

SOUTH AFRICA / JUDGMENT

Steve Tshwete Local Municipality v Commissioner M E Phooko N. O and Others (JR 1796/17) [2023] ZALCJHB 18 (7 February 2023) [2023] ZALCJHB 18

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

JR 1796/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR

1796/17

In

the matter between:

STEVE

TSHWETE LOCAL MUNICIPALITY Applicant
and

COMMISSIONER

M E PHOOKO N. O First

Respondent

SALGBC Second

Respondent

SAMWU

OBO THERESA KESHAV Third

Respondent

Heard:

02 February 2023

Delivered:

07 February 2023

Summary:

Application to review and set aside a varied arbitration award. Once a statutory function is performed the functionary becomes functus officio. In terms of section 143 (1) of the Labour Relations Act, 1995, (LRA) an arbitration award is final and binding. The only statutory power to perform the statutory function again happens within the confines of section 144 of the LRA. An exercise of the same function outside the confines of section 144 of the LRA is a nullity and ought to be set aside as such. An arbitration award issued contrary to the provisions of the LRA is a nullity and ought to be set aside as such. An award issued without the necessary jurisdictional powers is a nullity and ought to be set aside as such. Held (1): The varied arbitration award is reviewed and set aside. Held (2): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This application agitates one central legal question. Is a commissioner legally authorised to vary an arbitration award outside the confines of section 144 of the Labour Relations Act[1] (LRA)? Allied to that central question is, where a dispute is settled, is the Commission or a Bargaining Council authorised to

entertain a settled dispute?

[2] Serving before me is a review application seeking to review and set aside a variation ruling issued by Panellist Moloko Ephraim Phooko (Phooko) on 18 November 2016. In the ruling, Phooko concluded that the arbitration award dated 2 September 2015 is varied to read: “the Respondent to promote the Applicant to the position of Chief Administrative Officer level 4 with effect from 1st October 2015 retrospectively, i.e. from the date she should have been promoted.”

[3] The 2 September 2015 arbitration award read as follows:

“[35] I order the respondent to promote the applicant to the position of Administrative Officer on or before 1st October 2015 retrospectively from the date she should have been appointed after the second interview.”

- [4] The applicant before me, Steve Tshwete Local Municipality (the Municipality) was aggrieved by the variation ruling and launched the present application. The application is duly opposed by SAMWU on behalf of its member Tarisha Keshav (Keshav). However, on the day of the hearing of this application, the respondent failed to appear.

Background

facts

- [5] The relevant common cause facts are that on two occasions, Keshav applied for an advertised position of Administration Officer (AO). On her version she was interviewed twice and recommended twice for appointment by the interviewing panel. That notwithstanding, on her version, the municipal manager refused to appoint her. Aggrieved thereby, she referred a dispute to the Bargaining Council and alleged that her non-appointment constituted an unfair labour practice. Phooko was appointed to resolve the dispute through arbitration. Indeed, on 2 September 2015, Phooko resolved the dispute and issued a final and binding arbitration award.
- [6] The municipality was aggrieved thereby and launched a review application seeking to impugn the said arbitration award. Whilst the review application was pending, settlement discussions occurred, which settlement discussion produced a compromise. The terms of the compromise were recorded in a letter penned by the acting Municipal Manager on 11 August 2016. Partly the letter read thus:

“Kindly be informed that the above-mentioned employee is hereby afforded a protective promotion for the position of the Administrative officer from 1st October 2015, this is pursuant to the arbitration outcome attached herewith. And the employee be paid retrospectively from the second date of her non-appointment being the 1st December 2013 for the second interview (22nd November 2012)

As a result, the Municipality honours the award that rightly offers the employee the position of the administrative officer as per the award. And the co signature of the employee herein is a seal of this settlement agreement as a true and genuine reflection of the arbitration award and the matter is ultimately resolved thereof.”

- [7] As a sequel of the above stated compromise, the review application was withdrawn. Keshav was paid what was due to her following the compromise. As a complete surprise to the municipality, on 5 October 2016, Keshav launched an application seeking to vary the arbitration award of 2 September 2015. On 01 November 2016, as expected, the municipality informed the regional secretary of the SALGBC that it opposes the variation. Of significance, the SALGBC’s attention was drawn to the compromise reached in August
2016. This was also drawn to the attention of Phooko. That notwithstanding, Phooko proceeded to make a variation of the September 2015 award.
- [8] As indicated earlier, the municipality was disenchanted and brought the present application.

Evaluation

[9] Ordinarily I start with the condonation sought by the municipality. Owing to the excellent prospects of success in the review application, such condonation ought to be granted without any hesitation. Implicated herein is the rule of law. As a matter of law, an administrator is entitled to exercise a statutory function once. Thereafter, on application of the functus officio rule, an exercise of the same function becomes ultra vires. On 2 September 2015, Phooko issued a final and binding arbitration award. Section 138 (7) of the LRA provides that within 14 days of the conclusion of the arbitration proceedings, the commissioner must issue an arbitration award. This Phooko did on 2 September 2015. Section 143 (1) of the LRA provides that an arbitration award issued by a commissioner is final and binding.

[10] The arbitration award issued by Phooko finally resolved the unfair labour practice dispute that existed between the parties. In the arbitration award, Phooko recorded the following:

“[32] The applicant [Keshav] seeks to be promoted to the position of Administrative Officer. I find no reason on the facts before me and in law why I cannot award this remedy.”

[11] As outlined earlier, indeed Phooko awarded Keshav the remedy as set out in paragraph 35 of the arbitration award. The nett effect of the arbitration award became that the dispute of unfair labour practice ceased to exist.

[12] All things being equal, on application of the functus officio rule, that becomes the end of the statutory function of Phooko. However, section 144 of the LRA provides that a commissioner is

empowered to vary an arbitration award within certain confines. Although Phooko is not specific as to which of the four corners of section 144 permitted him to again exercise the statutory function, it seems obvious that he purported to act in terms of section 144 (b) of the LRA, which provides:

“... vary ... an arbitration award ... -

(b) in which there is ambiguity or an obvious error, but only to the extent of that ambiguity, error or omission”

[13] Perspicuously, in order to exercise the power under that subsection, the jurisdictional requirements are (a) ambiguity; (b) error; or (c) omission. Ambiguity grammatically it means the quality of being open to more than one interpretation; inexactness. An error means a mistake. A mistake is an act or judgment that is misguided or wrong. The section allows a commissioner who issued the award to act mero motu. By way of an example, if a commissioner spots an ambiguity, error or omission he or she may simply correct that. The section further confines the commissioner to the extent of that ambiguity; error; or omission. In other words, a commissioner cannot fashion a new award.

[14] In casu, Phooko did not on his own spot any ambiguity; error; or omission. Instead almost a year after he had completed his statutory function,

Keshav brought to his attention what, in her ebullient view, paragraph 35 of the arbitration award suddenly means. One Kgosi Makwati (Makwati), testified as follows:

“10 This effectively placed the Applicant in level 6 instead of level 4 (Chief Administrative Officer Position) as was originally prayed for.”

[15] Nowhere in the arbitration award of 2 September 2015 is it recorded that Keshav prayed for a level 4 Chief Administrative Officer position. On the contrary, in exact terms, Phooko recorded that Keshav sought to be promoted to the position of Administrative Officer. Regard being had to the levels; it is clear that the Chief Administrative Officer is at a higher level. Of great concern, when the awards are compared, on the one, the order is to promote and on the other the order is to appoint. It is clear to this

Court that there was no ambiguity in the original award. What Keshav suggested, a year later, is that she was awarded what she did not pray for. This somewhat suggests that Phooko made an ‘error’ by awarding what was not prayed for. Differently put, he failed to resolve the true dispute, a reviewable irregularity. On Keshav’s

own version, the remedy she had was a review as opposed to a variation.

[16] As proof that it was more of a new claim or failure to resolve the true dispute, Makwati testified that:

“11 ... We therefore believe this was an error on the side of the arbitrator because it was raised that the position was upgraded (from Administrative Officer to Chief Administrative Officer) prior to the current incumbent being

appointed.

12 It was also raised that the Applicant was interviewed a total of three (3) times including once for the Chief Administrative Officer position.

14

(c) After the recent strike that took place on the 26th July 2016, the two parties agreed to implement three arbitration awards ... but did not agree to place the Applicant on the Chief Administrative Assistant position.”

[17] It is unclear as to where and what ‘it was raised’ mean? It is clear that Makwati alleges ignorance or disregard of evidence – a reviewable irregularity – on the part of Phooko.

[18] Clearly, absent the jurisdictional requirements outlined above, Phooko was not authorized by the LRA to perform a variation function. Having performed it nevertheless, his actions are a nullity and incapable of legal enforcement. On this basis alone, the variation ruling cannot stand. It offends the principle of legality. In answering the central question, a commissioner is not authorized to vary an arbitration award outside the confines of section 144 of the LRA.

[19] I now turn to the ancillary question. At the time Phooko exercised statutory powers, there was no longer a dispute of unfair labour practice. The dispute was first resolved by Phooko. The resolution by Phooko was impugned, but later the parties reached a compromise, which compromise obliterated any dispute of unfair labour practice. In terms of section 136 of the LRA, it is the function of a

commissioner to resolve a dispute by way of arbitration. Absent a dispute, arbitral functions cannot be performed. Regard being had to the testimony of Makwati, after 26 July 2016, a new dispute arose between the parties. Phooko in the background details of the impugned variation ruling stated the following:

‘The arbitration award states that the applicant be promoted to the position of administrative officer level “6”[2]. This is the gravamen of the applicant.’

[20] A gravamen is the essence or most serious part of a complaint or accusation. Essentially it is a dispute. Having misquoted the award of 2

September 2015, it is perspicuous that a new dispute regarding levels emerged. If a dispute involves an unfair labour practice as defined, section 191 (1) (a) of the LRA requires that the employee alleging a dispute may refer the dispute in writing. Section 191 (4) obliges the Commission or Council to attempt resolution of a referred dispute through conciliation. The dispute alleged by Makwati was not referred to conciliation. What Keshav did and was permitted by Phooko was to resolve that new dispute through the variation process. That simply cannot be done.

[21] A disguised error is not an error within the contemplation of section 144 of the LRA. What compounds the situation is that Phooko is told in no uncertain terms that the dispute has been settled. He chose to ignore that. In my view, this conduct is not in keeping with section 34 of the Constitution of the Republic of South Africa, 1996. The municipality raised a legitimate point that required resolution by application of law. In law, a compromise obliterates a legal claim. In the current application, Keshav does not dispute the terms as recorded in the missive by the acting municipal manager. All she raises is a technical defence that the letter is not referred to as a settlement agreement. This is a lame technical defence. She does not dispute that an agreement was reached

and most importantly that she received her dues as a result. Makwati testified as follows:

“The Applicant only received a confirmation letter implementing the decision of the afore mentioned agreement on the 11 August 2015 and this was received on the 18th August 2016.

The Applicant ...then approached the local SAMWU and indicated her unhappiness about the agreement.”

- [22] The nature and the extent of the alleged unhappiness is not spelled out. However, of significance, she confirmed to the local union that an agreement was reached.
- [23] Under the circumstances, her version in the present application to the effect that the compromise did not prevent the variation is rejected. The version is not legally sound.

Conclusion

- [24] In summary, Phooko was not allowed in law to vary the arbitration award. Having varied the arbitration award, his conduct offends the principle of legality and the decision he reached, which factually exists, without the jurisdictional powers is a nullity and devoid of any legal force. The variation ruling ought not to have been issued on application of the functus officio rule, which is a species of the rule of law. Having issued the ruling contrary to the common law rule, the ruling is a nullity devoid of any legal consequences.
- [25] In light of the reasons outlined above, the variation ruling is incapable of any legal justification and is reviewable.
- [26] For all the above reasons, the ruling issued by Phooko is not justifiable or lawful and it is reviewable in law.
- [27] In the results I make the following order:

Order

1. The late filing of the review application is hereby condoned.
2. The ruling issued by Commissioner Phooko under the auspices of the SALGBC under case number MDP111401 dated 18 November 2016 is hereby reviewed and set aside.
3. There is no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr A.J Vermeulen of K C Law

For the Third Respondent: No appearance

[1] No. 66 of 1995.

- [2] Unashamedly, Phooko misquotes his own award. Nowhere in his award does he reference levels, let alone level 6. This Court views this as a form of dishonesty and sheer unprofessionalism. Such conduct is unfortunate and gravely unacceptable. Hopefully, the Bargaining Council shall somewhat address this conduct.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2023/18.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/steve-tshwete-local-municipality-v-commissioner-m-e-phooko-n-o-and-others-unknown-topic-alcjhb-2023>

Prepared on 12 October 2026 · Esheria