Reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: JR 388/14

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**Second Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
FLOORS BRAND (*M.O.*)	**Second Respondent**
ESKOM HOLDINGS SOC LTD	**Third Respondent**
SOLIDARITY	**Fourth Respondent**

Heard: 10 September 2015

Delivered: 15 December 2016

Summary: (Review-Interest arbitration-terms of reference constrain arbitrator's choice of outcome and affect review on grounds of reasonableness - outcome satisfying reasonableness standard – process related review , to

extent still available as a remedy would not succeed on facts - application dismissed)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to set aside a somewhat unusual arbitration award. The arbitration was conducted to settle a wage dispute between the parties, which is a dispute of interest in an essential service that may be referred to arbitration by either party if conciliation fails in terms of section 74 (4) of the Labour Relations Act, 66 of 1995 (' the LRA').

[2] The arbitrator issued an award in which the increase awarded was the final offer made by Eskom prior to the commencement of the arbitration. The final offer comprised a wage increase of 5.6% across the board for the 2013/2014 period and a range of related increases of various allowances and benefits, which I will simply refer to collectively as Eskom's package.

[3] A fortnight after issuing his award the arbitrator issued a variation ruling in which he substituted paragraph 121 of his award. In his original award, he had made specific findings on the wage increases, increases in various allowance, extension of death benefits, variation of maternity leave and contingency to leave and the referral of certain items to workgroups. In paragraph 121 of his award he also stated that, he made no order on the implementation of proposed changes to Eskom's disciplinary procedure and bargaining unit conditions of service as he was "not certain what those changes are". In his variation ruling it appears that he had inadvertently overlooked the fact that the proposed changes were contained in annexure attached to Eskom's referral form.

[4] Consequently, his failure to make any finding on those issues was an omission based on a patent error and he sought to correct it in his variation order. He noted that, according to Eskom, the changes were intended to conform to legislation and market trends and to accommodate the changing requirements of the business. He also noted that the unions did not lead any evidence on the proposed changes and he found that they were fair and reasonable. Accordingly, he then substituted paragraph 121 of the original award with an order that Eskom's conditions of service should be amended as set out in the Annexure to its referral form.

[5] The applicant unions, NUM and NUMSA, seek to set aside that award on two main grounds, which may be summarised thus -

5.1 The arbitrator misconceived the nature of the enquiry and ignored his terms of reference, particularly his failure to have regard to considering any increase beyond Eskom's final pre-arbitration position, because he took the view that the unions had not advanced "sufficient reasons" to accept their overall pre-arbitration position.

5.2 The arbitrator's decision to endorse Eskom's final pre-arbitration offer, despite shortcomings in the two legs on which its case rested, being affordability and comparability, and which ignored other important factors such as productivity and disparities in the wage gap made the result an unreasonable one that no reasonable arbitrator could have reached.

[6] The arbitrator was tasked by the parties to 'determine' a number of issues, amongst others, in terms of the terms of reference drawn up by them under section 135 (6)(a)(ii) of the LRA. Some of those listed, that are pertinent to this matter:

> "3 QUESTIONS THE ARBITRATOR MUST DETERMINE
>
> 3.1. ...
>
> 3.2...
>
> 3.3. The applicant's final proposal is attached to the LR A form 7.11 as annexure 1.

3.4 The parties have agreed that the following items, which form part of annexure 1 will be dealt with by a working group and the arbitrator shall not be required to make any findings in respect of these issues. The issues are-

3.4.1...

3.4.2...

3.4.3...

3.4.4...

3.5 Save for the items identified 3.4.1 to 3.4.4 the applicant's final offer remains unchanged and stop? the applicant will request the arbitrator to adopt its proposal as an arbitration award.

3.6 Whether the Conditions of Service and Salary should be amended in accordance with the unions proposals, demands set out in annexure A;

or

3.7 Whether the Conditions of Service should be amended in accordance with the Eskom's proposals attached as attachment 1 to the referral form?
3.8 The arbitrator's task is to determine an award which is reasonable and fair having regard to the following factors

3.8.1 The principles of equity, Reasonableness and fairness;

3.8.2 The total cost to company of the respective proposals;

3.8.3 What "bargain" might the parties have reached by themselves in terms of the principle of replication;

3.8.4 The contending legitimate interests of the parties;

3.8.5 The factors of affordability, comparability, productivity, costs of living;

3.86 The factor of public policy;

3.8.7 Bargaining history of the parties."

(Emphasis added)

The award

The arbitrator's approach

[7] The arbitrator considered what he characterised to be the two main approaches to interest arbitrations, namely the hypothetical outcome approach and the fairness based approach in the light of existing authorities as reflected in to arbitration awards. The hypothetical approach was characterised by Commissioner Levy in ***NEHAWU v Lifecare Health***[1] as an objective one in which it is accepted that the parties

> "…had final positions that were too far apart to allow for agreement, and that it is therefore the arbitrator's role to anticipate where the bargain should have been struck, in the light of available data, had the bargaining continued to conclusion and in good faith."

(emphasis added)

By contrast, the fairness of approach is articulated in the decision of Commissioner Grogan in ***SA Municipal Workers Union v Water & Sanitation Services***[2] in these terms:

> "For better or for worse, the legislature has chosen arbitration as the substitute for industrial action... Unlike industrial action and wall?, arbitration is a process of reason. While the parties to Interest arbitration cannot point to rights to sustain their cases, they are obliged at least to persuade the arbitrator why in fairness their position should be accepted. Only if both parties fail in that regard, may the arbitrator consider possible intermediate positions. The approach I have adopted in the present arbitration is accordingly to ask, in the first instance, whether the parties have advanced sufficient reasons for acceptance of their respective positions."

[8] In this instance, the arbitrator decided that the latter approach was preferable and explained his choice as follows:

> "I agree with Grogan and wish to add that, in my view it is not the function of an arbitrator in the interest dispute to extend the negotiation process.

[1] [1999] 2 BLLR (CCMA)

[2] [2002] 1 BALR 89 (CCMA)

Arbitration was a process based on reason and fairness by which the fairness and reasonableness of the respective positions must be determined. Furthermore as was suggested by Mr Boda, the hypothetical outcome approach undermines collective bargaining in that it encourages parties to come with unrealistic positions in the hope that the arbitrator will give more than what was offered. It gives too much emphasis to protecting the hypothetical outcome of powerplay and one cannot ignore the reality that arbitrators may have different approaches to the weight that they attached to the respective bargaining powers of the parties. In essential services unions have much more power because if they strike that can cause much more destruction than it a non-essential service. The very reason for essential service is to protect life, health and property. As was suggested by Mr Boda, it is abhorrent to countenance an argument for higher wages where that argument rests on the potential to destroy human life, on property or it affects health. If Eskom workers strike, hospitals may not function, which is a real and direct threat to life. Therefore, following a hypothetical outcome approach in essential services and arbitrator may tend to predict a higher outcome because striking workers may cause more devastation than in non-essential services. At the end of the day it is based on conjecture rather than reason, fairness and rationality which are the fundamental elements of arbitration-an approach that would be arbitra(ry) and irrational. Hence, I am of the view the hypothetical approach is not the correct approach to take in this matter."

[9] Nonetheless, one of the factors the arbitrator's terms of reference required him to consider, was the hypothetical outcome of the parties might have arrived at. That he did give consideration to the issue is reflected in his comments about the hypothetical bargain that the parties might have reached:

"**What 'Bargaining' might the parties have reached by themselves in terms of the principle of replication**

74. In terms of this principle is the function of the arbitrator to replicate or simulate in his or her award as closely as possible to the agreement that the parties would have concluded at the bargaining continued to conclusion in good faith and had they reached agreement.

75. As I have said above, my problem with this approach is that it is based on conjecture and not on fairness and reason, which the fundamental principles of the arbitration. It also encourages the resolution of disputes on a "split the difference" basis. I have therefore decided not to use this approach, but first determine whether either of the parties has convinced me that their respective positions are acceptable. Only if neither party has convinced me, will I follow this approach."

Thus, the arbitrator decided that the hypothetical approach should only be adopted if he was not persuaded of the reasonableness of either parties' proposals.

[10] Another pillar of the arbitrator's approach to his task was encapsulated in the following paragraphs of his award:

"**Equity, reasonableness and fairness**

69. Equity, fairness and reasonableness are the primary principles in interest arbitrations. Although equity, reasonableness and fairness are essentially relative concepts, they certainly suggest that regard must be had to all the circumstances of the matter and of the dispute that the arbitrator has to decide. The question therefore is whether the demands or office of the respective parties are fair and reasonable in all the circumstances of the matter.

70. Mr Boda argued that I should not consider the fairness and reasonableness of the bargaining items one by one, but as entire packages of the Union demands and Eskom's offer.

71. Save for the evidence of Mr Smal on the housing benefit and Mr Radebe on the office facilities for unions, no evidence was adduced by the unions which addressed any of the other items or for that matter the fairness of the Unions' demands as entire packages. Although Dr Forslund suggested that the Unions' demands are not exorbitant, he suggested that an increase of between 8 and 9% would be moderate. I was not informed that the Unions have deviated from their demands and there is simply no evidence which substantiate[s] any of their demands as presented at this arbitration. It is therefore not possible to weigh the Union's demands up against the offer of Eskom on any item by item basis even as a package. I will therefore look to the evidence adduced by Eskom and of course the evidence of Dr Forslund in so far as he suggested that the Eskom offer is

not fair and reasonable and decide whether Eskom has convinced me that its offer is indeed fair and reasonable. I will, however address the housing benefit and the union office facilities issues separately in so far as evidence was led by both parties."

The arbitrator's consideration of specific issues

[11] The arbitrator evaluated the dispute based on the criteria set out in paragraph 3.8 of the terms of reference. I will only mention ones which have some relevance to the review application.

[12] The arbitrator provided a comprehensive survey of the evidence and the parties' recorded positions, amongst other things, that the increased cost to the company of the parties' various packages of proposals were 39%, 44.3%, 20.1% and 6.3% for NUM, NUMSA, Solidarity and Eskom respectively.

[13] On the issue of the provision of union office facilities, the arbitrator accepted Eskom's argument that this was an issue regulated by the recognition agreement and noted that Eskom had agreed to review that agreement. He concluded that, accordingly, the proper place to deal with the demand was when that agreement was renegotiated. The arbitrator also noted that Eskom was in the process of reviewing its housing benefit policy and he accepted its evidence that its benefits were good and above average in the labour market. For these reasons he was of the view that the unions should await the outcome of that review and if unhappy with that outcome could table it for negotiation in the future.

[14] The arbitrator embarked on a detailed analysis of the factors of comparability and affordability. Without detracting from the details of his analysis, his conclusions may be summarised as follows -

14.1 Eskom could not afford to pay more than was being offered given that: it would entail borrowing money to fund higher salary increases, which was nonsensical; Eskom was facing severe financial constraints; management had received a 5,6% increase and executive management received no increase for 2013; reopening the NERSA process to increase tariffs in the current financial year was

impractical; higher increases would place the operational sustainability of Eskom at risk; the strain imposed by having to increase its workforce to build capacity and to operate and maintain plants; the need for Eskom to be financially self-sustainable, and the need to generate sufficient income to sustain not only day to day operational costs but also to repay capital on its borrowings and its interest bill. Lastly, the increase of between 8 and 9% as proposed by the union's expert witness only took into consideration inflation and the labour productivity and did not take account of its financial position, cash flow problems, position in the market, status of its employees and a decline in productivity or the inflationary impact of a higher increase.

14.2 Eskom employees' conditions of service compared favourably with the rest of the market even before an increase, taking into account *inter alia* evidence that: the affected employees all fell in the fourth income quintile (i.e. the second highest salary segment); they enjoyed consistently higher salaries than comparable market salaries; personnel turnover was extremely low; other benefits such as medical aid, leave policy, housing allowances, maternity leave and the like are either at the higher end of the market or market related.

[15] On the matter of productivity, the arbitrator accepted that the evidence of Eskom's expert witness showed that productivity was decreasing. He earlier noted that the union's expert witness had conceded that wage increases had been slightly higher than productivity over the years. He also was of the view that improved performance was a matter to be dealt with under an incentive scheme and not under general wage increases. He did not deal expressly with disparities in the wage gap.

Grounds of review

[16] The first and second applicants (NUM and NUMSA) jointly applied to review the award on the same founding papers, but were represented by different counsel at the hearing of the review application. The primary ground of review raised by the applicants is that, the arbitrator disregarded

his terms of reference. Had he interpreted them correctly he would have accepted that he should have adopted the hypothetical approach which attempts to replicate the results of collective bargaining and ought to have arrived at a bargain which the parties themselves would have reached by themselves.

[17] They claim the arbitrator also ignored material evidence in deciding that, apart for the evidence of Mr Smal ('Smal') and Mr Radebe ('Radebe') on the housing benefit and office facilities for the unions respectively, the unions failed to lead any evidence addressing any of the other items or dealing with the fairness of their own demands. The evidence which the applicants claim the arbitrator failed to consider or misconstrued was the evidence favourable to the union's case, which was given by Eskom's own witnesses under cross-examination. This evidence related to the issues of affordability, productivity and disparities in the production bonus awarded to employees falling within and outside the bargaining unit. More particularly, the applicants emphasised that he failed to consider evidence :

17.1 that affordability was an unreliable factor because it could be manipulated;

17.2 affordability was also a function of political choices made by the state which could be changed;

17.3 that although the rate of inflation at the time of making the award was 5.6% per annum, experts predicted that it was rising and expected to exceed 6% per annum for the period covered by the award;

17.4 that above inflation increases would not impact on the country's overall inflation rate and wage increases were not driving the inflationary trend, and

17.5 that productivity was an important factor in determining a fair increase and that productivity had increased.

As a result of these alleged omissions, the arbitrator arrived at a conclusion so at variance with the evidence dealing with those issues that his conclusions were ones no reasonable arbitrator could have arrived at.

[18] Thirdly, the applicants contend that the arbitrator failed to determine the issue of housing benefits and union office facilities. In his award, the arbitrator had found in respect of the housing demands, *inter-alia,* that Eskom was in the process of reviewing its housing policy and in view of that, the process should be completed and if necessary, the unions could table the matter again for negotiation and determination if they were not satisfied with the outcome. On the issue of union office facilities, the arbitrator accepted that the issue was regulated by a recognition agreement between the parties and as Eskom had agreed to review the agreement that this could be addressed when it was renegotiated.

Evaluation

Alleged misconception of the nature of the enquiry

[19] The first point that needs to be made is that, in the two arbitration cases in which the hypothetical and objective approaches were first discussed, the arbitrators were not bound by any written terms of reference agreed to by the parties, though both arbitrations were compulsory arbitrations in essential services. No specific criteria or methods of evaluation are prescribed by the LRA in dealing with interest disputes.

[20] Section 74 (4) which confers jurisdiction on the CCMA or bargaining Council to arbitrate essential service disputes, which include interest disputes, merely states:

> "(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission."

The special provisions dealing with the arbitration of interest disputes in section 139 of the LRA only deal with the conduct of the proceedings and not with the approach an arbitrator should adopt in dealing with an interest dispute. The determination of an interest dispute through arbitration is

therefore subject to the general requirements of section 138 (1) of the LRA, viz:

> **"138. General provisions for arbitration proceedings**
>
> (1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."

However, the parties are also expressly invited to determine terms of reference for the arbitration in terms of section 135 (6)(ii) of the Act :

> "(6)(a) If a dispute about a matter of mutual interest has been referred to the Commission and the parties to the dispute are engaged in an essential service then, despite subsection (1), the parties may consent within seven days of the date the Commission received the referral-
>
> (i) to the appointment of a specific commissioner by the Commission to attempt to resolve the dispute through conciliation; and
>
> (ii) to that commissioner's terms of reference. "

In this matter, the parties did agree to terms of reference and accordingly, the correctness of the arbitrator's approach depends primarily on the correct interpretation of those terms and he was not at large to simply elect which approach he would adopt, as the arbitrators did in the two cases mentioned.

[21] On a very superficial reading of the terms of reference, it might be argued that both the objective and hypothetical approaches were equally weighted by the parties in drafting the terms of reference. Thus, the terms of reference clearly identifies values and objective factors in subparagraphs 3.8.1, 3.8.2, 3.8.4, 3.8.5, 3.8.6 and 3.8.7, which the arbitrator must consider. On the other hand, sub-paragraph 3.8.3 describes the hypothetical approach, which seemingly invited the arbitrator to blend the two methods as he saw fit. However, paragraph 8.3 as a whole must be read in the context of the preceding paragraphs, which laid down constraints within which he could apply the various factors in arriving at an appropriate award.

[22] Paragraphs 3.5 to 3.7 of the terms of reference make it plain that, aside from certain items which were effectively assigned to a working group for determination, the fundamental task of the arbitrator was to decide whether he would make a determination either in terms of the union proposal as set out in ANNEXURE A or in terms of Eskom's proposals contained in Attachment 1 to the referral form. The significance of this constraint cannot be underestimated. Effectively, it deprived the arbitrator of the power to arrive at a compromise position between the two proposals of the parties, but compelled him to make a choice between the competing proposals. Although it was not described as such in the terms of reference, he was effectively engaged in what is sometimes referred to as 'final offer' arbitration.

[23] Consequently, he could not determine where the parties might have settled had they both been forced to compromise, using the 'hypothetical' approach, but had to assess which of the respective offers he found most reasonable. At best, the hypothetical approach could only have been an indirect aid in deciding if it was more likely parties might have settled closer to one offer rather than others, but it could not be applied in the sense normally intended, namely to craft the outcome the parties ought to have arrived at.

[24] Accordingly, I am satisfied that the arbitrator did not misconceive the nature of the enquiry. It also follows that any other grounds of review must be evaluated on the basis that the arbitrator embarked on the correct enquiry. What this means is that in considering any of the other factors listed in paragraph 8.3, those factors must still be evaluated with reference to the overarching question of which proposal the arbitrator ought to have preferred, and not with a view to finding a *via media*. This is a fundamentally different exercise from following the hypothetical approach because it means that the arbitrator might not agree with any of the proposals, but is nonetheless constrained to choose one. Inevitably, this means it is difficult for the arbitrator to give as much weight to nuances in the conflicting evidence which can be done when the arbitrator 'creates' the award using the hypothetical approach. It also means that the scope for a review based on irrationality is much more limited because the

arbitrator's freedom of choice and ability to explain the outcome has been already constrained by the parties own proposals. The best the arbitrator can do is to adopt the proposal which seems most reasonable (or conversely, the least unreasonable) even if that is not an outcome the arbitrator would have arrived at using the hypothetical approach, or an objective approach.

[25] It is for this reason that the arbitrator emphasised that it was necessary for the union's to defend their own proposals and not merely to attack Eskom's. Below I mention how this might affect questions of onus.

[26] The decisive effect of an alleged failure to take account of material evidence or issues under the ordinary standard of a review based on reasonableness is consequently even more difficult to establish because the 'outcome' determined by the arbitrator was one that did not emanate from the arbitrator's own reasoning but merely reflects a choice made by the arbitrator from pre-determined options after reflecting on them in the light of the evidence. As a result, the analysis below of the specific alleged *lacunae* in the arbitrator's evaluation of the evidence or attachment of weight to certain factors does not readily lend itself to the review test set out in recent decisions, viz:

> " [25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the B LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. The result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[3] (emphasis added)

and

[3] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at 2806.

> "[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health & another NO v New Clicks SA (Pty) Ltd & others 2006 (2) SA 311 (CC)). But again, this E is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."[4] (emphasis added).

The only way to apply the reasonableness test in the context of reviewing a 'last offer' award is if a rider is added to the test, namely that the arbitrator's reasons for choosing one outcome rather than another must not be a choice of pre-determined outcome no arbitrator could make on the evidence, when compared with the other possible outcomes.

[27] In his replying argument, *Mr Van der Riet*, who appeared for the second applicant, NUMSA, somewhat belatedly raised an argument not previously articulated that the arbitrator's conduct remained reviewable on the basis that he followed an unfair process and not only on grounds of unreasonableness. Accordingly, the arbitrator erred in only determining whether Eskom's offer was reasonable and not also whether it was fair. Leaving aside the merits of this argument based on whether or not the SCA decision in Herholdt was binding on the LAC or not, the difficulty I have is that the arbitrator's tasks was fashioned and constrained by the terms of reference. Fairness as a substantive value was included in the terms of reference as a factor to be considered but nonetheless within the overarching framework of paragraphs 3.6 and 3.7 of the terms of

[4] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC) at 950.

reference. The arbitrator acknowledged the roll of fairness had to play as mentioned in paragraphs [8] to [10] of this judgment.

[28] It may be correct that fairness in the sense of a fair outcome played less of a roll in his reasoning, but he did not ignore it and the fact it played less of a role was a consequence of the fact that, if properly construed, his terms of reference did not give him the discretion to arrive at an equitable outcome. Had the terms of reference been otherwise or even if the unions' proposals had not been pitched at a levels which were so remote from the scope of a realistic settlement, fairness could have been expected to have played a more prominent role in his deliberation. In the circumstances, even if it was competent on review to consider if the award also satisfied a fair process requirement, which required the arbitrator to make a finding based not only on reasonableness but also fairness, irrespective of whether it would affect the outcome, I do not think the arbitrator failed in this regard given the constraints imposed on him by the parties. In view of this it is not necessary to decide if, as a matter of law, the process related review remedy as argued for by the NUMSA was still available to the applicants.

[29] Further, it must be mentioned that any form of wage arbitration does not permit an analysis of factors which fits into a neat formula in which a number of requirements have to be met, unless the parties specify that in their terms of reference. To illustrate the difference with one example, an arbitrator evaluating the fairness of a dismissal for misconduct has to be satisfied *inter alia* that the dismissal meets the criteria for a substantively fair dismissal set out in Schedule 8 of the LRA. By contrast, in a wage arbitration, the arbitrator is confronted with a number of variables to consider none of which are, in principle, necessarily decisive. Also the arbitrator's findings on one factor may not determine or even affect the findings on others. At the end of the evidence, the arbitrator is confronted with a basket of factors some of which may favour the employees and others the employer. The arbitrator has the difficult task of deciding, based on the circumstances of that arbitration, which ought to be given more weight and how that relates to the opposing demands on the table. Because there is no 'correct' answer to an interest arbitration, the efficacy

of review proceedings based on unreasonableness will unavoidably be diluted, and even more so when the outcome is one of a number of pre-determined ones.

[30] In the context of arbitration of demarcation disputes, the LAC has recognised the difficulty of reviewing such determinations because of the complex nature of the decision. The observations of Van Niekerk J in another matter, which the LAC endorsed in *National Bargaining Council for the Road Freight Industry v Marcus No & others* [5] apply with even more force in the context of an interest arbitration, where the factors to be considered are even more diverse in nature. The LAC approved the approach to reviewing demarcation decisions:

> "[22] I am satisfied that the approach adopted by the first respondent passes muster against the principles enunciated in the Coin Security judgment. This is particularly so when consideration is paid to the following remarks made by the court in para 63 of the Coin Security judgment. It is apt to refer to the court's remarks, which appear at paras 59, 63 and 64 respectively:
>
> '[59] . . . Under the Act [LRA], demarcations need to be seen in the context of the system of bargaining councils established thereunder aimed at achieving the primary objects of the Act, including the promotion of orderly collective bargaining at a sectoral level. These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic comparison of jobs, into the relevant bargaining practices and structures. . . .
>
> [63] The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act. The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment. Particularly in decisions of this sort, and given the provisions of the Act, there must of necessity be a wide range of approaches and outcomes that would be in accordance with the behests of the Act. Due deference should therefore be given to the role and functions and resultant decisions of the CCMA in achieving the objects of the Act. This

[5] (2013) 34 *ILJ* 1458 (LAC)

approach will not only be consistent with these principles, but also consistent with the need for the Act to be administered effectively.

[64] The case for judicial deference becomes all the more compelling in this matter given that NEDLAC agreed to support the provisional award.' (Emphasis added.)[6]

In view of the constraints on the arbitrator, insofar as his failure to give weight to certain evidence or to factors he considered, or giving more emphasis to others might have made his award reviewable, the applicants have a much more difficult burden to discharge than they would even if the arbitration had been conducted on the hypothetical bargain approach, which in itself would have been a demanding task for the applicants. It is in this context that the consideration of particular issues set out below must be understood.

Alleged failure to consider material evidence

[31] Affordability was one of the criteria the arbitrator was obliged to consider under his terms of reference. The applicants argued that the arbitrator failed to consider Professor Mohr's statement that affordability was an unreliable factor because it could be manipulated, and that he failed to consider that affordability was also a function of political choices made by the state which could be changed.

[32] Firstly, the arbitrator did consider Professor Mohr's observations that affordability arguments were often used expediently by parties. In paragraph 81 of his award, the arbitrator stated:

"I got the impression that Professor Mohr is of the view that affordability is not a very reliable factor because parties can manipulate that. I am of the view that it is a very importan[t] factor which is objectively determinable. Hence the question is whether Eskom can afford to pay an increase above the offer."

In Professor Mohr's evidence, he was critical of the way employer and union parties tended to use affordability arguments opportunistically. For example, during bad years employers will focus on affordability as an

[6] *NBCFRI* case at 1468.

important factor whereas unions will discount the significance of this factor in bad times but emphasise its importance when an employer is doing well. He was also critical of the lack of substance that was often characteristic of employer arguments based on affordability and that union arguments on the issue were often lacking in substance and simply amounted to demands based on notions of entitlement. In his concluding remarks, Professor Mohr did not altogether discount affordability as a factor to be considered, but contended that it was irrational for employees to argue that just because funds might be available for a certain increase, that was a justification for awarding a particular level of increase. The arbitrator considered Professor Mohr's standpoint, but decided that it was nonetheless important for him to address the issue as objectively as he could, which is what he proceeded to do.

[33] The arbitrator did this by looking at the possible sources of additional finance that might be used to pay an increase above what was offered by Eskom. Amongst the factors considered by the arbitrator were its cash flow problems, the effect of a higher increase on Eskom's borrowings, whether it was a realistic prospect to reopen discussions on electricity prices with the regulator, NERSA, and reducing other operational expenses and capital expenses to finance the increase. He concluded that the sustainability of Eskom would be put at risk if it was forced to pay more than was on offer.

[34] The second point to be made is that the arbitrator was well aware of the unions' contention that, as a state owned company the state could be called upon to make funding available if that was necessary to finance the increase. In addressing the affordability question, the arbitrator noted the possible impact of Eskom being unable to pay its debts and meet its day-to-day obligations, namely that it could be downgraded which would require the state to step in as the guarantor of Eskom's debts. Secondly, he directly addressed the argument that the government could be approached to make the funding for salary increases available, viz:

> "The unions argued that Eskom, being a state owned company, should approach government to make money available to fund salary increases. That is of course an opportunistic approach. If I understood Mr Cassim

> correctly, government already said "no" which is in line with the shareholder compact agreement concluded between Eskom and government in October 2010 that Eskom should be sustainable, economically, socially and environmentally as an enterprise-in simple terms Eskom must stand on its own feet. Furthermore, the state has already given a guarantee of R 350 billion to enable Eskom to borrow money. The impression that I get is that the state is not keen to simply make money available to Eskom, but rather to assist Eskom to stand on its own feet."

Although he does not specifically refer to government policy on Eskom's funding as a matter of political choice, he plainly recognised that it was a matter of policy that Eskom should strive for financial self-sufficiency and that this was a legitimate aim. He did not decide that the fact that government was not willing to fund the operating expenses of Eskom meant operated like an artificial budgetary constraint that acted as insuperable obstacle to the state being required to fund part of the increase, directly or indirectly. Rather, he accepted that the policy choice made by government that Eskom should strive for self-sustainability was a constraint on Eskom's ability to afford the increase demanded by the unions because it was a *bona fide* policy choice. Characterising the unions' claim that government should simply stump up whatever funds were required to fund their demands as 'opportunistic' may appear to have been a robust comment, but must be understood in the context of the arbitrator accepting that it was a legitimate policy aim that Eskom should strive for financial self-sufficiency, which obviously cannot be achieved if operating costs have to be subsidised. It also must be seen in the context of Eskom being a state entity able to generate direct income through electricity sales independently of government transfers, unlike for example a state agency which simply distributes government welfare transfers.

Arbitrator's treatment of inflation

[35] In regard to the impact of inflation as a factor to be considered, the arbitrator found that Eskom's offer exceeded the current rate of inflation and that awarding inflationary increases was not a cast iron rule but also subject to considerations of affordability. It is true that he did not expressly make reference to anticipated inflation but only to known inflation values.

Is that something which renders his award in some way so unreasonable that it stands to be set aside?

[36] I fail to understand how having regard to historic and current data of the actual inflation rate immediately preceding the effective increase date, but disregarding estimates of future inflation must be necessarily be construed as an irrational approach. In so far as it is relevant for wage increases to keep pace with inflation, it is self-evident that the most reliable method is to consider, to what extent real wages have been eroded since the last increase was awarded and to make an adjustment for that erosion where possible to maintain the value of real wages over time. Basing an increase on estimates of future inflation during the course of the period to which the award is obviously a far more speculative approach to adopt and in my view it is within the arbitrator's discretion in a multivariate determination of this sort to prefer to rely on more certain inflation indicators.

[37] The applicants also argued that the arbitrator failed to consider that, above inflation increases would not impact on the country's overall inflation rate and wage increases were not driving the inflationary trend. Firstly, it should be mentioned that the arbitrator was alive to the submissions of the unions' expert witness Dr Forslund that wage increases played a small role in inflation. However, in his analysis, the arbitrator disagreed and took the view that an increase of between 8 and 9% would have an impact on inflation. The evidence of Professor Mohr had been that even though it could not be said that an above inflation increase by Eskom would directly accelerate inflation, because of its potential norm setting value it could impact on wage settlements throughout the economy which cumulatively would have an accelerating impact on inflation. He also made the connection between the impact of an above inflationary increase to Eskom workers on Eskom's costs which would have a bearing on future electricity price increases. This evidence was not materially challenged. Consequently, it cannot be said that it was irrational of the arbitrator to adopt a view that increases awarded by Eskom above the inflation rate would not have a neutral impact on the rate itself.

[38] The evidence of Eskom was that the overall impact of its offer would be 6.3 %. The actual increase in remuneration was 5.6% which was marginally above the year-on-year inflation rate at the end of June 2013, which was 5.5%. The proposed increase took effect at the beginning of July 2013. Eskom's evidence was that the average increase in non-bargaining unit employee's remuneration for the same period was 5.6%. That being an average, there were managerial employees such as one of Eskom's witnesses, Mrs Sherman, who received more than this.

Changes in productivity as a criterion

[39] The applicants contend that productivity had increased and that, because it was an important consideration in determining a fair increase, the arbitrator had failed to give due consideration to this factor. What emerged from the evidence before the arbitrator was contesting measures of productivity. Dr Forslund preferred to use the average productivity increase for the economy as a whole rather than the measure adopted by Professor Mohr, which measured per capita output per employee.

[40] In so far as he regarded productivity as an important factor, the arbitrator took the view that it was productivity at Eskom which mattered and not productivity measured across the whole economy. He accepted Professor Mohr's evidence that there was no evidence to support the fact that productivity had increased. Dr Forslund had argued in effect that because Eskom had consciously sought to reduce demand for electricity and had been partly successful, it was inevitable that labour productivity would appear to decline, but this was not something attributable to the employees' actions. His justification for this was that if productivity per employee did not increase in line with the increase in wages that would result in an increase in unit costs which would ultimately impact negatively on Eskom's customers.

[41] Obviously there are various measures of productivity and labour productivity is only one such measure. In the context of factors relevant to determining a wage increase, it cannot be said categorically that the productivity of employees in the entity under consideration should be given less weight than general labour productivity in the economy as a whole, as

the specific economic circumstances of the entity under consideration will always be directly relevant to the determination of appropriate wage levels in that entity whatever the weight attached to comparative measures in the broader economy or comparable entities. That is not to say that measures of productivity in the broader economy could not arguably be a consideration an arbitrator might take account of, but the arbitrator's decision to prefer to regard labour productivity in Eskom itself as the more important factor cannot be characterised as an arbitrary or irrational choice. In that regard, at best for the unions the evidence showed that labour productivity had not improved.

[42] In any event, the arbitrator was of the view that productivity as a factor should not play such a significant role in determining general wage increases, but that it was a factor that should rather feature in negotiations over incentive bonuses. Despite this, it is still clear from the arbitrator's observations on the productivity argument that he did consider productivity to be of some relevance to the extent that it might diminish the cost impact of a wage increase, and by implication would be a consideration affecting perceptions of the affordability of an increase.

[43] As mentioned above, the evaluation of the specific alleged deficiencies in the arbitrator's reasoning above, must be understood in the context of the type of arbitration decision under consideration. In short, none of the shortcomings are ones that, even if they have some merit, are ones that would compel me to find that the arbitrator chose Eskom's proposal as the more reasonable in circumstances where no other arbitrator could have chosen that outcome on the evidence before them.

Order

[44] The review application is dismissed.

[45] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

FIRST APPLICANT:	M Euijen assisted by L Ah Shene instructed by Cheadle, Thompson Inc
SECOND APPLICANT:	H Van der Riet, SC instructed by Ruth Edmonds Attorneys.
THIRD RESPONDENT:	F A Boda instructed by Cliff Dekker Hofmeyr Inc.