THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR140/16

In the matter between**:**

SAMA obo MANGWANE **Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL **First Respondent**

LUNGILE MATSHAKA *N.O* **Second Respondent**

DEPARTMENT OF CORRECTIONAL SERVICES **Third Respondent**

DEPARTMENT OF HEALTH NORTH WEST **Fourth Respondent**

DEPARTMENT OF HEALTH GAUTENG **Fifth Respondent**

Enrolled: **24 August 2021 (disposed of without oral argument)**

Delivered: **In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 30 September 2021.**

Summary: **Review application – if the parties decide not to lead oral evidence, they must conclude a stated case setting out both facts and legal**

issues for determination in a crisp and unequivocal manner – where there are patent disputes of fact, failure to conclude a stated case vitiates the award.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this application, the applicant (SAMA), acting on behalf of Dr Joseph Mangwane (Dr Mangwane), its member, seeks an order reviewing and setting aside the arbitration award issued by second respondent (arbitrator) under case number PSHS639-13/14 dated 19 November 2015 under the auspices of the first respondent (PHSDSBC) in terms of section 145 of the Labour Relations Act[1] (LRA). The arbitrator dismissed Mr Mangwane's claim for translation in terms of Occupation Specific Dispensation (OSD).

[2] SAMA's main impugn is that the arbitrator misconstrued the nature of the enquiry.

Pertinent facts

[3] SAMA referred a dispute of interpretation and application of the Resolution 3 of 2009 of the PHSDSBC (Resolution 3), a Collective Agreement in terms of section 24 of the LRA. The Resolution 3 pertinently deals with the OSD for the Medical Officers, Medical Dentists, Dental Specialists Pharmacologists, Pharmacists and Emergency Care Practitioners. SAMA's main issue is that the third respondent (DCS) incorrectly applied the Resolution 3 when it translated Dr Mangwane.

[4] The parties agreed to file heads of argument without leading of oral evidence under a guise that the facts are common cause. The arbitrator unfortunately conceded to the approach chosen by the parties without demanding a stated case. As things turned, the parties filed their written submissions wherein they

[1] Act 66 of 1995, as amended.

did not only differ on the interpretation of the Resolution 3, but even on the background facts.

[5] SAMA argued that Dr Mangwane was employed by the DCS as Medical Officer on salary level 12 and his personal notch was R476 307. Since his personal notch was higher than the last notch of R472 758, he was automatically placed in a post of Clinical Manager Grace 2. SAMA concedes that Dr Mangwane was correctly translated from notch R476 307 to notch R595 934 in July 2009. The challenge, however, came when he was translated from notch R 595 934 to R 614 976 in July 2010. SAMA is adamant that Dr Mangwane was supposed to have been translated to notch R682 527.

[6] DCS, on the other hand, argued that Dr Mangwane was correctly translated to notch R 614 976 in July 2010. That is so because the DCS structure had no post of Clinical Manager but Medical officer, so it was further argued. When the translation was implemented in 2009, the Medical Officers were temporarily translated to notch R 595 934 per the directive that was issued by the Department of Public Service Administration (DPSA) because at that time they did not have the translation keys for DCS. In April 2010, DCS fixed the notches and the Medical Officers were moved from job title code 82540 to 82539 which is Medial Officer Grade 3. This contention is disputed by the SAMA.

[7] Notwithstanding the disputes of fact, the arbitrator accepted the DCS's submission and found the Dr Mangwane was correctly submitted; hence this application.

Applicable legal principles

[8] In *POPCRU obo Nkuna v Safety and Security Sectoral Bargaining Council and Others,*[2] this Court decried the ingrained practice of determining matters that are patently encumbered by disputes of fact on the basis of written submissions and without oral evidence. Specific reference was made to the Labour Appeal Court's (LAC) decision in *Public Servants Association and others v Minister of*

[2] [2020] ZALCJHB 181; (2021) 42 ILJ 178 (LC) at paras 10-12.

Correctional Service and Others,[3] where it was underscored that '… the interpretation of contracts that an agreement including a collective agreement cannot properly be interpreted without a factual matrix' and any attempt to do so would render the arbitrator's conclusion unreasonable.[4] The LAC's directive to the arbitrators and commissioners was that, since it would not be possible to apply one's mind properly to the issues at hand without a factual foundation, they ought to decline to deal with a matter without an agreed set of facts or stated case.[5]

[9] In the present case, it is clear that the arbitrator did not even attempt the task of interpreting the Resolution 3 as she was of the view that the dispute had nothing to do with the incorrect translation, but the delayed implementation thereof. Obviously, the arbitrator found herself in this tangle because there was no agreed factual foundation. In my view, that should have been the opportune time for the arbitrator to refer the matter to oral evidence. Yet, despite the glaring disputes of fact, the arbitrator proceeded to pronounce on what she perceived to be the real issue; and accordingly accepted the DCS's submission that Dr Mangwane's translation to the post of Clinical Manager was temporary and found his subsequent translation in July 2010, from notch R 595 934 to R 614 976, to be correct.

[10] I must state once more, at the risk of belabouring this point, that arbitrators must guard against the parties' hotchpotch of various odds and ends that are put forward as a scheme to curtail the proceedings. If the parties decide to proceed by way of a stated case, it must set out both facts and issues in a crisp and unequivocal manner.

[3] [2017] 4 BLLR 371 (LAC) at para 16-19; see also *Arends and others v South African Local Government Bargaining Council and others* (2015) 36 ILJ 1200 (LAC); [2015] 1 BLLR 23 (LAC) at paras 15-17.
[4] Id.
[5] Id.

Conclusion

[11] It follows that the arbitrator misconstrued the nature of the enquiry and consequently deprived the parties a fair hearing.[6] On this ground alone, the award stands to be reviewed and set aside as it is vitiated by a glaring irregularity.

[12] The matter should then be remitted to the PHSDSBC for a proper hearing of the dispute before an arbitrator other than the second respondent.

Costs

[13] It is well accepted that costs do not follow the result in this Court. In the presence case the circumstances dictate that each party should pay its own costs.

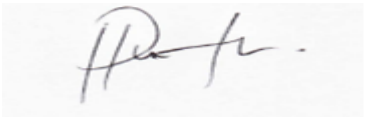
[14] In the circumstances, I make the following order:

Order

1. The arbitration award issued under case number PSHS639-13/14 dated 19 November 2015 is reviewed and set aside.

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

3. There is no order as to costs.



P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[6] See: *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at para 76; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) at para12; *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at paras 31-33; *Palluci Home Depot (Pty) Ltd v Herskowitz & Others* (2015) 36 *ILJ* 1511 (LAC) at paras 15-16; *Aquarius Platinum (SA)(Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2020] ZALAC 23; (2020) 41 ILJ 2059 (LAC); [2020] 11 BLLR 1071 (LAC) at para 10.