DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

18/03/2024
DATE

SIGNATURE

THE JUDICIARY
REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1852/21

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA) **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER HILDA GROBLER *N.O.* **Second Respondent**

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION (SATAWU) **Third Respondent**

UNITED NATIONAL TRANSPORT UNION (UNTU) **Fourth Respondent**

Heard: **1 February 2024**

Delivered: **18 March 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 18 March 2024.)**

JUDGMENT

PHEHANE, J

Introduction

[1] The applicant (PRASA) brings a review application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside an arbitration award by the second respondent dated 22 July 2021.

[2] The review application is opposed by the fourth respondent.

Condonation

[3] The fourth respondent launched an application for condonation for the late filing of its answering affidavit. This, in circumstances where no objection as contemplated in item 11.4.2 of the Practice Manual of this Court[2] was delivered by the applicant, although the applicant opposes the condonation application.

[4] Item 11.4.2 of the Practice Manual reads thus:

> 'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filling of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.' [Emphasis added]

[5] In the premises, the condonation application is unnecessary.

Relevant factual background

[6] Two issues were before the second respondent in respect of a consolidated dispute referred to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) by the third and fourth respondents, SATAWU and UNTU respectively. They were:

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[1] Act 66 of 1995, as amended. See also: notice of motion on p 1.
[2] Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

6.1 a dispute in respect of leave; and

6.2 a dispute relating to compulsory medical aid.

Leave dispute

[7] In respect of the dispute regarding leave, the brief facts are as follows: during the lockdown measures imposed by the South African Government as a result of the COVID-19 pandemic, PRASA was required to place employees that were not able to tender services due to the lockdown measures on leave. PRASA avers that during the lockdown period, its business was at a standstill and revenue streams were stunted. It opted not to place employees on unpaid leave as this would have placed employees in financial distress.

[8] PRASA hoped it would obtain financial relief in the form of the temporary employer/employee relief scheme (TERS) payments from the Department of Employment and Labour (DoL) to keep afloat financially in circumstances where it paid employees who were placed on "forced leave". It is not in dispute that PRASA applied to the DoL for such payments, but none was ever received.

[9] Relying on clause 1.7 of the Leave Agreement[3] concluded between the parties, which provides that annual leave is subject to operating and business requirements, PRASA placed its employees on paid leave during the period 17 April 2020 to 31 May 2020, a total of 29 leave days. UNTU suggested that 50% of this period be converted to special leave. PRASA obliged and converted 50% of the leave to special leave. This meant that employees used 14.5 of their own leave days to cover the period and the balance of 14.5 days was taken as 'special leave'.

[10] It is also not in dispute that the parties met to engage on how leave would be implemented during the COVID-19 lockdown period. Meetings in this regard were held on 29 April 2020 and 1 May 2020, whereafter, PRASA undertook to report to its EXCO and to revert to the unions with feedback, but did not.

[3] Record bundle at p 193.

Instead, PRASA unilaterally converted the employee's annual leave to 50% special leave.

[11] As I understand it, SATAWU launched a dispute at the CCMA regarding the interpretation and application of a collective agreement, being the Leave Agreement. The relief sought was that PRASA pay back to the employees the annual leave deducted from them during the period 17 April 2020 to 31 May 2020. Properly construed, the effect of the relief sought was that the entire period of leave should be recorded as special leave and not annual leave.

[12] This is in effect the decision by the second respondent. The second respondent ordered that the entire period of leave should be converted to special leave.

[13] PRASA takes umbrage with this decision and it laments that the Leave Agreement makes no provision for 'special leave'. I deal with the grounds of review below.

Medical aid dispute

[14] The second issue that was before the second respondent concerns PRASA's contention that its employees were required to be on compulsory medical aid since 2012. This did not apply to employees who could prove that they were on their spouse's medical aid. PRASA alleges that in 2016, it noticed employees resigning from its three compulsory medical aid providers, being Bonitas, Discovery and Sizwe Medical Aid. In the circumstances, its acting Group Human Resources Manager issued a letter dated 13 June 2016 reminding employees that medical aid is compulsory and instructed that no employee was permitted to terminate membership with PRASA's medical aid providers.

[15] The unions lodged a dispute five years later (in 2020), alleging that no compulsory medical aid existed in PRASA on the proper interpretation of clause 3.3.2 of the Total Guaranteed Package Agreement (TGPA), a collective agreement concluded between the parties in February 2012. The unions contend that clause 3.3.2 of the TGPA provides that medical aid will be compulsory *after* an agreement is reached between the parties to that effect.

As no such agreement had been concluded, the unions demanded that the letter by the acting Group Human Resources Manager be retracted.

[16] In interpreting clause 3.3.2 of the TGPA and taking into consideration related policies of PRASA, the second respondent found no agreement as referred to in the said clause had been concluded and therefore, the instructions in the letter by the acting Group Human Resources Manager of 13 June 2016 could not be followed or implemented and such letter is null and void.

Grounds of review

[17] The grounds of review, in summary, are as follows: the second respondent misconducted herself and committed a gross irregularity in determining the dispute on paper and failing to hear oral evidence when the disputes of fact were present; she misconstrued the nature of the disputes, as they were mutual interest disputes and not disputes relating to the interpretation and application of collective agreements;[4] further, the Leave Agreement makes no provision for special leave therefore, therefore, the was no basis for the second respondent to order that the leave period in question be converted to special leave.

Evaluation

[18] At the proceedings before the second respondent, the parties agreed that the matter could be decided on paper. In the arbitration award, the second respondent states that upon receipt of the parties' written submissions, it was necessary to call the parties before her on 16 July 2021 to get clarification on the submitted policy documents and pre-arbitration minutes.[5] The parties proceeded to make oral submissions before the second respondent. At no stage was the second respondent informed by PRASA of any dispute of fact

[4] See: supplementary affidavit at para 5.1 on p 72. This, is despite PRASA averring in para 4.4 of the founding affidavit at p 9, that both disputes were referred to the first respondent as disputes relating to the interpretation/application of collective agreement. See also referrals form at p 3 and 9 of the Records bundle.

[5] See: transcribed record of 16 July 2020 one at p 235 of the Record bundle.

that could not be determined on the papers and that required to be resolved by way of oral evidence.

[19] If I am wrong, which I do not think I am, no *bona fide* dispute of fact arose on the papers. Mrs Venter for PRASA submitted in oral argument, that PRASA implemented special leave when it realised the lockdown would be long-term. In addition, pursuant to a question by the second respondent whether PRASA took into consideration converting the leave period in question to special leave when it was clear that the lockdown would be long term, Mr. Le Roux for PRASA submitted that this was considered, but he did not have a mandate.[6] In my view, these submissions by PRASA's representatives demonstrate that PRASA had considered special leave for the entire period in question but did not implement it due to financial difficulties it brought on itself and due to its failure to follow up with the DoL on the TERS benefits. PRASA offered no cogent reasons for its failure to follow up with the DoL to alleviate its financial difficulties consequent upon placing employees on paid leave.

[20] The submissions as aforesaid by PRASA's representatives had nothing to do with any agreement between the parties on how leave would be implemented during this period, as PRASA seems to suggest in the present case.

[21] PRASA alleges that clause 3.3.2 of the TGPA is "*clumsily worded*" and does not reflect the true intentions of the parties, which is that the parties intended to regulate the percentages of employer contributions to the compulsory medical aid. I find that no dispute of fact existed on the papers in relation to the medical aid dispute.

[22] Even if I am wrong, I find that the second respondent did not commit any irregularity in ascribing a purposive and business-like interpretation to the said clause, which reads:[7]

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[6] Transcribed record at pp 276 to 277.

[7] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA), where the Supreme Court of Appeal set out the proper approach to interpretation of documents.

'3.3.2 The parties hereby agree that the equity adjustments in clause 3.3.1 above may be offset against any further adjustments that may be required when medical aid membership is made compulsory for all. Compulsory medical aid membership will be implemented later, following negotiations between PRASA and Labour and based on the agreement reached to that effect".[8] [Emphasis added]

[23] On the facts before the second respondent, Mr. Haasbroek for UNTU submitted that no collective agreement had been concluded between PRASA and the unions as provided in clause 3.3.2 of the TGPA. [9] PRASA was not able to demonstrate that any collective agreement as provided for in clause 3.3.2 the TGPA had been concluded.

Did the Commissioner misconduct herself and/or commit a reviewable irregularity?

[24] The answer is a resounding 'no'.

[25] Section 138 of the LRA provides that a Commissioner may conduct the arbitration proceedings in the manner s/he considers appropriate to determine the dispute expeditiously and fairly and to determine the substantial merits of the dispute with minimal legal formalities. In determining a dispute, a Commissioner is obliged to apply his/her mind to the issues before him/her, failing which, s/he acts unreasonably[10] and his/her decisions will be susceptible to review.

[26] The second respondent correctly found that the dispute between the parties concerned the interpretation and application of the respective collective

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[8] See: Records bundle at p 139. Clause 3.3.1 of the TGPA reads:
'Total Guaranteed Package is inclusive of medical aid contribution subsidies based on entitlement opposed to utilisation. PRASA agrees to include a minimum subsidy of R356 per month in the packages of all Junior Officials, who currently do not receive a medical aid subsidy. The medical aid contribution subsidies of those who are currently higher will remain unaffected i.e. the current actual subsidies will be included in the total guaranteed packages.'

[9] See: UNTU's heads of argument at paras 12 to 18.

[10] See: *Commercial Workers Union of SA v Tao Ying Metal Industries and others* [2008] ZACC 15; (2008) 29 ILJ 2461 (CC).

agreement (the Leave Agreement and the TGPA). In so doing, she did not misconstrue the nature of the dispute before her. On PRASA's own version, a dispute on the interpretation and application of a collective agreement was referred to the CCMA for determination and the certificate of non-resolution of the dispute issued by the CCMA confirms this.[11]

[27] PRASA elected to divide the leave period between annual leave and 'special leave' and proceeded to convert 50% of the annual leave to special leave, even though the Leave Agreement made no provision for this type of leave. It is apparent in light of the unprecedented times of the COVID-19 pandemic, that special leave was a consideration in applying the leave policy where employees were forced to take leave from work as a result of the stringent lockdown measures. In view of no serious contestation by PRASA to convert the leave to special leave for the entire period question, I find that the second respondent applied her mind to the substantive issues before her and she cannot be faulted for converting the leave over the entire period in question to special leave.

[28] In respect of the dispute relating to medical aid, I find that the second respondent applied her mind to the issues before her and correctly interpreted clause 3.2.2 of the TGPA. In the circumstances, she committed no irregularity and did not misconduct herself in her duties as commissioner.

[29] The second respondent is to be commended for calling the parties before her to hear oral arguments after they had agreed that the matter may be decided on paper and when presented with several documents and agreements. In so doing, in my view, the parties were afforded a fair opportunity to be heard.

[30] In view of the afore-going, I find that the arbitration award is reasonable and there is no basis for its interference.

[31] In the premises, the following order is made:

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[11] Records bundle at p 19.

Order

1. The condonation application is struck out.

2. The review application is dismissed.

3. There is no order as to costs.

M. T. M. Phehane
Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv L Steenkamp (Ms.)
Instructed by:	Khumalo Masondo Attorneys Inc.
For the Fourth Respondent:	Adv MJ van As
Instructed by:	Fluxmans Inc.