



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1585/12

In the matter between:

NUPSAW obo DINEO MODISE

Applicant

and

GPSSBC

First Respondent

N MASEKO N.O.

Second Respondent

**HEAD OF DEPARTMENT:
GAUTENG DEPARTMENT OF
ROADS AND TRANSPORT**

Third Respondent

G L DABULA

Fourth Respondent

L MDAKANE

Fifth respondent

M NKABITI

Sixth respondent

M P JONAS

Seventh respondent

I N MASEKO

Eighth respondent

**MEMBER OF EXECUTIVE COUNCIL
(MEC) FOR THE GAUTENG
DEPARTMENT OF ROADS AND
TRANSPORT**

Ninth respondent

Heard: 19 November 2013

Delivered: 19 November 2013

Edited: 17 March 2014

JUDGMENT

STEENKAMP J

[1] On 13 November 2013 I granted an order in the following terms:

“The arbitration award under case number GPBC 1941/2011 dated 10 May 2012 is reviewed and set aside. The dispute is remitted to the Bargaining Council, that is the first respondent, for arbitration on the unfair labour practice dispute before an arbitrator other than the second respondent.”

[2] The applicant has applied for leave to appeal and has requested reasons for the order that I debated with its attorney, Mr *Ndou*, on the day that the order was granted. These are the expanded and edited reasons.

[3] The application arises from an award made by the arbitrator in which he held that the Bargaining Council had no jurisdiction to entertain the dispute referred by the applicant. It is that award that the applicant sought to have reviewed and set aside.

[4] The applicant referred the dispute to the Bargaining Council as an alleged unfair labour practice in terms of s 186(2)(a) of the LRA. It relates to the appointment of employees other than Ms Modise, the applicant who is represented by her trade union, NUPSAW, and Mr *Ndou*.

[5] The Department¹ raised a preliminary point that the Council did not have jurisdiction as the real issue was one of alleged discrimination, and not an unfair labour practice.

¹ Cited as the respondent at arbitration and represented by the first respondent (the head of department) and the ninth respondent (the MEC for roads and transport) in these proceedings.

- [6] The arbitrator had to rule on that preliminary point. He noted that the applicant's attorney had argued that the Department had appointed employees on fixed term contracts in "fictitious" positions that could have been filled by the applicant. The applicant alleged an unfair labour practice relating to promotion.
- [7] The arbitrator concluded that "the dispute is not necessarily about the alleged unfair labour practice. Resultantly [sic], the Council must be found to be lacking jurisdiction to entertain this matter."
- [8] This conclusion by the arbitrator was irrational and unreasonable. The referral form clearly alleged an unfair labour practice. As Nugent JA pointed out in *Makhanya v University of Zululand*², a claim is a matter of fact. If the applicant claims that her non-appointment is an unfair labour practice, then that is her claim, as a matter of fact. That it may be a bad claim, is a different matter. That is something that the Bargaining Council, and not this Court, must decide. But the Council has the jurisdiction to decide the unfair labour practice claim that the applicant referred to it, whether or not the applicant can prove the claim.
- [9] I came to the conclusion that the Bargaining Council does have jurisdiction to hear the unfair labour practice dispute. That is the proper forum to decide the merits with the benefit of evidence and argument. This application was heard on an unopposed basis. This Court is not in a position to decide on the further relief sought, which takes the form of a declaratory order and a mandamus, and a further order setting aside the appointments of the fourth to eighth respondents.
- [10] The arbitrator decided the jurisdictional point on a preliminary basis. Having set aside that ruling, this dispute should properly be remitted to the Council for another arbitrator to hear full evidence and argument on the merits, given that I have found that the Council is the forum with jurisdiction.
- [11] It is for those reasons that I granted the order that I did

² 2010 (1) 62 (SCA).

Steenkamp J

APPEARANCES

APPLICANT: B A Ndou (attorney).

LABOUR COURT