

SOUTH AFRICA / JUDGMENT

Netcare Hospitals (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (D 415/21) [2023] ZALCD 4; [2023] 8 BLLR 827 (LC) (4 April 2023)

[2023] ZALCD 4

COURT

Labour Court Durban

BEFORE

Whitcher

CASE / FILE NUMBER

D 415/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case

No: D 415/21

Not

Reportable

In

the matter between:

NETCARE
HOSPITALS (PTY) LTD
Applicant
and
CCMA
First
Respondent
COMMISSIONER
PATRICK
MBATSANA
Second
Respondent
HOSPERSA
Third
Respondent

Heard:

3 November 2022

Delivered:

4 April 2023 {-Electronically)

JUDGMENT

WHITCHERJ

Introduction

- [1] This is a review application in terms of section 145 of the Labour Relations Act, 1995 to have certain findings in the arbitration award made by the Second Respondent (the arbitrator) under case number GAJB3387-21 reviewed and set aside.
- [2] The dispute before the arbitrator was referred in terms of section 74(3) of the LRA as Netcare and Hospersa, acting on behalf of its members, had reached a deadlock in negotiations related to wage and allowance increases for the 2020/2021 financial year.
- [3] In the award, the arbitrator directed that an annual across the board (ATB) increase of 4.5% must be implemented by Netcare in respect of Hospersa members and made various other findings in relation to the increase of certain allowances. Netcare submits that the arbitrator's finding in respect of an ATB increase stands to be reviewed and set aside.
- [4] Netcare raises as a ground of review that the arbitrator committed a material, and thus reviewable, error of fact in finding that, both parties submitted in evidence that "the average increase in their industry is, around 4.5%". Netcare states that their own witness testified that the ATB in the industry ranged between 3.5% and 4.5%. They further state that Hospersa tendered no evidence of what the applicable range of increases in the industry, were. Hospersa simply testified that some competitors offered increases as high as 4.5% but offered no evidence of an average.
- [5] Netcare argues that the only evidence before the arbitrator of any average ATB was thus 4%, the midway point between 3.5% and 4.5%. They correctly point out that testimony that this was the industry ATB range went without challenge under cross-examination. By erroneously pegging the average ATB increase at 4.5%, the arbitrator thus reached an unreasonable finding of fact. A reasonable arbitrator, they argue, could not reach such a finding based on the evidence tendered at the arbitration.
- [6] The first point to be decided is if this finding constitutes an error of fact at all. Hospersa, in answer, made much of the fact that the benchmark ATB of 4.5% relied upon by the arbitrator fell within the range of ATB increases mentioned in evidence by Netcare (3.5% - 4.5%). Hospersa also directed the Court's attention to the word "around" in the phrase in question. Here the arbitrator held: "the average increase in their industry is around 4.5%".
- [7] I am not persuaded by Hospersa's arguments in excusing the arbitrator's mishandling of the evidence. The word "average" in the short passage cited above belies their approach. With the evidence before him, an arbitrator would have been as incorrect to record that the average ATB increase in the industry was around 3.5% (its lowest point) as he was to have set it at around 4.5%, its very highest point. The fact that Hospersa led evidence that some

competitors awarded increases of 4.5% does not constitute evidence of an industry average, standard or benchmark. They cited anecdotes, not statistical ranges, benchmarks or averages. As we will see later the notion of an average was central to the arbitrator's determination of what a fair increase should be.

[8] There is thus merit in Netcare's argument that as far as a benchmark or "average" ATB is concerned, 4% was the figure the arbitrator should have taken into account. After consideration, I am not persuaded by suggestions that, if the arbitrator was off the mark, he was not off by much.[1] He was half a percent off in his understanding of what the evidence was in relation to the industry ATB. This is not the same as losing half a percent in an exam. In wage negotiations, it is self-evident that much may ride on a fraction of a percentage in commercial terms for both parties. More importantly, in wage arbitrations, especially those applying the fairness approach, it is important that the arbitrator correctly records and applies evidence on industry average wage increases as this is often an important consideration or even a decisive one.

[9] This brings us to the next question. Is this error of fact reviewable? In our law, an error of fact will be reviewable if it results in an unreasonable award. The LAC in Mofokeng held:

In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result.[2]

[10] In their answering affidavit, Hospersa contested the materiality of the error in arguing:

Had the Second Respondent used as a benchmark a figure of say 5%, which was not consonant with the material before him that would perhaps be grounds to interfere with the award.

[11] The fact that he used "around 4.5%" as a "benchmark", out of a possible range, (on applicants own version of between 3.5 and 4.5%) and that testified to by the third respondent of 4.5% can hardly be grounds for review.

[12] It cannot be said that the conclusion reached by the Second Respondent to wit, that the parties agreed that the benchmark in industry was "around 4.5%" was an error such as to vitiate the award.

[13] As already stated, what Hospersa's submission does not deal with is the word "average" in paragraph 69 of the award. This term is applied by the arbitrator as a synonym for "benchmark". Far from the ATB average or benchmark increase constituting one variable or piece of evidence in deciding what a fair increase for Hospersa members will be, it is the dominant or even sole factor upon which the arbitrator relied. In the concluding paragraph of his award on this issue, he plainly says as much:

"72. In considering the submissions presented in (sic) before me, I am not convinced that the (sic) both parties have submitted a fair and reasonable offer as regard to the across the board increase, and consequently I align myself with the increase set by the industry as a benchmark".

[14] In light of the evidence, there is in my view no reasonable way to understand that the industry had set a benchmark of 4.5% for ATB increases. When paragraphs 69 and 72 of the award are read together, the materiality of the 4.5% figure which the arbitrator recorded as an industry average or benchmark is readily apparent. This figure almost fully informs his decision on the fairness of the ATB he decides Netcare must implement. Unfortunately the figure, as an average or benchmark, did not come from the evidence.

[15] In ordinary rights dispute arbitrations, it is far easier to determine whether an irregularity in handling evidence would likely have had a distorting effect on the final outcome. For instance, if an arbitrator mistakenly records that a witness's version was corroborated when it was not corroborated and, further,

that it appears from his award that corroboration was the single issue which drove him to a finding, then mishandling that piece of evidence would have a distorting effect on the outcome. The difficulty with interest arbitrations is that the outcome is a percentage increase flowing from a somewhat discretionary call on fairness. There are no legal principles, such as which inform the evaluation of evidence, against which to judge what a reasonable outcome would have been, but for the error of fact.

[16] In their papers and in argument, both parties eloquently motivated the fairness of the ATB increase for which they contended. Both parties argues that, notwithstanding the controversy around how the arbitrator arrived at the 4.5% ATB figure, a fair number could nevertheless reasonably be arrived at on the basis of other evidence canvassed during arbitration. This includes the ravages of the COVID pandemic, affordability, CPI, wage agreements concluded with other unions in the Netcare Group and Netcare's profits.

[17] I am asked to finally decide this wage dispute, to substitute or correct the award made by the arbitrator based on the comprehensive records, transcripts, pleadings, and arguments generated in this matter. This would prevent the parties wasting further resources in litigation.

[18] This may have been an exercise this court would have been drawn into if the award itself had analysed these other factors (such as affordability and fairness) and factored them into its final

determination

of a fair ATB. However, none of these factors were significant in informing the arbitrator's final decision to award 4.5%. In the analysis of evidence section of the award, the arbitrator appears to simply restate the position of the parties on these ancillary issues without expressing a definitive preference for any of the arguments the parties advanced based on the evidence. For instance, in discussing fairness, under paragraph 67, the arbitrator records:

"67. In substantiating the fairness of its across the board increase the union relied on the profit margin of the respondent for 2020, and further that the ravaging pandemic had a negative effect on life and livelihood of its members, in this regard, employees have lost their lives as frontline workers."

[19] Here, the arbitrator does not express a view on whether this argument holds water or would incline him towards a higher or a lower increase. I do not consider it to be the role of a reviewing court in this case to sew together an award from this material, in a sense as a decision-maker of first instance in a matter as subtle as an interest dispute arbitration. The policy considerations that militate in favour of the Labour Court assuming this role and facilitating finality are, in my view, more than counter-balanced by policy considerations militating against this Court taking on the work of arbitrators. The scheme of the LRA provides for the CCMA to correct its own mistakes.

[20] To underscore the complexity of the role the Labour Court is expected to perform to finalise this dispute, consider the arbitrator's comments on affordability. He states:

68. Affordability refers to the employer's ability to finance an increase. The respondent averments are that the increase was decided

and approved by the board. Negotiations are a tool to allocate percentages to the (sic) in accordance with a total package offer

[21] Again, these sentences do not analyse the evidence one way or the other so as to support the 4.5% decision the arbitrator arrived at. This itself is arguably a malfunction. This court is not in a position to determine from the records how affordability should feature in the determination of a fair ATB. Had this court presided over the trial stage, it would have asked questions to guide it in arriving at such an answer that do not appear in the record.

[22] While regrettable, it is not surprising that of all the variables that may have informed his decision, the arbitrator only locates one of them in the map of his decision. For it is only really his understanding of the average industry ATB increase that drove his decision of 4.5%. As described above, he committed a material factual error in this regard and for this reason his ruling falls to be set aside on review, in my view.

[23] It is not necessary to decide whether the arbitrator made a determination on the implementation date. Reading paragraph 73, I do not think so.

[24] Given the nature of the dispute and the relationship between the parties, a cost order is not appropriate.

[25] In the result, I make the following order:

1. The Second Respondent's finding in respect of an annual across-the-board (ATB) increase is reviewed and set aside.
2. The wage dispute between the parties (an annual ATB increase for the 2020/2021 financial year) is remitted back to the First Respondent for re- hearing by a Commissioner other than the Second Respondent.

Benita Whitcher

Judge of the Labour'court of South Africa

APPEARANCES:

For the Applicant: Norton Rose Fulbright South Africa Inc For the Third Respondent: Purdon & Munsamy Attorneys

[1] A suggestion I also at first blush made to Netcare during the hearing.

[2] Mofokeng at para 31

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