IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable
Case No: DA5/2021

In the matter between:

WORKING ON FIRE (PTY) LTD **Appellant**

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) **First Respondent**

DEPARTMENT OF ENVIRONMENTAL AFFAIRS **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA) **Third Respondent**

G JENKIN N.O. **Fourth Respondent**

Heard: **19 May 2022**

Delivered: **21 October 2022**

Coram: **Waglay JP, Coppin JA et Kathree-Setiloane AJA**

SUMMARY: mutual interest arbitration – essential services – no terms of reference – arbitration exercised narrow discretion in adopting hypothetical approach – election

neither wrong nor unreasonable – arbitrator's application of hypothetical approach to dispute did not render outcome of award unreasonable on the material before him.

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal and cross-appeal against the judgment and order of the Labour Court (Whitcher J) reviewing and setting aside an arbitration award made by the fourth respondent (arbitrator), in a mutual interest dispute, under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA).

[2] The first respondent, NUMSA, acts on behalf of its members who are employed as firefighters by the appellant, Working on Fire (Pty) Ltd (WoF). NUMSA referred the mutual interest dispute to arbitration in terms of section 74(4) of the Labour Relations Act (LRA).[1] It sought to improve the wages of its members through arbitration as they engage in an essential service and were precluded from embarking on a protected strike.[2]

[3] Firefighting is declared an essential service in terms of the LRA. WoF performs firefighting services in respect of veld and forest fires, as well as fires in townships and rural areas. WoF was appointed as implementing agent on 31 March 2014 for the Working on Fire Programme (WoF Programme) funded by the Department of Environmental Affairs (DEA). The WoF Programme is an

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[1] Act 66 of 1995, as amended.

[2] Section 74 of the LRA provides that:

'(1) Subject to section 73(1) any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to –

(a) A council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction.

(2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.

(3) The council or the Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission.

(5) …'

Expanded Public Works Programme (EPWP) aimed at providing services through a labour intensive programme initiated by the government and funded from public resources. The programme provides temporary employment and does not compete with the formal sector.

[4] In terms of the contractual arrangement between WoF and the DEA, participants in the programme are employed in terms of Ministerial Determination 4, issued in terms of section 50 of the Basic Conditions of Employment Act (BCEA).[3] Participants in the WoF Programme are paid in accordance with the wage rates prescribed by the DEA on an annual basis. Section 50 of the BCEA provides that a worker may not be paid less than the minimum EPWP wage rate determined by the Minister. As at 1 April 2018, firefighters employed by WoF earned R107,24 per day which was more than the minimum EPWP wage of R88.00 per day.

[5] WoF employs approximately 5 620 workers stationed at 203 bases throughout South Africa. Around 13% (742) are members of NUMSA. NUMSA attempted to negotiate a wage increase for its members but was unsuccessful because WoF refused to recognise NUMSA as a bargaining agent or to negotiate with it. On 19 January 2017, NUMSA referred a dispute to the CCMA alleging that WoF refused to bargain with it. Pursuant to a settlement between the parties on 8 March 2017, the dispute was withdrawn and the parties agreed to meet to negotiate wages and other substantive mutual issues.

[6] The parties met on 5 April 2017 and 23 May 2017 to discuss NUMSA's demands. WoF maintained throughout that it had no difficulty engaging with unions, but that it was constrained to negotiate with them over wages as the EPWP was intended as a poverty relief programme by the government where stipends are paid to participants at a daily rate set by the Minister of Environmental Affairs. And since the rates and annual increments were determined by the DEA, it had no authority to change these rates.

[7] The DEA also wrote to NUMSA explaining that the EPWP was intended as a public employment programme agreed to by the government, business and

[3] Act 75 of 1997, as amended.

organised labour at Nedlac. The DEA confirmed that it determined the wages and annual increases based on a fixed budget and that WoF had no authority to change these rates.

[8] 26 May 2017, NUMSA referred a mutual interest dispute to the CCMA. The arbitrator issued an advisory award in which he categorised the dispute as a "refusal to bargain" and advised NUMSA that it was inadvisable to embark on a strike without establishing from the Essential Services Committee (ESC) whether WoF's activities were a designated essential service. WoF referred this question to the ESC for determination as NUMSA failed to do so. The ESC determined that the services rendered by the employees of WoF fell within the designation of "firefighting" and constituted an essential service for the purpose of section 74 of the LRA.

[9] On 20 July 2017, NUMSA referred the wage dispute to arbitration. It sought the following outcome: "*[w]ages of individual applicants be increased to a reasonable and/or industry standard*". NUMSA initially demanded a wage increase to R12 000,00 together with other wage improvements. Two weeks before the commencement of the arbitration proceedings, NUMSA changed its demand to an increase of the daily rate of pay to 12%; payment of an additional allowance when called out to attend to fires or placed on standby to do so; an (unquantified) "S&T" allowance; overtime pay; medical aid or assistance etc. However, at the arbitration, it only persisted with its demand for a 12% wage increase for its members, payment of an allowance (double pay) for days working away from their home base, and a R50,00 per day S&T allowance.

The Arbitration Award

[10] The arbitrator favoured WoF's position not to bargain with NUMSA and accepted that "*no improvement to current wage levels and conditions of service, as proposed by NUMSA, be implemented by WoF*". He accordingly held that the wage levels and terms and conditions of employment in place for the period 1 April 2018 to 31 March 2019 remain in place. The arbitrator reasoned *inter alia* as follows in arriving at this decision:

> 'This is an atypical dispute. In most interest arbitrations, the parties have longstanding bargaining arrangements and trade union/s hold a significant, if not majority, membership. The issue of a refusal to bargain seldom, if ever, arises. Given the unusual circumstances surrounding this dispute, I have decided to adopt the hypothetical approach in determining the dispute, for reasons which will become apparent…'

[11] The arbitrator observed that the LRA recognised majoritarianism/substantial representativeness for union access to a number of rights. In the context of unfettered bargaining, outside of essential services, there was still no substitute for the economic muscle unions derived from substantial, if not majority levels of membership. In this dispute, NUMSA enjoyed a membership of only 13% of the 5 620 EPWP participants employed by WoF. The arbitrator postulated that had bargaining continued to conclusion, it was highly unlikely that NUMSA would have made any gains, and that although the outcome of interest arbitrations replaced the right to strike, this did not mean that the affected employees should be awarded with a favourable award, as compensation for being deprived of the right to strike. The arbitrator stated that NUMSA appeared to expect the CCMA to give it the muscle its lack of membership denied it.

[12] Concerning NUMSA's argument that wage rates paid to firefighters were insultingly low, amounted to exploitation and had to be addressed by the CCMA, the arbitrator stated that he wholly supported this view in the context of ordinary employment but that:

> 'The EPWP is a creation of government, in consultation with its social partners, which included organised labour. I have no doubts that it is a hugely successful venture in alleviating poverty and in giving participants skills, dignity and the confidence to prepare them for the open job market. I am not convinced that the [CCMA] is the forum to tamper with changes to the EPWP's wage rates. This is the subject of a much wider policy debate. Nedlac is currently tasked to determine whether the EPWP minimum wage should be aligned with the proposed national minimum wage. The cost of this is reportedly R10 billion.'

[13] In deciding that the *status quo* remains in place, the arbitrator also took into account that "*NUMSA presented no evidence to motivate its rationale for*

demanding a 12% wage increase and not some other number. That NUMSA initially demanded a R12 000 per month increase in December 2016 and reduced this to 12% on top of R107.24/day (approximately R2 642.00 per month), two weeks before the commencement of the arbitration, created the distinct impression that it had been arbitrarily selecting numbers without much consideration".

[14] In conclusion, the arbitrator stated that while he was mindful of the views expressed by the Labour Court about the pitfalls of the "hypothetical approach" in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[4] (*NUM v CCMA*), he was of the view that in the atypical circumstances of the dispute, it was the most appropriate approach.

[15] NUMSA sought to set aside the arbitration award on review. WoF brought a conditional counter-review in which it sought an order that, if the review was successful, the dispute should be referred back to the CCMA together with an instruction that the arbitrator had to adopt a final position approach instead of a hypothetical approach.[5]

In the Labour Court

[16] The Labour Court reviewed and set aside the arbitration award. Its reasons for doing so are as follows:

16.1 The hypothetical approach adopted by the arbitrator was a material error of law which rendered the award irrational and unjustifiable. However, the arbitrator's election was to some extent understandable.

16.2 The arbitrator's choice of approach was not itself an error of law that led to an unjustifiable result. However, the manner in which this approach was applied in the matter rendered the award unreasonable on the material before the arbitrator.

[4] (2017) 38 ILJ 1869 (LC).
[5] At the arbitration hearing, NUMSA argued in favour of the arbitrator adopting the fairness approach and WoF argued in favour of him adopting the final position approach.

16.3 The arbitrator abdicated his statutory duty to decide the matter before him when he expressed a reluctance to "tamper with the EPWP rates". He was required to weigh the arguments in favour of a wage increase and against an increase.

[17] The Labour Court did not make a decision on the question of whether the DEA should be held jointly and severally liable for the obligations of WoF in terms of section 200B[6] of the LRA. It held that this issue was not properly before it, as it did not feature as a ground of review in NUMSA's founding and supplementary affidavits in the review application.

[18] The Labour Court accordingly made the following order:

'1. The application to re-open the review proceedings is dismissed with costs.

2. The arbitration award of Commissioner Jenkins delivered under case number KNPM 1351-17 is reviewed and set aside.

3. The wage dispute between the parties is remitted to the CCMA for hearing *de novo* before a new commissioner.

4. The parties and the new commissioner must take into account paragraphs 43 of the judgment.[7]

5. There is no order as to costs in respect of the review application.'

[19] The appeal lies against the order of the Labour Court with its leave.

[6] The text of section 200B of the LRA is set out later in the judgment.

[7] At paragraph 43 of the judgment the Labour Court opined as follows:

'It should be apparent from the above that this court is not in a sound position to substitute itself for an adjudicator and make an actual order on what the wage increase (if any) should be at WOF. The evidentiary issues need new and better ventilation. it is safe to opine that, given the factors at play in this matter, the fairness approach to resolving the wage dispute in a CCMA arbitration hearing before a new commissioner is safest. Beyond this, this court will not interfere with the parties' own right to set appropriate terms of reference for the new arbitrator, nor bind this arbitrator's hands in deciding on the appropriate approach in the absence of agreed terms.'

[20] The cross-appeal is against paragraphs 3, 4 and 5 of the order of the Labour Court. NUMSA, the cross-appellant, seeks that these paragraphs of the order be reviewed and set aside and replaced with the following order:

> '1. NUMSA's members employed by the [WoF] are entitled to salary increases as follows:
>
> i. Across the board increase of 12%;
>
> ii. A R100.00 per day out-of-base payment, to be made in all circumstances where they are required to live away from their home base;
>
> iii. A R50.00 S&T allowance to be applied in the same circumstances;
>
> 2. That the [DEA] is declared to be jointly and severally liable with the [WoF] in giving effect to the award.'

The Appeal and Cross-Appeal

Adoption of the Hypothetical Approach

[21] An issue pertinent to both the appeal and cross-appeal is whether the arbitrator's decision to adopt the hypothetical approach in determining the dispute is reviewable. The antecedent question is whether the arbitrator's election of the hypothetical approach is a question of law or a matter of discretion.

[22] NUMSA and WoF had not agreed on the arbitrator's terms of reference and left this to the arbitrator to determine.[8] In so doing, the arbitrator had to ascertain the applicable rule of law or the legal options which were available to him. This was a question of law.

[23] The arbitrator identified the three options available to him. These were the hypothetical, fairness and final offer approaches.[9] Having identified them, the

[8] In terms of section 136(4) of the LRA, where the parties to an arbitration do not agree on the arbitrator's terms of reference, they are left to the arbitrator to determine.

[9] The hypothetical outcome approach as described in *NEHAWU v Lifecare Health* [1999] 2 BALR 153 (CCMA) is an objective approach in which the parties have final positions which are too far apart to allow for agreement. Therefore, the arbitrator's role is to anticipate where the bargain should have been struck in light of the available data, had the bargaining continued to conclusion and in good faith. The

arbitrator was required to make a value judgment in respect of which of the three available options was best suited to resolve the dispute before him. This was a matter of discretion.

[24] The Labour Court erred in classifying the arbitrator's election of the hypothetical approach as a question of law. Properly classified, it was a matter of discretion. Our law recognises two types of discretion. [10] The first is a discretion in the wide sense, where the decision-maker is required to have regard to all the relevant considerations in coming to a decision and does not have a choice between equally permissible alternatives. These decisions are reviewable for want of reasonableness in the ordinary course.[27]

[25] The second is true discretion (in the narrow sense). Here, the decision-maker has a choice between different but equally permissible alternatives; there being no single correct answer. The essence of a narrow discretion is that it is permissible for the decision-maker to choose any of the options available to him or her. This means that an appellate or review court should not readily substitute the decision of the decision-maker with that of its own. Consequently, if the decision-maker chooses to follow any one of the available options, he would be acting within his powers and his election cannot be set aside merely because a court would have preferred a different option to those available to him.[11] Since establishing unreasonableness in this context is difficult, courts are inclined to show a measure of deference to the election of the decision-maker.

[26] The arbitrator in the wage dispute in question in this appeal exercised a narrow discretion. Considering the facts of the dispute, it is not inconceivable that any

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fairness approach as described in *SA Municipal Workers Union v Water & Sanitation Services SA (Pty) Ltd* [2002] 1 BALR 89 (CCMA) is where the parties are unable to point to rights to sustain their respective cases, they are obliged to persuade the arbitrator why in fairness their approach should be accepted and the arbitrator asks whether the parties had advanced sufficient reason for the acceptance of their respective positions; and the final offer position/approach as described in *National Union of Metalworkers of South Africa v Working on Fire (Pty) Ltd and another* [2018] 10 BALR 1082 (CCMA), is where the arbitrator has no choice but to decide between the proposals of the parties, with no discretion to merely split the difference between the final positions advanced.

[10] See *Media Workers Association of SA & Others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) (*Press Corporation*).

[11] See *Press Corporation* at pp 1401-1402; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at para 10.

number of arbitrators may have decided on different approaches in determining their terms of reference, and none would be wrong.

[27] Although highly critical of the arbitrator's election of the hypothetical approach, the Labour Court was ambivalent in deciding which approach should be applied to the wage dispute in question. While it agreed with NUMSA that the fairness approach "*would have led to a defensible result*", the Labour Court acknowledged that it did so "*without deciding that the hypothetical outcome approach leads per se to unjustifiable interest arbitration outcomes*". Similarly, although it concluded that the adoption of the hypothetical approach in this dispute rendered the award irrational and unjustifiable, it contradicted this by stating that the arbitrator's election of the hypothetical approach "*is to some extent understandable*". The Labour Court also recognised that it was "*not required to find whether 'shopping' for a non-equity approach that provides a result an adjudicator considers equitable is appropriate*," and so refrained from doing so.

[28] The Labour Court's inability to decisively reject the hypothetical approach adopted by the arbitrator clearly indicates that the arbitrator's election was neither wrong nor unreasonable. As a result, it was constrained to conclude (*albeit* wrongly classifying it as an error of law) that "*I do not find that the arbitrator's choice of approach was itself the error of law that led to an unjustifiable result*", but it was rather the manner in which the approach was applied to the case which "*rendered the award unreasonable on the material before him*".

[29] NUMSA cross-appeals the Labour Court's conclusion that the arbitrator's adoption of the hypothetical approach was appropriate. NUMSA submitted, that the arbitrator committed a reviewable irregularity in refusing to adopt the fairness approach which gives effect to the advancement of social justice; one of the primary purposes of the LRA.

[30] I am of the view that this ground of cross-appeal is unsustainable. In exercising his discretion, the arbitrator gave careful consideration to the three options available to him, weighed up their pros and cons with reference to context and

decided case law, and concluded that the hypothetical approach was most suitable to resolving the "atypical nature" of the dispute between the parties where, on the one hand, WoF refused to bargain as it had already implemented a wage increase of 6%, and had no authority to negotiate any further wage increase demanded by NUMSA, and, on the other hand, NUMSA enjoyed a membership of only 13% of the 5620 odd EPWP firefighters (742) employed by WOF. Considering that the parties' final positions were too far apart to allow for agreement had the bargaining continued to conclusion, I am of the view that the arbitrator exercised his discretion judiciously in adopting the hypothetical approach. In the circumstances, his election was neither wrong nor unreasonable.

[31] Notwithstanding the approach adopted, the arbitrator did not, in his determination, flout "equity and fairness" and the advancement of social justice. With this concern in mind, he pertinently asked where fairness and equity fitted into the equation and concluded as follows:

> '[P]resumably in the trade-off between the dignity that a job affords, even at a low level of pay, the work experience it affords versus joblessness. Would an award of 12% for 742 NUMSA members out of 5620 WoF participants alleviate the situation or make the outcome of this arbitration fair and equitable? I say not, even if the DEA could be forced to come up with the money, in the likely event that it could be found to be a co-employer in common law or jointly and severally liable with the WoF – in terms of section 200B of the [LRA].'

[32] Accordingly, the Labour Court did not err in effectively concluding that the arbitrator's choice of the hypothetical approach was appropriate.

Reasonableness of the Award

[33] I turn now to the question of whether the manner in which the arbitrator applied the hypothetical approach to the wage dispute in question rendered the award unreasonable on the material before him.

[34] It is established law that an arbitrator's failure to apply his or her mind to issues which are material to the determination of a dispute will constitute an irregularity.

However, for it to result in a reviewable irregularity, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome. A result will only be unreasonable if it is one that a reasonable arbitrator cannot reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside on review, but are only of any consequence if their effect is to render the outcome unreasonable.[12]

[35] In the context of a wage dispute such as we have here, the question for the reviewing court was not whether the award was wrong or whether it held a different view to that of the arbitrator, but whether the award was reasonable in relation to all the material that served before the arbitrator.[13]

[36] The Labour Court found that the arbitrator's decision was unreasonable as he failed to take into account what the bargaining power of a trade union in an essential service would be if its members were free to strike, as the interruption of an essential service would endanger the life, personal safety or health of a whole or part of the population, and this would increase "*WoF's pressure to capitulate*". The Labour Court, nevertheless, accepted that having considered these factors, "*a reasonable arbitrator may still be unmoved*".

[37] It is inconceivable that in determining the wage dispute before him, the arbitrator would have been unmindful as to what NUMSA's bargaining powers over WoF would be if its members (who perform an essential service) were at liberty to embark on a strike. As is apparent from the award, the arbitrator took into account the views expressed by the Labour Court in *NUM v CCMA* concerning the pitfalls of the hypothetical approach, but concluded that it was the most appropriate approach in "*the atypical circumstances of the case*". Notably, *NUM v CCMA* concerned a review of an arbitration award in a wage dispute where the Labour Court, in considering the suitability of the hypothetical approach to resolving the

[12] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at para 25.
[13] *Public Servants Association obo PSA Members v National Prosecuting Authority & Another* (2012) 33 ILJ 1831 (LAC) at para 27.

dispute in question, made specific reference to the arbitrator's motivation (below) for not following that approach:

> 'In essential services unions have much more power because if they strike that can cause much more destruction than a non-essential service. The very reason of an essential service is to protect life, health and liberty. As was suggested by Mr Boda, it is abhorrent to countenance an argument for higher wages where that argument rests on the potential to destroy human life or property or it affects health. If Eskom workers strike, hospitals may not function which is a real and direct threat to life. Therefore following a hypothetical outcome approach in essential services, an arbitrator may tend to predict a higher outcome because striking workers may cause more devastation than non-essential workers…'[14]

[38] The Labour Court held that "*the arbitrator furthermore failed to take into account that non-members may, with ease, in law, join a protected strike or that NUMSA's activism against "insultingly" low pay rates would likely attract some support from some similarly affected non-members. It is not so much that the arbitrator jumped down the rabbit hole of strike suppositions but that, having done so, he did not go deep enough*".

[39] In support of the Labour Court's view on this aspect, NUMSA argued that even though it only held 13% of WoF's employees nationally, its membership was heavily weighted towards KwaZulu-Natal where it had 476 members and 265 in the Free State. NUMSA's membership thus constituted 68% of the 700 some odd employed in the province. A strike by NUMSA's members in KwaZulu-Natal and the Free State during the winter fire season would therefore have had a very significant impact on the applicant's operations in those provinces. Lastly, it submitted that there is no basis to suggest that any such strike would have remained limited to NUMSA's members and that other trade unions and non-unionised employees would not have joined the strike.

[40] However, this omission is not, in and of itself, sufficient to render the outcome of the award unreasonable. NUMSA does not explain how this omission would have

[14] *NUM v CCMA* at para 8.

resulted in a different outcome of the award having regard to all the material that was before the arbitrator. Although the arbitrator may not have taken this hypothesis into consideration, he considered the flipside which significantly, is what would happen to the other 4878 participants in the WoF Programme should he make a favourable award which could only be made applicable to NUMSA members? He posited that "*such an award would likely give rise to industrial unrest among them, with justification*," and correctly concluded that NUMSA expected "*the CCMA to give it the muscle its lack of membership denied it*". Indeed, this is consistent with the view that employees engaged in essential services should not expect to obtain through arbitration what other employees cannot obtain through industrial action.[15]

[41] Mr Trevor Abrahams (Mr Abrahams), the managing director of WoF, testified on the intention behind the WoF Programme with reference to the Growth and Development Summit Agreement of 7 June 2003. The stated intention of the programme is:

41.1 To "*provide poverty and income relief through temporary work for the unemployed to carry out socially useful activities*…";

41.2 "*To equip participants with a modicum of training and work experience, which should enhance their ability to earn a living in the future*…";

41.3 To provide "*short-term jobs in the communities with a greater emphasis on providing and/or improving basic and essential infrastructure in the communities*…"; and

41.4 To focus on young people, women and the rural poor.

[42] As is clear from Mr Abraham's evidence, the EPWP is a poverty relief initiative to provide relief and assistance to impoverished communities and to reduce unemployment by providing participants with skills to enable them to enter the formal job market. He said that there was an understanding with the formal labour sector that the EPWP will not compete with the formal job market. He, however,

[15] *SA Municipal Workers Union v Water and Sanitation Services SA (Pty) Ltd* (2002) 23 ILJ 444 (CCMA) at 447J-448A.

acknowledged that the WoF Programme and the employment of workers had deviated from what was originally envisaged by the Growth and Development Summit Agreement, in that the employment of firefighters is no longer temporary and short-term. As confirmed by Mr Abrahams in his evidence, some firefighters were employed for periods commensurate with WoF's contracts with the DEA and were re-employed when the contract was renewed. At the time of the arbitration, such contracts ran from 2014 to 2021 and were described by Mr Abrahams as "long-term". One of the firefighters has been working for a period of 11 years for WoF.

[43] Mr Abraham' also recognised, in his testimony, that the terrain in which firefighters operated required a high level of fitness and training, as firefighting entailed a high degree of personal danger and possible death, and required extensive training and a high degree of physical fitness. However, his testimony that the firefighters only perform about 5% of their overall duties actually fighting fires, whilst the rest of their paid time is spent on training and implementing preventative measures, and being on standby waiting to be called out to put out fires, was not disputed.

[44] The Labour Court held that the arbitrator abdicated his statutory responsibility to determine the wage dispute before him when he expressed a reluctance to tamper with the EPWP rates, and in so doing ignored the evidence that *inter alia* WoF program had gone beyond the ambit of the normal EPWP initiatives and that firefighting entailed significant skill, training and exposure to danger. This criticism is without foundation because the arbitrator had regard to these factors in paragraph 38.2 of the award under the heading "survey of evidence and argument" where he recorded NUMSA's main contention on this aspect as follows:

> 'WoF has progressed significantly beyond what was envisaged in the Growth and Development Summit Agreement of June 2003. The Working on Fire Programme clearly envisages something more than the 2-year maximum period of employment, coupled with the basic training in relatively menial tasks to facilitate entry into the formal job sector. Firefighters contracts are generally co-existent with the term of the management contract – in this case until 2021.

> The advantage of retaining trained and experienced firefighters in the Program are obvious both in terms of performance and safety. Further, participants perform an essential service entailing a high degree of personal danger, requiring ongoing tracking and peak physical fitness. This also goes beyond what was originally contemplated by the EWP Programs.'

[45] Although the arbitrator supported NUMSA's contention that the wage rates of firefighters were insultingly and unreasonably low and amounted to exploitation, he did so in the context of normal employment. In determining whether he could interfere with EPWP rates, it was incumbent on the arbitrator to consider (which he did) the context within which the wages were being paid, namely the EPWP, a poverty relief programme created by the government in consultation with labour and business in Nedlac. Relevant to this context was the EPWP's basic objective of job creation and its overall success in alleviating poverty by skilling otherwise jobless participants and enabling them to eventually enter the formal job market.

[46] The arbitrator also took into account the policy implications of changing the EPWP wage rate which is the subject of a much broader policy debate between the Minister of Labour, in consultation with Nedlac, and that Nedlac was tasked, at the time, to determine whether the EPWP minimum wage should be aligned with the proposed National Minimum Wage. The Labour Court correctly concluded that these factors "*could be legitimate countervailing factors in favour of the status quo*."

[47] Crucially, it is established on the evidence that the DEA determines wages and increases of WoF firefighters based on budgetary constraints and allocations from the National Treasury within which the DEA is required to meet certain job creation targets. WoF, in turn, is required to take steps within its budget and from funds allocated by the DEA, to reach particular job creation targets and there is no provision for any supplementary requests for increased wages. The only way a demand for the 12% wage increase can be accommodated is by releasing 677 firefighters on the WoF Programme.

[48] Moreover, the wages paid by WoF to its firefighters are higher than the other Working On programmes, such as the Working for Water Scheme which employs

brush cutters. Although the DEA has tried to standardise these wages, there is still a discrepancy in that WoF employees earn more than brush cutters, and more than the EPWP minimum rate of R88,00 a day. There are also three other trade unions operating in WoF, namely GIWUSA, NUPSAW and NUSWA. In the case of NUPSAW, they have approached the Minister of Environmental Affairs who referred them to Nedlac to address their issues. GIWUSA sent a memorandum to the Minister of Environmental Affairs to request that WoF to be taken out of EPWP.

[49] In so far as the financial position of WoF is concerned, the arbitrator took into account the uncontested evidence of WoF that it cannot afford any further increases in wages and other benefits. He also took into account that NUMSA presented no evidence to support its demand for a 12% wage increase. The Labour Court seemingly accepted this in stating that "*the evidentiary issues need new and better ventilation*" and accordingly made an award remitting the wage dispute to the CCMA for a hearing *de novo*.

[50] In its cross-appeal, NUMSA contends that the Labour Court erred in remitting the dispute to the CCMA for a hearing *de novo* on the basis that further evidence was necessary to decide on NUMSA's demands. According to NUMSA, the determination of the increase simply involved a balancing of the scales of social justice and equity and an appropriate value judgment. In this regard, it argued that it could not possibly be expected of the firefighters to lead evidence as to the difficulty of supporting themselves and their families on the sum of R107 a day to justify an increase, when this is already significantly below the National Minimum Wage, and that a salary increased by 12% would manifestly be 12% less unjust than R107 per day. NUMSA accordingly argued that there was no basis for the Labour Court to have referred the matter back to the CCMA for a rehearing and that it should have awarded a salary increase to its members.

[51] I disagree. Although in argument at the arbitration hearing, NUMSA contended that the wages of its members were insulting low and sought a 12% increase and other benefits, the record of evidence reveals that NUMSA did not advance independent evidence to justify its wage increase and other benefits demanded. While it sought in cross-examination to discredit the evidence presented by WoF

and the DEA, NUMSA failed to provide a factual basis for the assertion of the 12% wage increase and other benefits which it sought on behalf of its members.

[52] While it is common cause that the wages that WoF firefighters are currently receiving are below the National Minimum Wage and that the WoF Programme has deviated from what was originally intended, this did not absolve NUMSA of the onus to prove, by way of evidence, why a 12% wage increase and other benefits demanded were justified.

[53] It is important to bear in mind that evidence does not include "contentions, submissions and conjecture" which is the sum total of what NUMSA put up at the arbitration, in support of its demands.[16] The Labour Court, therefore, did not err in effectively concluding that there was insufficient evidence to support NUMSA's demands. However, instead of dismissing the review application against the arbitrator's award on the basis that NUMSA failed to prove its claim, the Labour Court erroneously remitted the dispute to the CCMA to be heard afresh by a different arbitrator.

Joint and several liability of the DEA

[54] NUMSA also cross-appeals the failure of the Labour Court to hold the DEA jointly and severally liable with WoF for the relief sought. As alluded to earlier in the judgment, WoF's position throughout the negotiations leading up to the arbitration, and at the arbitration itself, was that it could not bargain collectively on wages and other terms and conditions of employment of its firefighters, because as an implementing agent of the WoF Programme for the DEA, it was bound in terms of its contract to pay the rates stipulated by the DEA. NUMSA accordingly sought an order, at the arbitration, that the DEA be held jointly and severally liable for the performance of any obligations arising from an award favourable to NUMSA's members in terms of section 200B(2) of the LRA.

[55] To make a finding in terms of section 200B(2), the arbitrator had to first find that the DEA is a co-employer of WoF's employees as contemplated in section 200B(1) of the LRA. Section 200B of the LRA provides:

[16] *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C) at p 75.

'(1) For the purposes of this Act and any other employment law, "employer" includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of doing so is or has been to directly or indirectly defeat the purpose of the Act.

(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law.'

[56] Although NUMSA did not suggest that the contractual arrangements between WoF and the DEA were intentionally manipulated to undermine the due process of the LRA, it contended that the contractual arrangements in terms of which WoF implements the EPWP Programme clearly has the effect of defeating the purposes of the LRA.

[57] The arbitrator did not make a finding that the DEA is a co-employer with WoF as contemplated in section 200B(1) of the LRA. He confirmed as much in the penultimate paragraph of the award where he stated that whether the DEA is a co-employer in common law or jointly and severally liable with WoF in terms of section 200B of the LRA, "*is not a decision for me to make, given the reasons for my decision*".

[58] In paragraph 2.2 of its notice of motion in the review application, NUMSA sought an order that the DEA be declared jointly and severally liable with WoF in giving effect to the substituted award it sought. As correctly pointed out by the Labour Court, this ground of review was not properly before it, as there was no factual or legal basis foreshadowed in NUMSA's founding or supplementary affidavits. NUMSA conceded this during argument in the appeal.[17]

[59] Thus as acknowledged by the Labour Court in the judgment, the "sentiments" that the "*DEA carries on an associated business or related activity or business*" and that *"[i]f the DEA is not held to be jointly liable it would frustrate meaningful*

[17] NUMSA, however, submitted during argument in the appeal that in the event of it succeeding on appeal, it seeks a costs order that the DEA and WOF are jointly and severally liable for the costs in the appeal.

collective bargaining", is no more than a mere expression of opinion "*made in passing*" upon issues which were not before the Labour Court for determination.

[60] It is clear from his carefully reasoned award that the arbitrator exercised his discretion judiciously in adopting the hypothetical approach. He also applied his mind and gave consideration to the evidence when applying the approach to the wage dispute in question. In the circumstances, the arbitrator's decision was not one which a reasonable arbitrator could not have reached on the totality of the evidence before him.

Costs

[61] The Labour Court made no order as to costs in the review application. NUMSA cross-appeals that order. Having due regard to the nature of the dispute and the continuing relationship between the WoF and NUMSA's members, I am of the view that the Labour Court's costs order was fair and just and must, accordingly, stand.

[62] I also consider it fair and just not to award costs in both the appeal and cross-appeal.

Conclusion

[63] For all these reasons, the appeal succeeds and the cross-appeal fails.

Order

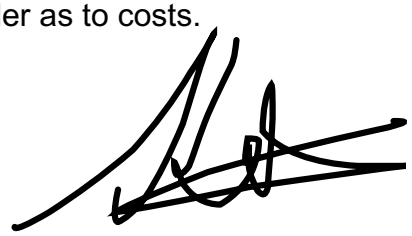
[64] In the result, it is ordered that:

1. The appeal succeeds with no order as to costs.

2. Paragraphs 2,3, and 4 of the order of the Labour Court are set aside and replaced by the following order:

"The application for review is dismissed."

3. The cross-appeal is dismissed with no order as to costs.



F Kathree-Setiloane AJA

Waglay JP and Coppin JA concurring.

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