THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR1174/2017

In the matter between:

POPCRU OBO AGNES NKUNA **Applicant**

And

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **First Respondent**

JACKSON MTHUKWANE **Second Respondent**

MINISTER OF POLICE **Third Respondent**

Enrolled: **7 July 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 31 August 2020.**

Summary: **Review application – if the parties decided to proceed by way of a stated case, it must set out both facts and issues in a crisp and unequivocal manner – failure to do so vitiates the award.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant, Police and Prisons Civil Rights Union (POPCRU), launched this application on behalf of its member, Ms Agnes Nkuna (Ms Nkuna), seeking an order reviewing and setting aside the arbitration award issued by the second respondent, Mr Jackson Mthukwane (arbitrator), under case number PSSS 679-14/15 under the auspices of the first respondent, Safety and Security Sectoral Bargaining Council (SSSBC), dated 6 March 2017. It also seeks condonation for late filing of the review application. The third respondent, Minister of Police (Minister), is opposing both applications and in turn seeks condonation for the later filing of its answering affidavit.

[2] Having considered both applications for condonation, I am satisfied that both parties have shown good cause for the grant of condonation.

Pertinent facts

[3] Ms Nkuna was in the employ of the South African Police Service (SAPS) as a Senior Administrative Officer with effect from 1 February 2006. She was stationed within the Human Resources Management Division at National Office.

[4] Ms Nkuna was charged for several allegations of misconduct. On 24 December 2013, she was placed on precautionary suspension without remuneration in terms of Regulation 13(2) of the Regulations for the South Africa Police Service[1] (Regulations). It must be mentioned that this decision was preceded by an opportunity to make representation being afforded to her.

[5] Ms Nkuna appeared before an internal disciplinary hearing on 19 March 2014, she was found guilty and a sanction of dismissals was rendered. Disgruntled by the outcome of the disciplinary enquiry, on 11 April 2014, she noted an appeal through POPCRU, challenging the finding and sanction of dismissal.

[6] Given the fact that the appeal was lodged outside the prescribed period; a condonation application was duly lodged. On 26 June 2014, the appeals authority granted the condonation.

[1] Notice No. R643, GG28958 of 3 July 2006.

[7] In terms of the Regulation 17(9), the appeals authority had thirty days within which to finalise the appeal. Yet, the appeals authority only issued its findings on the merits on 5 December 2014. POPCRU impugned the outcome as it was issued without affording Ms Nkuna an opportunity to supplement her ground of appeal subsequent to her receiving the transcribed record.

[8] POPCRU then referred a dispute of interpretation of the Collective Agreement in terms of section 24 of the Labour Relations Act[2] (LRA). The parties agreed to file heads of argument without leading oral evidence despite the patent disputes of fact. Unfortunately, they did so with the blessings of the arbitrator.

[9] The arbitrator pronounced on the interpretation of Regulations 13(2), 16(a) and (b) and 17(9); finding that POPCRU failed to prove that SAPS contravened these Regulations, hence this application.

Applicable legal principles

[10] The inveterate practice of dealing with issues on the basis of written submissions without leading oral evidence and without concluding a stated case has been denounced in various decisions of the Labour Appeal Court and this Court. Pertinently, *Public Servants Association and others v Minister of Correctional Service and Others,*[3] the LAC, beating the drum for the importance of a stated case, stated that:

> [16] In *Arends and others v South African Local Government Bargaining Council and others*,[4] Murphy AJA set out the approach to follow when parties want an arbitrator or court to decide a matter on a stated case extensively. I repeat it herein for the sake of emphasis and to focus arbitrators' attention to the best practice. Murphy AJA stated the approach thus:
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> > 'The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral

[2] Act 66 of 1995, as amended.
[3] [2017] 4 BLLR 371 (LAC).
[4] (2015) 36 ILJ 1200 (LAC) [also reported at [2015] 1 BLLR 23 (LAC) – Ed] at paras 15 - 17.

evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. Courts of law and arbitration tribunals dealing with disputes of right exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to give advice upon differing contentions about the meaning of an agreement. Where a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case a factual substratum which shows what has arisen and how it has arisen. The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts, defeats the purpose of the requirements of a stated case and as this case shows will lead to problematic results.

Rule 20(1) of the Rules for the Conduct of Proceedings before the CCMA (which might be followed in proceedings before bargaining councils) allows for a pre-arbitration conference at which the parties must attempt to reach consensus inter alia on the agreed facts, the issues to be decided, the precise relief claimed and the discovery and status of documentary evidence. The parties in this case did not engage in a proper pre-arbitration process with the aim of agreeing a stated case. Although the CCMA rules do not include provisions equivalent to the provisions of rules 33(1) and (2) of the rules of the High Court, parties who prefer to proceed by way of a stated case at the CCMA or before a bargaining council, in my view, should follow their prescriptions. These rules provide that the parties to any dispute may, after the institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court. Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties, their contentions thereon and shall be divided into consecutively numbered paragraphs. The parties must annex to

> the statement copies of documents necessary to enable the court to decide upon such questions.
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> Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case. An arbitrator faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request.'

[17] The factual matrix is important because each agreement must be placed in its proper context. Agreements are not made in a vacuum; they are a product of a particular background, context and knowledge of the parties thereto. It has been said that words without context mean nothing and that context is everything. That however does not mean that the words used by the parties become insignificant. Consideration must always be given to the language used in the particular context without allowing the context to drown the words chosen by the parties. The words used by the parties are the foundation on which the court and or arbitrator must build its interpretation. The process is succinctly set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.

[18] I have sympathy for the arbitrator because he was called upon to interpret a collective agreement devoid of a factual matrix. He, therefore, chose what he perceived to be the rational and logical contention but failed to interpret the words that he was called upon to interpret in their proper context. It is clear from the approach in relation to the adjudication of a stated case and the interpretation of contracts that an agreement including a collective agreement cannot properly be interpreted without a factual matrix.

[19] The absence of a factual plinth on which to build his interpretation renders his conclusion unreasonable. He could not apply his mind properly to the issue before him without a factual substratum. He should have refused to deal with the matter without an agreed set of facts. This irregularity distorted the result. The decision of the arbitrator falls outside the band of reasonable decisions and is consequently one which a reasonable arbitrator could not reach.' (Emphasis added and footnoted omitted)

[11] In the present instance, the arbitrator was similarly faced with an unenviable task of interpreting the Regulations 13(2), 16 (a) and (b) and 17(9) without a factual anchor. The elusiveness of the factual matrix is apparent from the pleadings. By way of example, the computation of the time in terms of the impugned Regulations is controversial. The actual date of the noting of the appeal is in dispute. POPCRU contends that it should be the date when the appeal was noted even though it had filed a condonation application. Whilst SAPS contents that it is the date from which the transcribed record of the disciplinary enquiry was received. Obviously, there must be evidence led in order to properly pronounce on this issue and compute the quantum of compensation, if at all.

[12] I must emphasise that arbitrators should not yield to any flotsam and jetsam mooted as a stratagem to curtail the proceedings. If the parties decided to proceed by way of a stated case, it must set out both facts and issues in a crisp and unequivocal manner.

Conclusion

[13] It follows that the arbitrator misconstrued the nature of the enquiry and consequently rendered a patently unreasonable award.[5] On this ground alone, the arbitration award is vitiated by this irregularity.

[14] The award stands to be set aside and the matter should be remitted to the SSSBC for the proper airing of the dispute before an arbitrator other than the second respondent.

Costs

[15] It is trite that costs do not follow the result in this Court. Moreover, there is persisting collective agreement relationship between the parties.

[16] In the circumstances, I make the following order:

[5] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79; *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

Order

1. The arbitration award issued under case number PSSS 679-14/15 dated 6 March 2017 is reviewed and set aside.

2. The matter is remitted to the SSSBC to be heard *de novo* before an arbitrator other than the second respondent.

3. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa