THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case No: PR175/18

In the matter between:

ZITHOBE MAXWELL MBALA **Applicant**

and

THE MINISTER OF PUBLIC WORKS *N.O.* **First Respondent**

GENERAL PUBLIC SERVICES SECTORAL BARGAINING COUNCIL **Second Respondent**

W BLUNDIN, *N.O.* **Third Respondent**

Heard : 13 February 2020

Delivered: In view of the measures implemented as a result of the Covid-19 pandemic, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 22 January 2021.

Summary: The application of the golden rule of interpretation is key to the resolution of interpretation of agreements as it works in tandem with the test utilised in review applications.

JUDGMENT

NHLAPO, AJ

Introduction

[1] This is a review application to set aside the arbitration award issued by the third respondent (commissioner) under the auspices of the second respondent. The application is opposed.

Material facts

[2] In 2007 the Applicant was employed by the first respondent as an Industrial Technician: Quantity Surveyor. By profession and qualification, he is a quantity surveyor and registered as such with the relevant statutory council.

[3] During 2007, a collective agreement was concluded between the State (as the employer party) and DENOSA, HOSPERSA/NUPSAW/NATU, NEHAWU, POPCRU, the PSA and SAPU (as the trade union parties) in the Public Service Co-ordinating Bargaining Council (GPSSBC) under Resolution 1. In order to implement Resolution 1, the GPSSBC, the employer party and POPCRU, NEHAWU and the PSA concluded various collective agreements for the implementation of an Occupational Specific Dispensation (OSD) for various categories of employees.

[4] The OSD was meant to revise the salary structures and occupations of public service employees. This was to cater for their career, pay progression, grade progression, seniority, increased competencies and performance with a view to attract and retain professionals and other specialists.

[5] Amongst these collective agreements are:

5.1 Resolution 3 of 2009 (Resolution 3), which applies to quantity surveyors, professional surveyors, architects, town and regional planners, GISC professionals and scientists.

5.2 Resolution 5 of 2009 (Resolution 5) applies to engineering technicians, survey technicians, architectural technicians, draughtspersons, GIS technicians and scientific technicians.

[6] Clause 13.2.3 of Resolution 3 provides for the translation of quantity surveyor and related work streams who are permanently appointed and have been performing the duties of the post satisfactory as at 30 June 2009 but are not registered with the relevant Council.

[7] At the time of the implementation of the OSD there were four Industrial Technician Quality Surveyors. The other three were translated to Quality Surveyors: Production A in terms of Resolution 3 of 2009.

[8] However, Resolution 5 was applied in the instance of the applicant, who was then translated to the position of an architectural technician. To date, the applicant is not performing any architectural duties.

[9] Despite the difference in the treatment he carried on to perform the same functions with the other three individuals (those who were translated in terms of Resolution 3).

Findings in the arbitration award

[10] The commissioner refused to consider Resolution 5 stating that he was only required to interpret Resolution 3. This is despite the fact that the applicant was translated in terms of Resolution 5, and his colleagues were translated in terms of Resolution 3. This is absurd.

[11] In his interpretation of Resolution 3 the commissioner considered its heading. He found that a literal interpretation of the heading revealed that the collective agreement is not applicable to technicians.

[12] He further found that the purpose of the agreement excluded the designation of the applicant.

[13] Clause 4.1.3 was also found to exclude the career streams of Technicians. This is despite a finding that the clause provides for various career streams for quantity surveyor.

[14] It was further the finding of the commissioner that the normal process of OSD cannot translate a technician to a candidate position without a vacancy within the various streams.

Grounds for Review

[15] Three grounds for review are raised by the applicant, which are:

15.1. That the commissioner failed to correctly interpret Resolution 3 by taking into account irrelevant evidence or evidence/facts not before the arbitrator; and not correctly applying the rules of interpretation.

15.2. The commissioner failed to apply his mind and/or incorrectly applied his mind to clause 13.2.3 of Resolution 3.

15.3. That the commissioner failed to consider relevant evidence that others in similar position to the applicant were translated in terms of Resolution 3.

Legal Framework

[16] Prior to a consideration of the agreements that are the subject of this review application, it is important to consider the jurisprudence on the interpretation of agreements.

[17] In terms of the golden rule of interpretation, the words are the primary and main source of information from which the intention of the parties should be ascertained and an interpreter may not venture beyond the words of the text to determine the meaning thereof. Words must be understood according to their ordinary grammatical meaning. If the words are clear and unambiguous, effect must be given thereto. The context only becomes relevant when the literal meaning is ambiguous, leads to an absurd result or a result that is manifestly repugnant to the intention of the parties, or if there is an inconsistency between different terms of the same contract.[1]

[18] In *Union Government v Smith,* Wessels CJ stated:[2]

> 'It is an elementary rule in the construction of contracts that we must take the grammatical and ordinary sense of the words used in order to ascertain what the parties meant by any particular term of the contract.'

[19] The applicant referred to an important decision of the Supreme Court of Appeal (SCA) on the interpretation of agreements, which is the principle set out in *Coopers and Lybrand and Others v Bryant*[3] where the "*golden rule of interpretation*" was set out as follows:

> '. . . According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. . .
>
> The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:
>
> (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, . . .

[1] Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* 2007 LexisNexis 31.
[2] 1935 AD 232 at 240.
[3] [1995] 2 All SA 635 (A).

(2) to the background circumstances which explain the genesis and purpose of the contract i.e. to matters probably present to the minds of the parties when they contracted.

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document save direct evidence of their own intentions.'

[20] I am of the view that in the interpretation of OSD agreements "*the golden rule of interpretation*" as set out by the SCA in *Coopers and Lybrand* is key to the resolution of the disputes that frequently arise between the employer and the affected employees.

[21] This is so in that the "golden rule" of interpretation does not start and end with ascertaining the grammatical and ordinary meaning of words, but it also requires a consideration of context, the background circumstances which explain the genesis and purpose of the agreement. Furthermore, it permits in the process of interpretation the application of extrinsic evidence when the language is on the face of it ambiguous, by considering previous negotiations and subsequent conduct of the parties showing the sense in which they acted on the document.

[22] The golden rule of interpretation further results in a consideration of all the evidence that is put before the commissioner and thus in compliance with the principles developed by this Court as well as the Labour Appeal Court (LAC) in the determination of review applications. The test for review discourages a piecemeal approach in the consideration of evidence. In this regard a consideration of the following by the LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*[4] case stated as follows with regards to the test for review:

[4] (2014) 35 ILJ 943 (LAC).

'[18] In a review conducted under s145 (2) (a) (c)(ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process – related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision – maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries.

[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 and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). <u>But again, this 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 a review as a process.</u> 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.'

[23] The golden rule of interpretation as formulated in *Coopers and Lybrandt* is in accord with the standard of review as developed by this Court and the LAC. As such I will consider Resolutions 3 and 5. I will further consider the evidence regarding the duties performed by the applicant before and after his translation. Lastly, I will also consider the fact that his other three colleagues were translated in terms of Resolution 3. This approach is sanctioned by the standard of review as well as the rules of interpretation.

Analysis

[24] In the interpretation of Resolution 3 the commissioner firstly considered the heading thereof, which reads:

> 'Agreement on the implementation of an Occupation Specific Dispensation for Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GISC, Professionals and Scientists.'

[25] The commissioner went on to find that the literal interpretation of the heading reveals that the agreement in question is not applicable to technicians.

[26] My view is that the literal interpretation of the heading of Resolution 3 says nothing about technicians. Instead the heading refers to quantity surveyors and professional surveyors.

[27] I agree with the applicant that the plain and literal wording of the heading does not qualify or limit the type of quantity surveyor that are included in the ambit of Resolution 3. I am therefore of the view that the commissioner erred in incorporating and reading-in words into the heading that do not appear from the plain and literal wording.

[28] Furthermore, the commissioner considered the purpose of Resolution 3 as set out in paragraph 1 thereof. The purpose of Resolution 3 is:

> 'This agreement gives effect to clause 4.14.3.3 of the PSCBC Resolution 1 of 2007 in providing an Occupational Specific Dispensation (OSD) for Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GISc Professionals and Scientists.'

[29] The commissioner's finding was that the purpose of the agreement excluded the designation of the applicant. I disagree.

[30] I again agree with the applicant that nothing supports that conclusion. In fact, one is confronted by the same predicament where mention is made of Quantity Surveyor, Professional Surveyors, Architects, Town and Regional Planners, GISe Professionals and Scientists.

[31] My view is that the type of quantity surveyor falling within the ambit of Resolution 3 is open ended. If the intention was to limit or close the category, then Resolution 3 would have done so. However, it cannot be reasonable to limit the type of quantity surveyor in circumstances where the collective agreement does not do so.

[32] The commissioner's decision to ignore Resolution 5, which was used to translate the applicant, deprived the commissioner the opportunity to consider the background circumstances which would have assisted him in understanding the genesis and purpose of Resolution 3.

[33] I agree that this then resulted in the irrational translation of the applicant to an architectural technician position. It is also irrational in that the applicant did not perform the work of an architecture. Further, the applicant's reporting structure and qualifications have nothing to do with architecture. This was not disputed by Ms Booysen, a Deputy Director in Human Resource Admin.

[34] This was a material aspect in the determination of the matter. The fact that the commissioner ignored such an important consideration constitutes a gross

irregularity resulting in an outcome that does not fall within the bounds of reasonableness.

[35] I agree with the applicant's that a rational interpretation of Resolution 3 would be that since it is the only Resolution that provides for a quantity surveyor, then quantity surveyor ought to be catered for in Resolution3.

[36] The applicant's further contention is that if the commissioner applied his mind properly to clause 13.2.3 of Resolution 3 he would have found that the designation Industrial Technician: Quantity Surveyor falls squarely within the Quantity Surveyor related work streams. This is due to the substantive nature of his work stream and the fact that Resolution 3 was applied to his colleagues.

[37] Further to the above, the commissioner was faced with two mutually destructive versions pertaining to the treatment of other Industrial Technicians: Quantity Surveyor but failed to make any credibility and/or reliability and/or probability findings to resolve this material aspect.

[38] Applicant's evidence was that his colleagues were translated into Quantity Surveyors posts. This testimony was not challenged, nor was any contradictory version put to him during cross examination. I must mention that the golden rule of interpretation requires such evidence to be considered in the interpretation of an agreement. I am also required to consider all the evidence that was put before the commissioner in the determination of this application.

[39] This is material. The fact that the commissioner ignored this important aspect in favour of an interpretation not supported by the evidence renders his decision irrational and not falling within the bounds of reasonableness.

[40] Premised upon the above, it is clear that the commissioner was wrong in his decision not to consider Resolution 5 in his consideration of Resolution 3. Furthermore, the commissioner erred in his non-consideration of the duties

performed by the applicant at the time of his translation as well as the duties performed thereafter. A further important aspect not considered by the commissioner is the extrinsic evidence regarding the translation of the applicant's other colleagues. All of this would have assisted the commissioner in his determination of the agreement that should have been used to translate the applicant.

[41] The arbitration award should therefore be reviewed and set aside as it cannot be said that the outcome falls within the bounds of reasonableness.

Costs

[42] I am not inclined to make an adverse order as to costs given the continuing relationship between the parties and further the intricacies of interpretation.

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

Order

1. The arbitration award issued by the third respondent is reviewed and set aside.
2. That Resolution 3 of 2009 be applied in the translation of the applicant as was the case with the three other individuals.
3. No order as to costs.

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S B Nhlapo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Y Peer
Instructed by: Edward Nathan Sonnenbergs Inc.

For the Third Respondent: Adv. A Rawjee
Instructed by: State Attorney, Port Elizabeth