LABOUR APPEAL COURT

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no JA4/2017

LC no: JR 899/2013

In the matter between:

MINISTER OF PUBLIC SERVICE AND ADMINISTATION **First Appellant**

MEC, PUBLIC WORKS, ROADS AND TRANSPORT,

MPUMALANGA **Second Appellant**

and

PUBLIC SERVANTS ASSOCIATION,

OBO MALEME JOHANNES MAKWELA **First Respondent**

DIALWA MATHALA N.O. **Second Respondent**

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **Third Respondent**

Heard: **07 September 2017**

Delivered: **01 November 2017**

Summary: Employee translated in terms of the OSD as a result of a settlement agreement which was made a binding award –Minister seeking rescission of the award on the basis that the Minister ought to have been joined to as a party to

the proceedings – issue for determination is whether the failure to join the Minister constitutes a non-joinder – held the Minister not an interested party to the dispute – the Minister having no authority over the provincial executive authorities - the role of the Minister is to advise and assist when asked to do so and not to make decisions - the Minister acts merely as the midwife to the OSD and is not affected by a decision that derives from an award resolving a dispute about the implementation of a binding collective agreement - the dispute is one between employer and employee – and Minister not employer of the employee - the absence of any legal connection between the Minister and the employee seems to have been overlooked in the argument composed on her behalf. Appeal dismissed with costs.

Coram: Coppin, Sutherland JJA *et* Savage AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] On 1 June 2012, an award was issued making a settlement agreement between the first respondent (Makwela) and his employer, the second appellant (the Member of the Executive committee (MEC)), a binding award. The agreement put an end to a dispute about whether Makwela should be translated in terms of an Occupation Specific Dispensation (OSD) into a particular post at a higher salary. The nub of the dispute had been, in part, whether Makwela had to be a registered Engineer or not, and whether he was more of a manager than an engineer in that post, factors supposedly relevant, as far as the MEC was concerned, to be eligible for translation. The details of the controversy are addressed elsewhere.

[2] After the award was published and the first appellant (the Minister) learned of it, she became aggrieved at the particular translation of Makwela. Evidently, the

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MEC, who was a party (as represented in the arbitration by the collective bargaining manager of the Department, Yuza Mushanganye) to the settlement agreement, and has now aligned himself with the Minister to support the rescission application, and by so doing, contradicts the stance initially adopted by the conclusion of the settlement agreement.[1]

[3] The two appellants applied for the rescission of the consent award on the basis that the Minister ought to have been a party to the arbitration proceedings. The relief sought was to set aside the award as erroneously granted and order that the Minister be joined. Although not expressed in the notice of motion, it is implicit that it was expected that the court would thereupon refer the matter back to be heard afresh by the bargaining council, affording the Minister an opportunity to participate in the resumed proceedings. No relief is sought in respect of the settlement agreement itself, which of course, continues to exist whether its terms are incorporated into an award or not. The implication of that circumstance is that even were the award be set aside, the agreement would remain binding between the contracting parties, ie, the MEC and Makwela.

[4] The second respondent, an arbitrator of the GPSSBC dismissed the rescission application. The appellant took that dismissal on review which application was also dismissed. The appeal lies against that decision.

[5] Accordingly, the sole issue for decision is whether the failure to join the Minister constitutes a non-joinder. Upon that foundation, the contention is advanced that the arbitrator issued an award in error within the meaning of section 144 of the Labour Relations Act 66 of 1995 (LRA) in that he ought to have directed the joinder, even *mero motu,* is necessary. The relevant portion of the section provides:

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[1] There is an allusion in the founding affidavit to a controversy about whether the Collective Bargaining Manager who, whilst representing the MEC, exceeded his mandate by binding the MEC to the terms of the agreement, but neither the review court nor the appeal court are seized with an issue based on a lack of authority nor is any relief sought on such a premise. This aspect is mentioned by way of explanation of the MEC's *volte face.)*

> ‘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-
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> (a) erroneously sought or erroneously made in the absence of any party affected by that award;
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> (b) ….
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> (c) granted as a result of a mistake common to the parties to the proceedings; or
>
> (d) ….’

<u>The Minister’s thesis in support of being a ‘necessary’ party</u>

[6] The premise of the Minister’s thesis, necessarily, is that encapsulated in the rescission application. That application gave voice to the following propositions:

6.1. The minister was “affected” by the award or was a “necessary” party.

6.2. The Minister had “made” the OSD and had a vested interest in the proper implementation of the OSD and is “responsible for the uniform and consistent application of all OSDs in the public service”.

6.3. The Minister (or the department) had “decided jointly” with the MEC that Makwela was ineligible to be translated.

6.4. The Minister only learnt of the award after it had been implemented by way of Makwela being translated and his translation was contrary to the “mandate” of the two appellants.

6.5. The award was thus “erroneously sought and erroneously granted”.

<u>The relevant context and factual background</u>

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The legislative apparatus

[7] The terms and conditions of employment of the employees who are subject to the GPSSBC are highly regulated. These terms and conditions are encapsulated in resolutions of the bargaining council which record collective agreements. Among other collective agreements are several which deal with "occupational specific dispensations". These collective agreements *via* the taking of resolutions are thereafter "determined" by the minister in terms of section 3(5)(a) of the Public Service Act, proclamation 103 of 1994, (PSA Act) whereupon they are in force. That section reads:

> 'Subject to the Labour Relations Act and any collective agreement, the Minister may make determinations regarding any conditions of service of employees generally or categories of employees, including determinations regarding a salary scale for all employees or salary scales for particular categories of employees and allowances for particular categories of employees.' [own emphasis]

[8] Once that has taken place, the Minister may play a further role. Section 3(6) provides:

> '(a) If so requested by the President or an executive authority, the Minister may advise, or assist in such manner or on such conditions as the Minister may determine, the President or the relevant executive authority as to any matter relating to-
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> (i) the public service;
>
> (ii) any staffing arrangements or employment practice regarding any organ of state; or
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> (iii) the remuneration or other conditions of appointment of the office-bearers of any board, institution or body.
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> (b) For the purposes of paragraph (a), the Minister, or any person authorised in writing by the Minister, has access to such official documents and may obtain such information from the chairperson or head of the relevant board, institution or

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> body as may be necessary to advise or assist the President or the relevant executive authority.' [own emphasis]

[9] Moreover, section 5(6) provides:

> '(a) Any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms of this Act, be deemed to be a determination made by the Minister in terms of section 3 (5).
>
> (b) The Minister may, for the proper implementation of the collective agreement, elucidate or supplement such determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement.' [underlining supplied]

[10] It is plain that in this scheme of enactments, the role of the Minister, provided for in section 5(6)(b) is ancillary to the *formalising* of a collective agreement in terms of Section 3(5) (a) and the *advisory* role provided for in section 3(6). Accordingly, the sections must be read in that way, which results in the issuing of circulars being undertaken in that context. The function of such circulars is to grapple with the nitty-gritty of implementation of collective agreements, not to supplement them with substantive material. In respect of the relevant OSD, the Minister issued a "circular" no 5 of 2009.

[11] There is, therefore, no self- standing executive role for the Minister established by section 5(6). Moreover, the circulars cannot contradict the terms of the collective agreements formalised in resolutions in respect of the OSD.

[12] The relevant "executive authority", which is mentioned in these provisions, refers to the MEC. The term is defined in section 1, *inter alia,* as follows:

> '"executive authority", in relation to-

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(d) the Office of a Premier or a provincial government component within a Premier's portfolio, means the Premier of that province; and

(e) a provincial department or a provincial government component within an Executive Council portfolio, means the member of the Executive Council responsible for such portfolio;"

[13] Notably, section 3(7) provides:

'An executive authority has all those powers and duties necessary for-

(a) the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human resources planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment; and

(b) the recruitment, appointment, performance management, transfer, dismissal and other career incidents of employees of that department, including any other matter which relates to such employees in their individual capacities, and such powers and duties shall be exercised or performed by the executive authority in accordance with this Act.' [own emphasis]

[14] Notably, there is no logical space for a role by the Minister in this context, to be 'interested' in the legal sense in the application of the provisions of the OSD to an individual employee.

The Makwela's request for translation

[15] When Makwela claimed an entitlement, the request was considered. The appellants say both of them made "decisions". The MEC denied the request on 20 May 2010. Ostensibly, the MEC had requested the Minister to express a view before making this decision. In support of this assertion, an e-mail dated 18 March 2010 is cited. This letter is a chummy note from Theresa and Robert to

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Zodwa. Who these people are is not disclosed. However, it is submitted on behalf of the Minister that this e-mail, to which is attached a schedule of persons who are said to be ineligible to be translated, including Makwela, constitutes the Minister's "decision" rejecting Makwela's request. Apart from any other consideration, not least of all policy or the principle of legality, the notion that a ministerial decision having the force of law can be effected by an informal exchange by unidentified officials of a department is a remarkable reach, and is unsustainable.

[16] What exactly is the difference of opinion about Makwela's eligibility for translation? Makwela was not a registered Engineer, albeit he has an academic engineering qualification. Makwela invoked clause 13.2.3 of resolution 2 of 2009.

> 'For employees on the Engineers work streams who are permanently appointed and have been performing the duties of the post satisfactorily as at 30 June 2009, but are not registered with the relevant Council upon the implementation of the OSD will as a once-off provision translate to the OSD in terms of phases 1 and 2 translation measures.'

[17] The appellants took a view that on an assessment of the job, Makwela devoted 80% of his time to management and 20% to operational engineering work. This, so they opined, should mean that he would be disqualified from being eligible for the translation because he was not enough of an engineer in the post to which he had been appointed, as deputy director in the Roads Directorate. However, that 80/20% idea is not stipulated in the resolutions, nor in the circular 5 of 2009 either. The further view is held that the OSD cannot apply to Makwela's post and clause 2(b)of circular 5 of 2009 is invoked which stipulated that the OSD for engineers was confined to posts where a professional registration was a "inherent requirement of the post". This viewpoint was compromised by the settlement agreement.

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The assessment of the rescission application

[18] The requirements for joinder are that the party to be joined must have a direct and substantial interest in the claim; ie be thus, a “necessary” party. This “interest” must be in respect of a legal right or obligation affected by the claim being litigated; ie a legal interest. The best proof of that interest is that order, if granted, cannot be effected without the party seeking joinder being subject to the order of court. The corollary is that if the order sought can compromise the rights of a person, that person must be joined. Axiomatically, a person who claims to be entitled to a benefit under a contract, must proceed against another party who is capable of lawfully performing the required act necessary to meet the claim. A person who is not a contracting party need not be joined. Thus, eg, when suing a company, the shareholders are not joined. Often strangers to a contract are in a practical every-day sense “affected”; by an order, eg creditors, employees etc. However, none of these persons are necessary parties for want of the necessary connection in law.

[19] The Minister’s argument for joinder boils down to this: because the Minister “made” the OSD and is the “custodian” of its consistent implementation, and moreover in respect of Makwela, because the Minister made an *ad hoc* “decision” refusing the request,the Minister was, therefore, a necessary party to any proceedings which give effect to the provisions of the OSD.

[20] The Labour Court expressed itself thus:

> ‘[15] Read in context, it appears that the OSD is deemed to be a determination made by the Minister. But once she is deemed to have made a termination, its implementation is left to the MEC.
>
> [16] The unfair labour practice dispute that the PSA referred to the GPSSBC questioned the implementation of the OSD in the case of Mr Makwela. It did not attack the OSD itself, or the fact that it is deemed to be a determination made by the Minister. In those circumstances, I do not believe that the Minister was a necessary party to the dispute. The arbitrator, Dr Martin, did not exceed his powers or commit any other reviewable irregularity when he made the settlement

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agreement an arbitration award at the request of the parties, being the PSA and the MEC.

[17] It cannot be envisioned that the Minister should be joined to every dispute concerning a "deemed determination" in the form of a collective agreement of a public service bargaining council such as an OSD. For example, in the case that Mr *Mashego* cited, *Western Cape Department of Health v MEC Van Wyk and others (2014) 35 ILJ 3078 (LAC)* [2]the LAC took no issue with only the provincial department (rather than the Minister) having been cited as a respondent in a similar dispute involving the implementation of an OSD – in that case, for nurses.

[18] Once it is concluded that the Minister was not a necessary party to the Martin award, the rescission ruling by commissioner Mathala is also not reviewable.

[19] Quite simply, the arbitration award – in terms of which the settlement agreement was made an award with the consent of both parties – was not "erroneously sought or erroneously made in the absence of any party affected by that award" as contemplated by s 144(a) of the LRA.

[20] The Department was properly cited. It was represented by its Manager: Collective Bargaining, Mr Yuza David Maswanganye. He is tasked with managing dispute resolution processes and entering into collective agreements. His authority to enter into the agreement with the PSA and to consent to it being made an arbitration award was not questioned; nor could it be."

[21] We agree. There are several reasons why the Minister cannot assert that she was a party "affected" by the award.

21.1. First, what is required is not merely that the Minister is "interested" in knowing what various "executive authorities" do when implementing collective agreements. That sort of common-sense "interest" is irrelevant. This is because the Minister has no authority over the executive authorities. The notion that a co-decision was made about Makwela is wrong on the facts. The role of the Minister is to advise and assist when

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[2] An argument was advanced that this decision is not authority for the proposition that the Minister must not be joined, and thus the Labour Court was in error. It is correct that the decision is not authority for that proposition. However, it was not cited in the judgment for that purpose; rather, it was alluded to merely as an example of the uncontroversial practice of not joining the Minister in such circumstances.

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asked to do so (not to make decisions), and otherwise is obliged to leave the MEC to get on with the implementation. Were it otherwise, the MEC would be the Minister's functionary which is an idea incompatible with the constitutional structure of the provinces having original jurisdiction and not being subordinate to the national government, within their scope of authority.[3] Thus, the Minister made no decision in respect of Makwela; what took place was the dispensing of advice.

21.2. The dispute did not trigger an interpretation issue about the meaning of the OSD. However, even had it done so, the Minister as the authority that acts merely as the midwife to the OSD, an instrument which derives from a binding collective agreement, would still not be "affected" by a decision on the meaning in the relevant sense.

21.3. The nub of the dispute with Makwela was a mere difference of opinion about the facts relevant to the application of the OSD. The Minister's role as the provisions of the legislation cited above illustrate, is confined to the issuing of instruments of general application, and not, in the least, is the Minister, in any legal sense, concerned with disputes concerning individual employees. Even if it be supposed that the decisions taken about Makwela in respect of implementing the OSD were to be wrong or inappropriate, that notional error could not confer on the Minister a legal interest that might found a proper claim to be joined.

21.4. The main hurdle which the Minister's case needs to clear is plain. The dispute is one between employer and employee - what can there be about that sort of dispute which "affects" the Minister, who is not Makwela's employer? The absence of any legal connection between the Minister and the employee seems to have been overlooked in the argument composed on her behalf.

Conclusions

[3] See: The Constitution, sections 103, 104, 125 and 146.

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[22] The Minister is plainly not a person who has a legal right at stake in thedisputereferred to arbitration by Makwela. The appeal must fail.

The Costs

[23] Both parties seek costs. Accordingly, costs ought to follow the result.

[24] Costs on a punitive scale are sought against the two appellants. In my view, no case to justify that has been made out. The stance of the appellants has been held to be wrong; no untoward conduct has been evidenced in their pursuit of a wrong view.

The order

The appeal is dismissed with costs.

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Sutherland JA

Sutherland JA (with whom Coppin JA and Savage AJA concur)

FOR THE APPELLANTS: Adv DT Skosana SC, With him, ADV N Mtembu,

Instructed by The State Attorney, Pretoria.

FOR THE FIRST RESPONDENT: Attorney D Mashego.

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