REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 563/2013

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

T/A METRORAIL **Applicant**

and

TRANSNET BARGAINING COUNCIL **First respondent**

TOKISO DISPUTE RESOLUTION **Second respondent**

SUZANNA HARVEY N.O. **Third respondent**

KAREL KOOPMAN & OTHERS **Fourth and further respondents**

Heard: **26 November 2014**

Delivered: **9 December 2014**

Summary: Review – question whether employees employed on fixed term contracts were dismissed. FTCs converted to permanent employment in terms of collective agreement. Arbitrator had to interpret agreement in order to establish dismissal. Finding on dismissal correct. Arbitrator did not exceed her powers in interpreting agreement in order to establish whether FTCs converted to permanent employment and whether employees were dismissed. Conclusion reasonable. Award not reviewable.

JUDGMENT

LABOUR COURT

STEENKAMP J

Introduction

[1] The applicant, Metrorail, seeks to have an arbitration award by the third respondent, Suzanna Harvey, reviewed and set aside. Ms Harvey (the arbitrator) presided over an arbitration under the auspices of the second respondent, Tokiso Dispute Resolution. Tokiso has been appointed to provide conciliation and arbitration services to the applicant in terms of an agreement with the relevant trade unions, the South African Transport and Allied Workers' Union (SATAWU) and the United Transport and Allied Workers' Union (UTATU). In terms of that agreement, "a panellist appointed to arbitrate a dispute shall have the same powers as those conferred on a Commissioner of the CCMA by the LRA and shall apply the legal principles as they apply to disputes subject to arbitration by the CCMA".

[2] It is specifically agreed that Tokiso panellists will have the power to hear unfair dismissal disputes, as well as "conciliation and arbitration of disputes about the interpretation and/or application of collective agreements concluded by the parties".

[3] The fourth and further respondents (the employees) were all employed by Metrorail as train guards on fixed term contracts of employment. These contracts terminated on 5 December 2009. However, on 5 August 2009 Metrorail and SATAWU signed a collective agreement providing for fixed term contract workers (FTCWs) to be converted to permanent employees. The employees whose fixed term contracts were nevertheless terminated on 5 December 2009 referred an unfair dismissal dispute to Tokiso. After an initial arbitration award had been reviewed and set aside, Ms Harvey found in a new arbitration that the employees had been dismissed and that their dismissals were substantively and procedurally unfair. She ordered Metrorail to reinstate six of them and to pay the other two compensation equal to 12 months' remuneration. She also ordered Metrorail to pay their costs. It is that award that Metrorail seeks to have reviewed and set aside.

LABOUR COURT

Background

[4] The employees initially worked for Metrorail between 1999 and 2004. They all left Metrorail's employment at various dates and for different reasons, including resignation and retirement. In November 2006 they were reemployed as train guards on a series of successive fixed term contracts ranging from one month to one year. On 5 December 2009 they were informed that the contracts would not be renewed. They say they were dismissed; Metrorail says that the contracts merely terminated by effluxion of time.

[5] The moment giving rise to the dispute is a collective agreement signed by Metrorail and the majority union, SATAWU, on 5 August 2009. The fourth and further respondents are members of UTATU. It is common cause that UTATU later signed the agreement and that it is binding on both unions and their members, including the fourth and further respondents.[1]

[6] The main subject matter of the collective agreement is a salary increment. It is headed: "**2009-2010 WAGE AGREEMENT AND OTHER SUBSTANTIVE ISSUES**". Clause 1 reads as follows:

"PRASA shall effect an across-the-board (ATB) salary increment on pensionable salaries or Total Cost to Company of 8% for all qualifying Junior Grades employed at PRASA Corporate Office and Metrorail effective 1 April 2009."

[7] The term "qualifying Junior Grades" is not defined.

[8] Clause 2 reads as follows:

"**JUNIOR GRADES FIXED TERM CONTRACT WORKERS (FTCWs)**

2.1 PRASA shall convert the current status of Fixed Term Contract Workers (FTCWs) into one of permanent employment within Metrorail and Shosholoza Meyl.

2.2 The Fixed Term Contract Workers (FTCWs) will be absorbed by 1 April 2010. Full employment benefits such as pension, medical and housing allowances will only be extended on the effective date of 1 April 2010 when the PRASA retirement fund and medical scheme as well as remuneration policy are expected to be implemented by the

[11] The fourth and further respondents are members of UTATU. However, in the course of this dispute wending its way through arbitration, the Labour Court, another arbitration, and back to this Court, they lost confidence in the union. In these proceedings the fourth respondent, Mr Koopman, represented himself. The other employees were represented by Adv de Kock, instructed by Carelse Khan attorneys.

LABOUR COURT

company. PRASA shall within 30 days of signing of this agreement consult with labour on its remuneration philosophy and policy and the date of its implementation within the current financial year.

2.3 Parties undertake to form a Joint Steering Committee comprising of [*sic*] both management and labour to oversee the completion of conversion of FTCWs to permanent employment.

2.4 Should the parties not be able to absorb the FTCWs as planned, the steering committee will be mandated to move the timelines by a maximum of three months within the agreed principles."

[9] Under the heading, **APPLICABILITY AND CONDITIONS**, it is recorded that:

"4.1 This agreement applies to all qualifying junior grades within the bargaining forum currently employed by PRASA corporate office and Metrorail.

4.2 This agreement will be extended to all qualifying junior grades, including Fixed Term Contract Workers."

[10] It is common cause that the employees were employed at "junior grades". The fixed term contracts were due to expire on 6 November 2009. They were extended until 5 December 2009. It was not extended further and the employees were no longer placed on the duty roster. They referred a dispute to the Bargaining Council – to be conciliated and arbitrated under the auspices of Tokiso – on the same day, alleging unfair dismissal. Conciliation failed and they referred a dispute to arbitration.

[11] The first arbitrator, Ms Hilary Mofsowitz, found in Metrorail's favour. The employees took that award on review to the Labour Court. Rabkin-Naicker J found in their favour, set the initial award aside and referred it back to Tokiso for an arbitration *de novo*. It was heard by the second respondent, Ms Harvey.

The award

[12] Both parties called a number of witnesses at arbitration. The arbitrator considered and summarised the evidence. She found that the employees did not have a claim based on section 186(1)(b) of the LRA, as they did not form an expectation that they would be reemployed on the same or similar terms as those governed by the fixed term contracts. Instead, they argued that those

LABOUR COURT

contracts had been converted to permanent employment in terms of the collective agreement; and that subsequent to that agreement, they were unfairly dismissed.

[13] In order to determine whether that was so, the arbitrator had to consider the collective agreement in issue. She noted that collective agreements have been described as "the optimum regulatory instrument of the LRA". [2] She also noted that the agreement signed on 5 December 2009 is a collective agreement as defined in section 213 of the LRA. Minutes of meetings, on the other hand, do not have the status of collective agreements. A collective agreement, she pointed out, is binding and enforceable at law. It binds the employer and all the employees who are identified and expressly bound in the agreement; and it varies any contract of employment between and employer and employees who are bound by it.[3]

[14] With reference to the parol evidence rule and relevant case law[4], the arbitrator expressed the view that, where the terms of the collective agreement are clear and unambiguous, extrinsic evidence proffered to aid interpretation is inadmissible.

[15] Having regard to these principles, the arbitrator found that the employees were fixed term contract workers expressly identified in the collective agreement and that they and Metrorail were accordingly bound thereby. She disagreed with the argument raised by Mr *van Wyk*, the attorney who appeared for Metrorail at arbitration, that the agreement would only apply to those fixed term contract workers who would 'qualify' in terms of criteria to be established by the steering committee. She did so for the following reasons:

(a) The collective agreement refers to 'fixed term contract workers' six times without any indication that the term applies only to <u>some</u> fixed term contract workers. Clause 2 is the clause providing for them to be made permanent: it is headed "junior grades fixed term contract workers

LABOUR COURT

[2] Thompson and Benjamin *South African Labour Law* (Juta) AA1-134.

[3] Cf LRA s 23; *Rustenburg Base Metal Refiners (Pty) Ltd v NUM* [2002] 11 BLLR 1097 (LC); *Sigwali & ors v Libanon (a division of Kloof Gold Mining Ltd)* [2000] 2 BLLR 216 (LC); *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [2000] 1 BLLR 101 (LC).

[4] *Airport Handling Services (Pty) Ltd v TOWU* (2004) 25 *ILJ* 117 (LC) paras 8, 120; *FAWU v CCMA* [2007] 6 BLLR 711 (LAC).

(FTCWs)" and refers to them inclusively as a group throughout without qualification; and

(b) in clause 4 the adjective 'qualifying' is attached to 'junior grades' and not to 'FTCWs'. The wording is not 'qualifying fixed term contract workers'.

[16] In the light of this finding, the arbitrator held that the collective agreement accordingly varied each employee's contract of employment on 5 August 2009. That had the effect that their contracts of employment were converted to one of permanent employment. The steering committee's mandate was simply to "oversee the completion of conversion of fixed term contract workers to permanent employment". By this she understood that the task given to the steering committee was to supervise the process of accomplishing what was already agreed (converting all FTCWs into permanent employees).

[17] Turning to the applicability of the parol evidence rule, the arbitrator found:

"The collective agreement is written in plain language and its meaning is clear and unambiguous. The collective agreement is not vague or equivocal. I've had no difficulty in understanding it or interpreting it. I cannot agree with the employer's submission that it is sufficiently vague as to render extrinsic evidence admissible. I accordingly do not find it necessary to deal with the parol evidence tendered in order to explain the intention behind, motivation for or meaning of the collective agreement."

[18] The arbitrator further pointed out that the collective agreement enjoyed the special status conferred by the LRA. Accordingly, no subsequent decisions of the steering committee could have superseded or contradicted its terms. The minutes of the steering committee meetings are not collective agreements. The members of the steering committee lacked the power to renegotiate, alter, vary or otherwise tinker with the terms of the collective agreement.

[19] The arbitrator concluded:

"The collective agreement therefore contains a complete solution to the issues in dispute: the [employees] became permanent. The collective agreement was not varied, and it is binding and enforceable as at 5 August 2009.

Their contracts of employment having been varied by the collective agreement on 5 August 2009, the termination of the [employees'] (now indefinite duration) contracts in early December 2009 constituted a dismissal as defined in section 186(1)(a) of the LRA (*an employer terminated a contract of employment with or without notice*). These

LABOUR COURT

dismissals, being without a fair reason and without compliance with a fair pre-dismissal procedure, were unfair."

[20] In the light of this finding, the arbitrator dealt with the appropriate remedy. She pointed out that the primary remedy for unfair dismissal is reinstatement. However, given the period of more than 3 ½ years that had elapsed since their dismissal, she did not order Metrorail to pay them full retrospective backpay but limited it to roughly 24 times their monthly salary. With regard to the two employees who were past retirement age, she awarded them compensation of 12 months' remuneration each.

[21] Although, as the arbitrator noted, it is unusual for an arbitrator to order an employer to pay costs, she nevertheless did so. She did so because she found that the employer sought to avoid the consequences of the collective agreement and it was unreasonable for it to choose to defend the matter through two arbitrations and a Labour Court hearing, involving expensive legal representation.

[22] Before I deal with the review grounds raised by Metrorail at this second round in the Labour Court, I need to deal with the late filing of the fourth respondent's answering affidavit.

Condonation: Koopman's answering affidavit

[23] The fourth respondent, Mr Koopman, represented himself. He filed his answering affidavit some 130 days late. He only applied for condonation after the applicant had raised it. Metrorail opposes his belated application for condonation.

[24] I have considered Mr Koopman's belated condonation application at the hand of the well-known principles in *Melane v Santam Insurance Co Ltd*.[5] The delay is substantial. The reasons for the delay are primarily that Mr Koopman is unrepresented, that he is not familiar with court proceedings, and that he consequently filed a number of unnecessary interlocutory applications before delivering his answering affidavit and application for condonation. Although he represents himself, he is in the same position as all of the other employees.

[5] 1962 (4) SA 531 (A).

LABOUR COURT

Their pleadings were filed in time. A full set of pleadings and heads of argument served before the court at the hearing of this matter. There is no prejudice to the applicant and it would not be in the interests of justice to non-suit Mr Koopman alone. I have therefore exercised my discretion to grant him condonation for the late filing of his answering affidavit.

Review grounds

[25] Metrorail raises four grounds of review. I shall deal with each of them.

First ground of review: jurisdiction

[26] Metrorail's first ground of review is that the arbitrator "failed to establish the jurisdictional prerequisite" permitting her to entertain the dispute. It does not take issue with her finding that the termination of the employees' contracts did not fall within the scope of section 186(1)(b) of the LRA. Its legal representative then argued that, "in so finding, the [arbitrator] essentially determined that there was no dismissal in law. In spite of this material finding [she] nevertheless proceeded to arbitrate the dispute as an unfair dismissal dispute after she simply assumed jurisdiction (without establishing whether she could do so) on the basis of the interpretation and application of the agreement." He further argued that, in terms of section 24 of the LRA, only the CCMA had jurisdiction to interpret the collective agreement.

[27] It is not correct that the arbitrator found "that there was no dismissal in law". In fact, she found the exact opposite. She found that the employees' fixed term contracts had been converted into permanent employment contracts; that the employer had terminated their employment; *ergo*, that they had been dismissed. Once that was established, the arbitrator had jurisdiction.

[28] The test for review on a jurisdictional question is not the reasonableness test set out in *Sidumo*[6] and *Herholdt*[7]. It is simply whether the arbitrator was right or wrong in determining that she had jurisdiction.[8]

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[6] *Sidumo & anor v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[7] *Herholdt v Nedbank Ltd* [2013] 1 BLLR 1074 (SCA).

[8] *SARPA v SA Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC) 2098C – 2099D.

LABOUR COURT

[29] The dispute that the employees referred to conciliation (and, when it was not resolved, to arbitration) is described as "unfair dismissal". That is the dispute that the arbitrator had to decide. Having correctly found that the dispute could not be categorised under s 186(1)(b) of the LRA, she nevertheless had to decide whether they had been dismissed; and if so, whether it was fair.

[30] In her judgment reviewing and setting aside the original arbitration award, Rabkin-Naicker J said:

"In my judgment, it is extraordinary that the arbitrator made no effort at all to interpret the wage agreement in her award. Rather, she accepted evidence of what Montana 'meant to say' when he made a statement about fixed-term employees in Metrorail. This amounts to a gross irregularity in the conduct of the proceedings and a failure to allow a fair trial of the issues. The award is therefore not one that a reasonable decision-maker could make."

[31] Little wonder then, that when called upon to decide the unfair dismissal dispute afresh, the new arbitrator (Ms Harvey) did exactly what Rabkin-Naicker J suggested, i.e. to interpret the wage agreement.

[32] In *Metro Bus (Pty) Ltd v SAMWU*[9] it was held that, despite the provisions of s 24, the Labour Court may interpret collective agreements when determination of their meaning is incidental to disputes falling within its jurisdiction. The same must hold true for an accredited agency of a bargaining council. In this case, the arbitrator had jurisdiction to decide whether the employees had been dismissed. In order to do so, she had to decide whether their fixed term contracts of employment had been converted to permanent employment before their services were terminated. And in order to answer that question, she had to interpret the agreement. The interpretation of the agreement, in other words, was incidental to her task of deciding whether the employees had been dismissed.

[33] The SCA made a similar point in *Johannesburg City Parks v Mphahlani N.O.*[10] when it distinguished between a "dispute" and an "issue in dispute"[11]:

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[9] [2009] 9 BLLR 905 (LC).

[10] [2012] 1 BLLR 1 (SCA); (2011) 32 *ILJ* 1847 (SCA), followed by this Court in *SAOU v Gauteng Department of Education* [2010] ZALCJHB 341 (LC) (21 December 2010) para [37].

[11] Paras [18] – [20].

LABOUR COURT

““There are a number of areas in the LRA which contain references to disputes or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolution. Some of the sections of the LRA which contain such references are sections 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be dealt with in order to resolve the main dispute. Let me make an example to illustrate the distinction that I seek to draw between a dispute and an issue in dispute. One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement, the employer was supposed to follow a certain procedure before dismissing the employee, but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer might argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement were applicable or were complied with before the employee was dismissed is an issue necessary to be decided in order to resolve the real dispute.

In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It would be different, however, when the main dispute, as opposed to an issue in a dispute, is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute would be required to be resolved through arbitration in terms of the LRA."

[34] In this case, the question before the arbitrator was whether the employees had been dismissed; and if so, whether the dismissal was fair. In the course of deciding that question, the arbitrator had to interpret the terms of the collective agreement converting fixed term contract of employment to permanent employment. She undoubtedly had jurisdiction to hear the unfair dismissal

LABOUR COURT

dispute. In the course of resolving the dispute, she had to interpret the terms of the collective agreement.

[35] The arbitrator had to determine the real dispute between the parties. The Constitutional Court held in *CUSA v Tao Ying Metal Industries*[12] that a commissioner must, as the LRA requires, deal with the substantial merits of the dispute.

'This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

[36] The arbitrator in this case correctly considered that she had the necessary jurisdiction to determine the real dispute between the parties; and, in the course of doing so, she had to interpret the terms of the wage agreement. This ground of review must fail.

Second ground of review: Interpretation and application of collective agreement

[37] The applicant takes issue with the arbitrator's reliance on the parol evidence rule when interpreting the collective agreement in circumstances where she found there was no ambiguity in the applicable clauses. The arbitrator's approach was consistent with precedent in this Court, for example in *FAWU v CCMA*:[13]

"What is accordingly very clear is that, where a court, or a commissioner of the CCMA for that matter, is tasked to interpret a written contract, or as in the present case, a collective agreement, it must give to the words used by the parties their plain, ordinary

[12] [2009] 1 BLLR 1 (CC) para 65.

[13] [2007] 6 BLLR 658 (LC); (2007) 28 *ILJ* 382 (LC) para [45].

LABOUR COURT

and popular meaning and if there is no ambiguity in the words of the contract, they must be given their plain, ordinary and popular meaning."

[38] This Court recently considered the development of the test in the interpretation of statutes and other documents in *POPCRU obo Ngope v Minister of Safety and Security & others.*[14] The most recent summary is to be found in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[15]:

> "In *Natal Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) the current state of our law in regard to the interpretation of documents was summarised as follows:
>
> '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 unnecesary to add unduly to the burden of annotations by trawling throught 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 the 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. 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

[1414] [2014] ZALCJHB 352 (LC) (16 September 2014) para [19].

[15] 2014 (2) SA 494 (SCA) 499-500 paras 10-12.

LABOUR COURT

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.'

... We had cited to us the well-known and much cited summary of the earlier approach to the interpretation of contracts by Joubert JA in *Coopers & Leibrandt and Others v Bryant* 1995 (3) SA 761 (A) that:

'The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

to the context in which the word or phrase is used with its inter-relation to the contract as a whole, including the nature and purpose of the contract ...

to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...

to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages, but is 'essentially one unitary exercise'.

Accordingly it is no longer helpful to refer to the earlier approach."

LABOUR COURT

[39] The applicant's legal representative also referred to *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* [16]. But there the SCA held that the integration (or parol evidence) rule remains part of our law. It pointed out that interpretation is a matter of law and not of fact and is a matter for the court and not for witnesses. It also confirmed that evidence to contextualise the document must be used as conservatively as possible. As Harms JA said:[17]

"Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ quite rightly responded with 'So what?' (*Scanvaegt International A/s v Pelcombe Ltd* 1998 EWCA Civ 436). All this was sadly and at some cost ignored by all."

[40] That was more or less the response of the arbitrator in the case before me. Confronted with a collective agreement unambiguously stating that the FTCWs would be made permanent, her response (not in those words) to the *ex post facto* and conflicting evidence of what criteria the standing committee actually applied afterwards and what Mr Lucky Montana – who wasn't called to testify – said at the various roadshows and what he may have meant, was essentially, "So what?". The agreement was clear. It had to be applied to the employees now before court.

[41] That conclusion does not appear to me to be so unreasonable that no other arbitrator could have come to the same conclusion. I do not agree with the applicant that it is wrong in law; but even if it were, that does not make the award reviewable.[18] As Judge Murphy[19] has pointed out, the grounds of review in section 145 are identical to those in section 33(1) of the Arbitration Act and reflect the intention of the legislature that CCMA awards would be 'final' and would be interfered with in very limited circumstances. 'Limiting interference to

LABOUR COURT

[16] 2009 (4) SA 399 (SCA) para [39].

[17] At para [41].

[18] *NUM v Samancor Ltd (Tubatse Ferrochrome*) [2011] 11 BLLR 1041 (SCA) para 7; *Hira v Booysen* [1992] 2 All SA 344 (A) 359; *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.

[19] Murphy 'An appeal for an appeal' (2013) 34 *ILJ* 1 at 5. See also Wallis 'The Rule of Law and Labour Relations' (2014) 35 *ILJ* 849 at 856–857.

the narrow grounds of misconduct or gross irregularity', he noted, 'generally means that the parties are bound by the finding of the arbitrator even if he or she errs on the facts or the law unless the mistake is gross to the point of evidencing misconduct or gross irregularity'. And, as Emma Fergus[20] has commented:

'The effect of this is to declare reasonable outcomes resolutive of procedural errors or poor reasoning, unless the commissioner involved wholly misunderstood the matter before him or her. In turn, neither inadequate reasons nor failure to take account of relevant factors (or vice versa) affects the legitimacy of commissioners' awards. Seemingly, too, errors of law or fact are unimportant.'

[42] This ground of review also fails.

Third ground of review: Relief

[43] The applicant further takes issue with the relief that the arbitrator awarded, should her findings on jurisdiction and dismissal be sustainable (as I have found).

[44] The applicant argues that the arbitrator "disregarded her duty to make the enquiry contemplated in s 193(2) of the LRA, failed to recognise a critical issue that she was required to deal with and ignored relevant and material evidence which was required to be applied to that enquiry." It further submitted that, "when determining a dismissal dispute, an arbitrator has to consider whether dismissal is, in the circumstances, fair and reasonable".

[45] That is not correct. Section 193(2) of the LRA postulates reinstatement as the primary remedy, as the arbitrator correctly found. It compels the arbitrator to reinstate, unless certain conditions prevail:

"The … arbitrator *must* require the employer to reinstate or re-employ the employee *unless* –

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

[20] Emma Fergus, 'Reviewing an appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47 at 59.

LABOUR COURT

(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure".

[46] It is clear that the conditions in subsections (a) and (d) did not apply in this case. What the arbitrator had to consider, therefore, were the factors in (b) and (c), and not simply whether it would be "fair and reasonable" to reinstate.

[47] It is so that the arbitrator only noted – correctly – that "the primary remedy for unfair dismissal is reinstatement". She did not set out in her reasoning whether she considered the exceptions outlined above. But that does not make the outcome unreasonable. This Court has to consider the evidence before the arbitrator "in the round" in order to assess whether the arbitrator's conclusion was a reasonable one. The employees' contract of employment had been converted to permanent employment. The arbitrator did consider the specific circumstances of two employees who had reached retirement age. She did not order the employer to reinstate them. It is therefore clear that she did consider the circumstances and whether it would be reasonably practicable to reinstate. She also limited the amount of back pay due to the employees. The result, having regard to all the surrounding circumstances, is not so unreasonable that no reasonable arbitrator could have ordered the same relief.

[48] This ground of review also fails.

Fourth ground of review: Costs

[49] The applicant argues that the arbitrator could only order costs if its conduct was frivolous or vexatious. But that is no longer what the LRA says. The reference to "frivolous or vexatious conduct" appeared in the subsection before it was amended as long ago as 2002. In terms of s 138(10) as it now reads, the arbitrator "may make an order for the payment of costs according to the requirements of law and fairness" and in accordance with the rules of the CCMA. The current CCMA rules do not contain a provision for costs, other than rule 39, stating that "the basis on which a Commissioner may make an order as to costs in any arbitration is regulated by section 138 (10) of the Act ". But the CCMA has issued a practice note recommending an approach to costs as

LABOUR COURT

adopted in *NUM v East Rand Gold & Uranium Co Ltd.*[21] In that case, the elements of "law and fairness" were held to include the following considerations: parties should not be discouraged from invoking the dispute mechanism of the LRA; costs should not lightly be ordered if a party acts in good faith; a costs award should not damage an ongoing relationship between the parties; and the conduct of the parties is relevant.

[50] In this case, the arbitrator noted that it is unusual for an arbitrator to order an employer to pay costs. Nevertheless, in this case, she was of the view that it was fair to do so. That is because, in her view, the employer was seeking to avoid the consequences of the collective agreement.

[51] The arbitrator properly applied her mind to the question of costs. She took into account the relevant section of the LRA. She used her discretion. This court will not, in those circumstances, interfere with that discretion on review.

Conclusion

[52] The applicant has not established that the award is open to review on any of the grounds it has raised. With regard to costs, I take into account that both parties have asked for costs to follow the result; and that the employees are no longer represented by their trade union. Although six of them will return to work and will therefore have a continued relationship with Metrorail, that factor must be weighed up against the other factors I have mentioned. In law and fairness, I agree with the parties that costs should follow the result.

Order

The application for review is dismissed with costs.

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Anton Steenkamp

Judge

[21] (1991) 12 *ILJ* 1221 (A).

LABOUR COURT

APPEARANCES

APPLICANT:	Grant Marinus of Werksmans.
FIFTH AND FURTHER RESPONDENTS: Instructed by	Coen de Kock Carelse Khan.

LABOUR COURT