REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2347/11

In the matter between:

Ekurhuleni Metropolitan Municipality **Applicant**

and

R Spies **First Respondent**

J Mkhwanazi **Second Respondent**

K Heineke **Third Respondent**

M L Matlala N.O. **Fourth Respondent**

SALGBC **Fifth Respondent**

Heard: **31 May 2013**

Delivered: **03 October 2013**

Summary: **Practice and Procedure – ambit of section 144 of the LRA; comparison with sections 165 of the LRA and rule 42 of the High Court rules**

JUDGMENT

GAIBIE, AJ

Introduction

Background

[1] Pursuant to a referral in terms of section 186(2)(a) of the Labour Relations Act [1] (LRA), the South African Local Government Bargaining Council (SALGBC) issued an arbitration award ("award") dated 7 July 2009, in terms of which, the Applicant's ("the Municipality") suspension of certain travel allowances was declared to be an unfair labour practice. The Municipality was also ordered to pay the travel allowances of the first to third respondents ("the employees") from the date of the suspension of the allowance to the date the new transport scheme was implemented; and to honour its obligations in respect of certain clauses of the collective agreement relating to the employees' entitlement to financing, insurance and running cost allowances for their vehicles ("financing costs") from the same date[2].

[2] Upon receipt of the award, the employees certified the award in terms of section 143 of the LRA[3] and attempted to enforce the award on several occasions without success. Approximately two years later, on or about 12 July 2011, the employees launched an application in terms of section 144 of the LRA to quantify or vary the award ("variation application"), inter alia, by specifying the amounts owing to each employee, and to settle the financing costs owing by the employees to any financial institutions[4].

[3] The award was varied on 18 August 2011[5] ("the variation ruling"). I will revert to the details of the variation later in this judgment. It is necessary, at this point, to indicate that although the Municipality had participated in the arbitration proceedings in June 2009, it had effectively refused to implement the award, and had not taken any steps to review the award. In addition, and despite the fact that the variation application had been served on the Municipality, it did not oppose it. Upon receipt of the variation ruling, the

[1] 66 of 1995
[2] Paras [55] and [56] of the arbitration award at page 218 of the bundle.
[3] See the certification of the award dated 8 Oct 2009 at page 236 of the bundle.
[4] Para 4 of the Variation Application at pages 220 – 223 of the bundle.
[5] See Quantification/Variation Ruling dated 18 August 2011 at pages 271-273 of the bundle.

Municipality now seeks to review both the award[6] dated 7 July 2009 and the variation ruling dated 18 August 2011 in an application that was launched on 20 September 2011.

Grounds of Review

[4] Based on the Municipality's contention that the variation ruling replaces the original award, and that it is in the circumstances also entitled to review the basis upon which the original award was granted, the Municipality raises several grounds of review in relation to the variation ruling and thereafter in relation to the substance of the original award. It is apparent from the review application[7], and in particular the grounds of review, that the Municipality attacks the variation ruling on the basis of the *Sidumo* test, and simultaneously attacks the arbitration award on the basis of certain procedurally related gross irregularities[8]. Before I proceed to determine which grounds of review must be dealt with for the purposes of this judgment, it is necessary to determine whether the award and the variation ruling constitute one award for the purposes of determining whether one or both of them are reviewable.

Does the award and the variation ruling constitute one award for the purposes of determining whether, and if so when, they are reviewable?

[5] The Municipality contends that the original award and the variation ruling constitutes one award. They do so by relying on the dictum in *JDG Trading (Pty) Limited t/a Bradlows Furnitures v Laka N.O. and Others*[9] where it was held that the parties are bound by the first award as amended and therefore by one award which came into existence in its present form on the date of the second award. In other words, the Municipality contends that it is entitled to review the first award which was issued two years prior to the variation ruling within six weeks of the latter ruling. In *JDG Trading,* although the LAC indicated that the date of the award for the purposes of section 145 (1) of the

[6] Pages 209 – 219 of the bundle.
[7] See grounds of review from paragraphs 20 to 29 (at pages 128 to 134 of the bundle)
[8] Presumably on the basis of the LAC's dictum in *Nedbank v Herholdt*
[9] (2001) 22 ILJ 641 (LAC); [2001] 3 BLLR 294 (LAC).

LRA is that of the second award, the LAC recorded that the applicant therein did not make or launch an application to review the initial award but waited for approximately one year until the variation ruling had been made to launch the review application. At paragraph 20 of that judgment, the LAC stated that the period of a one year delay for the purposes of reviewing the initial award was unreasonable in the circumstances.

[6] In this matter the initial award was dated June 2009, the Municipality refused to comply with its obligations emanating from that award for approximately two years. Even after the variation application was served on the Municipality it took no steps to oppose it. It seeks now, in the context of its historical failure to comply with the award, to review its implementation by attempting to review the initial award some two years later. The Municipality's conduct, much like the applicant in the *JDG* matter constitutes an unreasonable delay of a kind which runs counter to the purposes of the LRA, namely to effect the expeditious resolution of labour disputes. This principle of the expeditious resolution of labour disputes has been recognised implicitly by the Constitutional Court in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*[10] and explicitly by the Supreme Court of Appeal in *Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union & others*[11] where Nugent JA pointed out that the hallmark of the Act is its insistence upon disputes being resolved expeditiously[12].

[7] However, there is a more fundamental reason as to why the Municipality should not be entitled to review the initial award in this matter. The purpose of an application for variation in terms of section 144(b) is clear:

> 'Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-
>
> …

[10] [2010] 5 BLLR 465 (CC)
[11] (2007) 28 ILJ 2503 (SCA) at 2514 para [20]
[12] Albeit that Nugent JA was, in that matter, referring to dismissal disputes.

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;'

[8] That section is similar to section 165(b) of the LRA and Rule 42 of the Uniform Rules of the High Court which provide as follows:

Section 165(b) of the LRA

> The Labour Court, acting of its own accord or on application of any affected party may vary or rescind a decision, judgment or order-
>
> …
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;…

Rule 42 of the Uniform Rules of the High Court

> '42 Variation and Rescission of Orders
>
> (1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
>
> …
>
> (b) an order or judgment in which there is ambiguity, or a patent error, or omission, but only to the extent of such ambiguity, error or omission…'

[9] Herbstein and Van Winsen in the Civil Practice of the High Courts of South Africa[13] indicate that it was against the common law background which imports finality to judgments that rule 42 was introduced to cater for "mistakes". According to them, not every mistake or irregularity may be corrected in terms of the rule and that this approach '.... is, for the most part, a restatement of the common law. It does not purport to amend or extend the common law and that is why the common law is the proper context for its interpretation. Because it is a rule of Court its ambit is entirely procedural. The trend of the Courts

[13] 5th Edition volume 1 at pages 929, 930 and 934

over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities.'

[10] In Erasmus – Superior Court Practice[14], the authors indicate that the general principle is that once a court has handed down a final judgment or order, it has no authority to correct, alter or supplement it, because it becomes *functus officio* and its authority over the subject matter has ceased[15]. The authors also record that despite the general principle, the Appellate Division (as it was then known) has recognised a number of exceptions to the rule[16], some of which include the following:

10.1. The principle judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant;

10.2. The court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided that it does not thereby alter 'the sense and substance' of the judgment or order;

10.3. The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

[11] In other words, the rule is a procedural step designed to correct quickly or expeditiously an obvious wrong, a mistake or ambiguity in the judgment.

[12] Where an arbitration award expresses the true intention and the decision of the Commissioner, ordinarily, there would be no mistake, inadvertent omission or any oversight on the part of the Commissioner or in the award that was

[14] Main Volume (updated as at April 2013) at pages B1-309 to B1-310B
[15] At pg B1-309
[16] At pages B1-309 to B1-310A

made[17]. In the ordinary course of things, an application for variation of the order is limited to a clarification of or the removal of any ambiguous language, patent error or omission in the award. In other words, insofar as there is a variation it would in most part be limited to an aspect of the original award that would clarify matters. Insofar as it does not, and goes beyond the import or purport of section 144, that variation would clearly be reviewable.

[13] Given the parameters or the purpose of section 144, the original decision remains intact. In the circumstances any review of the original award must be made timeously after that award is handed down. To the extent that the Municipality seeks to review the variation ruling it must accordingly be dealt with within the confines of section 144(b), that means that its application for review will be limited to the extent of the variation ruling.

[14] That seems to me to be a logical and appropriate way of dealing with any reviews of variation rulings, precisely because any other route would clearly unseat the principle of the expeditious resolution of labour disputes. It was clearly on the basis of that principle that the LAC in the *JDG* matter refused to entertain the review application in that matter.

[15] In the circumstances the Municipality in this matter is limited to reviewing the variation ruling issued by the SALGBC on 18 August 2011.

The remaining grounds of review

[16] The Municipality contends that in terms of the rules of the SALGBC, the employees were required to bring the application for variation within ten days of the ruling. However, in paragraph 23 of its founding affidavit[18] the Municipality submits that the employees on their own version became aware on 4 May 2011 that the award could not be enforced without variation and that they were accordingly required to have brought the application on or before 18 May 2011. The variation application was only served on the Municipality on 12 July 2011 and according to them the application is 39 days late. The Municipality further contends that the Commissioner failed to apply the

[17] See in this regard: *McDonalds SA (Pty) Ltd v CCMA* and Others [2003] 10 BLLR 1020 (LC)
[18] Pages 129 to 130 of the bundle

appropriate legal principles when he determined the application for condonation in respect of the application for variation and that his failure amounted to a gross irregularity by his subsequent condonation of the late filing of the variation application.

[17] In order to determine this issue, it is necessary to assess the employees' contentions in their variation application, which was unopposed.

[18] It is apparent from the provisions of section 144(b) read with rule 16A (1)(a)(ii) and rule 16A(2) that there is no time limit for an application for the variation of an award. To the extent that there is any time period that is applicable, the Municipality relies on rule 2.32 of the SALGBC which is entitled Variation or Rescission of Arbitration Awards or Ruling and provides as follows:

> '(1) An application for the variation or rescission of arbitration award or ruling must be made within 10 days of the date on which the applicant became aware of-
>
> (a) the arbitration award or ruling; and
>
> *(b)* a mistake common to the parties to the proceedings'.

[19] Rule 2.32 of the rules of the SALGBC appears to be a truncated version of the equivalent provision in the LRA and in the Uniform Rules of the High Court, and it links the date on which the relevant party became aware of the arbitration award together with any mistake that is common to the parties to the proceedings. No legal challenge or interpretation on this section has been raised by the parties to this matter, but it is apparent that the rule indicates that the ten days must operate by determining when the applicant became aware of the ruling and simultaneously became aware that there was a mistake common to the parties to the proceedings. It is my view that this rule does not apply to this matter because the variation application is not based on a mistake common to the parties.

[20] However, and in light of the fact that the employees have not challenged its applicability, I proceed to deal with whether the commissioner correctly decided the condonation aspect of the variation application. The Municipality

contends that the employees became aware that it was necessary to apply for the variation of the award on 4 May 2011 and that the variation application should therefore have been filed on or before 18 May 2011. It is common cause that the variation application was only served on 12 July 2011 approximately 39 days late.

[21] The employees, in their variation application had applied for condonation for the late filing thereof.

[22] The employees contend in their affidavit attached to the variation application that their application is 25 days late. They explain that the delay in bringing the application was wholly due to the Municipality's conduct in this matter and in that regard they made the following submissions:

22.1. During the arbitration hearing, it was accepted by the parties that the non-payment of the travel allowance could be determined from the administrative records of the Municipality, and in the circumstances the exact amounts owing to each of the employees was not recorded in the award.

22.2. As early as 6 August 2009 the Municipality, in an internal communication, recorded the outcome of the arbitration proceedings and the effect of the award that was handed down in favour of the employees. The communication also indicated that the Municipality should consider the possibility of "appealing" the award[19].

22.3. During the first six weeks after the award was handed down, the employees awaited a review application from the Municipality in respect of this matter. When none was received, the employees, on 9 September 2009 requested the certification of the award in terms of section 143 of the LRA[20].

[19] Page 234 of the bundle
[20] Page 235 of the bundle

22.4. On 8 October 2009, the arbitration award was certified. Despite efforts to obtain the Municipality's compliance with the award, it was evident that the respondent had no intention of doing so.

22.5. Accordingly, and during October 2010 the employees approached their attorneys who addressed a formal letter of demand to the Municipality[21].

22.6. During January 2011, the employees made various efforts to obtain information about the amounts owing to them and they made contact with a Mr Phillip Smit at the Municipality's Benoni pay office who provided them with the AA tables for the fixed cost component and the vehicle operating cost in use at the Benoni office. In light of the information received from Mr Smit the employees attested to affidavits which set out the amount due to them.

22.7. On 16 February 2011, the employees' previous attorneys of record despatched a letter to the Deputy Sheriff requesting him, on the strength of the affidavits attested to by the employees, to attend to the execution of the award.

22.8. Further communications from and to the Deputy Sheriff followed on 16 March 2011 and 30 March 2011 respectively[22].

22.9. On 4 May 2011, when the employees consulted with their attorneys, they became aware that the Deputy Sheriff was not able to attach the property of the Municipality in satisfaction of the award because the award did not set out the value or the amount of their claims.

22.10. Thereafter further communications were addressed to the Municipality by the employees' attorneys on 12, 16 and 30 May 2011 in the hope that the Municipality would comply with the award.

22.11. On 30 May 2011, the employees' attorneys received a call from Mr Hofman of the Municipality who advised them that the Municipality

[21] Page 248 of the bundle
[22] Pages 263 and 264 of the bundle

intended to review the award and that no payments would be made to the employees in terms of the award. That conversation was recorded in a letter from the employees attorneys dated 1 June 2011.

22.12. On 2 June 2011 the Municipality confirmed in writing that it intended take the award on review. But by 28 June 2011, the employees had not received any further communication nor any review application from the Municipality. In the circumstances and on 28 June 2011, the employees submitted an application for the variation of the award.

[23] In order to consider whether the employees are to blame for the delay in obtaining a variation in the award, I have to consider the steps it had taken since it became aware that the Sheriff was unable to execute the award in the absence of a clear quantification of their claims, that being 4 May 2011. It is apparent from that date that several correspondences passed between the parties and in-between that time the Municipality had informed the employees that it intended to review the arbitration award. In the absence of any further communication from the Municipality, the employees were entitled to assume that the Municipality no longer intended to review the award and accordingly sought a variation of the award.

[24] The steps taken by employees in the finalisation of legal proceedings before the launching of a claim and the period after an award has been granted must surely be viewed with a different magnifying glass. In the prior situation, the compliance with the *dies* indicated in the rules are obligatory or peremptory. In the process after an award has been granted there are no rules or peremptory time periods that are applicable, and it is assumed on the basis of common courtesy and respect for the rule of law that the parties who have awards granted against them will endeavour to comply with them. In the circumstances it would be unfair to judge the employees and the steps taken by them in achieving compliance with an award in their favour in the same way as they would be judged prior to the launch of legal proceedings.

[25] In the circumstances, and in light of their application for variation and the reasons for the delay in launching the application, I am satisfied that they

have adequately explained the steps taken by them. It must in any event be recorded that the applicants would not have found themselves in this position had the Municipality been more co-operative in this process. It was apparent that it did not intend to comply with the initial award, waited to see whether the employees would succeed in obtaining a variation of the award and then attempted at the last moment to obtain the advantage of reviewing both the original award and the subsequent ruling two years after the initial event. In the circumstances, I am satisfied that the extent of the delay was not egregious, that the reasons for the late application for the variation of the original award were sound and that their prospects of success are apparent given what appears in the paragraphs that follow.

The Second Ground of Review – Variation of the Award

[26] The Municipality contends that the Commissioner committed a gross irregularity by varying the award in the manner that he did. In that regard, the Municipality submits that the Commissioner was not in a position, on the evidence before him, to vary the award in the manner in which he did. In other words, the affidavits filed by the employees in justification for the amounts claimed should not have been accepted by the Commissioner for one or more of the following reasons:

26.1. Several annexures to the variation application were not attached to the variation application;

26.2. The variation application did not contain a confirmatory affidavit from Mr Smit who is the person responsible for the calculation of travel allowances for employees on the Benoni Travelling Allowance Scheme and the employees accordingly did not provide the Commissioner with a proper explanation of how the calculations were to be determined;

[27] In the variation application, the employees sought a variation of the initial award which amongst other things, sought to indicate the precise amounts owed by the Municipality to the employees in relation to the allowances that were suspended. In that regard the variation application sought to indicate that the Municipality owed: Ms C Heyneke (Heyneke), the sum of R202

429.78; Mr R Spies (Spies), the amount of R723 991.30; and Mr J Mkhwanazi (Mkhwanazi) the sum of R227 616.00.

[28] Attached to the variation application are affidavits attested to by the individual employees in relation to the amounts owing to them. Each affidavit refers to annexures that are not attached thereto and it is unclear how the amounts claimed by the employees is constituted. It is also unclear from the variation ruling on what basis the Commissioner accepted the amounts indicated by the employees as the amounts owing to them as the travel allowances. His decision in that regard is accordingly not the decision of a reasonable decision maker.

[29] In the circumstances, it is necessary for this matter to be remitted back to the SALGBC only for the purposes of a determination regarding the amounts owing to the employees in terms of paragraph 55 and 56 of the award and the amounts that the Municipality is required to honour in relation to the allowances indicated in clauses 5.3.2.1 and 5.3.2.2 of the Collective Agreement.

The applicants in the variation application

[30] There is one further matter that requires a response. It is contended by the Municipality that the deponent to the affidavit in the variation application, Spies, does not indicate explicitly that he is authorised to bring this application on behalf of the other two employees, Heyneke and Mkhwanazi respectively. It was contended on behalf of the Municipality, during argument, that even though there are confirmatory affidavits attached to the variation application in which they specify the amounts owing to them by the Municipality, they do not formally accord authority to Spies to bring this application on their behalf.

[31] It is apparent from a holistic reading of the variation application, that Spies launched the variation application in his own interest and on behalf of Heyneke and Mkhwanazi, who attest to confirmatory affidavits. In addition thereto they also indicate the detail of the amounts owing to them by the Municipality. In the circumstances I regard that objection as being spurious,

highly technical and unwarranted in the circumstances. The application was properly brought.

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

1. The application for the review of the arbitration award dated 7 July 2013 is dismissed;

2. The application for the review of the variation ruling is granted for the purpose articulated in paragraph 3 below;

3. The determination of the amounts owing by the Municipality to the employees in respect of the travel allowance, as well as the Municipality's financial obligations to the employees in terms of clauses 5.3.2.1 and 5.3.2.2 of the Collective Agreement is remitted back to the SALGBC for determination.

_____

Gaibie, AJ

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Advocate A.L. Cook
Instructed by:	A.F. Van Wyk Attorneys
For the 1st to 3rd Respondents:	Advocate B.M. Jackson
Instructed by:	C.A. Bailie Attorneys