

SOUTH AFRICA / JUDGMENT

Public Servants Association v South African Revenue Services [2018] ZAGPJHC 416 (22 June 2018)

[2018] ZAGPJHC 416

COURT

South Gauteng High Court, Johannesburg

BEFORE

Carelse

CASE / FILE NUMBER

29168/17

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED.

22/6/2018

29168/17

In the matter between:

Public Servants Association Applicant

and

South African Revenue Services Respondent

Judgment

Carelse J

- [1] This is an application in terms of section 12(2) of the Arbitration Act 42 of 1965 (“The Act”) in which the applicant seeks an order in the following terms;

1.1 Directing the parties to agree on the identification and the appointment of a suitable arbitrator to arbitrate their dispute involving Category B disputes in relation to the Hay Job Evaluation System as referred to in the 20 June 2002 collective agreement between the parties (“the disputes”).

1.2 That, should the parties not reach consensus in regard to the identification and appointment of a suitable arbitrator within 10 days from the granting of the order, the applicant may approach the CCMA director contemplated in section 118 of the Labour Relations Act 1995 to appoint a suitable arbitrator from amongst the CCMA commissioners ordinarily carrying out their functions as such in Johannesburg to arbitrate the disputes.

1.3 Directing that the respondent pays the costs of this application.

The Parties

[2] The applicant is the Public Servants Association of South Africa (“PSA”), a trade union who acts on behalf of its members who are employed by the South African Revenue Services (“SARS”), the respondent.

Background

facts are largely common cause.

[3] This matter has a long history spanning some 20 years. In 1998, the PSA and NEHAWU, a labour union agreed to the introduction of a salary grading system which utilises the Hay Job Evaluation system. As a result, hereof, SARS employee’s ranks were converted, as an interim measure, SARS employees were informed that ‘career ladders would have to be developed.’ Eventually grades were allocated to the employees. Many of SARS employees were unhappy with their grading and the verification process that was undertaken.

[4] Part of the process included the opportunity to ‘appeal’ their grading with the deadline for the appeals being 16 March 2001. On 30 May 2001, the PSA, SARS and NEHAWU concluded a collective agreement setting out the procedure to be followed in the appeal.[1]

[5] On 31 August 2001, SARS employees were informed of the outcome of the appeal and were further informed that a general review of all grades would be undertaken which was done. SARS employees were informed about the outcomes of the national grading review and were pertinently advised to request arbitration in writing by 11 February 2002.

[6] On 20 June 2002, the PSA, SARS and NEHAWU concluded a further collective agreement[2] in the following terms:

“22.1 for a procedure to deal with what are termed category A and category B disputes (the matter at hand relates only to category B disputes):

22.2 for category B disputes which had been referred to arbitration in terms of the 30 May 2001 collective agreement to be arbitrated on an individual basis; . . . “[3]

- [7] On 18 July 2002, Mr Cohen was appointed as the arbitrator and a consolidation process of the arbitrations would begin on 22 July 2002.
- [8] On 21 February 2003, the PSA and SARS concluded a third collective agreement. On 17, 18, 19 and 20 March 2003, Mr Cohen arbitrated the category A disputes and found the grades awarded to be correct. On 31 July 2003, SARS unilaterally issued a statement to the effect that:
- “The arbitration process for non –career ladder jobs (category A) was concluded on a clustering basis. This means that there will be no arbitration hearings for career – ladder jobs (category B). This is as a result of Management and Organised Labour not agreeing on the terms of reference for an arbitrator in this regard, and therefore making the arbitration agreement on Hay Grading is (sic) unenforceable.”[4]*
- [9] The PSA vehemently disputed the position taken by SARS and insists that the collective agreements were valid and binding and that arbitration hearings relating to category B disputes were still to be held. The PSA members requested certain documentation from SARS to enable them to prepare which were refused by SARS and reasons for such were refused.
- [10] On 1 August 2007, the PSA addressed correspondence to SARS indicating that the costs of the arbitrator would be borne by the National Bargaining Forum (“NBF”) levy. A pre- arbitration meeting was held whereby SARS agreed to provide all outstanding documentation.
- [11] Notwithstanding the foregoing on 14 January 2008, SARS advised the PSA that it was of the view that it had exhausted the dispute process and deemed the matter closed and that no further interventions on the Category B arbitrations would be considered.
- [12] Several meetings were held and it appeared as if things were moving forward to the extent that a costing was done for the arbitration in the region of R900 000. At that stage the NBF’s entire annual income was R1,3 million. Eventually a quote in the amount of R2, 250 million was received. As a result, the PSA approached the CCMA in order to seek assistance. The CCMA responded that in principle it was prepared to assist but required further information.
- [13] On 1 March 2017, the attorneys for SARS wrote the following to the PSA “... our client regards the matter as having been finalised and closed given your clients failure to provide our client with documents on which their claims and the dispute are based”. [5]
- [14] Because of the stance adopted by SARS, the PSA elected to launch this application giving the necessary notice to SARS as contemplated in section 12(1) of the Act.

The Law

- [15] Section 12 of the Act provides as follows:

“12 Power of court to appoint an arbitrator or umpire

- (1) Where –
 - (a) In terms of an arbitration agreement or this Act the reference shall be to a single arbitrator and all the parties to the reference do not, after a dispute has arisen, agree in the appointment of an arbitrator; or
 - (b) ...,
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) more than one arbitrator has to be appointed and the parties to the reference do not, after a dispute has arisen, agree on the

appointment of arbitrators so far as the arbitration agreement may require such agreement, any party to the reference may serve the other party or parties or the arbitrators, as the case may be, with a written notice requiring him or them to appoint or if agreement be necessary, to agree in the appointment of an arbitrator or arbitrators or umpire.

- (2) If the appointment referred to in the notice served under section (1) is not made or agreed to, as the case may be, within seven days after the service of the notice, the party who gave the notice, may upon notice to the other party or parties or the arbitrators, as the case may be, apply to the court to make the necessary appointment and thereupon the court may appoint an arbitrator or arbitrators or umpire.

[16] Having regard to the relief sought it is clear that a single arbitrator is required. That being so, section 12 (1) (a) is applicable in the circumstances.

[17] In its heads of argument SARS raises three defences namely; jurisdiction; locus standi and non – joinder. During argument,

counsel for SARS submitted that SARS was only persisting with the issue of non- joinder of NEHAWU.

Non- joinder

[18] It is SAR’s case that NEHAWU has a substantial and direct interest in the order sought by the PSA and should have been joined. NEHAWU’s interest is apparent from the collective agreement[6] where it is a party to the collective agreement which was concluded on 20 June 2002 and pertinently in terms of the aforesaid collective agreement “all costs associated with the arbitrator shall be carried by the SARS NBF levy”,[7] so SARS submits. Because NEHAWU is a member of the NBF and the PSA seeks to have an arbitrator appointed who will be paid by the NBF, NEHAWU, as a member would be affected by the costs of the arbitration.[8] Furthermore, SARS submits that section 12 (1) (a) of the Act pertinently refers “..... the

reference

shall be to a single arbitrator and all the parties to the reference do not....”, in other words all the parties cited in the collective agreement also includes’ NEHAWU.

- [19] Fundamentally because NEHAWU is a party to the collective agreement it has a direct and substantial interest, so SARS submits in support of this submission. I was referred to the case of *Amalgamated Engineering Union v Minister of Labour*[9] where the court held that the issue of joinder does not depend on the nature of the subject matter of the proceedings before a court, but rather “on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties.” SARS further submitted that any order granted by this court will have no effect against NEHAWU.
- [20] SARS submits that it requires the documents from PSA in order to assess the matter in the likelihood that the matter can be settled and avoid the cost of the arbitration. It is unable to make an informed decision without these documents. All that the PSA has to do is to submit the necessary documents.
- [21] The PSA submits that SARS has made a fundamental error in its submission, to the extent that NEHAWU has decided not to refer

category B disputes in relation to its members, whereas the PSA members did not accept the outcome. In other words, NEHAWU has not referred any category B disputes for arbitration. This can be gleaned from all the correspondence.[10] Pertinently in an email by Adrie Baauw of SARS to the PSA in which he states: “Hi Dirk ... It is hereby confirmed that with immediate effect, Category B arbitrators processes should commence in accordance with the provisions of the.... as a first step and in accordance with the provisions of paragraph 2(f) of the aforementioned agreement, the PSA is to submit in respect of all the identified Category B cases affidavits to the employer in “. Clearly there is no reference in any of the correspondence that NEHAWU has referred any category B disputes for referral.[11]

- [22] In my view section 12 (1) (a) of the Act clearly states that it is the parties to the arbitration that is being referred to, not the parties to the agreement. Notwithstanding the reference to NEHAWU in the agreement, it is the parties to the category B disputes that have a substantial and direct interest in the matter. That being so, the dispute is between SARS and the PSA. NEHAWU, therefore has no interest. It also bears mentioning that in an application before Advocate Sirkhot at the CCMA relating to this matter, the non-joinder of NEHAWU as a party to those proceedings was not raised.[12] Even if NEHAWU may have an interest in so far as costs are concerned, it is an issue to be dealt with by the arbitrator. The arbitrator may very well order the PSA to pay all the costs or part thereof. In fact, the CCMA has already indicated that in principle it was willing to conduct the arbitration. All that the CCMA required was further information.

[23] In my view the facts in Amalgamated Engineering Union supra are distinguishable from the facts in this case, to the extent that it was the employer in Amalgamated supra that was not joined to the proceedings. In so far as the documents are concerned that SARS seeks, in my view this should not be a bar to the referral, the arbitrator appointed can make that determination. Likewise, the issue of costs will be determined by the arbitrator.

[24] In my view, the point in limine raised has no merit. I also do not agree that the relief sought by the PSA amounts to a declaratory. This application is in terms of section 12 of the Act. I am satisfied that the PSA has made out a case in its founding affidavit for the relief sought. Pertinently SARS does not deny the allegations set out in the founding affidavit, where it had the opportunity to do so.

In the result I make the following order:

[25] The point in limine is dismissed.

26.1 Directing the parties to agree on the identification and the appointment of a suitable arbitrator to arbitrate their disputes involving Category B disputes in relation to the Hay Job Evaluation system as referred to in the 20 June 2002 collective agreement between the parties (“the disputes”).

*26. 2 That, should the parties not reach consensus in regard to the identification and appointment of a suitable arbitrator within 10 days from the granting of the order, the applicant may approach the CCMA director contemplated in Section 118 of the Labour Relations Act 1995 to appoint a suitable arbitrator from amongst the CCMA.

26.3 The Respondent is to pay the costs of this application.

* Correction

Judge of the South Gauteng Local Division

Appearances:

Counsel for the Applicant: Adv BD Hitchings

Instructed by: Martins Weir- Smith Inc

Counsel for the Respondent: Adv Nduso Mojozi

Instructed by: Edward Nathan Sonnenbergs Inc

[1] founding affidavit FA1 page 33

[2] founding affidavit FA2 page 35

[3] Founding affidavit page 10

- [4] founding affidavit page 11 paragraph 27
 - [5] founding affidavit FA26 page 95
 - [6] founding affidavit FA2 page 36
 - [7] founding affidavit FA2 page 36 paragraph (j)
 - [8] answering affidavit page 106 paragraph 13
 - [9] 1949 3 ALL SA 436(a) at 450
 - [10] founding affidavit FA4 page 39, founding affidavit page 40
 - [11] founding affidavit FA6 page 42
 - [12] founding affidavit page 52-65
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