REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 1825/12

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA obo DD MALEPE — **Applicant**

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — **First Respondent**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — **Second Respondent**

Heard: 7 November 2013

Delivered: 28 November 2013

Summary: (S 158(1) (c) application - Arbitration award – interpretation and application dispute-award of interest from date bonus was due-award competent-section 33A(9) of the LRA).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application in terms of s 158(1) (c) to make an arbitration award an order of Court. The arbitrator had found that the respondent had failed to pay a performance bonus which it had approved and authorised and which was also due in terms of a collective agreement. The dispute which had been referred to arbitration was a dispute about the interpretation and application of a collective agreement.

[2] The arbitrator ordered the respondent to pay the applicant her performance bonus for the financial year 2008/2009 and to pay interest on the amount with effect from the 1 April 2009. The arbitrator's reason for ordering the payment of interest and was that the respondent "took long to pay what was due to the applicant". The award was issued on 1 December 2011.

[3] The respondent has paid the principal amount of R 17,774-10, which is the amount of the unpaid bonus, but has not paid the interest thereon. The respondent decided not to pay the interest on the principle amount as ordered by the arbitrator, because it contends that the arbitrator exceeded his powers in issuing an order compelling the respondent to pay interest. Accordingly, the respondent seeks to persuade the Court that it should not make the award an order of Court, which would be sanctioning an award which was made *ultra vires*.

[4] In ***Bargaining Council for the Electrical Industry KwaZulu-Natal v Industrial Electrical Company (Pty) Ltd*** **[2000] 5 BLLR 570 (LC)**, Lyster, AJ refused to make an order to enforce a settlement agreement which had been made an arbitration award. The learned judge's principal reason for doing so was that the Court did not have jurisdiction over an agreement that one party would provide security to a bargaining council.[1] He had also found that the agreement was not a competent award for the

[1] At 572,para [12]

arbitrator to have made[2] and therefore the only question he considered was if the settlement agreement was independently capable of being made an order of court in the absence of the arbitration award itself being competent. Implicitly, the court therefore found that it could not enforce an arbitration award that was not competent. I agree that a Court cannot lend its authority to an award which ought not to have been issued for want of jurisdiction on the part of the arbitrator, by making that award an order of Court. However, it may not go so far as to set aside the award aside *mero motu* in such circumstances.[3]

[5] The central issue in this matter is whether it was competent for the arbitrator to order the payment of interest from the date the performance bonus was due. The wording of this specific relief in the arbitration award read:

> *"Interest must be calculated on the money stated above as from 01st of April 2009 as per section 143(2) of the Act."*

[6] Section 143 (2) of the Labour Relations Act, 66 of 1995 ('the LRA') states:

> *"If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgement debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (act number 55 of 1975), unless the award provides otherwise."*

[7] Section 138 (9) of the LRA provides for the general remedial powers of an arbitrator:

> *"(9) The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award—*
>
> *(a) that gives effect to any collective agreement;*

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[2] At 571, para [9].

[3] See ***MEC for the Department of Education, Eastern Cape Province v Gqebe* [2009] 9 BLLR 896 (LAC)** at 901-903, paras [24]-[32].

(b) that gives effect to the provisions and primary objects of this Act;

(c) that includes, or is in the form of, a declaratory order."

[8] Further, section 33A(9) of the LRA states:

(9) Interest on any amount that a person is obliged to pay in terms of a collective agreement accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the arbitration award provides otherwise."

[9] The respondent contends that section 143(2) permits an arbitrator to do only one of two things: either the arbitrator may order interest to run from the date of issuing the award, or the arbitrator can decide that the award will carry no interest.

[10] In advancing this proposition, and the respondent relied on the judgment of Van Zyl, J in ***Top v Top Reizen CC* (2006) 27 *ILJ* 1948 (LC)**. In that matter, the applicant also sought to have an arbitration award made an order of court in terms of section 158(1)(c) of the LRA. The award in question concerned an unfair dismissal claim and the arbitrator had found that the dismissal was substantively unfair and awarded payment of six months' remuneration to the applicant as compensation. In the award, no specific mention was made of interest payable on the compensation. At the hearing of the matter, the respondent conceded that the compensation was due and payable but asked the court to order that no interest should run on the award from the date on which it was made an order of court on the basis that it alleged the applicant had abused the legal process in the course of its litigation with the respondent.[4] In the learned judge's decision he considered the legal nature of *mora* interest, which he regarded as central to the case.

[11] Van Zyl J's analysis of the legal position on the payment of interest may be summarised in point form as follows:

[4] At 1953, para [6] of the judgement.

11.1 under the common law a debtor is only liable for interest on the principal debt if he is in mora[5];

11.2 a debtor is not in mora and therefore not liable for the payment of interest if the debtor could not know or determine the amount to be paid[6];

11.3 in the case of illiquid claims that cannot be readily ascertained or not fixed by agreement, interest accrues from the date of judgement if it was specifically claimed[7], and

11.4 the liability to pay *mora* interest automatically attaches to the principal obligation by operation of law so that once the liability of the debtor to pay *mora* interest has been established the creditor is entitled there to as a matter of right and not at the discretion of the court[8];

[12] The court then turned its attention to the effect of the Prescribed Rate of Interest Act, 55 of 1975 as amended by the Prescribed Rate of Interest Amendment Act 7 of 1979, and in particular the provisions of section 2 (1) and portions of section 2A which are set out below:

> *'2(1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.*
>
> *...*
>
> *2A(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section.*

[5] At 1954, para [11].

[6] At 1954, para [12].

[7] at 1955, para [13].

[8] at 1955, para [14].

(2) (a) . . .

(b) In the case of arbitration proceedings and subject to any other agreement between the parties, interest shall run from the date on which the creditor takes steps to commence arbitration proceedings, or any of the dates contemplated in paragraph (a), whichever date is the earlier....

(4) Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

[13] Noting that, in the interests of avoiding inequitable results and contrary to the common law position, sub-section 2A(5) of the Prescribed Rate of Interest Act permits an arbitrator to fix not only the rate of interest but also the date from which it is to run, the court then turned its attention to s143 (2) of the LRA. The learned judge interpreted the effect of that section as follows:

"[21] The effect of section 143 (2) is that an award of any sum of money automatically attracts post-award interest at the rate set by the statutory instruments made under the prescribed rate of interest act, unless the arbitrator specifies that the award shall not carry interest. It is clear that section 143(2) does not depart from the common law position in that interest commences to run from the date on which the debtor's claim was ascertained. The

arbitrator however has a veto by the exercise of which he may direct that the award will not carry interest at all."

(Emphasis added)

[14] It is this interpretation of the section, which the respondent relies on in support of its submission that the arbitrator acted in breach of this provision in ordering it to pay interest from the date when the performance bonus was due and payable. It must be mentioned that the arbitrator purported to be acting in terms of this section when he awarded interest, though for the purposes of whether to make his award an order of court or not, the main question I am concerned with is whether it was competent for him to make such an order of interest and not why he believed he could.

[15] The applicant's first answer to the respondent's defence is that in *Top's* case, the Court was dealing with an unfair dismissal claim in which the amount of compensation awarded could not have been determined until the award was issued. As such, it was essentially an unliquidated claim, unlike the present matter in which the amount of the performance bonus was readily calculable at the time it was due. In terms of the common law as set out in *Top's* case, the respondent's liability for interest arose when the debt was liquidated, which is when it was readily ascertainable. Secondly, the applicant correctly points out that this matter has nothing in common with the issue that was before the court in *Top*'s case, namely whether the applicants in that matter should be deprived of interest which had accrued since the award was issued.

[16] Further, the applicant points out that the present matter concerns an interpretation and application of a collective agreement and sub-section 33A(9) of the LRA clearly states that interest on amounts due in terms of the collective agreement accrues from the date on which the amount was due and payable.

[17] It is true that ss33A(9) is part of a provision dealing with the enforcement of collective agreements by a bargaining Council rather than a dispute

about the interpretation and application of a collective agreement initiated by an interested party. Nonetheless, ss 33A(9) does not have any quantification limiting its application only to an arbitration conducted in terms of that section, such as subsections 33A(2),(3),(4)(b),(5),(7) and (8). Further, on a plain reading of the provision it appears to apply to any amount that a person is required to pay in terms of a collective agreement. Consequently, there seems no reason to confine its application only to collective agreement enforcement disputes initiated by a bargaining Council.

[18] Moreover, the consequence of doing so would, in my opinion, lead to an absurd result. Thus, if the effect of ss 33A(9) were confined to enforcement claims initiated by a bargaining Council, it would mean that an employee bringing a claim to enforce an identical provision of a collective agreement in the form of a dispute over the interpretation and application of the agreement could not obtain an award of interest from the date on which a liquid amount was due and payable to the employee in terms of the agreement, but if the same claim were brought by the bargaining Council under section 33A, the employee would automatically be entitled to interest on the amount by virtue of ss 33A(9). Accordingly, a narrow interpretation of the application of the provision having such a result cannot be correct, and ss 33A(9) must apply equally to an award ordering payment of an amount due and payable arising from an interpretation and application dispute.[9]

[19] In the circumstances, I am satisfied the award was well within the remit of the arbitrator's powers, even if he erroneously identified his power to emanate from s 143(2), and there is no reason not to make it an order of Court.

Order

[20] The arbitration award issued under case number GPBC 2894/2010 is made an order of Court.

[9] See, e.g. ***Director Of Public Prosecutions, Cape Of Good Hope v Robinson*** **2005 (4) SA 1 (CC)** at 17, para [30].

[21] The respondent must pay the applicant's costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: F. Van der Merwe instructed by Bouwers Inc

FIRST RESPONDENT: K. Magano instructed by the State Attorney