

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR283/17

In the matter between:

STATISTICS SOUTH AFRICA

Applicant

and

PUBLIC SERVANTS ASSOCIATION

First Respondent

OF SOUTH AFRICA

WS HOBYANE

Second Respondent

**GENERAL SECTORAL PUBLIC
BARGAINING COUNCIL**

Third Respondent

THULANI NORMAN DUBE

Fourth Respondent

Heard: 24 July 2020

Delivered: 17 August 2020

Summary: Application to review and set aside arbitration award – no condonation application – bargaining council has no jurisdiction – referral to bargaining council was outside of the 90-day period prescribed by section 191(1)(b)(ii) of the LRA - review is upheld – cannot remit for a hearing *de novo* as bargaining council lacked jurisdiction – no costs order

JUDGMENT

Introduction

- [1] This is an opposed application brought in terms of s 145 of the Labour Relations Act 66 of 1995 (LRA) for the review, correcting and setting aside of a decision and award made on 30 November 2016, by the Fourth Respondent (the Commissioner) under case number GPBC 71/2016, wherein it was found that the Applicant had committed an unfair labour practice and was ordered to pay the Second Respondent (Hobyane) an amount equivalent to R170 799.00 as compensation.
- [2] The Applicant seeks an order substituting the Award with a decision that the Third Respondent (Bargaining Council) lacked jurisdiction to entertain Hobyane's referral, alternatively, that the Applicant did not commit an unfair labour practice against Hobyane, further alternatively, remitting the matter to the Bargaining Council for a hearing *de novo* by an arbitrator other than the Commissioner.
- [3] The Second Respondent seeks the dismissal of the review application with costs.

Material Background Facts

- [4] On 15 January 2016, the First Respondent, on behalf of Hobyane referred a dispute to the Bargaining Council alleging that the Applicant had committed an unfair labour practice relating to promotion by not shortlisting him for various positions which he had applied for, and for which he was of the view, that he complied with the requirements.¹
- [5] Hobyane is employed by the Department of Justice and Constitutional Development as a Junior State Accountant.
- [6] On 19 April 2012, Hobyane applied for a Junior State Accountant position at the Applicant; the reference number for this position was 07/01/12HO (post

¹ Record - Bundle A pg 7; Transcribed Record: pg 109, Lines 21 - 24. See also Record - Arbitration Award pg 98, at para 3.

07/01/12HO). Hobyane received an auto-reply email from the Applicant confirming that his application for the position has been received.² Hobyane was not shortlisted for the post 07/01/12HO.

[7] On 29 February 2013, Hobyane applied for the position of Principal Methodologist at the Applicant. The reference number for this position was 07/01/13HO (post 07/01/13HO). Hobyane received an auto-reply email from the Applicant confirming that his application for the position has been received. Hobyane was not shortlisted for post 07/01/13HO.

[8] On 20 February 2014, Hobyane once again applied for the position of Junior State Accountant at the Applicant. The reference number for this position was 10/12/13HO (post 10/12/13HO). Hobyane received an auto-reply email from the Applicant confirming that his application for the position has been received. Hobyane was not shortlisted for post 10/12/13HO.

[9] Hobyane again applied for and was shortlisted for a Junior State Accountant position at the Applicant. The reference number for this position was 02/11/14HO (post 02/11/14HO).³ It is further common cause that in February 2015, Hobyane completed a competency assessment for post 02/11/14HO,⁴ and he failed the competency assessment.⁵

[10] Hobyane laid a complaint with the Statistician General of the Applicant regarding the recruitment processes followed by the Applicant.⁶ The complaint was laid on 23 February 2015.

[11] The Statistician General referred Hobyane's complaint to the Deputy Director General of Corporate Services, Akhtari Henning (Henning) to be dealt with.

² Record - Arbitration Award pg 98, at para 6.

³ Record - Bundle B pg 66.

⁴ Record - Bundle B pg 78.

⁵ Record - Bundle B pg 66.

⁶ Transcribed Record pg 122, lines 20-25

- [12] The Applicant then conducted an investigation into the complaints made by Hobyane. A Report dated 15 July 2015 containing the findings of the investigation was compiled and sent to Hobyane (the Report).⁹
- [13] The Report indicated that Hobyane's applications for the posts in question (i.e. post 07/01/12HO, post 07/01/13HO and post 10/12/13HO) were not actually received by the Applicant, despite him having received auto-reply e-mails confirming that his applications for the positions had been received.⁷⁸
- [14] Hobyane was of the view that he met all the requirements for the posts that he applied for and should have been shortlisted for the positions.¹¹ Accordingly, on 15 January 2016, Hobyane referred a dispute to the Bargaining Council alleging that the Applicant committed an unfair labour practice relating to promotion by failing to shortlist and/or appoint him to the posts that he applied for.
- [15] The date that the dispute arose is contentious and according to the Applicant they argue that Hobyane became aware of the alleged act or omission as early as 15 July 2015 but Hobyane states that he became aware of the alleged act or omission on 27 October 2015.⁹
- [16] In the arbitration award, the Commissioner held that the Applicant had committed an unfair labour practice relating to promotion by not shortlisting Hobyane for the positions which he had applied for. The Commissioner accordingly ordered the Applicant to compensate Hobyane.

Grounds of review

- [17] The Applicant argues that the Bargaining Council did not have any jurisdiction to hear the matter as Hobyane's referral to them was outside of the 90-day period prescribed by s 191(1)(b)(ii) of the LRA.

⁷ Transcribed Record pg 124, line 15.

⁸ Transcribed Record pg 143 line 1.

⁹ Record - Bundle A pg 16.

[18] The Applicant seeks an order reviewing and setting aside the Award and dismissing Hobyane's unfair labour practice claim on the following basis:

- (i) The Commissioner committed a gross irregularity by failing to consider relevant and material evidence in reaching his decision;
- (ii) The Commissioner misconstrued the nature of the enquiry before him when he failed to determine whether, on the evidence, Hobyane would have been promoted and appointed to the posts he applied for; and
- (iii) The Commissioner committed a gross irregularity when he awarded compensation to Hobyane in instances where it was clear that Hobyane did not meet the requirements for the posts he had applied for and accordingly, would not have been shortlisted, promoted or appointed to any of the posts.

Issues

[19] Since this review application concerns an issue of jurisdiction, the review test as enunciated in *Sidumo & Another v Rustenburg Platinum Mines Ltd & others*¹⁰ does not apply.

[20] In cases such as these, where it is about whether the Bargaining Council had jurisdiction, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction.¹¹

[21] In *Trio Glass t/a The Glass Group v Molapo NO & others*,¹² the court said that “the Labour Court thus, in what can be labelled a ‘jurisdictional’ review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only

¹⁰ (2007) 28 ILJ 2405 (CC).

¹¹ See *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen & others* (2012) 33 ILJ 363 (LC) at para 23; *Hickman v Tsatsimpe NO & others* (2012) 33 ILJ 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun & others* (2013) 34 ILJ 392 (LC) at paras 5-6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO & others* (2012) 33 ILJ 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2012) 33 ILJ 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO & others* (2013) 34 ILJ 1272 (LC) at para 21.

¹² (2013) 34 ILJ 2662 (LC) at para 22. See also *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 12; *Phaka & others v Bracks NO & others* (2015) 36 ILJ 1541 (LAC) at para 31.

to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.”

[22] It was held in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*¹³ that “*the CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.....*”

[23] Disputes concerning an unfair labour practice are dealt with under s 191 of the LRA. Section 191 determines the time frames within which Employees must refer disputes pertaining to alleged unfair dismissals and unfair labour practices. An Employee must refer their alleged unfair dismissal to the CCMA within 30 days in accordance with s 191(1)(b)(i) of the LRA. Should the Employee’s dispute relate to an alleged unfair labour practice, then the Employee has 90 days to refer their dispute to the CCMA in accordance with s 191(1)(b)(ii) of the LRA. If the Employee fails to refer their dispute within the set time frames, then the Employee must apply for condonation of their late referral.

[24] Based on the above legal principles, I will now turn to the issue of jurisdiction.

[25] It is argued by Hobyane’s representatives that “*the third respondent had the necessary jurisdiction to arbitrate the dispute as the dispute was within its ambit of jurisdiction. The jurisdiction challenge is without merit and if there was a jurisdictional dispute, the applicant would have raised such point in limine at arbitration proceedings*”;¹⁴ and that “*the Employee was only notified on 27 October 2015 that his applications would not be considered following his complaint regarding the matter. Hence, this date would then be considered the date on which the dispute had arose as it was only*

¹³ (2008) 29 ILJ 2218 (LAC) at para 40.

¹⁴ First Respondent’s Heads of Argument at para 9.

communicated to the Employee that his application will not be considered on 27 October 2015.”¹⁵

[26] However, it is trite in our law that a jurisdictional point can be raised at any stage of the proceedings including at the hearing of the matter.¹⁶

[27] In looking at when, did Hobyane become aware of the act or omission s191 of the LRA becomes relevant and provides as follows:

“(1)(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

(i) a council if the parties to the dispute fall within the registered scope of that council or

(ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within –

(i) 30 days of the date of a dismissal or, if it is a later date within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence” (own emphasis).

[28] In *SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration & others*¹⁷ the Labour Appeal Court held that “*the referral must be made, if not within 90 days of the act or omission constituting the unfair labour practice, then within 90 days of the date on which the employee became aware of the act or occurrence*”.

[29] Turning to the facts of this case, Hobyane alleges that the dispute arose on 27 October 2017 in his referral forms. The Report, which was compiled by the Applicant through Henning was as a result of the investigations regarding the

¹⁵ First Respondent’s Heads of Argument at para 8.

¹⁶ *Tshehla v Emfuleni Local Municipality* (JS 619/13) [2015] ZALCJHB 7 (21 January 2015).

¹⁷ (JA36/07) (2009) ZALAC 13; (2010) 31 ILJ 592 (LAC) ; [2010] 3 BLLR 251 (LAC) (18 November 2009) at para 26.

recruitment process on the positions Hobyane applied for. The Report was sent to and received by Hobyane on or about 15 July 2015. This is evident by his response to the Report in an email dated 15 July 2015.¹⁸

[30] The Report states that “*Mr Hobyane applied for the following positions*” and proceeds to list the “*reasons of why he was not appointed in the comment column in the below table*”.¹⁹ It then details the positions that Hobyane applied for together with the reasons why he was not successful.

[31] Throughout his e-mail communications with the Applicant after receiving the Report, Hobyane’s communiqués show that he is clearly aggrieved by the Report and the contents thereof. In coming to this conclusion, I have had regard to the following:

- (i) The record of the arbitration proceedings show that Hobyane was aggrieved by the Report in that he constantly questions its validity and accuracy.
- (ii) In an email to Henning dated 15 July 2015, Hobyane makes various requests directly related to the Report issued and received by himself, including requesting the following: “*Firstly can you provide me with all sources documents that you used to compiled the report (sic)*”.²⁰
- (iii) On 16 July 2015, Hobyane questions the integrity of the Report once again and writes “*where is the integrity base to the report*”.²¹

[32] I have also had regard to the e-mails dated 21 July 2015;²² and in addition, I have considered the communications after 27 October 2015 for a fuller deliberation of why Hobyane would choose the date of dispute as being 27 October 2015.

[33] In this regard, I have read the e-mail communications dated 29 October 2015;²³ 30 October 2015;²⁴ and 18 December 2015. In the communication of

¹⁸ Record – Bundle A pg 56C.

¹⁹ Index to Record - pg 17 (The Report).

²⁰ Record - Bundle A pg 56C.

²¹ Record - Bundle A pgs 56A to 56C.

²² Record - Bundle A pg 56A.

²³ Record - Bundle A pg 56A.

²⁴ Record - Bundle A pg 50.

18 December 2015, reference is made to a meeting held on 27 October 2015, a meeting held to address the concerns of Hobyane arising directly out of the Report.²⁵

- (iv) In an earlier e-mail communication of the same day, 18 December 2015, Hobyane once again attacks the Report for its “*lack of integrity and accountability*”.²⁶
- (v) On 21 December 2015, Hobyane once again refers to the Report by writing “*I provided copies of acknowledgement to you*” clearly referring to comments of the Report wherein it was stated that his name does not appear amongst the list of candidates who applied for the post and whose details were captured therein.²⁷
- (vi) Even during 11 January 2016, reference is once again made to this Report and his unhappiness with it.

[34] The Respondent’s arguments that “*the Employee was only notified on 27 October 2015 that his applications would not be considered following his complaint regarding the matter. Hence, this date would then be considered the date on which the dispute had arose as it was only communicated to the Employee that his application will not be considered on 27 October 2015*” is rejected because it is abundantly clear from these communications that Hobyane attacks the integrity and validity of the Report of 15 July 2015. He did so on a consistent basis, for the very same reasons, throughout his interactions with the Applicant. Furthermore, the Report of 15 July 2015 states the reasons for Hobyane’s unsuccessful applications. The fact that he disagreed with the reasons is evidence of a dispute arising. His communications bear witness to the evidence that he was aware that a dispute had already arisen by 15 July 2015.

[35] It is without a doubt that I can, therefore, conclude that Hobyane became aware of the issue on 15 July 2015. The various communications entertained by the Applicant after the issuing of the Report and the subsequent meeting

²⁵ Record - Bundle A pgs 48-49.

²⁶ Record - Bundle A pg 49.

²⁷ The Report pgs 17-18.

of 27 October 2015 was conducted and concluded as a direct result of the reasons provided for in the Report of 15 July 2015. The meeting held, and the communications entered into, were done out of good faith by the Applicant and a respect for the grievance that Hobyane, as employee, had raised. The meeting of 27 October 2015 was meant to bring finality to the grievance arising out of the contents of the Report of 15 July 2015. By that date, i.e., 27 October 2015, Hobyane was already aware that he had not been shortlisted and of the reasons for the decision. The communications, therefore, provide a clear evidence of the dispute arising on 15 July 2015.

- [36] Hobyane lodged an official grievance with the Applicant on 11 November 2015; however, no outcome was received.²⁸ The Employee then referred the dispute to the third respondent on 15 January 2016.²⁹
- [37] The dispute had to be referred within 90 days from the date it arose or when he became aware of it. Accordingly, Hobyane should have referred a dispute within 90 days from 15 July 2015 or failing to do so, he should have applied for condonation when he referred the dispute to the bargaining council in January 2016. It is common cause that Hobyane did not apply for condonation for the late referral of his dispute.
- [38] In the absence of that condonation application and an order condoning the delay, the bargaining council had no jurisdiction to arbitrate the dispute.
- [39] Having regard to the *dicta* in *Du Plessis v Public Protector & others*³⁰ the court decided that “*Jurisdiction cannot be assumed or implied. It either exists or it does not. Jurisdiction is the power of the Court to decide a matter that has been brought before it. If the Court does not have the power to do so, it cannot consider the matter, no matter what the merits or equities may be. In Makhanya v University of Zululand, the Court also dealt with the meaning of jurisdiction as follows: ‘.... Judicial power is the power both to uphold and to dismiss a claim. It is sometimes overlooked that the dismissal of a claim is as much an exercise of judicial power as is the upholding of a claim. A court that*

²⁸ Record - Bundle A pg 16.

²⁹ Record - Bundle A pg 8.

³⁰ (C272/19) (2019) ZALCCT 41; (2020) 41 ILJ 919 (LC) (12 December 2019) at para 20.

has no power to consider a claim has no power to do either (other than to dismiss the claim for want of jurisdiction)’.”

[40] On the relief that this court should remit the matter back for a hearing *de novo*; it would not make sense to remit the matter back to the bargaining council as a wrong date of when the dispute arose was alleged by Hobyane on the referral form and on evidence. As a consequence, no condonation application was filed for the late referral of the dispute.

[41] For all the reasons as set out above, I, therefore, uphold the review application on the basis that the bargaining council had no jurisdiction to hear the dispute and the application falls to be dismissed on this basis alone, without needing to consider the merits thereof.

Order

[42] In the result, I made the following order:

- (i) The arbitration award issued by the commissioner dated 30 November 2016 under case number MPD040901 is reviewed and set aside;
- (ii) The matter is not remitted back to the bargaining council, because in the absence of the condonation application the bargaining council lacked jurisdiction to arbitrate the dispute.
- (iii) There is no order as to costs.

T Deane

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Mr Masher - Edward Nathan Sonnenbergs Inc.

For the First Respondent:

Mr Elco Geldenhuys - Macgregor Erasmus
Attorneys