



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGEMENT

Reportable

Case no: JR 633/10

J 277/13

In the matter between:

HEAD OF THE DEPARTMENT OF EDUCATION

Applicant

and

M J MOFOKENG

First Respondent

THE EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

K C MOODLEY

Third Respondent

Heard: 25 April 2013

Delivered: 30 April 2013

Edited: 13 May 2013

Summary: Review – combination of two schools to one – issue of merger or absorption and consequence thereof – award not reviewable.

JUDGMENT

CELE J

Introduction

- [1] The applicant seeks a review of the arbitration award dated 5 March 2010 issued by the third respondent under the auspices of the second respondent. An order remitting the matter to the second respondent for a *de novo* determination of the issues is a consequential order sought in the event the application is granted. This application is brought in terms of section 158 (1) (g) of the Act¹. The application is opposed by the first respondent as a beneficiary of the assailed arbitration award. In the event the application is dismissed, the first respondent seeks to have the award made an order of Court.

Background facts

- [2] The first respondent, Mr Mofokeng was in the employ of the applicant as an Educator. On 1 March 1994 Mr Mofokeng was appointed the Principal at Credo Primary School within applicant's area of operation. On 1 January 2001 Credo Primary School was combined with another public school, called Somerspos Primary School, whose Principal was Mr Msibi.
- [3] On 19 January 2001 Mr Mofokeng received a letter issued by the District Manager: Sasolburg Education District, Mr M R Mthombeni addressed to the Principal Credo Primary School and for his personal attention stating that:

'ABSORPTION OF SOMERSPOS PERSONNEL ON YOUR SCHOOL ESTABLISHMENT

Please be informed hereby that all educators of Somerspos have been absorbed in your school establishment. Mr Msibi will be utilised as a Deputy Principal and you will remain the principal of Credo.'

- [4] As a result of the change Mr Msibi was transferred to Credo School but he was thereafter transferred to another school. Mr Mofokeng was retained at the merged school which had a number of learners and educators increased to the point that it acquired a grade 4 instead of grade 3 that Credo School had been during the change.

¹ The Labour Relations Act, 66 of 1995.

- [5] A letter was issued under the hand of the Head of Department addressed to Mr Mofokeng stating that:

‘Human Resources Circular No 21/1996 stipulates that the principal of a school which is upgraded will be considered for promotion to the higher post without being advertised, provided that he/she qualifies for the higher post and subject to a written recommendation from the Governing Body and the District Manager.’

- [6] Mr Mofokeng was however not appointed to the post of principal and consequently the applicant decided to advertise the post. Mr Mofokeng unsuccessfully applied for the post as Mr Chuta was appointed instead. Mr Mofokeng referred unfair labour practice dispute for conciliation and later for arbitration. In his capacity as the appointed commissioner, the third respondent issued an award with a finding that the decision by the applicant not to promote Mr Mofokeng to post level 4 was declared to be an unfair labour practice and he issued orders to give effect to that promotion. His chief findings in support of the order are that:

1. In writing the governing body recommended the appointment of Mr Mofokeng as the principal of the merged Credo.
2. The applicant seemed to have rejected the recommendation, firstly on the basis that the recommendation was made in terms of resolution 3 of 2001, which resolution did not apply to a merger.
3. The second ground of rejection was that the acceptance of the recommendation would have prejudiced Msibi.
4. The third ground of rejection hovered around the submission that the recommendation should have come from a newly constituted governing body at Credo.
5. The assertion had to be rejected on the basis that Somerspos was for all intents and purposes absorbed by Credo. The governing body at Somerspos would thus have ceased to exist as on 1 January 2001. The argument that the collective agreement did not apply had to be rejected. The school had been re-graded on account of the increase in learners. The governing body made an appeal for the appointment of Mr Mofokeng to be automatically appointed to post level 4. It was based on his competence and ability.
6. The applicant accepted the applicability of Resolution 3 in order to declare the upgraded post as being vacant and yet rejected the resolution when it

came to the recommendation of the governing body. In essence the applicant was accepting and rejecting resolution 3 at the same time. Such conduct can hardly be said to be fair.

7. Mr Mofokeng was informed in writing as per letter on 19 January 2001 that he would remain as the principal of Credo. The applicant sought to disown the letter by stating that the author had no mandate to have written it. The same person wrote most if not all of the other letters which the applicant relied on.
8. The applicant has for all intents and purposes accepted the recommendation of the governing body, confirmed the appointment of Mr Mofokeng as principal post level 4. It then sought to undo the acceptance and confirmation by having the post advertised. That brought about the question whether the conduct of the applicant in appointing and then reversing the promotion of Mr Mofokeng from a principal on post level 4 to a post level 3 educator fell within the ambit of Section 186(2) of the Act.
9. Mr Mofokeng did not rely on a belief which could be said to be legally fallacious. He relied on the resolution and the applicant acted in accordance with the resolution. Hence the principle of estoppel was applicable in this matter. The applicant is thus estopped from denying that Mr Mofokeng should have been promoted to post level 4. The applicant's conduct in promoting and demoting him was unfair. The contested post was vacant and Mr Msibi was transferred. There was no reason why Mr Mofokeng was not to be appointed.

[7] The applicant outlined grounds of review to substantiate the application by averring that the third respondent made a fundamental error in finding that:

- a) Somerspos was absorbed into Credo School; a merger occurred as a result of absorption of one school into another and that Credo School was upgraded.
- b) In so doing the third respondent failed to take into account or misapplied the provisions of section 12A of the South African School Act relating to mergers of public schools.
- c) The provisions of clauses 3.2 and 4.3 of resolution 3 of 2001 applied. The applicant ought not to have advertised the post of the principal.
- d) The applicant was estopped from denying the applicability of the resolution.

- [8] According to the applicant, where two schools merge there are three schools involved being the two schools involved and the school established by the merger. The result was that Credo school was not upgraded but that a new school was graded for the first time after the merger. The submission was that what was absorbed into Credo was not the school but the staff establishment of the Somerspos School. Each of the schools lost their identity upon the merger with the result that clause 3.2 of the resolution did not apply. The advertisement of the principal post of the merged school was therefore compulsory in terms of clause 3 of Chapter B of the Personnel Administration measures.
- [9] On estoppel the applicant said that if the collective agreement was not applicable then the applicant was not bound by it. The submission was that the representation contained in the letter relied upon was not a representation of the applicant but of the District Manager who could not bind the applicant.
- [10] In opposition to this application the submissions made by and on behalf of Mr Mofokeng are that the third respondent reached a fair, reasonable, rational and justifiable conclusion based on the evidence and issues which were before him. No reviewable irregularity existed as meant in terms of section 145 and 158(1)(g) of the Act. The evidence before the third respondent showed that Mr Mofokeng had been unfairly treated. The application for review was a frivolous and vexatious attempt to evade, delay and/or frustrate Mr Mofokeng's claim.
- [11] The submission was further that Somerspos School was absorbed into Credo School and the name remained Credo School. There were sufficient learners for re-grading of the school prior to absorption. Mr Chuta, who was placed in the position that Mr Mofokeng should have been in, was placed in post level 4 on about 15 July 2003. The case of Mr Mofokeng was defined in the pre-arbitration minute. The third respondent properly applied the relevant provisions which were before him. Disagreement with that did not provide grounds for review.
- [12] The essence of the dispute was described as whether unfair labour practices had been committed. Mr Chuta was said to have been unfairly placed in Mr Mofokeng's position as principal on post level 4, after it was agreed in writing that Mr Mofokeng

would remain principal. Therefore, the application for review should be dismissed with costs, so the submission went.

Analysis

[13] A party who alleges a defect in any arbitration proceedings may apply for an order setting aside the arbitration award. In terms of section 145(2) of Act:

a defect referred to in subsection (1), means –

- (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
- (b) that an award has been improperly obtained.

[14] This Court may, subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law². Section 145 of the Act is now suffused by the constitutional standard of reasonableness provided for in section 33 of the Constitution Act of 1996.³ The question in this regard is then whether the decision reached by the third respondent is one that a reasonable decision maker could reach.

[15] The applicant has correctly submitted that in terms of section 15 of SASA every public school is a juristic person with legal capacity to perform its functions in terms of the SASA. Each public school therefore is a separate legal entity. The provisions of section 12A of SASA deal with the merger of public schools. In terms of section 12A(1) the MEC for Education may by notice in the Provincial Gazette merge two or more public schools in a single entity. Each public school as would appear from Section 15 of SASA has assets and liabilities. In terms of Section 12(4) the merged

² See section 158(1) (g) of the Act.

³ See *Sidumo and another v Rustenburg Platinum Mines Ltd and other* (2007) 28 ILJ 2405 (CC).

school which is regarded as a single school must be regarded as a public school. In terms of Section 12A (5) all assets, liabilities, rights and obligations of the schools that are merged must vest in the single school. There is therefore a statutory transfer of the respective rights, obligations, assets and liabilities to the single school.

- [16] According to the applicant the two schools that are merged lose the individual identities and juristic personalities. Three separate juristic *personae* are involved in a merger. The two separate schools which are merged and resultant third school which is a single school. This legal consequence results in the “death” of the two schools which are merged into the third single school. Mr Mofokeng disputed this assertion by contending that one school was absorbed by the other.
- [17] Evidence on the record shows that there was absorption of personnel of Somerspos School into the Credo Public School. Personnel were not merged but were absorbed into Credo School. Neither the personnel nor the learners of Credo Schools were affected by the change, which ever description is given to that change. There is no evidence which suggested that the school premises at Credo School underwent any change consequential upon the change. The undisputed evidence of Mr Mofokeng was that the school governing bodies of the two schools met before the change and agreed, irrevocably, to have Mr Mofokeng retained as the principal of the combined school. During that transition the principal of Somerspos School was transferred to Credo School and thereafter to another school. The name of the final entity never changed from Credo Primary School. It remained undisputed that the changes experienced by Somerspos, in form and substance, were not the same changes experienced by Credo School. By and large losses experienced by Somerspos School were gains to Credo School. When the form and substance of the change is considered it appears irresistible to have to conclude that the change in question was absorption of Somerspos School into Credo School. This is not the case of two institutions that lost a material number of their learners, educators and properties as they both converge into the formation of a third, new institution, which would clearly be a merger. These are essentially the findings of the third respondent.

- [18] Accordingly, the decision reached by the third respondent in this respect one that a reasonable decision maker could reach.

The upgrading of a post

- [19] Paragraph 2.5 of Chapter B of the Personnel Administration Measures (PAM) refers to the position of Principals in case where an institution is upgraded or downgraded.

- [20] Paragraph 2.5 of this chapter states that when an institution is re-graded the post of the principal is regarded as a new and vacant post that must, subject to these measures be filled in terms of paragraph 3 without undue delay. Paragraph 3 of Chapter B refers to the advertising and filling of educators posts. In terms of this chapter the following processes are required for the filling of vacant posts:

1. the post must be advertised (paragraph 3.1);
2. the applications must be sifted (paragraph 3.2);
3. the post must be shortlisted and interviews must be held (paragraph);and
4. the appointment must be made (paragraph 3.4 of the chapter).

- [21] Paragraph 2.5 (b) of Chapter B of the PAM reads:

'If the permanent incumbent of a Principal post that has been upgraded qualifies to be promoted to the new level and the governing body or council recommends in writing that the person may be appointed to a higher post such appointment may be made without having to advertise the post. If the governing body or council does not make such a recommendation, the post must be advertised in which case the incumbent will be entitled to apply for upgraded post and he shall be shortlisted.'

- [22] Mr Mofokeng had the necessary qualifications for the principal post at the newly constituted Credo School. There was a recommendation for his appointment issued by the District Manager: Sasolburg Education District, Mr Mthombeni, even though it purported to be the actual appointment. The two school governing bodies has earlier met and resolved to have Mr Mofokeng as the principal of the final institution. In terms of paragraph 2.5 (b) of Chapter B of the PAM there was no

need for the applicant to advertise the post of the principal of Credo School. Mr Mofokeng deserved to be appointed. In this respect again, the third respondent committed no defect. He issued an award that a reasonable decision maker could have issued in the circumstances. It has become unnecessary that the issue of estoppel be examined. To the extent that it might be found necessary, I would have found no defect committed by the third respondent in a situation where the applicant operated at district level through the services of the District Manager.

[23] Accordingly the following order is issued:

1. Condonation for the late filing of the record is granted.
2. The review application in this matter is dismissed.
3. The arbitration award in this matter is made an order of Court.
4. No costs order is made.

Cele J

Judge of the Labour Court

Appearances:

For the applicant: Adv. Y van Aarsten instructed by the State Attorney Bloemfontein

For the third respondent: Ms. N Koulontis, Koulontis Inc.

LABOUR COURT