



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: P 340/09

In the matter between:

THE DEPARTMENT OF CORRECTIONAL SERVICES **Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **First Respondent**

ELVIN KAYSTER **Second Respondent**

D M MALAI **Third Respondent**

Heard: 06 November 2012

Delivered: 24 January 2013

Summary: Review application – deponent to the answering had no locus standi – applicant may bring default award directly on review - commissioner's finding that the applicant was properly notified not supported by the evidence on record.

JUDGMENT

BOQWANA AJ

Introduction

- [1] This is an application to review and set aside a default arbitration award of the second respondent ('the commissioner') issued 01 June 2009 under case number PSG 8196 – 08/09. There was no appearance for the applicant at the arbitration.
- [2] The commissioner found that the dismissal of the third respondent was substantively and procedurally unfair and ordered the applicant to reinstate the respondent with effect from 1 July 2009 into the same or similar position that he occupied before the dismissal, and to restore his benefits as if the dismissal had not occurred. The commissioner further ordered the applicant to pay to the third respondent an amount of R108 108.00, being the equivalent of 12 months' salary, as lost income resulting from the dismissal. The applicant was ordered to pay this amount into the bank account by no later than 01 July 2009.
- [3] There are number of issues to be determined by this Court. First is the issue of *locus standi* of the deponent to the answering affidavit that has been raised by the applicant. The second issue is whether the applicant should not have taken its matter on rescission instead of review proceedings and if it is competent whether there are any grounds capable of reviewing and setting aside the default award.

Locus standi

- [4] The applicant contends that deponent to the answering affidavit has no *locus standi* in these proceedings. Initially, the applicant appeared to be also challenging POPCRU's authority to oppose this application however it seems that it is no longer pursuing that point. The issue that remains is whether Geoff Kembo ('Kembo') has authority to depose to the affidavit on behalf of the third respondent.
- [5] The applicant's issue is that the POPRCU's constitution empowers the National Executive Committee ('NEC') to institute or defend legal proceedings

on behalf of POPCRU. The applicant contends that Kembo is not a member of the NEC and only an ordinary member of POPCRU. Accordingly, POPCRU should have filed a resolution authorising him to defend the present application.

- [6] This issue was first raised in the applicant's replying affidavit. The third respondent was then granted leave by the court to file further affidavits to deal with this issue as *per* Lallie J's court order of 28 February 2012.
- [7] The third respondent filed a duplicate affidavit deposed to by POPCRU's General Secretary Nkosinathi Thibedi ('Thibedi'). Thibedi's affidavit largely dealt with POPCRU's right to litigate on behalf of its members in dispute resolution procedures and in particular the third respondent and Kembo's specific authority to represent both POPCRU and the third respondent.
- [8] It is further submitted on behalf of the third respondent that the authority vested to the NEC in terms of the constitution relates to litigation brought in the name of POPCRU itself and not litigation where POPCRU represents or assists its members.
- [9] In my view, the third respondent misses the point that is raised. There is a difference between a deponent being authorised to represent members in labour relations matters as part of his daily duties and him being authorised to depose to an affidavit on behalf of POPCRU or the third respondent. If power is given to the NEC to institute or defend litigation in terms of clause 12.2.10, it seems to me if any other person is appointed there should be a specific provision for such appointment or a clear delegation of power. Thibedi's affidavit is in my view not sufficient. Thibedi is not empowered to delegate or appoint a deponent on behalf of the NEC. There is also no confirmatory affidavit attached from the third respondent.
- [10] I have no issue that POPCRU defends the matter on behalf of its member although not being cited as a party to these proceedings in the notice of motion. It is very clear that they were involved at the arbitration and referred

the arbitration in their name on behalf of their member, the third respondent. It seems to me the applicant is also not pursuing that point.

- [11] The answering affidavit is not properly deposed to and therefore not properly before court.

Grounds for review

- [12] The applicant alleges that it was never advised by the first respondent ('the bargaining council') about the date, time and venue of the arbitration proceedings.

- [13] The applicant alleges that its fax number at Middleburg Correctional Centre is 049 842 1208, the notice of set down reflects the applicant's fax number 043 722 1056. However it appears that the bargaining council appears to have faxed the notice of set down to fax number 012 323 4836. This it alleges is not the applicant's fax number.

- [14] The applicant further submits that when exercising his discretion in terms of section 138 (5) of the Labour Relations Act,¹ the commissioner is obliged to take into account various factors in accordance with Rule 29 of the Rules Regulating the Practice and Procedure to Resolving Disputes through Conciliation and Arbitration in the GPSSBC. Rule 29 requires the arbitrator to be satisfied that a party who is absent has been properly notified of the date, time and venue of the proceedings. The commissioner failed to exercise such discretion and proceeded with the matter without taking those things into account.

- [15] The applicant also submits that the commissioner allowed part of the evidence to be given under oath whilst the other part was not and thus committing a gross irregularity. It makes reference to transcript of the arbitration hearing.²

Analysis

¹ Act No.66 of 1995

² Page 27 of the transcribed record of the arbitration proceedings.

- [16] It is interesting that the applicant chooses review proceedings instead of lodging a rescission application at the bargaining council in terms of section 144 of the LRA.
- [17] The applicant argues that there is sufficient jurisprudence to support their submission that the exercise of discretion in terms of section 138(5) (b) is a separate ground for review.
- [18] I find that nothing prevents the applicant from directly approaching the court on review for an alleged defect as long as it can show that there are grounds for doing so.
- [19] Section 144 is also not couched in peremptory terms that every time arbitration has been held in the absence of a party that party must only refer the matter on rescission. A party must however be careful in that the test for review and rescission are not the same especially if the application to rescind a default award was not brought before the commissioner for his or determination. Be that as it may, this Court is not prevented from hearing a review application in respect of a default award even without a rescission application preceding it.
- [20] I disagree with the applicant that the commissioner needs to set out factors he took into account when he elected to proceed with the arbitration in the applicant's absence in his award. Rule 29 only requires him to be satisfied that a party was properly notified on the date, time and venue of the hearing. There is nothing amiss with him only stating he was satisfied and nothing further. Those factors in my view need not reflect in the transcript either.
- [21] The important question however is whether the evidence at hand or on record supports a finding that should lead the commissioner to a finding that he was satisfied. In other words did he properly look at all evidence before him in order to satisfy himself that there was proper notice? If he did not or the record shows differently it can be argued that he committed process related unreasonableness.

[22] Having perused the record I found the following:

1. The fax number provided by the third respondent in the request for arbitration as the applicant's fax number was 043 722 1056;
2. The notice of set down for the hearing set down for 31 March 2009 in Quigney was sent to 043 722 1056 as shown by transmission;
3. On 31 March 2009, the commissioner gave a ruling postponing the matter to 21 May 2009 due to a misunderstanding relating to the venue of the proceedings, the applicant reported for the hearing in Middleburg whilst the third respondent reported in East London. The commissioner records that he elected to postpone the matter in order for the misunderstanding to be cleared up. Further he records that the parties decided on 21 May 2009 as a suitable date for the hearing. He also recorded that the hearing will take place in Middleburg, Eastern Cape.
4. It is not clear if the commissioner communicated with the parties telephonically or physically but what is important is that he communicated with the parties.
5. It is also not clear whether this ruling was faxed to the parties, particularly the applicant, but what is significant is that the applicant did not appear on 21 May 2009 and arbitration proceedings were held in its absence.
6. The applicant says that whilst it agreed to the date of 21 May 2009, it was waiting for a formal notice of set down from the bargaining council as *per* the bargaining council rules. This submission is in my view supported by the conduct of the bargaining council which was an attempt to serve the formal notice of set down.
7. Be that as it may, the record shows that there was a notice of set down setting the matter down to 21 May 2009. It is this notice that the applicant claims it did not receive.

8. On perusal of this notice and covering letters. It does appear that this notice was sent to a number of fax numbers. The notice directed to the applicant appears to have been sent to 012 323 3476 (according to the transmission record although the fax number on the notice itself is 043 722 1056. The applicant claims that 012 323 3476 is not their fax number.

[23] Whilst I hear the applicant that its Middleburg Correctional Centre is 049 842 1208, I would find it hard to believe that 043 722 1056 does not belong to them, simply because they were sent a notice of set down for the initial set down of 31 March 2009 and they did appear albeit at the wrong venue. It is interesting to note that the 043 number is an East London number.

[24] Having said all that, I cannot ignore the fact that the notice of set down for 21 May 2009 was transmitted to a 012 323 3476 number that does not appear in any other document including the referral form as the number for the applicant. For that reason I am of view that had the commissioner taken that into account he would have exercised his discretion differently. By failing to take that factor into account he committed a gross irregularity which makes his award reviewable.

[25] Insofar as the second ground for review is concerned, the transcript shows that the witness stood down and it looks like the applicant had finished his and the commissioner was asking about the closing argument, when the witness said there is a slight thing he nearly forgot to mention. The applicant states that the commissioner ought to have administered an oath again because the witness had stood down and applicant's case was closed. By failing to do so the applicant argues the commissioner committed a gross irregularity in that the evidence given from that point was not given under oath.

[26] My view is that the applicant is taking an overly technical approach. We cannot make out from the record whether the witness literally stood down. It seems to me nothing much happened after it was said the applicant is closing its case. Just as the commissioner was asking for closing argument the witness jumped in and said that there was something he forgot to mention. In

my view that could be taken as a continuation of his testimony and the commissioner's approach in allowing the witness to continue when no other activity had taken place in between such closing argument or another witness being called, apart for the applicant's representative stating he had no further questions and witness reportedly standing down, cannot be said to be grossly irregular. It may look a little clumsy but I would not take it to be fundamentally flawed.

Conclusion

- [27] Kembo has no *locus standi* and the third respondent has failed to show that he had the necessary authority to depose to the affidavit.
- [28] The commissioner did not commit a gross irregularity by allowing the witness to testify.
- [29] However the commissioner misdirected himself by failing to take into account that the fax number where the notice was sent was not the same as that provided in request for arbitration and in other documents and therefore failed to exercise his discretion on whether to proceed with the hearing judiciously.
- [30] In the light of my finding my order is as follows:
1. The arbitration award of the second respondent dated 01 June 2009 under case number PSG 8196 – 08/09 is reviewed and set aside;
 2. The matter is remitted back to the first respondent for a fresh hearing before another commissioner other than the second respondent;
 3. There is not order as to costs.

Boqwana AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Advocate N Gqamana

Instructed by State Attorney

FOR THE THIRD RESPONDENT:

Advocate JL BASSON

Instructed by Grosskopf Attorneys, Pretoria