REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

CASE NO'S: P118/11;
125/11 & 127/11

In the matter between:

NEHAWU Applicants

PSA

HOSPERSA

PAWUSA

& FURTHER APPLICANTS

and

MEC: DEPARTMENT OF HEALTH,
EASTERN CAPE First Respondent

SUPERINTENDENT GENERAL:
DEPARTMENT OF HEALTH, EASTERN CAPE Second Respondent

THE PREMIER OF THE EASTERN CAPE Third Respondent

MINISTER: PUBLIC SERVICE AND ADMINISTRATION Fourth Respondent

Date of application: 26 September 2012

Date of judgment: 11 February 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] This application concerns a question of law referred in terms of section 20 of the Arbitration Act no. 42 of 1965 ('the Act') for the opinion of this court. Section 20 of the Act provides:

> 'An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.'[1]

[2] I do not intend, for the purposes of this opinion, to traverse the history of the dispute between the parties nor do I intend, despite the invitation and temptation to do so, to canvass issues beyond the narrow question of law posed by the arbitrator. The arbitrator is empowered to decide all questions of law and fact that fall within his terms of reference, and it is not for this court to venture beyond the bounds of the immediate question that has been referred. The arbitrator must necessarily be left to complete the process that has been entrusted to him, and to make such decisions and rulings that may be necessary to give effect to his

[1] Section 157 (3) of the Labour Relations Act provides : ' Any reference to the court in the Arbitration Act (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.'

mandate.

[3] The dispute between the parties is long-standing. It has its roots in the merger of the of the public services of the former Ciskei, the former Transkei and the former Cape Provincial administration into a single public service for the Eastern Cape Province. The present referral is made more directly in the context of a dispute between the parties consequent on the province's Department of Health granting promotions and salary increases to certain of its employees during April to June 2009. The department contends that the promotions and increases were unauthorised, and that they resulted in massive and immediate unauthorised expenditure. Shortly after the promotions and increases had been effected, in September 2009, the department decided to reverse those promotions that it believed were unauthorised, and to recover the resulting payment of augmented salaries from the affected employees in terms of s 38 of the Public Service Act.

[4] The implementation of that decision has been the subject of litigation before this court, in which the unions *inter alia* sought and obtained an interim interdict in March 2011 restraining the department from reversing the promotions and increases and recovering the monies paid to employees.[2]

[5] The parties ultimately decided to refer the substantive dispute between them to arbitration. On 15 August 2011, the parties agreed to appoint Adv. Floors Brand as arbitrator. The arbitration hearing was set down for 12 and 13 October 2011. The arbitration did not commence. Instead, the

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[2] The rule *nisi* was extended on a number of occasions until 17 August 2012, when Basson J discharged the rule.

parties concluded a procedural agreement in order to complete the preparatory phase of the arbitration and in terms of which individual employees would be interviewed and provided with information. This process has been referred to as the 'information road show'. The arbitration was thereafter scheduled to commence on 26 January 2012. On that date, the parties entered into what has been termed a 'settlement agreement'. The first few clauses of the settlement agreement are relevant to these proceedings, and provide as follows:

'1. The parties hereto withdraw their dispute from arbitration, subject to the agreement set out hereunder.

2. Subject to the provisions of clause 4, the promotion of the employees of the Department of Health whose names are set out in Annexure 'A' hereto is hereby reversed with the result that the employees shall revert to the pre-May 2009 ranks/grades/levels as held at that time and shall be paid the salaries and/or remuneration commensurate with those ranks/grades/levels.

3. The reversal of the promotion shall take effect on 31 March 2012.

4. The affected employees shall be considered for whatever promotion that has, in the course of time, become lawfully due, regard being had to the relevant instruments, namely:

4.1 The Public Service Act, 1994 (Proclamation 103 of 1994);

4.2 The Public Service Regulations; and

4.3 any and all Collective Agreements, Circulars, Resolutions, Directives, Arbitration awards, Court orders and the applicable PAS documents duly issued during the period 1994 to the date when the employees concerned are considered for promotion in terms of this agreement.

N.B: for the sake of certainty, a list of the regulatory instruments contemplated in paragraph 4.3 about shall be provided by 03 February 2012.

5. The arbitration process (referred to in clause 4 above) shall be conducted by the Arbitrator, Mr Floors Brand, and shall take

> place from 6 February 2012 to 31 March 2012. The parties agree that the arbitrator's terms of reference shall be those set out in annexure "B" hereto….
>
> 7. For those persons his assessment in terms of clause 4 takes place after 31 March 2012, any salary adjustment will be made retrospective to 31 March 2012. With a process referred to in clause 4 above results in an employee been promoted before 31 March 2012, the promotion contemplated in clause 4 above shall be implemented on the 31 March 2012…

[6] The settlement agreement was made an order of this court on 15 February 2012.

[7] After a challenge to the arbitrator's powers to make rulings on which of the regulatory instruments identified in clause 4.1 of the agreement applied, the parties agreed that the arbitrator be mandated to 'determine the applicability or otherwise of the instruments'. Despite that agreement, and during the arbitration hearing in March and April 2012, differences of opinion emerged as to the application of certain instruments.

[8] On 17 April 2012, the arbitrator made an interim ruling. In his ruling, the arbitrator records the background to the issue before him in the following terms:

> '[7] At the commencement of a further meeting held on 11 April 2012, Mr Mbenenge, indicated that his challenge against the use of the Collective Agreement of 1997 and other instruments is that they are no longer valid or, for that matter applicable because of the new dispensation which was introduced by the 2001 Regulations. As he put it, the affected employees "are barred from relying on any of the instruments whose terms are not consistent with the provisions of the 2001 regulations".
>
> [8] Mr Buchanan on behalf of the PSA argued that this is a question of law, and that notwithstanding the parties' intention by the

> agreement to empower me to determine the applicability of the instruments or some of them, I do not have the power in law to determine questions of law, which includes the validity of a collective agreement. He requested me to rule that I do not have the required power to determine the question at hand and for an indulgence to approach the Court to rule on the issue….

[9] The arbitrator concluded his interim ruling by noting that he deemed it appropriate to refrain from deciding the question at hand and that he considered it appropriate for an opinion to be sought in terms of s 20 of the Arbitration Act.

S 20

[10] In *Road Accident Fund v Cloete* 2010 (6) SA 120 (SCA), the Supreme Court of Appeal recently considered the scope of s 20 of the Act. The court observed that when parties agree to refer their dispute to arbitration, they select an arbitrator as the judge of fact and law. Ordinarily, the award of the arbitrator is final. Section 20 constitutes an exception to the general principle that the arbitrator makes a final decision on both matters of fact and law. Since it is an exceptional provision, and out of deference to the principle of party autonomy, the court's powers under s 20 should be sparingly exercised. First, the mere fact that an arbitrator has seen fit to state a question of law for the opinion of the court does not oblige the court to furnish an opinion. Secondly, the factors that might appropriately be taken into account in the exercise of the discretion that the section confers (none of them being conclusive or binding) are that the determination is likely to produce substantial savings in costs, and that the application was made without delay.[3]

[11] None of the parties to the present proceedings contends that the court should not provide the opinion sought by the arbitrator and indeed, there

[3] See paragraphs [36] and [37] of the judgment.

are cogent reasons why the court should do so. As the arbitrator points out in his interim ruling, the question of law posed is fundamental to the basis on which the arbitration is to be conducted. In particular, if the collective agreement and other instruments that were applicable prior to the 2001 Regulations remain valid and in force, many of the affected employees may qualify for promotion and *vice versa*. Further, the arbitrator has recognised the inevitability of an application for review, whatever his decision. A later challenge to the exercise of the arbitrator's powers may thus be obviated by the present application. In these circumstances, I am satisfied that the interests of justice are served by entertaining the present application.

[12] The respondents initially sought to broaden this enquiry beyond that stated above, including the determination of an alleged counter-application that a decision by the first respondent taken on 15 April 2009 and certain ensuing decisions taken by the superintendent-general for Health, are unlawful and invalid. The counter-application was not pursued at the hearing of the application. All that remains for decision therefore is the question of law stated for the opinion of the court.

The question posed by the arbitrator

[13] As I have indicated, the question of law arose in the context of a challenge by the respondents' counsel to the validity of certain of the instruments listed in the settlement agreement on the basis *inter alia* that they were no longer valid or applicable by virtue of the promulgation of the 2001 Regulations. Regrettably, the arbitrator has not formulated the question of law that he wishes to be determined with any degree of clarity. Paragraph [17] of his interim award comes closest to defining the issue. It reads as follows:

> 'If I look at the basis of Mr Mbenenge's challenge then it is clear that it would be necessary to decide what legal effect the 2001 Regulations had on instruments that were applicable prior to the Regulations

> coming into operation, which includes a collective agreement. Hence, a ruling on this issue may have the effect that the collective agreement is no longer valid, bearing in mind that the LRA gives legal status to collective agreements – see s 23 of the LRA. The new dispensation introduced by the 2001 Regulations is clearly not consistent with, in particular, Collective Agreement no 1 of 1997.'

[14] If regard is had to this passage and to the terms of the award as a whole, the question of law is a crisp one can be formulated in the following terms: Are the applicants entitled to rely upon the legal instruments stipulated in clause 4.3 of the parties' arbitration agreement notwithstanding that all or any of them may be inconsistent with the provisions of the Public Service Act or the 2001 Regulations promulgated in terms of that Act?

Analysis

[15] The opinion sought does not require the court to make any determination of the validity of any of the instruments sought to be introduced only on account of matters arising from the application of the instruments, for example, whether any particular instrument was in fact concluded, whether the affected employees fall within a class of employees covered by the instrument concerned, or whether the promotion or increase at issue complies with the terms of any particular agreement. Those are matters that relate to internal consistency and compliance which, if necessary, must be determined by the arbitrator. The request for an opinion extends only to those instruments that the applicant contends stand in conflict with an Act of parliament or secondary legislation, and in particular, the Regulations promulgated in 2001 under the PSA.

[16] The respondents contend that the agreements which pre-date the promulgation of the 2001 Regulations fell away in the face of a new statutory regime, applicable from 1 May 2001, the date on which the

Regulations came into force. They contend that the collective agreements concluded before the promulgation of the Regulations have been superseded, and that at least to the extent that they are inconsistent with the Regulations, the union parties may not rely on these terms.

[17] The Regulations prescribe the process by which promotion in the public sector is governed. In short, the Regulations require that there be a vacant post in the approved establishment, budgeted funds to fill the vacancy, advertisement of the vacant post, fair selection from the pool of applicants and written approval by the executing authority.[4]

[18] Section 23 of the LRA extends statutory recognition to and confers legal status on collective agreements. The section provides that validly concluded collective agreements are in defined circumstances binding on the parties to those agreements, and on the members of those parties. It is also possible in terms of s 23 (1)(d) to make collective agreements binding on employees who are not members of any union party to the agreement.

[19] To the extent that the applicants contend that as a general proposition, a collective agreement trumps any applicable regulatory measure, this cannot be so. Collective agreements, despite the status conferred on them by s 23 of the LRA, are subject to the principle of legality. It follows that a collective agreement that contains terms in conflict with any applicable statutory instrument must yield to the instrument, at least to the extent that the terms of the collective agreement is inconsistent with the applicable instrument.

[20] Given the terms of the question posed, a number of obvious qualifications to the general proposition stated above should be recorded. Clause 4 of the settlement agreement requires the arbitrator

[4] See Regulation VII, C-F.

to consider each individual's eligibility for promotion for the period from 1994 to date. In my view, the agreement does not limit eligibility for promotion to the post-2001 period. That being so, the arbitrator is required to determine each employee's eligibility in accordance with the instruments then applicable. The 2001 Regulations do not operate with retrospective effect. The arbitrator is therefore not precluded from considering and giving effect to instruments that pre-date the Regulations (in so far as the instruments are relevant to a particular case) only because those instruments are inconsistent with the terms of any Regulation. In other words, the 2001 Regulations cannot be used as a basis to determine the validity of instruments created before the promulgation of the Regulations.

[21] The second qualification that I would record is that where the terms of a statutory instrument are themselves made subject to any collective agreement, in the event of a conflict, the terms of the collective agreement must prevail. The Labour Relations Act, for example, contemplates that a collective agreement may vary or limit even constitutionally entrenched rights.[5] The Basic Conditions of Employment Act similarly acknowledges a degree of party autonomy by permitting parties to a collective agreement to vary statutory terms.

[22] In summary:

1. Collective agreements are subject to the principle of legality, meaning that collective agreements do not on account only of their nature or the status conferred on them by the LRA trump the provisions of any statutory instruments. Collective agreements must be read and applied subject to the terms any relevant statutory instrument. A statutory instrument may itself accord primacy to collective agreements, in which case the instrument must necessarily be read and applied subject to the collective agreement.

[5] For example, s 65 of the Act permits parties to limit the scope of the right to strike through the mechanism of a collective agreement.

2. Statutory measures, unless expressly stated to the contrary, do not affect the validity or application of previously applicable instruments (including collective agreements) only because those instruments are inconsistent with the statutory measure. In any dispute concerning the rights and obligations of parties at any defined point, the nature of those rights and obligations must be determined in accordance with the regulatory dispensation applicable at the time.
3. It follows that the union parties in the present dispute are entitled to rely on all collective agreements, resolutions and directives in respect of periods during which they were applicable, notwithstanding that all or any of them may be inconsistent with the provisions of the 2001 Regulations and that the arbitrator is entitled, in the discharge of his mandate, to have regard to them.

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André van Niekerk
Judge of the Labour Court

Representation

For NEHAWU: Adv. M Eujen, instructed by Cheadle Thompson and Haysom Inc.
For PSA: Adv. R Buchanan SC, instructed by Brown Braude & Vlok Inc
For HOSPERSA: Adv. R Seggie SC
For the respondents: Adv. P Pretorius SC, with Adv. Mbenenge SC, instructed by the state attorney.