Not reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J 2458/08; JR 2646/08

In the matter between:

MINISTER OF CORRECTIONAL SERVICES	**APPLICANT**
and	
MIKE MBADA N.O	**1ST RESPONDENT**
GENERAL PUBLIC SERVICES BARGAINING COUNCIL	**2ND RESPONDENT**
MOKONEHATSE RD	**3RD RESPONDENT**
TSIRI MC	**4TH RESPONDENT**
TAU TS	**5TH RESPONDENT**
SIHLANGU SL	**6TH RESPONDENT**
KHUMALO JJ	**7TH RESPONDENT**
FRENCH C	**8TH RESPONDENT**

Date of application: 25 August 2011

Date of judgment: 30 September 2011

JUDGMENT

VAN NIEKERK J

Introduction

[1] There are two applications before the court. The first is an application to review and set aside an arbitration award made by the first respondent ('the

arbitrator') on 29 September 2008; the second is an application in terms of s 158 of the Labour Relations Act to have the award made an order of this court. The arbitrator's award was made after the referral of an unfair labour practice dispute to the bargaining council by the third to eighth respondents ('the individual respondents'). In their referral, the individual respondents contended that the applicant had committed an unfair labour practice in relation to promotion by failing to adjust their salaries from date of appointment as opposed to the date of approval of the promotion. The factual circumstances of the claim are discussed below.

The factual background and the arbitration award

[2] The relevant facts can be distilled to the following. directorate code enforcement (DCE) and the departmental investigating unity (DIU) were established in terms of s 95 of the Correctional Services Act, 111 of 1998, to combat corruption in the department. The DIU was established to investigate corruption, theft and fraud; the DCE was established to prosecute officials in internal disciplinary hearings. The individual respondents are members of the DCE.

[3] Following approval by the national commissioner on 6 September 2006, the salaries of officials in the DCE were adjusted on the basis that assistant directors be placed on level 10 (from level 9) and that deputy directors be placed on level 12 (from level 11). The salaries of officials in the DCE were subsequently adjusted, with effect from the date of approval.

[4] Officials in the DIU had previously requested approval for the salaries of assistant directors to be adjusted to level 10. This request was approved in terms of a memorandum dated 10 February 2005, with effect from the date of assumption of duty of the officials concerned.

[5] The DCE thereafter requested clarity regarding the implementation dates of the salary adjustment. The memorandum that had resulted in the promotions of DCE officials being approved was prepared on 24 August 2006 by Paxton, the director of the DCE. The memorandum recommended that the salaries of officials in the CDE be adjusted (assistant directors from level 9 to level 10, deputy directors from level 11 to 12) and that "*The same procedure and principle that were followed and applied*

when adjusting salaries for DIU officials be used in this regard." As I have noted, this recommendation was accepted by the national commissioner on 6 September 2006.

[6] The department implemented that part of the recommendation that concerned the promotion of DCE officials, but refused to apply the salary increases consequent on their promotion with retrospective effect. The union declared a dispute about the disparity in treatment of the DIU officials (who had their salary increases paid retrospective to their dates of appointment) and the DCE officials, whose increases were paid only with effect from date of approval, i.e. without retrospective effect.

[7] The issue before the arbitrator was whether the department had committed an unfair labour practice by failing to promote the applicants with effect from the date of their assumption of duty.

[8] The arbitrator found that the national commissioner had approved the retrospective promotion of the affected DCE officials, and that there was no evidence to the effect that the commissioner acted wrongly in doing so. In other words, the terms of the approval, and in particular the reference in it to the DIU officials and the terms on which they were promoted, required the department to treat the DCE officials similarly. In the absence of any justification for the disparity between officials of the DIU and DCE, the arbitrator held that the department had acted unfairly when it failed to implement the national commissioner's recommendation. He ordered the department to promote the individual respondents with effect from the dates of their assumption of duty at the DCE and to pay them the value of increases to which they were entitled given the retrospective effect of their promotion.

Grounds for review

[9] The applicant contends that the arbitrator misdirected himself with regard to the facts and the law by finding that the respondent had acted unfairly when it failed to promote the individual respondents with effect from the date of assumption of duty. In particular, the applicant contends that there was no evidence before t arbitrator on the principles followed and applied when adjusting the salaries of DIU officials, and that the arbitrator ought to have enquired into this matter before drawing the conclusion he did. This submission overlooks the content of the pre-arbitration minute. The fact that the DIU officials received were promoted and

retrospective effect of that promotion was never in issue – paragraph 2.7 of the minute records that their promotions were implemented from date of assumption of duty. What was in issue before the arbitrator was not any principle that may have underpinned that decision – the individual respondents' complaint was that their disparity in treatment in circumstances where they were similarly situated to DIU officials, a similarity that had been recognised by the terms of the approval. There is therefore no merit to this ground of review.

[10] In so far as the applicant contends that the arbitrator committed an error of law by finding as he did, while it is correct that certain regulatory provisions regarding the payment of salaries were introduced into the arbitration proceedings, it was not in dispute that the national commissioner had the authority to promote the affected officials with retrospective effect.

[11] In so far as the applicant attacks the justifiability of the arbitrator's decision, the applicant contends that it was obliged only to adjust the salary levels of officials attached to the DCE to be on a par with those engaged in the DIU, and that it had therefore complied with the terms of the approval of the national commissioner. This submission overlooks the nature of the dispute before the commissioner. The commissioner was not called on, in a narrow sense, to determine whether the terms of the national commissioner's approval had been implemented. He was called on to decide whether the department's refusal to apply the approval with retrospective effect was an unfair labour practice. He decided, for the reasons that he recorded, that the applicant's conduct was unfair. In particular, he found that the terms of the commissioner' approval extended to the individual respondent's retrospective promotion and that the department had acted arbitrarily when refusing to implement that approval.

[12] The basis on which an award can be set aside is well –established. The court may interfere if and only if the decision to which the commissioner came was so unreasonable that no reasonable person could have come to that decision (*Sidumo & another v Rustenburg Platinum Mines & others* [2007] 12 BLLR 1097 (CC)). In my view, the commissioner's decision (i.e. that the applicant had acted arbitrarily by failing to implement the national commissioner's recommendation) is not one that is so unreasonable that it falls outside of the band of decisions to which reasonable

people could come on the available evidence. For these reasons, there is no basis on which this court is entitled to interfere with the arbitrator's award. There is also no reason why the award should not be made an order of this court in terms of s 158(1)(c) of the Act.

[13] Finally, there is no reason why costs should not follow the result. I accordingly make the following order:

1. The application is dismissed.
2. The first respondent's arbitration award issued on 27 September 2008 is made an order of court.
3. The applicant is to pay the costs of these proceedings.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: Adv TAN Makhubele, instructed by the state attorney

For the third to eighth respondents: Adv J Basson, instructed by Grosskopf Inc