THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 82/2024

In the matter between:

MILTON MARWESHE AND OTHERS Applicants

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY First Respondent

SA LOCAL GOVERNMENT BARGAINING COUNCIL Second Respondent

ELSABE MAREE *NO* Third Respondent

Heard: 7 November 2024
Delivered: 9 December 2024

Judgment handed down electronically by circulation to the parties' representatives by email. The date and time for the handing down is deemed to be 9 December 2024

Review of award – conclusion of arbitrator reasonable. If findings of the arbitrator constitute a jurisdictional ruling, award is correct. Application dismissed.

JUDGMENT

LABOUR COURT

DANIELS J

Introduction

1. The applicants bring this application to review and set aside an arbitration award issued by the third respondent in her capacity as an arbitrator appointed by the second respondent, the South African Local Government Bargaining Council (the "SALGBC").

2. The dispute relates to the alleged dismissal of 514 employees (hereafter "the applicants") who were engaged on fixed term employment contracts, by the first respondent, the City of Tshwane Metropolitan Municipality (the "City").

3. In an award, issued on 13 December 2023, the third respondent (the "arbitrator") found that the applicants had not proven that they were dismissed.

Background to the dispute

4. Each of the 514 applicants were engaged by the City on twelve months fixed term employment contracts, together with approximately 88 others, to commence on 1 November 2019 and expire on 31 October 2020. Many of these individuals were members of the Independent Municipal and Allied Trade Union ("IMATU").

5. The relevant portion of the employment contracts state as follows:

> "*You are hereby appointed on a fixed term contractual basis in the position of **General Worker**, in the **Department of Environment and Agriculture Management**.*
>
> *The terms and conditions applicable to your contractual appointment are the following:*
>
> 1. *You are contracted with effect from 11 November 2019 to 31 October 2020 with the provision that, **by mutual agreement, this contract may be extended by means of an addendum to the principal contract.** Either the Municipality or you have the right to terminate this agreement in accordance with the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) as amended. Any extension of the initial contract must not create an expectation that*

LABOUR COURT

such extension will lead to permanent employment or further extensions.

…

16. It must be noted that ***no legitimate expectation, to be appointed in a permanent position by the Municipality, can be created*** *in accepting this contractual appointment.*

Notwithstanding any stipulations in this agreement constituting the contract, no expectations, prospects, rights or claim for appointment in terms of this agreement are created and this contractual relationship between the parties hereto expires in entirety on termination thereof" (own emphasis)

6. During their employment, the applicants regularly tendered their services. At arbitration, it was disputed whether they actually worked during the period of the contract. However, it was common cause that the applicants were paid for the entire duration of the contracts.

7. It was common cause that the employment contracts were never extended by mutual agreement, and an addendum to the principal contract, as contemplated in clause 1 of the contracts.

8. The services of the applicants were terminated on various dates after the end of October 2020, with some receiving no notices of termination, others receiving notices of termination on 5 November 2020, and others receiving notices soon after.

9. Thereafter, on behalf of its members, IMATU referred a dispute to the SALGBC alleging that its members had been dismissed and their dismissals were unfair. On or about 28 February 2022, the arbitrator appointed by the SALGBC, found the dismissal of the applicants in the IMATU dispute was in breach of section 198B(3), and ordered the City to reinstate them. The City instituted review proceedings in this Court. It is unclear what became of the review application.

10. When the applicants (in this matter) discovered that the arbitration award secured by IMATU included only 88 employees, and did not cover them, they applied to

LABOUR COURT

vary the arbitration award to include them. That application was opposed by IMATU, and failed.

11. Thereafter, on or about 30 May 2022, the applicants referred their own dispute to the SALGBC and applied for condonation. In the referral, the applicants ticked the box marked section 198B and summarized the dispute as follows: "*The respondent never issued us with the termination of employment of fixed term contracts. We continued rendering our services and only to be informed after the 5 November 2020 that our contracts have been terminated.*"

12. Condonation for the late referral was granted on 8 September 2022. After conciliation failed to resolve the dispute, the dispute was referred to arbitration before the third respondent. The arbitration resulted in the arbitration award, dated 13 December 2023, currently under review.

The test on review

13. The test for review of an arbitration award is well established and may briefly be summarised as follows:

    13.1. In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[1] the Constitutional Court held that '*the reasonableness standard should now suffuse s 145 of* the *LRA*' and the test for reasonableness of an arbitration award was: '*… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*'[2]

    13.2. The award must be tested against the facts before the arbitrator to ascertain if it meets the threshold of reasonableness.[3]

    13.3. Though the distinction between reviews and appeals remains applicable, it is necessary for the Court to enquire into the merits of the matter and all the evidence properly before the arbitrator.[4]

[1] (2007) 28 ILJ 2405 (CC).
[2] Id at para 110. See also *CUSA v Tao Ying Metal Industries and others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v CCMA and others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[3] See *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC) at paras 43.
[4] Id at para 41.

LABOUR COURT

13.4. In *Herholdt v Nedbank Ltd* and *another*[5] the Court said:

> *'… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'*

14. In summary, applying the review test applicable to arbitration awards follow a logical sequence. First, it must be determined if there is a failure or error on the part of the commissioner. Second, where there is such a failure or error, it must be shown that the outcome arrived at was unreasonable, based on all the evidence before the commissioner, even if it may be for different reasons or on different grounds as those referred to in the award.[6] Thus, it is only where the outcome cannot be sustained on any of the evidence that the review application will succeed.[7]

15. However, the test on review of jurisdictional rulings is different. It is trite that the CCMA and Bargaining Councils are not courts of law, but are administrative bodies charged with the execution of statutory functions. As creatures of statute, the jurisdiction of the CCMA and Bargaining Councils are governed by the statute (or statutes) which empower them. In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[8] the court set out the test for reviews of jurisdictional rulings as follows:

> *[40] 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*

[5] (2013) 34 *ILJ* 2795 (SCA) at para 25. *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and another v CCMA and others* (2015) 36 ILJ 2038 (LAC) at para 16.

[6] *Fidelity Cash Management Service (supra)* at para 102.

[7] *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others* (2015) 36 ILJ 1453 (LAC) at para 12.

[8] (2008) 29 ILJ 2218 (LAC) at para 40

LABOUR COURT

matter is a matter to be decided by the Labour Court. …. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. (own emphasis)

The Arbitration

16. First, I deal with the documentary evidence.

16.1. The parties referred to a collective agreement concluded during 2011 which contained an undertaking by the City that all employees of labour brokers, with 12 months' service as of 28 February 2011, will be insourced. It appears that Capacity Outsourcing addressed a letter to the City on or about 9 March 2014 stating that employees engaged by it from June 2010 until May 2012 had been assigned to the City on an "as and when basis".[9] These individuals would not have had 12 months service on 28 February 2011, and thus fell outside of the scope of the 2011 collective agreement.

16.2. The parties also referred to a collective agreement concluded during 2017, which related to all contract and temporary employees in the employ of the City *at that time*. Clearly, the 2017 agreement finds no application.

16.3. The minutes of two Special Mayoral Committee meetings held on 24 February 2020 and 14 May 2020 indicated, among other things, that Human Capital presented a report to the Mayoral Committee ("MAYCO") with a recommendation that it condone the appointment (of the applicants) for a period of 12 months. However, MAYCO did not approve the recommendation and required that the report to be withdrawn.

[9] Minutes of the Mayoral Committee dated 24 February 2020 at Record p284

LABOUR COURT

16.4. The minutes of the MAYCO meetings reflect that, at the meeting, the Chief Financial Officer, as well as the Group Heads of Human Capital, Environment and Agriculture, and the Legal Unit, all weighed in on the debate. During the discussions, these individuals voiced concerns over the manner in which the applicants had been appointed; noted that the applicants were not catered for on the staff establishment; noted that there was no budget for the applicants' continued employment; noted that the applicants' employment would require a funding source of more than R76 million; noted that the expenditure would constitute irregular expenditure; noted that the applicants were appointed without compliance with the recruitment processes required by the Staffing Policy Collective Agreement; and noted that MAYCO itself has no powers to condone their employment because such power resided with the municipal manager (in respect of individuals who do not report directly to the municipal manager).

17. The minutes of the MAYCO meetings suggest that the appointments of the applicants were not budgeted for, the municipal manager had not condoned their employment, and their appointments were not contemplated in the staff establishment. It is obvious that MAYCO would not have been approached, to condone the appointments, if the City believed the appointments were not irregular.

18. The applicants called three witnesses.

18.1. The first witness, Mr Msuvene Cedrick Cele ("Cele") testified that he was an applicant in the IMATU dispute. He realised after the issue of the award that the applicants had not been included as parties in that dispute. He applied to vary the award to include the applicants but failed. Cele testified that he was employed on a twelve-month fixed term contract (together with the applicants) and received a notice of termination on 9 November 2020. In addition, Cele testified that, for the duration of his employment, he would report to Mr Velly Ngomane, at the Pretoria West depot, who would deploy him to various locations where he (and the other applicants) would do litter picking and cleaning. Cele testified that when he signed the employment

LABOUR COURT

contract he was told by a certain "Victor"[10] that after three months they would become permanent.

18.2. The second witness, Mr David Mekoa ("Mekoa") testified that he was an applicant and had been employed by the City together with the other applicants. He testified that he began working in February 2020. Mekoa testified that worked until the COVID19 pandemic interrupted work but cannot recall when they started working again. He testified that he too reported to Mr Velly Ngomane.

18.3. The third witness, Mr Jonas Diphofa ("Diphofa") testified that although they signed the contracts in November 2019 they only commenced working during February 2020. Diphofa testified that they were employed to do general work which, by its nature, is continuous.

19. The respondent called a single witness, Mr Abel Malaka ("Malaka").

19.1. Malaka was, at the time that the contracts were signed, the Divisional Head: Waste within the Department of Environment and Agriculture. From 1 December 2019, he was appointed as the Group Head for Environment and Agriculture. As the Group Head, he bears overall responsibility for financial and strategic issues in the Department. He referred to the applicants as the "Capacity workers" because they had previously been employed by a labour broker known as Capacity.

19.2. On 9 December 2019, Malaka emailed his subordinates advising them that the applicants should not be permitted to work until all the administrative processes were resolved.

19.3. Malaka testified that the applicants did not work since they were engaged. He testified that Mr Velly Ngomane was a HR administrative officer with no authority to instruct the applicants to work.[11]

[10] This is most likely a reference to Mr. Victor M Letshwiti, a manager in Human Capital, who addressed an email to his colleagues on 17 February 2020 advising: "*I am of the view that workers should be dispatched to their workstations commence (sic) and commence work immediately*." Record p334

[11] Mr. Ngomane was not called, or subpoenaed, to contradict the evidence of Mr. A Malaka.

LABOUR COURT

19.4. Malaka testified that the employment contracts had been irregularly concluded because the applicable policies had not been followed, the budget did not exist for their employment, and they were not included on the staff establishment. He testified that a report had been presented to the Mayoral Committee to condone non-compliance with the policies, but this had been rejected.[12] He testified that there were no funds to remunerate the applicants, or even to purchase PPE for them. He testified that the remuneration paid to the applicants constituted irregular expenditure.

The Arbitration Award

20. In her analysis of the evidence, the arbitrator made the following findings:

20.1. The applicants never actually performed any work for the City.[13] Mr Velly Ngomane had no authority to instruct them to work. Mr Malaka had the authority to instruct them to work, but never did.

20.2. The appointment of the applicants was not properly authorised.[14] The arbitrator unfortunately does not say who ought to have authorised the appointment.

20.3. The contracts were irregular.[15] The arbitrator does not say in which manner the contracts were irregular.

20.4. There are no legal consequences which flow from unlawful contracts.[16]

20.5. There was no meeting of the minds as concerns the essentialia of the employment contracts.[17] The arbitrator does not state which essentialia were not agreed upon.

[12] Transcript p229 lines 3 – 7
[13] See para 60 of the award, Record at p325
[14] See para 65 of the award, Record p326
[15] See para 78 of the award, Record p328
[16] See para 82 of the award, Record p329
[17] See para 81 of the award, Record p329

LABOUR COURT

20.6. If the employment contracts were not unlawful, there was no reasonable expectation that the contracts would be renewed.[18]

20.7. If the employment contracts were not unlawful, the dispute must still fail because relief, apart from declaratory relief, may not be granted under section 198B where the employment relationship has terminated.[19] For reasons which will become apparent later, I do not need to address this issue in this judgment.

Grounds of review and analysis

21. Somewhat strangely, the applicants withdrew their supplementary affidavit and advised the court that they no longer relied on the grounds articulated in that affidavit.

22. The applicants take issue with the arbitrator's finding that they did not work and that Mr Ngomane had no authority to instruct them to work. Although the arbitrator spent a lot of time considering this issue, nothing turns on it. I don't propose to consider this further. The applicants also take issue with the arbitrator's finding that they were unjustifiably enriched. Once again, nothing turns on this. I don't propose to explore this either.

23. The applicants also take issue with the arbitrator's finding that there was no meeting of the minds in regard to the essentialia of the employment contracts. I accept that this finding was irregular. The arbitrator does not spell out in what respect the essentialia were not agreed. Employment contracts had been signed which, it appears to me, sets out all the essentialia of the contract. The contracts set out the agreed remuneration, the department to which the applicants had been assigned, and the nature of the position – general worker.[20] While the evidence does not support this finding, the question remains whether the outcome was reasonable in light of all the evidence.

24. The applicants take issue with the arbitrator's finding that expenditure on their remuneration would constitute irregular or fruitless and wasteful expenditure. It is

[18] See para 85 of the award, Record p329
[19] See para 95 of the award, Record p331
[20] Record p344

LABOUR COURT

correct that there was no audited report to back up the City's claim. However, the absence of an audited report does not indicate that such expenditure was proper, regular and authorised. In my view, little turns on this issue. The real issue is whether the employment contracts were unlawful.

25. The applicants take issue with the finding that their contracts were unlawful, unauthorised, or irregular. However, at arbitration, the applicants presented no evidence to demonstrate that the contracts were authorised by MAYCO, or the municipal manager, that the budget for their remuneration had been approved, that their appointment complied with the processes contemplated in the Staff Recruitment Collective Agreement, or that their employment is contemplated by the staff establishment. Importantly, the arbitrator found Malaka to be a credible witness.

26. Section 66 of the Municipal Systems Act No. 32 of 2000 provides as follows:

> *66 (1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must (a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval; (b) provide a job description for each post on the staff establishment; (c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and (d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.*
>
> *(2) Subsection (1) (c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57.*
>
> *(3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.*
>
> *(4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3).*
>
> *(5) Any person who takes a decision contemplated in subsection (4), knowing that the decision is in contravention of subsection (3), may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of the invalid decision.* (own emphasis)

LABOURCOURT

27. Section 66 of the Municipal Systems Act is perfectly clear. No person may be employed in a position not on the staff establishment. The employment of any person, in a position that is not on the staff establishment, is null and void. The employment of a person not on the staff establishment constitutes irregular or fruitless and wasteful expenditure. The applicants were challenged to show that their positions appeared on the staff establishment. They failed to provide any such proof. Section 66(4) states that employment contracts concluded in respect of positions not on the staff establishment are null and void.

Findings: Review application

28. In my view, the award issued by the commissioner is in fact a jurisdictional ruling. As I explained above, the jurisdictional ruling of the third respondent (that the employment contracts were unlawful) is correct. However, even if I am incorrect and the award cannot be said to be a jurisdictional ruling, the outcome was reasonable in relation to the evidence before the commissioner. The evidence demonstrated that the positions did not appear on the staff establishment, and, by operation of law, the employment contracts were null and void.

Costs

29. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicants were unsuccessful, I do not intend to burden them with a costs order. I am mindful of the *dictum* in *Zungu v Premier of the Province of Kwa-Zulu Natal and others*[21] that costs awards in employment disputes are not the norm and there must be sufficient reason to depart from this. I accordingly exercise my discretion by making no order as to costs.

Order

30. In the premises, I make the following order:

    1. The review application is dismissed,
    2. There is no order as to costs.

[21] (2018) 39 ILJ 523 (CC) at para 25.

LABOUR COURT

R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Mr M Marweshe, Attorney
	Marweshe Attorneys
For the First Respondent:	Advocate A Redding SC & Adv V Mndebele
Instructed by:	Motsoeneng Bill Attorneys

LABOUR COURT