IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: JR1905/08

In the matter between:

STEVE THSWETE LOCAL

MUNICIPALITY APPLICANT

AND

THE SOUTH AFRICAN LOCAL

GOVERNMENT BARGAINING COUNCIL 1ST RESPONDENT

RAYMOND HLONGWANE N.O. 2ND RESPONDENT

SAMWU obo PITJADI & OTHERS 3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent on the 18th July 2008 under case number MPD 040801. The matter also concerns an application to review the rescission ruling issued by second respondent on the 23rd July 2008 under the same case number. In terms of the arbitration hearing the commissioner found that the applicant had committed an unfair labour practice in terms of s 186 (2) (c) of the Labour

Relation Act 66 of 1995 (the LRA), in not paying members of the third respondent the scarce skills allowance.

Background facts

[2] It is common cause that during November 2000, the applicant adopted a resolution the provisions of which were intended to govern payment of the scarce skills allowance to employees in the electrical department. The underlying purpose of the resolution was to attract and retain employees in the municipality who were in possession of scarce skills. The respondents having not received the said allowance lodged an unfair labour practice grievance on the 26th February 2008. The respondents were unhappy with the outcome of the grievance procedure and accordingly lodged a dispute concerning unfair labour practice with the first respondent.

[3] Subsequent to failure to reaching an agreement over the dispute at the conciliation stage the matter was referred to arbitration. At the arbitration hearing a point in *limine* concerning the jurisdiction of the first respondent to entertain the dispute was raised by the applicant. It would appear that before commencing with the arbitration proceedings the commissioner attempted further conciliation. The applicant made a suggestion that the municipal manager be given some time to consider the matter further and revert back to the respondents. The suggestion which was made in the private discussion between the commissioner and the applicant was communicated to the

respondents. The respondents rejected the proposal and consequently the commissioner proceeded with the arbitration hearing.

[4] It is common cause that at the commencement of the arbitration hearing the commissioner gave both parties the opportunity to address him on the point in *limine* which point as indicated earlier concerned the jurisdiction of the first respondent to entertain the dispute. There is some dispute as concerning what happened after both parties had made their submissions concerning the point in *limine.* The respondents contend that after making the submission regarding the point in *limine* the parties proceeded to make submissions regarding the merits of the dispute. The applicant on the other had contends that no submissions regarding the merits of the dispute was made. However, what is common cause is that at the conclusion of the hearing on that day the commissioner directed the parties to make further submissions within seven days from the date of the hearing.

The arbitration award and the grounds for review

[5] In the arbitration award the commissioner identified three issues which he had to determine. The first issue concerned the jurisdiction of the first respondent and the second whether the applicant has subjected the respondents to an unfair labour practice arising from denial of the provisions of benefits. The other point which the commissioner had to determine if he firstly found that the first respondent had jurisdiction and secondly that applicant had committed an unfair labour practice was the appropriate relief for the respondents.

[6] After recording the issues he had to deal with the commissioner, in dealing with the background facts to the matter records that the applicants had contended that the first respondent did have jurisdiction as the benefits the respondents sought to enforce did not fall with the ambit of s 186 (2) (c) of the LRA. The commissioner then and more importantly for the purposes of considering this review application records the following:

> *"Both parties made submissions both in respect of the merit of the case and the point in limine."*

[7] In relation to the issue of jurisdiction the commissioner found that the first respondent had jurisdiction to entertain the dispute. And in relation to the merits of the dispute the commissioner found that the respondents had been subjected to an unfair labour practice relating to the provision of the benefits, and accordingly ordered the applicants to pay the respondents the scarce skills allowance back dated to 16th November 2006.

[8] Turning to the grounds for review, the applicant has raised a crisp issue in terms of which it contends that it was not afforded the opportunity to present its case regarding the merits of the dispute. In this respect the applicant contends that it was never given the opportunity of dealing with the merits as it had intended to call witnesses to deal with particular circumstances in which certain people were given discretionary skills allowance and others not.

Evaluation

[9] The court in considering whether or not to review the decision of the commissioner applies the reasonable decision maker test. In this respect the enquiry which the court needs to consider in determining whether the conclusion reached by the commissioner is one which falls within a range of reasonable conclusions which a reasonable decision maker could have reached. See *Sidumo v Rustenburg Platinum Mines (2007) 28 ILJ 2405(CC).*

[10] It would seem to me that the applicant does not dispute the fact that in addition to the submissions regarding the jurisdictional point the parties also made submissions with regard to the interpretation of the resolution regarding the issue of scarce skills. The commissioner deals with the resolution in his arbitration award under the heading *"Factual Findings."* In this respect the commissioner states the following:

> *"It is common cause that on the 14th November 2006 Mayoral Committee considered and adopted a resolution regarding the payment of scarcity allowance to employees in the electrical department as follows:*
>
> 1. *"THAT the following non pensionable scarcity allowance be paid to the following positions in the Electricity Department.*
>
> - *An amount of R2 000.00 pm to all employees who are qualified electrician and who are required and authorised to work on the high tension electricity network;*

- *An amount of R3 000.00 pm to Superintended Electrical;*
- *An amount of R5 000.00 pm to the Town Electrical Engineer and the three Assistant Town Electrical Engineers.*

2. *THAT the allowances referred to in 1 above be paid for a period of 3 years from the date of the resolution and that at that stage the situation be re-assessed,*

3. *THAT the payment be subjected to the condition that employees concerned be prepared to work standby duty and to be on second or third call when necessary."*

[11] The contention of the applicant is that the consideration of the provisions of the resolution by the commissioner was limited to the issue of jurisdiction. This contention is unsustainable because in terms of the structure of the commissioner's arbitration award there is clear separation in terms of dealing with the issue of jurisdiction and the merits of the dispute. The commissioner deals with the issue of jurisdiction under the heading "*ANALYSIS OF EVIDENCE AND ARGUMENT."* The merits of the matter are dealt with under the heading*, "FACTUAL FINDINGS."*

[12] In dealing with his factual findings the commissioner after quoting the provisions of the resolution, proceeds to deal with the submissions of both parties. In this respect the commissioner records the submissions of the respondent which was that they fell within the category of the employees indentified in the resolution. He further says that there was no reason proffered

by the applicant during the grievance hearing as to why the respondents were excluded from the provisions of the resolution. And significantly the commissioner states that the applicant failed to provide any reason for the exclusion of the respondents even during the arbitration hearing.

[13] In relation to the contention of the applicant, the commissioner says the following:

> "*The respondent's only contention for excluding the applicants (the applicant in the present instance) from the benefit was that this was a discretionary benefit and does not form part of the conditions of their service."*

[14] It is apparent from the reading of the arbitration award that the commissioner in exercising the powers given to him in terms of s 138 of the LRA resolved that there was no need for oral evidence. He adopted this approach based on the common cause facts which were before him. The important material which was before the commissioner was the written document in the form of a resolution. The validity and the manner in which that document came into existence was not disputed or put into question. It seems the complaint of the applicant is that it ought to be given an opportunity to lead oral evidence extraneous to the contents of the document. This the applicant seeks to do by complaining that it ought to have been given the opportunity to lead oral evidence to explain how the decision was arrived at in formulating the resolution The approach adopted by the commissioner is summarised in the rescission ruling as follows:

"I accordingly proceed to deal with the merits of the dispute because of the following undisputed evidence and submissions made on behalf of the applicants;

- *That the applicants also fall within the category of employees identified in Council's resolution to enjoy the benefits;*
- *That no explanation was provided with regard to the exclusion of the applicant from the benefit;*
- *That the only reason for the respondents to exclude the applicant from the benefit was that this was a discretionary benefit, and does not form part of their conditions of service."*

[15] Thus the facts and circumstances of this case support the view that the matter was finalised on the basis of the submissions made by the parties without the need for oral evidence. Except for the directive that the parties, if they so wished, could make further written submissions within seven days after the hearing, there is no evidence that the hearing was incomplete. The argument of the applicant that it still expeted to lead oral evidence is unsustainable. There is no evidence in this respect that the matter was part-heard at the time the commissioner issued his award.

[16] In my view based on the above analysis, the approach adopted by the commissioner cannot be said to be unreasonable or amounting to gross irregularity or misconduct. Thus the applicant's review application stand to fail. It also follows for the same reason that the rescission application stand to fail.

[17] The review application also stands to fail for the reason that the applicant has failed to provide the record of the proceedings. It is trite that the applicant in review application has the duty of ensuring that the records of the proceedings are made available to the court.

[18] In its notice in terms of Rule 7 (A) (6) and (8) of the Rules of the Court the applicant states that it would not submit the record of the arbitration hearing as there was *"no Arbitration process per ser but both parties were afforded an opportunity to address the Arbitrator on the points in limine, hence, the records of the same do not exist at the SALGBC."* This averment is contrary to what is stated at the very beginning of the commissioner's arbitration award where it is stated:

> *"The proceedings were electronically recorded and by means of hand written notes."*

[19] I am also of the view that the commissioner dealt with the rescission ruling properly and that there is no basis to interfere with it. I am also of the view that there is no reason why the costs should not follow the results.

[20] In the premises the following order is made:

1. The applicant's review application is dismissed.
2. The applicants' application to review the second respondents ruling of rescission is dismissed.
3. The applicant is to pay the costs of the respondent.

Molahlehi J

Date of Hearing : 4th June 2010

Date of Judgment : 16th July 2010

Appearances

For the Applicant : Adv J. G. Rautenbach SC

Instructed by : Ntuli Noble Inc

For the Respondent: Adv Malindi

Instructed by : Mkhabela Huntley Adekeye Inc