Public Servants Association and others v Minister of Correctional Service and others

(2017) 26 LAC 4.2.1.

Reported in Butterworths	[2017] 4 BLLR 371 (LAC)
Case No.	JR2363/2011 and JA 52/2014
Judgment Date	26/05/2016
Jurisdiction	Labour Appeal Court, Johannesburg
Judge	CJ Musi, Sutherland Judges of Appeal and JR Murphy Acting Judge of Appeal
Subject	Collective bargaining Interpretation and application of collective agreements

Keywords

Collective bargaining- Interpretation and application of collective agreements- Bargaining councils - Arbitration award - Review of - Arbitrator called on to interpret collective agreement without evidence of context of agreement - Award unreasonable because interpretation impossible without factual context.

Collective agreements - Interpretation - Arbitrator choosing one of two competing interpretations of agreement without evidence to justify choice - Award set aside.

Mini Summary

During 2009 the appellant trade union and several others concluded an "Occupation Specific" salary dispensation ("OSD"), which was made a collective agreement of the General Public Service Sectional Bargaining Council. The OSD was to be implemented in two phases, the second of which entailed financial recognition of past experience in the Department of Correctional Services, with a notch increase for each five years worked "based on the new notch of the OSD". The appellant union referred a dispute to the GPSSBC under section 24 of the LRA. After regurgitating the parties' conflicting arguments, the arbitrator accepted that of the union. On review, the Labour Court found that the arbitrator had paid no attention to the critical phrase in the agreement - "new notch of the OSD". The award was set aside. The union argued on appeal that the court a quo had erred by setting aside the award because the arbitrator had reasonably chosen between competing interpretations. The Minister contended that the arbitrator's conclusion was unreasonable because he had no facts before him to justify the interpretation he had accepted.

The Court noted that when an arbitrator is required to decide a matter on a "stated case" the facts must be set out in sufficient detail for the arbitrator to make an informed decision. This is important because the agreement that is being interpreted must be placed in its context. The words used by the parties are significant, but they are merely the foundation on which interpretation is built. The Court expressed sympathy for the arbitrator because he had been called upon to interpret an agreement without being provided with its context. The commissioner had chosen what he perceived to be the most logical and rational interpretation without considering their context. The absence of a factual plinth to justify his choice rendered his choice unreasonable.

The appeal was dismissed, and the award was set aside and remitted to the council to be heard by another arbitrator.

Award

Musi JA:

[1] The issue that falls to be decided in this appeal, namely how to formulate, present and adjudicate a stated case, has already received the attention of this Court. The appeal is with the leave of the court a quo.

[2] The facts as gleaned from the affidavits filed in the review application are as follows. During 2009, the Public Servants Association ("PSA") a registered trade union and various other trade unions that are members of the third respondent (The General Public Service Sectorial Bargaining Council ("GPSSBC")) agreed with the first and second respondents - the Minister of Correctional Services and the Minister of Public Service and Administration respectively - to create an Occupation Specific Dispensation ("OSD") for the Department of Correctional Services employees (employees). The agreement became known as Resolution 2 of 2009.

[3] The OSD was to be implemented in two phases. Phase 1 which took effect on 1 July 2009 entailed that all employees not previously accommodated by the OSD created by Resolution 1 of 2007 would be translated from their old (existing) salary scales and notches to new scales and notches determined in Resolution 2 of 2009 provided that they should not be financially worse off than before the translation.

[4] Phase two which was supposed to take effect on 1 April 2010 would entail financial recognition for past experience in the Department of Correctional Services.

[5] Clause 11 of Resolution 2 of 2009 which made provision for phase 2 reads as follows:

"Recognition of experience - Phase 2

11.1 With effect from 1 April 2010 the recalculation of salary notch position shall be based on DCS experience as at 30 June 2009 based on years of experience obtained in addition to the experience required for

appointment on the level. The recalculation of salary notch will be limited to officials in the production levels (current salary level 3 to 8).

11.2 Translation of experience shall be recognised as one notch for every five years worked, calculated from the date of employment in DCS based on new notch of the OSD.

11.3. The employer shall introduce a basis for salary recognition for relevant experience on appointment for employees who are appointed from outside the public service in production posts."

[6] The words "based on the new notch of the OSD" in clause 11.2 gave rise to two competing views of interpreting clause 11.2 and therefore the implementation of phase 2 of the OSD. The parties could not agree on the proper interpretation of clause 11.2. The employees who were all members of the PSA referred a dispute to the GPSSBC. Conciliation failed and the matter was referred to arbitration.

[7] The parties agreed not to adduce any viva voce evidence during the arbitration hearing. They further agreed to hand in a bundle of documents and to submit heads of argument, which they duly did. It is unclear what the purpose and status of the bundle was.

[8] The appellants, the PSA and its 522 members, argued that clause 11.2 should be interpreted to mean that a calculation should be made according to the length of service of each employee, calculated from the first day of his/her employment in the Department of Correctional Services. The employee would then be entitled to advance one notch for every five years worked, from the next notch on the OSD to which the employee had been translated in phase 1. The effect of this interpretation would be that an employee who was translated on 1 July 2009 would on 1 April 2010 be given financial recognition for his/her experience calculated on the notch attained during phase 1.

[9] The Ministers were of the view that what was intended was that clause 11.2 would afford further redress to a limited number of employees who were left behind, despite long years of service, as a result of the way the previous salary scales were structured. They contended that an assessment would be made, in phase 2, of the service years of all employees from the date of employment. Those years would then be translated to the new OSD salary scales based on the recognition of every five years in addition to the experience required upon appointed. The recognition basis would commence from the first notch attached to the relevant OSD post to which the employee translated during phase 1. Should the exercise show that the employee would have reached a higher notch on the new OSD than that which he/she had attained in phase 1, she/he would then be awarded the higher notch as stipulated in terms of the phase 2 translation.

[10] The arbitrator, after regurgitating the different arguments, decided that the interpretation advanced by the appellants properly sets out the intention of the drafters of clause 11.2. He found that the "new notch of the OSD" means the new OSD notch to which the employee was translated to during the first phase. He therefore issued the following award:

> "It is hereby determined that clause 11.2 of the GPSSBC Resolution 2 of 2009 should be interpreted to read that the notches that employees of the first respondent are entitled to in terms of their years of experience must be added to the individual notch position of employees after the interpretation of the phase 1 of OSD (sic)."

[11] The Ministers were dissatisfied with the award and they approached the court a quo with a review application to set it aside.

[12] The court a quo correctly restated the review test and the principle relating to the interpretation of documents.

[13] The court a quo pointed out that the arbitrator was supposed to interpret the words "new notch of the OSD" but he did not give any meaning to the words. He only recanted the arguments and reached a conclusion without giving proper reasons for such conclusion. The court a quo found that the arbitrator failed to carry out his duties when he failed to interpret the words he was asked to interpret. The court a quo found it astonishing that the arbitrator could make a finding on what the intention of the drafters was without hearing evidence on that issue. It found that the arbitrator should have asked the parties to present oral evidence, despite their agreement not to do so. The court a quo found that the arbitrator misconceived the nature of the enquiry when he failed to engage in the process of attributing meaning to the words used in clause 11.2 and by not having regard to the context. The court a quo concluded that he arbitrator resultantly arrived at an unreasonable conclusion.

[14] Mr Pauw, on behalf of the appellant, argued before us that the court a quo erred in setting the award aside because the award is one which a reasonable decision-maker could reach. He pointed out that the arbitrator did bring an independent mind to bear on the issue and settled on a reasonable conclusion because he made a choice between two competing interpretations.

[15] Mr Ramawela, for the Ministers, argued that the court a quo was correct because there were no facts before the arbitrator to assist him to come to the conclusion that he reached. He submitted that the award is not one which a reasonable decision-maker could reach.

[16] In ***Arends and others v South African Local Government Bargaining Council and others***, [1] 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:

> "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 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 pro-visions 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.

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."[2]

[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 [3] and that context is everything. [4] 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***. [5]

[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. [6] 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.

[20] I, therefore, agree with the court a quo that the award falls to be set aside. I also agree with the court a quo's order that the matter should be remitted to the GPSSBC for the proper ventilation of the dispute before another arbitrator.

[21] I, therefore, make the following order.

1. The appeal is dismissed with no order as to costs

Footnotes

1 (2015) 36 ILJ 1200 (LAC) [also reported at [2015] 1 BLLR 23 (LAC) - Ed].
2 At paras [15]-[17]. Footnotes omitted.
3 *Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para [29].
4 See *KPMG Chartered Accountants v Securefin Ltd and another* 2009 (4) SA 399 (SCA) at para [39] [also reported at [2009] 2 All SA 523 (SCA) - Ed].
5 2012 (4) SA 593 (SCA) at para [18] [also reported at [2012] 2 All SA 262 (SCA) - Ed].
6 See *Bane and others v D'Ambrosi* 2010 (2) SA 539 (SCA) at para [7] [also reported at [2010] 1 All SA 101 (SCA) - Ed].