



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA 09/2019

PUBLIC SERVANTS ASSOCIATION obo

H R RAMUKHESHA AND SEVEN OTHERS

Appellants

and

DEPARTMENT OF AGRICULTURE,

FORESTRY AND FISHERIES

First Respondent

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Second Respondent

COMMISSIONER JUSTICE NEDZAMBA N.O

Third Respondent

DEPARTMENT OF PUBLIC SERVICE AND

ADMINISTRATION

Fourth Respondent

Heard: 29 September 2020

Delivered: 27 November 2020

Coram: Davis JA, Coppin JA and Kathree-Setiloane AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This appeal concerns an interpretation of resolutions passed by the General Public Service Sectoral Bargaining Council (PSSBC) which forms part of a collective agreement involving the translation of posts of a series of employees from old post establishment into a newly created Occupational Specific Dispensation (OSD).
- [2] A dispute arose in relation to the interpretation and application of the OSD, in particular, the OSD for scientists and for scientific technicians respectively. The crisp issue which was disputed was whether the OSD for scientists incorporated the post of scientific technicians. The dispute was heard by third respondent who held on 13 December 2016 that the first respondent should have applied the OSD for scientists as incorporated in Resolution number 3 of 2009 to the employees who were considered to scientific technicians. He ordered the first respondent to translate these employees into the OSD for scientists.
- [3] This decision prompted an application for a review of this award. Sitting in the court *a quo*, Whitcher J set aside the arbitration award of 13 December 2016. With leave having been granted by the court *a quo*, the appellant approaches this court on appeal.

The factual background

[4] The relevant members of the appellant were employed by first respondent as Senior Plant Health Officers at the time of the translation of their posts into the new OSD as scientific technicians, the latter being effected by second respondent in terms of Resolution of 5 of 2009. At the same time a further resolution being Resolution 3 of 2009 was passed which concerned the implementation of OSD for scientists.

[5] According to the pre-trial minute which was served prior to the hearing of the arbitration the following were considered to be facts which were common cause:

‘The applicants were all employed as Senior Plant Health Officers at the time of their translation to Occupational Specific Dispensation (OSD).

When the OSD process started they resorted under the Directorate Plant Health.

When the OSD process was concluded they resorted under Inspection Services.

The applicants were all translated to the OSD for Scientific Technicians in terms of GPSSBC 5 of 2009.

The Plant Health officers of the divisions Plant Health Early Warning and Pest Risk Analysis were translated to the OSD for scientist, in terms of GPSSBC Resolution 3 of 2009.

The dispute concerns GPSSBC resolutions 5 and 3 of 2009.

Both resolutions came into effect on 1 July 2009.’

[6] The affected employees, who are all represented by the appellant, lodged grievances on 16 February 2012 in which they challenged the translation of their posts from senior plant health officers to scientific technicians. The basis of their grievance was set out in a document prepared by one of the employees, Mr Ramsey Maharaj who set out his complaint thus:

‘I strongly feel that my post was unfairly classified and translated, as the nature of my job warrants the translation to that of a Scientist. The current Job description

which was used as the basis to translate the post in an outline of the broad job requirements and does not reflect the complexity and the finer details that the post details.

The comparison between the broad job description and the requirements of OSD may have caused the complexity of these posts to be under-estimated and the posts were subsequently translated to Scientific Technicians.

- [7] First respondent disagreed with the case as made out by Mr Maharaj. In a letter of 8 August 2012 first respondent answered Mr Maharaj as follows:

‘Ms T Pieterse, Assistant Director: Policies and Practices, Directorate, Employee Relations was appointed to conduct an investigation into the grievance.

The investigation that the job description of Senior Plant Health Officer (SPHO) does not correlate with the Key Performance Areas (KPA's) of the OSD for Scientist as prescribed in the OSD, but it correlates with the OSD for the post of Scientific Technician. The investigation confirmed that the job descriptions do not contain details of all activities performed, but it is a broad and generic description of what a post entails. The job description is used as a basis for developing a work plan in which an employee's specific environment is taken into account and to ensure that it is aligned with specific job objectives and required outputs.

In light of the above, the Investigation Officer recommended that you should be informed that the process of translation of the post of Senior Plant Health Officer of the OSD for the category of scientific technician was conducted fairly and correctly.’

- [8] The approach adopted by the third respondent was to hold that the employees' job functions "correlated more with that of scientist than that of scientific technicians" and accordingly "the respondent incorrectly translated the applicant to the position of scientific technician instead of translating them to the position of scientists."

- [9] In setting aside the award, the court *a quo* relied to a considerable extent on the evidence of Mr Braam van der Walt who was the Deputy Director in the Directorate of Remuneration Policy for the fourth respondent. The core of Mr van der Walt's testimony is captured in the following paragraph from his testimony:

'If the functions were duties of the incumbent ... is different from that which is attached to the post in terms of the job description those duties and functions could not have been taken into account in order to determine the correct OSD post to which it should be converted. As I have indicated it is not in the hands of the incumbent of the post or supervisor in order to come up with other duties etcetera to be attached, to be included in the job description. Therefore those duties could not have been used or considered in coming up with the correct OSD post to which the incumbents should have been translated.'

- [10] In setting aside this award, Whitcher J found that the third respondent had:

'Overlooked the crucial aspect that, even if most of the employees may have performed functions equivalent to those of CPHO or scientist, and are scientist in their qualifications, the formal function and purpose of the posts they had occupied, that of SPHOs (and which was translated) was a technical support post. The closest correlation to this post was that of scientific technician. Furthermore, that the posts of CPHO was one level above that of an SPHO.'

The appeal

- [11] The essence of appellants' case before this Court was to refer to evidence presented during the arbitration to the effect that the employees concerned performed the same functions as that of scientists. Accordingly, the finding of the third respondent could not be considered to be unreasonable, particularly in the light of clause 2.1 of resolution 3 of 2009 which provided that the objective of the resolution, inter alia, was to provide 'career pathing opportunities for competencies, experiences, performance and scope of work and therefore to recognise appropriate experience and increased competence.

[12] In support of this submission Mr du Preez, who appeared on behalf of the appellants, relied on the judgment in *Department of Correctional Services (Western Cape) v Democratic Nursing organisation of South Africa and others* [2414] ZALAC 76 (18 December 2014) to the effect that formal job descriptions attached to posts did not constitute the only basis for assessment. Consideration must be given to the actual functions and skills of an employee for the purposes of translating a post from a particular classificatory dispensation to another.

[13] The case of *Department of Correctional Services*, supra, needs to be placed in its appropriate factual context. It concerned the question of whether a professional nurse who had managed a nursing speciality unit as the operational manager was entitled to the appropriate salary scale attached to the corresponding management level for the operational manager of the unit. The finding of the court is reflected in para 22 as follows:

‘Since the employee was managing a nursing speciality unit primary health care clinic, and although not in possession of the post – basic clinical nursing qualification listed in Government Notices R 48 or R 212 but had been performing these duties and managing the unit satisfactorily on 30 June 2007, she was entitled to be translated as a once off provision to the salary level PN – B3, being the appropriate salary scale for nurses who were previously earning at salary level 8 and 9. Therefore, her translation to the lower salary scale of R 183 000. 00 per annum attached to the post of Clinical Nurse Practitioner was erroneous’.

[14] Contrary to the submission of appellants’ counsel in the present dispute, the judgment in *Department of Correctional Services*, supra, is not authority for the proposition that the translation of posts as set out in a previous occupational dispensation to that of the OSD requires an examination of the actual performance of individual employees which may extend beyond the formal job description that attaches to the post.

- [15] In describing the approach to translation that was adopted by first respondent, Mr van der Walt testified thus:

‘The Department had to analyse the job description attached to the post which the incumbents occupied on 30 June 2009. It is like taking a photograph, a snapshot on the first, on that millisecond on 1 July 2009 when this new dispensation came into being. The Department had then to assess and to check it with the key performance areas attached to the OSD post which is contained in the determination by the Minister to find the closest correlation where there, no not closest correlation. To find the correlation which is strong enough that would validate or justify a conversation of the post of the incumbent to the relevant OSD post and once that has been established the translation of the incumbent namely the applicants, and I assume the applicants were in service on 1 July 2009, then to the identified OSD post, because attached to tan OSD posts is a set of key performance areas which is contained in the determination.’

- [16] In essence, the appellants’ case was the following: when a translation process takes place such as occurred in the present dispute, the employer in the position of first respondent must focus on each incumbent of the designated post and then consider that employee’s job description in the light of the individual performance of each incumbent rather than applying the formal job description that is attached to the post itself in terms of the requirements as set out in the relevant resolution.

- [17] One needs only to state this proposition to realise the uncertainty which its vindication would cause to the classification of posts in the public administration. In a case such as the present, if Mr Maharaj claimed without being gainsaid that he performed tasks in excess of the designated job description but none of the other employees could show a similar level of performance, then Mr Maharaj would stand to be reclassified as a scientist while the other employees would be held to have correctly been translated as scientific technicians. This would cause a level of uncertainty that would make the entire process of translation of posts

almost impossible to implement in a coherent, consistent and manageable fashion.

[18] For these reasons, the approach which was adopted by the court a quo, namely that the formal function as set out in the OSD description of the relevant posts must be employed in the translation process is correct. It, therefore, follows that in the present case the affected employees were correctly translated by first respondent into that of scientific technicians.

[19] For all of these reasons therefore, the appeal is dismissed with costs.

Davis JA

Coppin JA and Kathree-Setiloane AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv C Du Preez

Instructed by T Brivik from Malcolm Lyon & Brivik Inc.

THE FIRST RESPONDENT:

Adv B Joseph SC

Instructed by C Bailey from State Attorney Cape Town.