



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

Delivered: 20 March 2014

RULING ON LEAVE TO APPEAL

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 on the following grounds:

- 2.1 The Court erred in failing to find that the [arbitrator], even though he dismissed the matter on a jurisdictional point, made material factual findings to the effect that there were posts available which were filled by the fourth to eighth respondents, without those posts having been advertised;
- 2.2 The Court erred in directing that the matter be referred back to the Bargaining Council, in that there are no longer factual issues remaining to be decided;
- 2.3 The Court erred in failing to find that there was no counter-application for a cross-review on the “findings of fact”;
- 2.4 The Court should have found that the only remaining issue left for determination was one of law;
- 2.5 The Court was not prevented from granting the other orders, as the application was unopposed;
- 2.6 The Court should have granted all the orders sought; and

2.7 There are reasonable prospects of another court coming to a different conclusion.

- [3] The first four grounds can conveniently be dealt with together. They all relate to the complaint that the arbitrator had already made findings of fact. The next two grounds relate to the relief sought but not granted; and the last is a “catch-all” reiterating the test for leave to appeal.
- [4] I will first deal with the grounds relating to alleged findings of fact.
- [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. 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.
- [6] 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.”
- [7] It is that jurisdictional point that has been reviewed and set aside. Having found that he did not have jurisdiction, the arbitrator could hardly have made any binding rulings on matters of fact. Whatever he said about the factual situation, given his finding that he did not have jurisdiction, could have been *obiter* at best. His finding was a preliminary one, decided upon without having heard any evidence. It may be that the parties at the reconvened arbitration decide to argue the matter on a stated case; it may also not be. The fact is that the Council has not had the opportunity to hear any evidence on the merits. It must be given that opportunity, given my ruling that it – and not this Court – has the jurisdiction to do so.
- [8] With regard to the relief sought but not granted, it matters not that the application for review was unopposed. This Court still has to be satisfied that the award is reviewable; and then the Court has a discretion whether

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.

to substitute or to remit. In this case, I was satisfied that the jurisdictional ruling had to be reviewed and set aside. Having made that ruling, though, it is for the Bargaining Council to decide afresh whether the Department had indeed committed an unfair labour practice; and if so, what the appropriate relief is. It is a classic case where the dispute on the merits should be remitted to the appropriate decision-maker to exercise the powers bestowed upon it by the LRA.

- [9] There are no reasonable prospects that another court will come to a different conclusion, especially given the discretionary nature of the decision whether to substitute or remit.

Order

The application for leave to appeal is dismissed.

Steenkamp J

APPEARANCES

APPLICANT: B A Ndou (attorney).