IN THE LABOUR COURT OF SOUTH AFRICA **REPORTABLE**

HELD AT DURBAN

CASE NO: **D513/06**

In the matter between:

IMATU	Applicant
and	
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	First Respondent
A J RYCROFT N.O.	Second Respondent
ETHEKWINI MUNICIPALITY (METRO FIRE SERVICES)	Third Respondent
SAMWU	Fourth Respondent

JUDGMENT

CONRADIE AJ

INTRODUCTION

1. In this matter the Applicant (Imatu) seeks an order reviewing and setting aside a "ruling" that an award does not operate retrospectively, and amending it to make the award operate retrospectively.

2. If the relief sought appears to be unusual then that is because the facts of the matter insofar as they relate to the grounds for review are somewhat unusual. I do not need to

repeat all the facts in the matter as the facts relevant to the issue to be decided do not depend on the facts which pertained to the underlying dispute.

3. This matter came before the Second Respondent (the Arbitrator) as an interest arbitration in terms of section 74 of the Labour Relations Act 66 of 1995 (the LRA). The underlying dispute related to an allowance which used to be paid to members of Imatu and the Fourth Respondent (Samwu) up until its withdrawal in August 2003.

4. On 23 March 2006 the Arbitrator forwarded the following email to the attorneys representing the unions and the Third Respondent (the Municipality) respectively:

"Dear Richard and Michael

I am about to issue my award in the Metro Fire exemption allowance arbitration.

I am anxious to avoid an order which is difficult to implement or simply unworkable because of a lack of records. What I would like to do is to provide you both with the last part of my award and for you to give me feedback on any practical aspects which could make the award easier to implement. You'll realize, I hope, that I am not asking for comments on the merits of my decision, just the implementation thereof! I'd appreciate your comments.

Regards

Alan Rycroft"

5. The email continues with the Arbitrator then setting out what he purports to be his finding in the matter as follows:

> "*61 To sum up: It is my view that:*
> *(a) there is no jurisdiction in the circumstances of this case to reinstate the exemption allowance;*
> *(b) the averaged working hours system does not include scheduled overtime;*
> *(c) with regard to unscheduled overtime, there is no legal obligation to exclude from overtime pay those employees earning in excess of the amount determined by the Minister from time to time in terms of s 6(3) of the BCEA;*
> *(d) I am not prohibited from considering the fairness of the consequences of the threshold on individual employees as there existed a long-standing practice to pay an allowance (which included overtime) regardless of the threshold earnings;*
> *(e) It was inequitable to move from the exemption allowance system which ignored salary thresholds to a system which is prejudicial to those earning in excess of the threshold.*

62 A consequence of these views is that the Applicant's pray that I order that the exemption allowance of 29% be reinstated is refused. However with regard to those earning in excess of the threshold, I order that they be treated on the same basis as all other employees as regards overtime, night allowance, Sunday time and public holidays. This order is herby made effective until such time as agreement has been reached in the rationalisation of allowances as referred to in the Staff Placement Policy.

63 I can see no reason why this rectification should not be made retrospective to August 2003. I am mindful that there may be difficulties in computing the arrear payments and, in accordance with the Respondent's request, Applicants are required to submit a list of individuals who are party to this dispute and a computation of their claims so that that list can be verified by the Respondent before the award is given effect.

5.1. AWARD

5.1.1. For the reasons set out above I make the order as set out in Paragraphs 62 and 63 of this award."

6. A response was received from Mr Richard Haslop, who appeared on behalf of Imatu & Samwu, and from Mr Michael Maeso, who appeared on behalf of the Municipality. Both representatives dealt with issues touching on the retrospectivity of the award. Mr Maeso suggested that *"a retrospective award to the 1st August 2003 creates enormous practical problems and industrial relations concerns. As this is a dispute of interest, there is nothing preventing an award that is not retrospective or if it is retrospective, to be retrospective for a short period to lessen the administrative complications in implementing such an award."*

7. Following on the above, on 16 May 2006 the Second Respondent issued an award in terms of which he indicated in paragraph 64 that he was persuaded that the rectification should not be made retrospective. This is obviously contrary to what was stated with reference to paragraph 63 in the email.

8. The crux of the dispute turns on the Arbitrator's change of view in respect of the issue of retrospectivity. The unions contend that their members are entitled to the retrospectivity as contained in the email. The Municipality, on the other hand, argues that there is no retrospectivity as per the award of 16 May 2006.

Imatu's Submissions

9. Imatu's submissions can be summarised as follows:

9.1. The Arbitrator communicated his decision to the legal representatives in an email by providing them with the last few paragraphs of the award that he was about to issue.

9.2. He asked for feedback only to make the practical implementation of the award easier.

9.3. He made the following clear in his email:

9.3.1. He was about to issue his award, i.e. he had made a final decision;

9.3.2. He did not require or expect any comment on the decision as such, but asked for feedback on any practical aspects which would make the award easier to implement;

9.3.3. He had decided that the rectification to which effect was given in the award was to operate retrospectively to August 2003;

9.3.4. He set out the decision in the body of the email itself, being the last three paragraphs of the reasoning leading to the award, and in the final paragraph he set out the award itself.

9.4. It was not open to the Arbitrator to change his mind when he issued the signed award which he changed substantially by ruling that the award would not operate retrospectively.

9.5. Having made a decision that impacted on the parties' rights, and having communicated that decision to the parties, the Arbitrator was *functus officio* and therefore could not change his mind and alter his decision.

9.6. The Arbitrator could only reopen his decision if enabling legislation expressly or by necessary implication gave him the authority to do so.

9.7. He had clearly and concisely communicated to the parties what he had decided via the email in question. There was no qualification that the award was not finalised on the issue of whether the relief should be granted and if so whether it should be retrospective and to what date. The only peripheral issue which remained related to how the practical implementation of the award could be made easier.

9.8. The fact that there were legislative or procedural steps that had to be taken before the award would be published in a form that would allow it to be enforced does not detract from the fact that the decision that the award would operate with retrospective effect had been made and communicated to the parties.

The Municipality' Submissions

10. The Municipality's arguments can be summarised as follows:

10.1. An arbitrator is not *functus officio* until he or she has made a final award in the proceedings.

10.2. The Arbitrator's email was sent to the attorneys representing the parties after evidence had been lead and written representations had been made. The award was therefore in the process of preparation.

10.3. The Arbitrator's email confirms that the content did not constitute a final and binding arbitration award.

10.4. It was only on delivery of the award on 16 May 2006 that the Arbitrator became *functus officio*. It was therefore open to the Arbitrator to revise any preliminary findings which he might have made with regard to the award in preparation of the final award dated 16 May 2006.

10.5. The Arbitrator's email to the parties can best be described as his preliminary findings. The final decision would only be taken once the parties had provided input on the practical implementation of the award.

10.6. The Bargaining Council's own Constitution provides that within 14 days of the conclusion of the arbitration proceedings the arbitrator must issue an arbitration award with reasons, signed by the arbitrator. In terms of the Constitution the arbitration award was only issued when the Arbitrator delivered the award to the parties on 17 May 2006. It was only then that he became *functus officio*.

Requirements for a valid award

11. Section 138(7) of the LRA provides that within 14 days of the conclusion of an arbitration *"the commissioner must issue an arbitration award with brief reasons, signed by the commissioner."* From this it is clear that an arbitration award must be in writing, must provide brief reasons and must be signed by the Commissioner. In order for an award to exist the legal requirements contained in the LRA as well as certain common law requirements must be met. This includes that the award must determine and finally dispose of the dispute between the parties, it must be in writing, contain reasons and be signed by the commissioner. [1]

12. The LRA also requires that the award be issued by the commissioner. The word "issue" is not defined in the LRA. In *Free State Buying Association LTD t/a Alpha Pharm v SA Commercial Catering & Allied Workers Union & Another (1998) 19 ILJ 1481 (LC)* it was held that an award will be issued once it is made available for service and filing.[2]

13. The reference to service relates to section 138(7)(b) which requires that the Commission must serve a copy of the award on the parties to the dispute or on the person who represented them in the arbitration proceedings. The reference to issue relates to section 138(7)(c) which requires the Commission to file the original award with the registrar of the Labour Court.

14. I am of the view that the provisions of section 138(7) requiring that an award be issued, contain brief reasons and be signed by the Commissioner are peremptory. Until these requirements are complied with the award has no legal effect.[3]

15. The email sent by the Arbitrator to the representatives of the Unions and the Municipality does not comply with any of the above requirements. Firstly, no reasons are provided in support of the "award" which he intended to make as set out in the email. At most the email contains a summary of his conclusions. Secondly, the "award" is not signed. Thirdly, the

[1]See Bosch, Molahleli and Everett - The Conciliation and Arbitration Handbook, 2004 at p156.
[2] See also Queenstown Fuel distributors CC v Labuschagne NO and others [1998] JOL 4234 (LC).
[3] See Meyer v CCMA & Another [2002] 2 BLLR 186 (LC).

award has not been issued by the Second Respondent in the sense that it has been made available for service and filing.

16. The constitution of the bargaining council under whose jurisdiction the parties to this dispute fall also required at the time that an Arbitrator must issue an arbitration award with reasons and must be signed by the Arbitrator.[4]

Functus Officio

17. Even if the email of the Arbitrator is not considered an award in that it does not comply with the above requirements, the question which remains is whether or not the Arbitrator could change his decision as contained in the email.

18. Imatu's view is that the content of the email reflected the decision which the Arbitrator had taken in the matter and as such he could not change that decision as he was *functus officio*.

19. According to Hoexter, the *functus officio* doctrine applies only to final decisions. A decision is therefore revocable before it becomes final. Finality is considered to be arrived at when the decision is published, announced or otherwise conveyed to those affected by it.[5]

20. Imatu argues that the substance of what had to be decided had been finally decided and was clearly communicated to the parties by the email in question. There was no qualification that the award was not finalised on the issue of whether relief should be granted and whether it should be retrospective and to what date. All that had been decided. The only issue that remained related to how the practical implementation of the award could be made easier.

21. I am of the view that an arbitration award is only final when it is complete in all respects and disposes of all the matters in dispute. It is only at this point that an arbitrator is *functus officio*. An award can only be considered to be complete in all respects once it has met the requirements of section 138(7) and any requirements which a particular bargaining council

[4] See clause 10.7.10 of the 2003 constitution.
[5] See Cora Hoexter, Administrative Law in South Africa, 2007 at 247.

may have. This includes that the award must contain brief reasons and be signed. The content of the email in question merely contains a decision without any reasons. It is also not signed. There has also been no "publication" of the award in the sense that there has been no service and filing of the award in the manner contemplated in the LRA.

22. In the circumstances the application must fail. Insofar as costs are concerned, the underlying dispute is clearly of considerable importance to Imatu and the Municipality and as such it was important to obtain clarity on the status of the e-mail and the award proper. I therefore see no basis for ordering Imatu to pay the costs of this application.

In the circumstances I make the following order:

1. The application is dismissed;

2. No order as to costs.

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Conradie AJ

Date of hearing	7 December 2009
Appearance for Applicants	S Reddy of Shanta Reddy Attorneys
Appearance for Respondents	M Maeso of Shepstone & Wylie
Date of Judgment	5 February 2010