on changing trends.

8. IMPLEMENTATION OF STRATEGIES

The strategies as set out in par 5 above shall be implemented as set out hereunder and must be considered and recommended by the Technical Remuneration Committee to the Municipal Manager on a case to case basis as and when necessary.

8.1. Payment of allowances for the attraction and retention of scarce skills.

In order to attract and retain scarce skills, allowances for scarce skills/individual cases identified in terms par 7 may be rewarded in one or more of the following ways;

8.1.1. Scarce skills and vehicle allowances as set out hereunder.

POST LEVEL	ALLOWANCE

0-3	<p>1. Scares skills allowance of up to a maximum of 10%</p> <p>2. Motor vehicle allowance of 850km/month</p>
4	<p>1. scares skills allowances of up to a maximum of 10%</p> <p>2. Motor vehicle allowance of 750 km/month</p>
5	<p>3. care kills allowance up to a maximum of 10%</p> <p>2. Motor vehicle allowance of 650 km/month</p>
6 and lower	Scares skills allowance of up to a maximum of 15%

8.1.2. Starting on higher notch within the approved salary scale subject to the maximum to the scale

8.1.3. The retention of technical /non-management skilled employees who do become managers, by allowing them to develop and be rewarded laterally (broad banding)

8.1.4. any other method recommended by the Technical Remuneration Committee, not exceeding the financial cost of 8.1.1

8.1.5. the scale skills allowance shall be calculated as the percentage indicated in the table in 8.1.1 of the basic salary.

8.2. Payment of allowances for the retention of strategic skills

If an Executive Director is of the view that there is a proven danger that the directorate stands to loose [sic] the services of an employees with strategic skills, irrespective whether such post is from a designated scarce skills group

or not, the Technical Remuneration Committee may consider any one of the strategies under 8.1 above in order to retain such services.

8.3. Performance related notch increments

8.3.1. Reward for performance may be paid in the form of notch increments within the post salary scale. Such rewards shall be provided for and managed in terms of Council's Performance Management Policy. Should the incumbent already be at the top notch of the salary scale an alternative arrangement will be considered.

8.3.2. As an interim arrangement until performance management and recognition has been implemented in terms of the Performance Management Policy, a recognition scheme that recognise and reward individuals financially or non-financially for their contribution to service delivery objectives, may be developed by the Municipal Manager on advice from the Technical Remuneration Committee. Such scheme must be introduced against predetermined and measured targets. Where poor performance is identified, corrective and improvement measure must be introduced.

8.4. Staff career planning and development

The Municipality acknowledges the need to determine a framework to support employee's career paths, while advancing organisational needs and service delivery imperatives. For this purpose, the Municipal Manager together with the Technical Remuneration Committee must determine a framework to facilitate:

- 8.4.1. career planning, development and management; and
- 8.4.2. implementation of focused training and development
- 8.4.3. programmes to facilitate employee's career movements.
- 8.4.4. the development of acknowledgement and reward for in-service completion of job related academic qualifications.

Such framework may provide for the considering of positions for advancement between scales, subject to the identification of the

necessary competence, experience and qualifications required for such advancements.

8.5. Maintaining a positive work environment and climate

The Municipal Manager shall initiate programmes to promote a positive work environment, for all employees. These programs may include

8.5.1. employees wellness programs

8.5.2. surveys to determine

- How employees feel about their work, i.e., is it challenging and stimulating
- How employees feel about Drakenstein as an organisation they work for and the people they work with, i.e., organisational culture and climate;
- Do employees feel valued and respected;
- Do employees feel that their career aspirations are met by the organization;

8.5.3. consider and implement corrective measures based on the results from the surveys in 8.5.2.

8.6. Attraction of pre-identified individuals

.....

8.7. Maintaining of remuneration strategies

Though the determination and review of salaries falls within the scope of SALGBC, the Municipality has to be up to date with all the changes in the labour market to ensure that its strategies remain relevant and do not compromise its capacity to compete for skills in the labour market. To this view the Municipal Manager in conjunction with the Technical Remuneration Committee shall maintain these remuneration strategies by:

- the annual review of this policy supported by the necessary research, and approval by council where necessary
- annual review of the designated scarce skills groups.

8.8.⁶

[10] A reading of the policy reveals that it was composed of a wide range of options some of which, but not all, involved payment of money to employees. Throughout the text, the tenor of the provisions emphasises the short term, provisional and permissive character of the scheme.

[11] The statement of the Municipal Manager⁷ referred to in the minute of 28 April, further contextualises that event. The Municipal Manager described the process of the policy's development. The statement juxtaposes the twin challenges of a rational selection process and the appropriation of funding to serve its objectives. The burden of finding money is highlighted and its absence is given as the reason why the first list of the eligible was pruned.

He states:

'At the time of adopting the policy, what could not be ascertained and known was the full financial impact that will come with the implementation thereof. This is because the list of affected positions in the administration was yet to be finalized and the necessary calculation could only be done when that list was presented. What then transpired after the adoption of the policy were the following:

- Our municipality was to identify all those broad critical scarce skills found in different departments in the administration;
- Out of those broad critical skills extraction of those very skills that fully comply with all criteria captured in the policy should be undertaken;
- Deliberation should also take place to highlight and identify those that may not be seen to be fully compliant with the criteria but make sense to be considered as urgent and critical.

With this in mind the important consideration needed by the Municipal Manager in the implementation of the policy rests with the following:

⁶ Record vol 1: 58 – 64.

⁷ Record vol 2:102 -107.

- The affordability of the scheme by the municipality
- Manner to deal with the possibility of opening a flood gate of many inquiries from those employees who would feel that they too possess scarce skills.
- The clear message that the implementation of the policy is not permanent and may need to be reviewed from time to time.'

[12] The statement goes on to recount the debacle in which unauthorised letters were sent to employees on the first list purporting to inform them of the benefits they would get. In an empathetic tone, he apologises and explains that the errors cannot be allowed to stand. He concludes the statement with a recommendation; it reads:

'It is proposed that:

- (a) The municipal manager consults the LLF in terms of item 7.3 of Council's Scarce Skills and Retention Policy the unforeseen costs of implementing the current list;
- (b) The application of the criteria for the identification of scarce skills positions be revisited;
- (c) A revised list of posts should then be recommended by the Technical Remuneration Committee to the Municipal manager;
- (d) *as per the policy recommendation list be forwarded to the Municipal Manager to approve and implement forthwith as from 1st of April ...[This passage not wholly legible]*
- (e) Employees who no longer qualify for such an allowance (after the above mentioned exercise is completed) be duly informed in this regard and that the letter informing them should state that the initial list of identified positions recommended by the Technical Remuneration Committee proved to be regrettably unaffordable and that the criteria had proved to be inconsistent;'

[13] A reading of the text demonstrates the burden of the Municipal Manager's address was to sooth the ruffled feathers of those excluded, to explain that funding dictated the scope of the scheme, and that the assessment of

affordability was possible only when the pool of the eligible had been ascertained.

The award: what does it order and upon what grounds is it founded?

- [14] So much for the material available to the arbitrator about the terms of the policy and the alleged agreement to “implement” it. Given the tenor of the award, what would the municipality understand it was obliged to do? The award itself does not specify exactly what is to be paid. Cryptically, it orders implementation of the policy retrospectively from 1 November 2008 plus interest thereon. This obscurity is itself a defect in the award which, independently of other considerations, renders it liable to be set aside. But that aside, what payments are contended for? From the text of the award, it may be gleaned that allowances are due for scarce skills and vehicle allowances. No greater detail exists. To what *does*, indeed, *can*, the award refer?⁸
- [15] The policy, as cited above, provides in paragraph 5 for seven “strategies”. The first two strategies are “payment of allowances for the attraction and retention of scarce skills” and “payment of allowances for the retention of strategic skills”. None of the other strategies are, *per se*, “allowances”. Semantically, the award must refer only to the first mentioned allowance for “scarce” as distinct from “strategic” skills. As cited above, what such allowances contemplate is set out in paragraph 8.1 of the policy.
- [16] Patently obvious is that paragraph 8.1 does not prescribe a definitive sum in any case. The table in 8.1.1 provides for allowances of “up to a maximum” of 10% or of 15%, of basic salary. Moreover, paragraph 8.1 stipulates that “... scarce skills, allowances for scarce skills/ individual cases identified in terms of para 7 may be rewarded *in one or more of the following ways*”. The table of allowances in paragraph 8.1.1 is only one of the ways that may be employed; others involve no direct payments. Paragraph 8.1.2 proposes a notch increase and paragraph 8.1.4 mentions “any other method recommended by the Technical Remuneration committee not exceeding the cost of 8.1.1”.
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- [17] On which of the several premises postulated in the policy must the award be complied with? It must be inferred that the arbitrator, in composing his award, must have realised the impossibility of giving effect to the fatuous order to “implement the policy” and dodged the embarrassment by telling the parties to calculate the sums themselves and come back if they disagreed. Such an exercise would have itself been impossible because the award fails to give a fixed formula to perform a calculation. The award is fatally defective for these reasons alone.
- [18] More fundamentally, the award is plainly wrong in concluding that a contract existed that could found a claim for specific performance of a money payment on any basis upon the “implementation” of the policy. In this, the Labour Court was correct in finding that no rights, as alleged, could arise in terms of the policy, once it was implemented, which could found any claim as alleged or indeed any money claims at all.
- [19] The reason is plain: the policy created a discretionary regime for the conferment of benefits. The discretion was to be exercised by the Municipal Manager. However, the authority of the Municipal Manager to exercise such a discretion was not unfettered. The Technical Remuneration Committee first had to make a recommendation “...on a case by case basis as and when necessary.”⁹ No part of the appellant’s case hints that such a step was taken.
- [20] In argument, it was contended that the Municipal Manager, exercising his delegated power, *de facto* overrode the terms of the policy and bound the municipality to a novation in terms whereof the maximum rate of the allowance for scarce skills was payable and fell due. This improvisation argument, apart from contradicting the appellant’s initial thesis, is in my view unsubstantiated and fanciful.
- [21] Plainly, as alluded to earlier, the policy is heavily impregnated with several contingent factors shutting out a claim of the nature alleged. Paragraphs 5,6, 7.3, and 8 read together make plain that the policy was an enabling measure whose aim was to serve the interest of the municipality (only benefiting the

⁹ Policy paragraph 8 – preamble.

employees instrumentally) and that a wide range of options were to be drawn upon. Moreover, recognising the fluidity of the predicament of staff retention over time and the prospects of circumstances changing that would free the municipality from the burdens of topping up benefits, the measures were not permanent and were to be applied ad hoc.

[22] Thus, even if it were possible to conclude that on 28 April, an agreement was reached that the policy would be “implemented” (whatever that could mean, however generously construed), *no rights to payments of any allowance could arise from such an agreement*. It was in an attempt to scale this sheer cliff face, that the submissions about the Municipal Manager’s *de facto* override of the terms of the policy were vainly proffered.

[23] What remains to address is the untenable argument that an agreement was concluded on 28 April 2009 which bound the municipality to “implement” the policy. The bare text of the resolution, in my view, deals with the settling of a list of eligible persons to whom the policy would be made applicable. Addressing the circumstances dealt with by the persons at the meeting, which must include the matters traversed in the statement read by the Municipal Manager, it is plain that the resolution concerned itself with a list of fewer eligible persons that had beforehand been under consideration. The question of the unaffordability of funding measures for the longer list was at the forefront of the discussion. In light of these facts, the notion that the Municipal Manager came to that meeting to commit the municipality to pay money allowances is preposterous.

[24] The Municipal Manager’s denial of a negotiation and an agreement being concluded is not dented by the probabilities in the least degree. Several elaborate arguments against this denial were mounted, none of which tally with the plain facts.

[25] It is common cause that the LLF is used to both consult and negotiate. However, the fact that the LLF does sometimes negotiate collective agreements does not support the idea that it was a forum for negotiation in this case. The gross improbability that the Municipal Manager sought to

negotiate on these issues is illustrated by the very fact that the policy expressly and unequivocally prescribes consultation in paragraph 7.3.

- [26] However chummy the exchanges might have been, and whatever phraseology used by the scribe of the LLF minutes, there is no room whatsoever for any union representative at the meetings, all of whom had full knowledge of the text of the policy, to imagine that any negotiation was taking place. For these reasons too, any thought of the Municipal Manager having concluded an agreement binding the municipality by reason of his supposed ostensible authority to do is wholly absent.
- [27] A proposition that somehow consultation could morph into negotiation is fanciful. The idea that because a Municipal Manager is vested with authority to deal with the terms and conditions of employment of staff, the council is denuded of authority to also regulate such matters and needs only to be informed of the Municipal Manager's decisions is untenable.
- [28] Lastly, the submissions that the notion of unaffordability to implement any such policy is a falsehood because the costs "must" have been worked out beforehand are vacuous and are inconsistent with both the hard evidence and with the probabilities. It was suggested that the Municipal Manager made concessions on these issues. That reading of his evidence is incorrect. A witness whose demeanour is deferential to the views of the other party and is empathetic to aspects of their grievances ought to be commended for his humanity not accused of conceding his own case. Curiously, this part of the cross-examination of the Municipal Manager was conducted by the arbitrator, who in a display of bad-temperedness harangued the witness about the implications of an "agreement" which the questioning took as an established fact, rather than as the very subject of the enquiry. A fair reading of the evidence of the Municipal Manager is that he was in full agreement with the proposition that a decision was taken on 28 April, in consultation, about which persons were to be included in the pool of eligible persons. As to implementation, he was at pains to make clear that he thereupon embarked on the exercise to see *how that could be done*, given the constraints of adequate funding. A nominal sum of R1million had already been budgeted.

He recognised the inadequacy of that sum and the need to pilot a proposal to the council to revise the municipality's budget to cater for more money, if possible. The absence of adequate funding was an objective bar to implementation and, until that was resolved, to speak of implementation was a nonsense, still less the actual payment of sums. The debacle of the unauthorised letters to certain employees indicating payments to which individuals were supposedly entitled was explained to be an error which, at once the Municipal Manager was aware thereof, he put right. A question put to the witness about whether there was enough money "in the budget" to pay the allowances of the three individual employees illustrated the unreality of the attack; self-evidently, payment of any sum had to be appropriated to that purpose in a properly approved budget - it is not simply a matter of how much money is in the bank account.

- [29] Accordingly, the award misconstrued the facts, reached an untenable conclusion about the existence of a contract and its terms, and thus the award rendered was unreasonable and must be set aside. (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC))

The Labour Court's remittal order

- [30] The Labour Court correctly held that no contract as alleged was proven. Upon that finding, the Labour court should have simply set aside the award. However, the Labour Court expressed a view that IMATU had a different and better cause of action by articulating a complaint that there was an unfair exercise of the discretion which had been conferred on the Municipal Manager by the policy to award benefits, and on that basis remitted the matter for that issue to be adjudicated afresh.

- [31] This was inappropriate. First, the issue to be remitted was never the case referred by IMATU to the SALGBC and could thus never form the basis for a remittal; and second, it is inappropriate for a court to extract from a factual matrix a supposedly overlooked cause of action, however meritorious, and propel it into adjudication. Courts decide the issues put before them by the

parties and do not second guess them. (Cf: *Fischer and Another v Persons Unknown* 2014 (3) SA 292 (WCC); 2014 (4) SA 614 (SCA))

[32] There has been no cross-appeal. However, that is no bar in this case to the setting aside of the order. The reason for this outcome is that the order is not being set aside because it is unmeritorious but because it is incompetent. Even in the absence of a direct challenge by a party, an appeal court, upon recognising that the court *a quo* has erred by making an order that it could not have made, is by reason of its inherent jurisdiction, empowered to correct that error.

[33] Accordingly, the remittal order cannot stand and is set aside.

Conclusions

[34] In the result, the appeal must be dismissed.

[35] Costs fall to be decided on equitable grounds. In labour litigation, there is a full appreciation that costs awards may have an undesirable chilling effect on under-resourced parties seeking relief. However, some measure of self-discipline in Labour litigation is appropriate. The pursuit of an appeal, despite such manifest absence of merit, in my view warrants an order directing the appellant to pay the costs of the appeal, such costs to include the costs of employing senior counsel. The defence of an award, however unmeritorious stands in a different light and defending even a weak award in a review application will rarely be inappropriate. However, persistence in litigation, at all costs (usually the adversary's), ought not to be rewarded, despite an on-going employment relationship between the employer and the employees who are members of the union.

The order

[36] The appeal is dismissed.

[37] The order of the Labour Court is set aside and substituted with an order dismissing the review.

[38] The appellant shall pay the costs of the appeal.

Sutherland JA

Tlaetsi DJP and Davis JA concur in the judgment of Sutherland JA

FOR THE APPELLANT: Attorney Minnaar Niehaus

FOR THE FIRST RESPONDENT: Adv A Freund SC

Instructed by Herold Gie Attorneys