IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J456/08

In the matter between:

NATIONAL PROSECUTING AUTHORITY	1ST APPLICANT
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2ND APPLICANT
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3RD APPLICANT

AND

THE PUBLIC SERVANTS ASSOCIATION	1ST RESPONDENT
PSA MEMBERS	2ND AND FURTHER RESPONDENTS
SOCIETY OF STATE ADVOCATES	3RD RESPONDENT
THE HON JUDGE McNALLY N.O	4TH RESPONDENT
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	5TH RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award made by the fourth respondent, Hon Judge McNally, a retired judge of the Zimbabwe

Supreme Court, on 29th February 2008. I will refer to the Honourable Judge as the *"arbitrator"* in this judgment.

[2] The arbitrator in his award ordered the first applicant to pay employees employed by the National Prosecuting Authority (the NPA) an amount equivalent to the amount they would have received had the outcome of the job grading been implemented with effect from the middle of 2005.

[3] This matter was initially referred to the fifth respondent (the bargaining council) as a dispute of mutual interest for conciliation under case number PSGA14-05/06. Conciliation having failed the bargaining council facilitated an agreement in terms of which the matter was to be arbitrated by a private arbitrator under its auspices. It was agreed by the parties that the arbitrator's award shall be deemed to have the same status as an award made by the bargaining council.

[4] The application was opposed by the first respondent (the PSA) on the grounds that it disclosed no basis for review.

[5] The respondent's late filing of the heads of argument was condoned regard being had to the explanation provided.

Backgrounds facts

[6] As stated in the applicant's heads of argument the background facts are fairly common cause. The dispute that was arbitrated by the arbitrator arose out of a job evaluation which was conducted through out the public service. The job

evaluation exercise was conducted over 133 national and provincial departments and involved some 800 000 employees. The exercise involved some 15 000 different job descriptions.

[7] It is common cause that there was extensive consultation between the parties before the implementation of the job evaluation exercise. All the key role players including the National Treasury (the Treasury) were involved in the consultation process. Arising from this consultation process, according to the applicants, the method of implementing and managing the job evaluation exercise was regulated by the Public Service Regulations, of 2001. Regulation V.C.5 reads as follows:

> *"An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-*
>
> *(a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and*
>
> *(b) the department's budget and medium-term expenditure framework provide sufficient funds."*

[8] The consequences of the job evaluation exercise in the NPA, which was completed within six months, required that a number of posts be upgraded. The costs of the upgrades had it been implemented simultaneously, would according to the applicant, have amounted to approximately R140 million for the first three-year budgetary cycle, the Medium Term Expenditure Framework (the MTEF).

[9] The NPA through the Department of Justice lodged with the Treasury a motivation for additional funding after receipt of the job evaluation results. The funding request for the first year was R54 million which was intended to address the first phase of the implementation of the outcome of the job evaluation. This request was unsuccessful.

[10] Arising from the refusal to approve the requested funding by the Treasury, the NPA raised funding from existing allocation through savings. The applicants were through this approach able to implement the first phase-in of the salary adjustment for a number of graded posts. The first phase was implemented effective 1st June 2005 and benefited those categories of employees who the applicants regarded as *"pressing"*.

[11] The PSA rejected the phased-in approach in the implementation of the upgrading of the upgraded positions and insisted on the simultaneous salary increase on all evaluated positions. The applicants contended that simultaneous salary increases for the upgraded posts was impossible because of the budgetary constrains which arose from the refusal by the Treasury to approve the funding of the job grading programme. It was the result of this disagreement that gave rise to the dispute which was finally referred to the bargaining council for resolution.

The grounds for review and the award

[12] The first criticism of the award by the applicants is that the arbitrator considered the job evaluation exercise to have replaced the former *"rank and leg"*

promotion system. This finding, according to the applicant, significantly influenced the arbitrator in arriving at his final conclusion that the applicants should have made a prior fiscal provision for the outcome of the job evaluation.

[13] The arbitrator is also criticised for failing to have regard to the evidence presented by the witness of the applicants that the job evaluation had nothing to do with the termination of the *"rank and leg"* system. The rank and leg system had been terminated by the parties through a collective agreement and replaced by the performance management system.

[14] The key challenge to the award in my view turns around the complaint that the arbitrator failed to take into account the provisions of regulations, regulating the implementation of the outcome of the job grading exercise, in particular regulation V.C.5. The applicants contended that the regulations were a product of the interaction between the parties and the stakeholders at the beginning of the job evaluation process.

[15] The other point related to the above in the attack of the award is that the arbitrator failed to take into account the statutory framework which was a fundamental feature of the issue before him. The arbitrator was for this reason criticised for exceeding his powers.

[16] In the interlocutory ruling on points *in limine* raised by the applicants and in dealing with the fourth objection, the arbitrator found that:

> *"21. In the premises, it is a statutory requirement, the applicability of which is common cause between the parties, that in so far as the*

results of the JE process may entail an increase in salary payments, such increase may only be implemented if the required funding is available."

[17] In dealing with the fifth objection the arbitrator found that it was the Treasury and not Parliament which refused to provide the required funds for the implementation of the outcome of the job grading exercise. The arbitrator found that it was the refusal by the Treasury to allocate funds which defined the nature of the dispute which took the form of interest dispute. The arbitrator further found that had the Treasury allocated the funds, those funds would have appeared in the NPA's budget, and the up-graded employees would have been paid.

[18] In the arbitration award, which was written separate from the *in limine* ruling, the arbitrator confirmed his ruling that, what he was dealing with was an interest dispute and rejected the contention of Mr Tip for the applicants, that he was dealing with a rights dispute. The arbitrator reasoned in this respect that the dispute was and has always been characterised as an interest dispute and because *"the word "entitlement" was used in framing of the dispute, it had to be interpreted to mean "moral" or perhaps "equitable" entitlement."*

Evaluation

[19] Mr Brassey for the respondents argued that the dispute which the arbitrator was enjoined to consider was truly an interest dispute concerning payment of higher salaries because the jobs performed by the employees were intrinsically higher

than the salary they received. The demand for a higher salary is according to him based on the demand by the employees that they were entitled to be paid higher salaries consequent to the job evaluation. He further argued that the defence of the applicants was not based on the inability to pay but on the fact that those responsible for the budget refused to approve the funding.

[20] In the heads of argument the respondents argues that there are no contentions of procedural irregularity in this matter and that the case of the applicants rested on the contention that the arbitrator's award was as a matter of substance, irregular. In responding to the attack that the arbitrator exceeded his jurisdiction because he failed to take into account the dictates of the regulations, the respondents contended that the regulations placed no constraints on the arbitrator's powers. It was argued in this regard that the arbitrator derived his powers from the provisions of section 74 of the Labour Relations Act 66 of 1995 (the LRA) and that the provisions of this section transcended the regulatory framework.

[21] Whilst the arbitrator was appointed in terms of the Arbitration Act 42 of 1965, the proceedings were conducted under the auspices of the bargaining council and therefore I am enjoined to apply the reasonable decision-maker test in determining whether or not there is a basis upon which this Court could interfere with the award. The inquiry to be conducted in determining the reasonableness or otherwise of the decision of the arbitrator is whether the decision reached is one which a reasonable decision-maker could not reach. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC).*

[22] In his testimony for the applicants, Mr Oelofsen referred to a number of regulations whose common norm was that no changes can be implemented in the public service without funds being available. In this regard he referred to Part II. C.5. Part III B.2, Part III. F(d), Part III. G(a), Part X.A, Part X.D, Part I.G and section 5(3) of the Public Service Act 103 of 1994. He further testified that it would be *"unauthorised expenditure"* for an executing authority to incur additional expenditure which has not been approved, within the contemplation of the Public Finance Management Act 1 of 1999 (the PFMA). This was in essence the main feature of the case which the applicants presented before the arbitrator.

[23] In essence the arbitrator accepted the above case when he, as quoted above, found that it was a statutory requirement that, in so far as the results of the job grading process may entail an increase in salary payments, such an increase may only be implemented if the required funding was available. However, the arbitrator did not base his conclusion on this finding but mainly on the finding that the funds ought to have been made available and that the regulations should not stand on the way of the outcome of the job grading exercise. The other leg upon which his decision rested on, as will appear later, was fairness and equity.

[24] It seems to me common cause that the NPA would have implemented the outcome of the job grading but for the refusal to authorise the funding by the Treasury. To this extent the arbitrator acknowledged the unhappiness of the NPA in the refusal to authorise the funding of the programme by the Treasury. Thus the decision of the arbitrator was not based on the consideration that the

NPA reneged on its obligation as provided for by the collective bargaining agreement. The reading of the award reveals that the arbitrator's decision is based on considerations of equity and fairness which did not take into account the regulatory and statutory framework within which the public service operates in, including how the job grading process came into being and the context in which the regulations were promulgated.

[25] The approach adopted by the arbitrator also ignored the circumstances within which this dispute arose. His reasoning, however does in some way take him back to the true nature of the dispute. At paragraph 18 and 19 of the award the arbitrator reiterates his conclusion that the applicants failed to timeously ensure sufficient funding and does so by reference to the DPSA's Guide on Job Evaluation in which all the departments were cautioned to deal carefully with the situations where insufficient funding might prevent the implementation of the programme. This demonstrates very clearly that the availability of funds was central to the implementation of the job grading programme, a matter which as stated earlier the arbitrator found to have been common cause.

[26] It is therefore my view that the conclusion reached by the arbitrator is not one which a reasonable decision-maker could have reached. In applying the principles of equity and fairness as he did, the arbitrator failed to take into account the legislative and regulatory framework governing this matter, a matter which fundamentally affected the outcome of the proceedings, resulting in the applicant being denied a fair hearing. Put differently the arbitrator in failing to

apply the regulatory framework failed to fully and fairly consider the issues which were before him.

[27] This takes me to the next issue regarding the definition of the nature of the dispute. As indicated earlier the arbitrator confirmed his initial ruling that he was dealing with an *"interest"* dispute. The arbitrator arrived at this conclusion after setting out the various considerations relating to the nature of the dispute and arrived at the conclusion that the matter concerned the creation of fresh rights and not an existing right. The arbitrator rejected the argument of the respondents that this dispute was materially different from a wage dispute. It was for this reason, it would appear, that the arbitrator treated the dispute as being analogous to a strike action.

[28] In my view it cannot be denied that there is an element of interest in this matter in that the employees are seeking to obtain what they do not have. This, as Mr Tip conceded, imports an element of interest dispute into the matter. However, the regulation imported into the matter a much more significant component of a right. It is clear that what was to happen once the job grading process was completed was that those employees whose jobs were upgraded would be entitled to a wage increase. This, in my view, brought into the dispute a major component of a rights dispute which as Mr Tip put it, provided a legal impediment of the relief sought by the respondents. Until set aside the regulation forms part of the law and the executing authorities were once the job evaluation was completed obliged as a matter of law to ensure that funds were

available before effecting salary adjustment arising from the findings of the job evaluation.

[29] In the light of the above discussion it is my view that the arbitration award stands to be reviewed because a reasonable decision maker could not have reached such a decision. I see no reason both in law and fairness why the costs should not follow the results and this applies to the application for the say of the enforcement of the award which was heard on the 12th and 13th March 2008.

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

(i) The arbitration award issued by the arbitrator dated 29th February 2008 under the auspices of the bargaining council is hereby reviewed and set aside.

(ii) The determination made by the arbitrator is substituted with the following:

"The applicants' claims are dismissed."

(iii) The first and second and further respondents are ordered to pay the applicant's costs of the review application including the costs of two counsels, the one paying the other to be absolved.

(iv) The first and second and further respondents are ordered to pay the applicants' costs of the application to stay the enforcement of the arbitration award which was heard on 12th and 13th March 2008, the one paying the other to be absolved.

Molahlehi J

Date of Hearing : 27th June 2008

Date of Judgment : 19th November 2008

Appearances

For the Applicant : Adv K S Tip SC with Adv G I Hulley

Instructed by : The State Attorney

For the Respondent: Adv M S M Brassey SC with Adv R Lagrange

Instructed by : Bowman Gilfillan Inc