THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 3021/19

In the matter between:

MERVIN MULLER **Applicant**

and

PUBLIC INVESTMENT CORPORATION (SOC) LIMITED (PIC) **First Respondent**

THE CCMA **Second Respondent**

COMMISSIONER M C LEBEA N.O **Third Respondent**

Heard: **15 February 2022.**
Delivered: **18 February 2022**
Edited: **23 February 2022**

Summary: Opposed review – award falls outside the bounds of reasonableness.
Held: (1) The arbitration award is reviewed and set aside. It is replaced with an order of this Court. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The legislature in section 138 (7) of the Labour Relations Act (LRA)[1] decreed that within 14 days of the conclusion of the arbitration proceedings, the commissioner must issue an arbitration award with brief reasons. This notwithstanding, there is a growing tendency for commissioners to render what appears to be erudite and scholarly arbitration awards. In *casu*, the impugned arbitration award comprises of 40 pages. This in a matter that involves a simple dispute of an alleged unfair labour practice. As it shall be demonstrated later in this judgment, some of the issues canvassed in the impugned arbitration award were not necessary and did not come for decision. The message this judgment sends is that it remains the solitary duty of a commissioner to resolve a dispute, which the parties present before him or her.

[2] That said, this is a review application brought by Mr Mervin Muller (Muller), the former employee of the Public Investment Corporation (SOC) Ltd (PIC). Muller seeks to review and set aside an arbitration award issued by Commissioner Lebea (Lebea) in terms of which, Lebea found that the unfair labour practice alleged by Muller against the PIC based on the alleged unfairness of the directive issued by the Minister or the Minister's alleged unfair conduct was dismissed due to *non-joinder*. Lebea further found that the alleged unfair labour practice against the PIC based on the alleged direct conduct of the PIC is dismissed.

Background facts

[1] Act 66 of 1995 as amended.

[3] To a greater degree, the facts pertinent to this dispute are common cause. Muller was employed by the PIC as Executive Head: Private Equity and Structured Investment Products. His employment as such commenced on 15 March 2017. Prior thereto, he was employed by the PIC for a period spanning over 10 years.

[4] On 4 December 2018, the erstwhile Minister of Finance, the Honourable Tito Mboweni (Minister) revised the PIC's proposed Short Term Incentives (STI) allocated to the individual executive managers of the PIC. Additionally, the Minister deferred the approval of the Long Term Incentives (LTI) which were payable in December of 2018. In respect of Muller, the STI was revised from an amount of R1 849 999.71 to R989 229.71. That revision short-changed Muller by an amount of R860 700.00. Additionally, an amount of R2 416 880.00, in respect of the LTI was deferred and not paid to him when it became due in December 2018.

[5] The revision and the deferment resulting in the short-payment of the STI and the non-payment of the LTI aggrieved Muller. He lodged an internal grievance, which was not resolved to his satisfaction. Resultantly, he resigned from his position on 14 March 2019 and alleged that the revision and the deferment, which led to the non-payment of the STI balance and the LTI, amounted to a breach of his contract of employment and reserved his rights to sue the PIC for damages. Prior to his resignation, on 6 March 2019, Muller had referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair labour practice in relation to the payments of the STI and LTI (the benefits).

[6] Conciliation failed to resolve the dispute. Muller requested the CCMA to resolve the dispute through arbitration. Lebea was appointed by the CCMA to resolve the dispute through arbitration. Arbitration happened on 17 July; 31 October and 01 November 2019 respectively. On 19 November 2019, Lebea published the impugned arbitration award. As indicated above, Muller was

aggrieved and he launched the present application. The PIC duly opposes the present application.

Grounds of review

[7] Muller contends that the finding that the Minister should be joined is a reviewable irregularity and a material error of law. Additionally, he contends that it was not competent of Lebea to dismiss his case due to *non-joinder*. Lebea also committed an error in finding that no unfair labour practice has been committed in relation to the direct conduct of the PIC.

[8] The PIC contends that there is no merit in the grounds punted for by Muller. Accordingly, the impugned arbitration award is one that a reasonable decision maker may reach regard being had to the evidence presented before Lebea.

Evaluation

[9] The parties outlined the road map of the dispute in a pre-arbitration agreement concluded on 4 June 2019. Two issues were brought for the decision of Lebea; namely (a) the jurisdictional powers of the CCMA; and (b) whether there is an unfair labour practice as defined in section 186 (2) (a) of the LRA. Muller sought as a relief the payment of the STI and the LTI. On the other hand, PIC sought the dismissal of the dispute. On 22 August 2019, Lebea in a written ruling resolved the dispute over the jurisdictional powers. He concluded that the CCMA retained jurisdiction to arbitrate the dispute – whether there was an unfair labour practice as defined in section 186 (2) (a) of the LRA. This ruling was not challenged by the PIC.

[10] A pre-arbitration agreement binds the parties and the commissioner in so far as the dispute is concerned. In *Telkom SA SOC Limited v Van Staden and Others*[2], the Labour Appeal Court (LAC) concluded that:

[2] [2021] 42 ILJ 869 (LAC).

> "[16] A pre-trial agreement is a consensual document which narrows down the issues in dispute between the parties so as to limit the scope of litigation. Such an agreement binds the parties and the court in the same way as pleadings…
>
> [24] Given the status of a pre-trial agreement as a contract entered into between the parties, I am satisfied that the approach taken in *CEPPWAWU* is correct…"

[11] In light of the above legal position, Lebea was not authorised to determine the issue of *non-joinder*. Having done so, he committed a gross irregularity, which vitiates the arbitration award.

Is non-joinder raised and destructive of the claim of Muller?

[12] Assuming that Lebea was authorised to determine the issue of *non-joinder*, the veritable question is whether *non-joinder* was pleaded or raised and whether its success obliterates the case of Muller. At the CCMA, there are no pleadings. Owing to that, there is no provision for a respondent party to raise a special plea, which *non-joinder* is. However, Rule 20 (3) (d) and (l) of the CCMA Rules provides that in the pre-arbitration conference, the parties must attempt to reach consensus on, (a) the issues that the Commission is required to decide; and (b) the resolution of any preliminary points that are intended to be taken. If the PIC wished to raise a plea of *non-joinder*, it would have done so at the pre-arbitration conference and recorded it as a preliminary point to be taken. Defining a plea of *non-joinder*, the Virginia Supreme Court in *Bush v Campbell*[3] had the following to say:

> "It is purely technical in its nature, in many instances producing great delay and much inconvenience without any corresponding

[3] 26 Gratt.403, 435 (1875), Henry C. Jones & Leo Carlin, *Non-Joinder and Misjoinder of Parties in Common-Law Actions* 28 W. Va. L Rev (19220

> advantages. The defendants very rarely derive any real and substantial benefit from it"

[13] A plea of *non-joinder* is a special plea, which is one of the classes of pleas known as dilatory pleas. It is a plea which does not go to the merits of the action but if successful merely delays it. In fact, if the plea is successful the usual procedure is that the Court stays the action until the necessary party has been joined.[4]

[14] Regard being had to the principles outlined above; it was grossly irregular for Lebea to have dismissed the claim of Muller based on the plea *non-joinder*. The PIC did not raise it. The PIC was throughout the dispute ably represented legally. During argument, Ms Gabie appearing for the PIC correctly conceded that Lebea acted irregularly in that regard. It does seem though that Lebea took a view that the Minister is an interested party. This view is wrong. In terms of Rule 26 (2) of the CCMA Rules a Commissioner may on own accord make an order joining a party to the proceedings. However, the legal basis to do so is when the party to be joined has a substantial interest in the subject matter of the proceedings or that such a party may be prejudicially affected by the outcome of the proceedings. The Minister did not have any substantial interest in the subject matter – the unfair labour practice dispute – and the Minister may not be prejudicially affected when the PIC is ordered or not ordered to pay the STI and the LTI as contractually obliged.

[15] As I see it, the Minister featured, as it were, as a supervening impossibility for the PIC to comply with its contractual obligations. To this proposition, Ms Gabie conceded. In other words, had the Minister not revised the STI and or delayed the LTI, the PIC was well on course to perform its part of the contract – pay the benefit. In as far as the PIC is concerned, the set criteria was met, hence its recommendation for approval by the Minister. In fact, in terms of clause 7.3 of the Remuneration Policy, February 2016, which forms part of the employment contract of Muller, the Board of the PIC recommends the

[4] See *Beck's Theory and Principles of Pleadings in Civil Actions*, H Daniels 6ed 2002.

payment to the shareholder (Government of South Africa, represented by the Minister of Finance). The relationship between the Government of the Republic of South Africa and the PIC is regulated by a Shareholder's Compact (Compact). In terms of clause 9.2.1 of the Compact, it is apparent that the powers reserved for the Minister is to approve the payment of the STI and LTI and not to revise and or defer.

[16] Supervening impossibility is a defence available to the party who has to perform in terms of the contract. The PIC did not raise such defence. A claim for payment of benefits is akin to a contractual claim. In other words, Muller is effectively alleging a breach. A breach is a mal-performance or deficient performance. Had supervening impossibility been raised by the PIC, the Minister would have been a crucial witness in support of that defence as opposed to being a party. He did what he did to prevent the PIC from performing its contractual obligations.

[17] In summary, the plea of *non-joinder* was not raised and even if it was successfully raised, it does not in its nature destroy the claim of Muller. Accordingly, by dismissing the claim of Muller based on *non-joinder*, Lebea committed a reviewable irregularity.

The powers of the Minister

[18] Recently, the Constitutional Court in *Minister of Finance v Afribusiness NPC*[5] reaffirmed the principle that where a functionary is not empowered to act, acting *ultra vires* is unlawful and abysmal to the rule of law. Regard being had to the Compact, the only power reserved for the Minister is to approve and not to revise and or defer. It is accepted that the converse of approve is disapproval. It may be argued that where the Minister disapproves payment of

[5] (CCT279/20) [2022] ZACC 4 (16 February 2022)

the STI and LTI, the Minister may be acting within the parameters of the Compact. Mercifully, that argument does not arise *in casu*. The Minister simply revised and deferred and did not disapprove. The internal arrangements are such that the Board of the PIC consider the incentives in line with set criteria. It is not the function of the Minister to do so. It must follow that in revising or deferring, the Minister was not guided by the set criteria. I shall in due course revert to this aspect when considering the fairness of the conduct of the Minister.

[19] In an attempt to justify the conduct of the Minister, Ms Gabie submitted that Muller agreed that his contract of employment should be regulated by the Public Investment Corporation Act (PICA)[6] as well as the Public Finance Management Act (PFMA).[7] Based on that she submitted that the revision and the deferment amounts to a directive contemplated in section 6 (4) of PICA. This submission does not, in my considered view, assist the PIC nor does the text of the section support the revision and the deferment. The section reads:

> "6 (4) The Minister may issue directives to the board regarding the management of the corporation if –
> (a) It is in the public interest; or
> (b) It is reasonably necessary to do so.

[20] It is perspicuous from the language employed by the legislature that the discretionary power is limited to the management of the corporation. By definition, management means the process of dealing with or controlling things or people. It cannot be said that management in this case implies taking arbitrary action, which adversely affects the rights to fair labour practice of employees. It is trite that any legislation must be interpreted within the prism of the Constitution of the Republic of South Africa, 1996. Section 23 of the Constitution affords every worker a right to fair labour practices. Section

[6] Act 23 of 2004

[7] Act 1 of 1999.

185 of the LRA affords employees a right not to be subjected to unfair labour practice. To the extent that there is a conflict between PICA and the LRA, in terms of section 210 of the LRA, the LRA must prevail. The directives are to be issued to the board and not to usurp as it were the powers of the board. In terms of section 8 of PICA, the board must control the business of the corporation, direct the operations of the corporation and exercise all such powers of the corporation that are not required to be exercised by the shareholders of the corporation. Therefore, when it comes to management, the discretionary power of the Minister is limited to issuing directives to the board and not usurp its powers. In *casu*, what happened on 4 December 2018 is the following:

> "I have therefore revised the PIC's proposed Short Term Incentives (STI)…
> I have deferred approval for the Long Term Incentives (LTI).

[21] Although the letter of 4 December 2018 is addressed to the chairperson of the PIC, it does not direct the PIC *per se* to revise and defer but it records the decision taken by the Minister. By definition, a directive is an official or authoritative instruction. There was no instruction but a communication of a decision taken. The Minister acted *ultra vires* and on the strength of the *Afribusiness* judgment, his actions are invalid. It was submitted that the remedy of Muller is to seek a legality review; otherwise, the decision of the Minister remains binding. I do not agree. The *Oudekraal* principle was fully explained by the Constitutional Court in a number of its judgments. An invalid decision is bereft of legal consequences. It only exists as a fact until set aside by a competent Court of law.

[22] Reliance was also placed on section 63 (2) of the PFMA. The section reads:

> "(2) The executive authority responsible for a public entity under the ownership control of the national or provincial executive must exercise that executive's ownership control powers to ensure that

public entity complies with this Act and the financial policies of that executive."

[23] The PFMA defines what an executive authority is. In relation to national department, it means the Cabinet member responsible for a department. In relation to a national public entity, the Cabinet member who is accountable to Parliament for that national public entity. A national public entity means a national government business enterprise; or a board, commission, company, fund, or other entity other than a national government business enterprise which is established in terms of national legislation; fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and accountable to Parliament.

[24] Section 2 of PICA establishes the PIC as a juristic person. The State is the sole shareholder of the shares in the corporation. The Minister only exercises rights attached to the shares in the corporation on behalf of the state. The PIC is listed as a national government enterprise under Schedule 2 Part B of the PFMA. In my view, the exercise of the powers is simply to ensure that the public entity complies with the PFMA and the financial policies of the Minister. When one reads the letter of 4 December 2018, one does not find any allegations of non-compliance with the PFMA or the named financial policies. What is apparent is an arbitrary revision and deferment. Accordingly, the provisions of the PFMA does not validate the actions of the Minister.

[25] Ultimately, the conclusion I reach is that the Minister does not have powers to revise or defer the payment of the STI and the LTI. By this, the Court simply asserts the legal position and does not seek to review and set aside the decision of the Minister. To my mind, it being an invalid decision, it is bereft of any legal consequences.

Is there an unfair labour practice or not?

[26] In the impugned award, Lebea, correctly concluded that the STI and the LTI are benefits within the meaning of section 186 (2) (a) of the LRA. There is no attack on this finding nor is there any counter-review. Section 186 (2) (a) provides –

> "(2) "**Unfair Labour Practice**" means any unfair act or omission that arises between an employer and an employee involving –
> (a) Unfair conduct by the employer relating to the…provision of benefits to an employee."

[27] The section considers any unfair act that arises between an employee and an employer. Lebea somewhat considered the unfair act of the Minister in revising and deferring to be an irrelevant act. That cannot be a correct interpretation of the section. The Minister's act qualifies as any unfair act. That act of the Minister undoubtedly arose between the PIC and Muller. It stifled their contractual arrangement. The definition of arise is emerge or become apparent. Therefore, the unfair act – arbitrary revision and deferment – emerged as a problem in the contractual arrangements of Muller and the PIC. This must not be conflated with the unfair conduct by the PIC, being failure to pay the STI and the LTI as contractually obliged. As indicated earlier, the lack of approval by the Minister may be seen as a supervening impossibility. However, such a defence was not raised by the PIC. In any event, in my view, it does not qualify as a supervening impossibility[8].

[28] It is axiomatic that the unfair act of the Minister – revision and deferment – was involved in the unfair conduct of the PIC – failure to pay the STI and the LTI as contractually obliged. Muller testified at length that he met the performance threshold required to be eligible for the STI and the LTI. The fact that the PIC recommended payment bears testimony to this assertion. Having met the requirements, it is an unfair conduct on the part of the PIC not to perform its part of the contractual obligation. In terms of section 186 (2) (a) of

[8] See *Transnet t/a National Port Authority v The Owner of MV Snow Crystal* [2008] 3 All SA 255 (SCA)

the LRA, it is an unfair labour practice for the PIC to refuse to pay the STI and the LTI (benefits). The fact that the PIC engaged the Minister in order to resolve whatever dispute arising from the Compact is completely irrelevant to the veritable question – was the PIC contractually obliged to pay the STI and the LTI to Muller. It is apparent that Lebea devoted his attention to this irrelevant fact and concluded that since the Minister and the PIC did not reach a deadlock, there is no unfair conduct regard been had to the steps the PIC took to resolve the apparent impulse. A commissioner who takes into account irrelevant considerations fails to apply mind and can never reach a reasonable decision. It is clear that Lebea did not evaluate the conduct of the PIC – failing to pay the benefit – in order to determine the unfairness thereof. That failure alone renders the arbitration award reviewable in law.

[29] It became common cause during the arbitration proceedings that the PIC viewed the action of the Minister to be unfair given what had happened in the past regarding payment of STI and LTI. The fact that Mr Pholwane (Pholwane) testified that they locked horns with the Minister, although deadlock was not reached, attests to the fact that like Muller, the PIC considered the act of the Minister to be unfair. In fact as correctly recorded by Lebea Pholwane felt that the Minister has acted unfairly[9].

[30] In summary, regard been had to the provisions of the section referred to above and the relevant evidence presented before Lebea, a reasonable decision maker could reach a decision that the PIC by failing to pay Muller committed an unfair labour practice. Accordingly, the arbitration award by Lebea does pass the constitutional scrutiny and is reviewable.

What then? Remit or not remit?

[9] Para 4.32.5 of the arbitration award.

[31] Mr Buirski, appearing for Muller argued that this Court is in as good a position as Lebea. All the relevant material is available for the Court to make a determination. Ms Gabie did not offer any resistance or submit otherwise. Section 145 (4) of the LRA provides that if the award is set aside, the Labour Court may determine the dispute in the manner it considers appropriate.

[32] Regard being had to the overwhelming evidence of unfairness as discussed above, an appropriate determination is that the PIC had committed an unfair labour practice. At the conclusion of the matter, Mr Buirski handed up a draft order for the Court's consideration. Having considered the draft, this Court is minded to adopt the draft.

[33] In the result the following order is made:

Order

1. The Arbitration award issued by Commissioner Lebea under case number GATW4343/19 dated 19 November 2019 is hereby reviewed and set aside.
2. It is replaced with an order that the PIC has committed an unfair labour practice within the contemplation of section 186 (2) (a) of the LRA.
3. The PIC is ordered to pay to Muller an amount of **R860 700.00** being the shortfall of the STI and an amount of **R2 416 880.00** being the outstanding LTI.
4. The PIC is ordered to pay interest at the prescribed rate *a temporae morae* on the STI amount of **R1 850 000.00** from the vesting date (30 September 2018) to date of part payment on 14 December 2018 and on the balance amount due of **R860 700.00** from 15 December 2018 to date of payment.
5. The PIC is ordered to pay interest at the prescribed rate *a temporae morae* on the LTI amount of **R2 416880.00** from the vesting date (31 December 2018) to date of payment.
6. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr P Buirski
Instructed by:	Makhafola & Verster Inc, Pretoria
For the 1st Respondent:	Ms S Gabie of Cheadle Thompson & Haysom Inc, Braamfontein.