IN THE LABOUR COURT IN JOHANNESBURG

CASE NUMBER: JS89/18

In the matter between:

KHUMALO, JABU	FIRST APPLICANT
LESEJANE, PATRICK	SECOND APPLICANT
SEMELA, MALEFU	THIRD APPLICANT
and	
GAUTENG DEPARTMENT OF ECONOMIC DEVELOPMENT	RESPONDENT

Heard: 8 February 2024

Delivered: 1 March 2024

Summary: Employees located at level 5 claiming for arrear payment from 2012 – 2017 of remuneration applicable to a level 9 rate. Claim essentially a dispute of interest. Held that the Labour Court has no jurisdiction. Claim dismissed.

JUDGEMENT

Norton AJ

Introduction

1. Three employees, Mr Jabu Khumalo, Mr Patrick Lesejane and Ms Malefu Semela (the Applicants) worked in the public education unit in the directorate called "Client Relations Management" in the Gauteng Department of Economic Development (the "Department" / the Respondent). In essence they created

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community awareness about the dangers of alcohol abuse. Colloquially the Applicants were called “education practitioners”.

2. Their claim in this court is for arrear payment of remuneration for the years 2012 to 2017, based on the argument that whilst they were employed and remunerated at level 5 for Mr Khumalo and Mr Lesejane; and level 7 for Ms Semela, they should have been remunerated at level 9. They explain that because the post “ASD Client Relations Management” (the formal title given to education practitioners) advertised in 2015, was ultimately graded at level 9, they should be compensated at the remuneration applicable to employees at that level.

3. Mr Khumalo and Mr Lesejane claim R809 712.00 each and Ms Semela claims R401 752.00. (The difference in the quantum of the claim between Ms Semela and her male colleagues is attributed to her higher level). By way of example: with respect to Mr Khumalo, in 2012 his annual salary at level 5 was R123 579. At level 9 in 2012 employees were earning R236 532.00 per annum. The difference being R112 953.00. For Ms Semela in 2012 at level 7 her salary was R180 489.00. At level 9 employees were earning R236 532.00 per annum. The difference was R56 047.00.[1] The Applicants calculated the difference between the remuneration at level 5 and level 9 for the years 2012, 2013, 2014, 2015, 2016 and 2017 to get the total quantum of their respective claims.

4. The Applicants summarise their case succinctly in paragraph 39 of the Statement of Case as follows,

“*The applicants have provided their services to the respondent in the position which is at level 9. Therefore they were entitled to be paid in accordance with* (that*) salary level, however despite all the demands the respondent has failed, and or refused to pay to the applicants the amount of money they are entitled to*.”

5. Legally speaking, the Applicants submit that the Respondent has breached section 32[2] of the Basic Conditions of Employment Act, 1997[3] (the “BCEA”) and that

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[1] Statement of Claim, pgs 11 and 13.

[2] Payment of remuneration

the Labour Court has jurisdiction to hear the matter as per section 77(3) of the BCEA.[4] For reasons I set out later in this judgment I disagree with both propositions.

6. The Respondent denies that there was a breach of the BCEA, or of their contracts of employment, pointing to the lateral transfers of the employees as clerks within the Department at level 5, their none appointment into the position when it was advertised, and that whilst the employees were performing some of the functions envisaged in the post, they were not performing all, notably those of a more complicated nature.

Background to the Applicants

7. The three Applicants testified at the trial.

8. Mr Khumalo joined the Department in 1996 as an Accounting clerk. In 2001 he was appointed as an inspector at the Gauteng Liquor Board and later he was transferred to the Liquor Licensing Unit, with a new job title being "Data Capture" (presumably date capturer). Both the inspector and the data capture positions were at Level 5. Despite the title "data capture", it was common cause that he was performing community education tasks.

9. The Department, represented by the Chief Director: Resource Management wrote to him in February 2014 as follows:
"*Transfer: Please note that you have been transferred …to Liquor Registration & Licensing however you will be reporting under the Education and Awareness Unit…The transfer does not change your current employment level. A new job profile and contract will be given to you with your new duties …*"[5]

10. Mr Khumalo replies a few weeks later,

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[3] Act 75 of 1997

[4] Jurisdiction of the Labour Court to determine disputes about contracts of employment

[5] Pleadings page 38

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"*I, Jabu Khumalo agree to a horizontal movement to Liquor Licensing Office Education Unit. I also state that there will not be any financial implications to the department as I will be moving on the same level*.:[6]

11. The post "ASD Client Relations Manager" was advertised in 2015. Mr Khumalo applied but was not shortlisted for an interview. The post required a tertiary qualification but his highest qualification was a matric.

12. Mr Lesejane's employment history closely mirrors that of Mr Khumalo. He joined the Respondent in 1996 as an administrative clerk and in 2014 he was transferred to the Liquor Licensing Unit where he worked as an educational practitioner. His grade remained "5". It was a lateral move. He received a similar letter from the Chief Director: Resource Management in 2014, and also agreed that there would *"not be any financial implications to the department as I will be moving on the same level*."[7]

13. Mr Lesejane applied for the post when it was advertised, but was not shortlisted for an interview. The post required a tertiary qualification but his highest qualification was a matric.

14. For both Mr Khumalo and Mr Lesejane the transfers were an attempt to keep the men in employment, as their positions as inspectors had become redundant. The Respondent in their Heads of Argument explain that

"*for several years Mr Khumalo and Mr Lesejane had become idle…and were without any specific key performance areas. A meeting was held with Mr Khumalo and Mr Lesejane, Acting Director Human Resources and Chief Director: Liquor Licensing. All parties agreed to the horizontal transfer to … increase capacity in the Education and Awareness sub directorate*"[8]

[6] Pleadings pg 39

[7] Pleadings page 60 and 61.

[8] Paragraph 8

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15. The Third Applicant, Ms Semela joined the Respondent in 2008 as an Administration Officer at level 7. In 2009 she was transferred to the Gauteng Liquor Board as an educational practitioner.

16. She had a tertiary qualification and in 2015 applied for the post. She was shortlisted but ultimately not appointed.

The Department's proposed organisational structure (organogram) and the description of the post "Client Relations Management"

17. In May 2012 the MEC approved an organogram for the various directorates in the Department.[9] Included was the Directorate: Client Relations Management. The Applicants continued to perform their community education functions.

18. The Respondent advertised the post Client Relations Management three years later. The requisite qualifications were a diploma or degree in corporate communication, education and training or public relations.

19. The duties were described as follows,
"*create awareness around liquor education in the Gauteng Provance through exhibitions, workshops, campaigns…Liaise with NGOs and community leaders…Conduct research around prevalent liquor related topics, conduct needs analysis according to regional dynamics, design and develop training materials…assist in writing publications for liquor education…"*[10]

20. The salary indicated on the advert was R270 804.00 per annum.

21. The Applicants then correlated the salary with the Department's salary circular, to conclude that the post for which they had applied, was at level 9, and as they had been performing the functions particular to that post informally since around 2012 they too should be remunerated at level 9.

[9] Annexure "D"

[10] Respondents bundle of documents, pg 20

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22. The Applicants were not appointed to the post which had now become formalised.

23. In November 2017 they launched a grievance unhappy that they had not been remunerated at the level 9 rate, and unhappy that they were being transferred out of the unit to another department to perform "backscanning" duties.[11] They never returned to the directorate: Client Relations Management.

The Department's evidence

24. Ms Lushaba testified for the employer. She held the position "Director Client Relations Management" and said it was her responsibility to oversee the unit. The employer was concerned with irresponsible drinking and underage consumption of liquor.

25. Ms Lushaba heard that 2 people (Mr Khumalo and Mr Lesejane) were redundant in consumer affairs, and faced retrenchment. She said she needed assistance setting up the new unit and they were offered a transfer to do just that. There were no clear job descriptions or titles. The Applicants accepted the transfer on the express proviso that their levels (at level 5) remained unchanged.

26. They raised no concerns, until after the job advert came out in 2015, when they they argued that they should be remunerated at level 9.

27. Generally Ms Lushaba said that the Applicants performed satisfactorily. She encouraged them to apply for the post (there were 2 positions available), but ultimately they were not appointed. There were stronger candidates.

[11] Pleadings pg 15. The GPSSBC arbitrated their dispute, characterised as an unfair labour practice: demotion, when in 2017 they were transferred out of the Directorate. The case number is GPBC 241/2018. The arbitrator awarded 2 months compensation each.

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28. She testified, when asked by the court, that the Applicants did not carry out higher order tasks set out in the duties advertised such as conducting research, conducting needs analyses, or developing training materials. Those sort of tasks were carried out by the successful candidates for the post.

29. Ms Lushaba's evidence went unchallenged (no cross examination from the Applicant's legal representative).

Discussion and analysis

30. The Applicants have launched their claim in terms of section 32 of the BCEA. That section deals with the payment of remuneration (in South African currency, within 7 days it becomes due etc). This section has no bearing on the dispute before us.

31. In my view, cut to the bare bones, the Applicants claim is for a retrospective salary increase. That is a dispute of interest and the Labour Court has no jurisdiction to entertain the matter. The employees seek to create new rights, and this may only be achieved through a bargaining process.

32. The Applicants have couched their dispute as one concerning a contract of employment presumably to bring the matter within the jurisdiction of this Court as contemplated in section 77(3) of the BCEA. Whilst at first glance the dispute does concern a contract of employment and the applicable level of the Applicants, which has a bearing on remuneration; the dispute more intrinsically analysed is a salary demand and the Labour Court has no jurisdiction to grant an order on such a matter. The Applicants certainly could not demonstrate any breach to their contracts of employment to bring their claim within the jurisdiction of the Labour Court.

33. In an analogous case, *Gauteng Provinsiale Administrasie v Scheepers*[12] the employees were administration clerks who were performing the duties of network controllers. Network controllers earned higher salaries and received better benefits.

[12] (2000) 21 ILJ 1305 (LAC)

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The employees sought the remuneration packages applicable to network controllers. The issue came before the Labour Appeal Court, with Conradie JA commenting at paragraph 8,

"*Generally speaking a dispute relating to proposals for the creation of new rights…is a dispute of mutual interest. Such disputes are ordinarily resolved by collective bargaining*".[13]

34. Arguably though the Applicants could have characterised their dispute as one about an Unfair Labour Practice relating to Promotions, in terms of section 186 (2)(a) of the Labour Relations Act, 1995 and could have referred the matter to the GPSSBC for arbitration. Arguably too, the Applicants could have pursued an unfair discrimination claim under section 6(4) of the Employment Equity Act, 1998 at the CCMA. (Similar pay for work of similar value). This is not to suggest that such claims would have had good prospects, but simply to point out at a notional level that the facts could have given rise to different characterisations, and dispute resolution *fora* and processes.

35. Even if I am wrong on the jurisdiction point, I am unpersuaded that the Applicants have made out a case for the relief they seek. I say so because the merits of their claim for arrear payments for remuneration at level 9 for the years 2012 – 2017 is weak for three reasons: firstly they consented to a horizontal / lateral move remaining at level 5; secondly they failed to be appointed into the post when it was advertised, they simply did not have the qualifications, and there were stronger candidates in the arena; and thirdly they did not perform the more complex tasks required such as designing training materials or conducting research – they were not carrying out all the duties expected of an incumbent in the level 9 post.

36. The Applicants cannot point to a breach of their contracts of employment. They seek to claim a higher remuneration, for which there is little merit. Ultimately their claim is simply a demand, which constitutes a matter of mutual interest. The Labour Court has no jurisdiction in this matter.

[13] See too *Farhana v Open Learning Systems Education Trust* (2011) 32 ILJ 2128 (LC)

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37. For the reasons set out above, their claim fails.

38. In the circumstances I make the following order:

Order

39. The Applicant's claim is dismissed.

40. No order as to costs.

D Norton

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: S Mabaso

For the Respondents: Adv Malungani

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