

JURISDICTIONAL RULING

Panelist: Joseph Thee
Case No: PSCBC 579-09/10
Ruling date: 13 April 2012

In the matter between:

PSA OBO PRETORIOUS T Applicant

and

OFFICE OF THE PREMIER-WESTERN CAPE Respondent

Applicant's representative: Mr. Gerry Theunissen

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Respondent's representative: Ms. E. Southgate / R Mohammed

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DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration hearing was scheduled on 19 September 2011 at the Office of the Premier in Cape Town. The applicant, Ms. Pretorius was represented by Mr. Gerry Theunissen of Public Servants Association (PSA), and Ms. Southgate appeared on behalf of the respondent.
2. At the commencement of the proceedings, Ms. Southgate had raised a Point *in limine* objecting to the Council's jurisdiction to hear this dispute. I was obliged to hear the *Point in Limine* to determine whether I have the legal authority to proceed with the matter.
3. The proceedings were conducted in English and digitally recorded.

ISSUE TO BE DECIDED

4. I am required to determine whether or not the Council has jurisdiction to hear the dispute.

BACKGROUND TO THE DISPUTE

5. The applicant had referred a dispute to council for conciliation on 24 March 2010 concerning an interpretation /application of a collective agreement in terms of Resolution 3 of 1999. A conciliation meeting took place on 7 June 2010 but the dispute remained unresolved and a certificate to such effect was issued.
6. The matter was accordingly scheduled for arbitration on 12 November 2010 and to be heard by Arbitrator Ms Sarah Christie. At this hearing the respondent had apparently raised a preliminary point as to whether council has jurisdiction to entertain the dispute.

7. The matter was subsequently rescheduled by council for an arbitration hearing on 19 September 2011. It is at this juncture when the respondent had many interactions with the Bargaining Council as to the status of the previous hearing in the absence of an expecting ruling which was not forthcoming.

ARGUMENT BY RESPONDENT

8. Ms. Southgate submitted that as the respondent that it found it strange when it was served with the notice of set down for an arbitration hearing to be heard on 19 September 2011.
9. It is on this basis that had raised an objection to the proceedings to continue, the council has no jurisdiction to hear the dispute. She contended that the same matter appeared before Ms. Christie and heard on 12 November 2010. The Arbitrator, Ms. Christie, was required to make a determination in this regard. The respondent had not heard or seen any ruling that was issued.
10. The respondent had written several letters to council enquiring about the outcome of the ruling. They were surprised when the matter was set down for arbitration on 19 September 2011 despite inquiring about the status of the matter in the light that no ruling was issued.
11. The Secretary of the council in his written replies had submitted that despite numerous attempts to secure the outcome of the arbitration/ jurisdictional hearing no responses were received from the Arbitrator.
12. It was on this basis that Mr. Mashudu Nkosi had consulted both the applicant and respondent and suggested that the matter be rescheduled and heard by another Commissioner. It is for this very reason why the respondent objected until such time that a ruling was made by Ms. Christie.

ANALYSIS OF EVIDENCE AND ARGUMENT

13. The respondent had raised a Point *in limine* and I am accordingly obliged to consider the legal challenge. Section 138(7) of the LRA provides within 14 days of the conclusion of the arbitration proceedings; the commissioner must issue an arbitration award with brief reasons and signed by the commissioner.
14. Section 138 (8) provides that on good cause shown the director / secretary may extend the period within which the arbitration award and reasons are to be served and filed.
15. The commission must serve a copy of that award on each party to the dispute or the person representing a party in the proceedings. In the present case, it is clear that the award or the ruling was not issued or signed by the commissioner within the prescribed time limit as provided by law.
16. In the circumstances it is clear that Section 138(7) has not been complied with and no extension was sought or granted under Section 137 (8). It is abundantly clear that there is no reasonable prospect; it seems that that this section will be complied with.
17. It has been held that it is possible in a given case for there to be a substantial compliance with section 138(7) which will not vitiate the ruling/award. In the judgment of Landman .J in **Free State Mining Association Ltd t/a Alpha Farm v SACCAWU and & another 1999 [3] BBLR 223 (LC)** In that case , an award signed within 14 days was served on the parties outside the 14 day limit and it was contended that it was invalid. The Court found that it was not a nullity and in particular , said the following at page 226E –G –

“It’s is quite clear that having regard to the human nature, a commissioner may not always be able to sign and issue an award within 14 days. If a commissioner were to sign or issue the award after the period, it would not be in accordance with the

*Aims of the Act to visits such omission with invalidity. I that was to be done it would simply mean that the dispute had not reached finality and the arbitration proceedings would have to take place **de-novo**. This could not have been the intended. There may, of course be circumstances where an award is issued so late that different consequences may follow.”*

18. Under the circumstances of this case it is clear that there can be no legal effect since no ruling was issued as none of the parties were prejudiced. There seems little likelihood that the situation can or will be rectified and, in my view, it is in any event too late to do so now. Both parties had been compromise in this instance.
19. In my view it is a fundamental principle that a party should and must be afforded the *audi alteram partem* before a decision is taken which is not in the best interest of parties rights or more importantly in this case the applicant because of the negligence of the presiding officer. It is highly improbable that our Courts will accept a departure from this principle.
20. Our law promotes justice and fairness in the workplace. In this context fairness must benefit both the employee and the employer. This involves balancing of competing and, sometimes, conflicting interest of the parties.
21. In the circumstances of this case, it would be appropriate that the case be set down as a de novo hearing and to be heard by another commissioner. In the premises I make the following ruling for the reasons stated above.

RULING

I order that:

22. The Council has jurisdiction to hear this dispute as no ruling was issued. The secretary or a designated person may schedule the matter as a de novo hearing and to be heard by another Commissioner/Panelist.

23. The application is dismissed.

A handwritten signature in black ink, appearing to read 'J. Thee', with a long horizontal flourish extending to the right.

Panelist: Joseph Thee