REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

J2790/13

In the matter between:

KLAAS KGOTONG MABALA Applicant

And

TIGER FOODS BRAND LIMITED Respondent

Date heard: 22 October 2014

Delivered: 3 March 2015

Summary: Claim under section 77(3) of the BCEA brought on motion

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JUDGMENT

RABKIN-NAICKER J

[1] In this opposed application, the applicant seeks *inter alia* an order in the following terms:

1. Ordering the respondent to pay R747 811.14 to the applicant, being the amounts of remuneration, directly caused by the respondent's

underpayment of applicant's remuneration for period 1 May 2004 to 30 September 2012.

2. Directing the respondent to pay interest on the amount due and payable in terms of this order at the rate referred to in section 75 of the Basic Conditions of Employment Act 75 of 1997, as amended, to the applicant to whom a payment should have been made.

[3] The applicant claims the difference between the remuneration he has earned and that which he should have earned if he had been paid at the level of the grade he was appointed on. He brings the application in terms of section 77 (3) of the BCEA. The applicant avers that during the period 1 May 2004 to 30 September 2012 he was paid aremuneration package lower than that provided for by the company at the grade on which he was employed. This was a grade CL. However he was paid the remuneration package of the lower grade of B upper (grade BU). After his appointment, he discovered that other employees doing the same job as him were being paid at the higher salary scale of CL.

[4] The applicant sets out a schedule in his affidavit purporting to show the remuneration per annum of grade CL as opposed to grade BU from 2004 to 2012, the difference in quantum for the period being an amount of R747 811.14. The company avers that:

> "…the Respondent has no knowledge of the policy and/or schedule to which the Applicant is referring in this paragraph. All employees who are employed in the position that the applicant has always been employed, namely Sales Supervisor have all been employed and continue to be employed in job grade B Upper since the year 2005."

[5] In their answering papers, the company states that it has a job grading system in place in terms of which various positions within the respondent's organizational structure are graded to reflect the level of seniority and responsibility of each position. The Patterson job grading system grades a job based on decision-making or freedom to act in a specific role. It submits that: "it is possible employees who are in positions that are the same have been similarly graded would be paid different remuneration because of other relevant considerations such as the performance of the individual and the

length of service." The company also avers that the job grading which an employee is employed on is not the sole determining factor of the remuneration that an employee would be paid.

[6] The company further avers in its answering papers that it does not have any formalized pay policy which specifically links specific job grades with minimum rates of pay.. It does however endeavour to pay employees between the 25th and 75th percentile based, *inter alia*, on individual skills, number of years in position, responsibilities and performance.

[7] The company records that prior to the applicant being appointed to a position of sales supervisor, the respondent advertised position of sales supervisor at its Manna Bakery, and invited interested persons to apply for that position by no later than 12 March 2004. The position was specifically mentioned in the advertisement as being that of sales supervisor. The advert also expressly stated that the successful candidate would report to the sales manager and that the advertised position was graded as a B upper position. However, the job grade in the advertisement was altered in handwriting to indicate that it was a C lower grade position. This was because, despite the fact that after the re-evaluation of job grades that had been undertaken by the respondent, it was determined that the sales supervisor position was B upper grade and not C lower grade, employees had not yet been informed of this change. It is admitted by the company that the letter of appointment of the applicant also reflects the position was graded as a C lower position.

[8] It would appear from annexure "MN4" to the answering papers that respondent's employees were formally informed about the re-grading of posts after 18 July 2005. The re-grading, according to the company in its letter "… will not materially affect the individual and any adjustments will only become effective at the renewal of their car allowance cycles." Employees were given an opportunity to appeal the re-grading of their posts.

[9] The company's case is essentially the following: at all material times the applicant agreed in writing to the quantum of remuneration he was earning from the time of his first appointment. The applicant has not pleaded any term of his contract that has been breached by the company. It contends that the

applicant has at all material times been paid his remuneration in accordance with the letters of appointment which expressly set out the applicant's remuneration and how it would be adjusted from time to time. It submits that if the applicant's grievance is actually that he has been paid less than other employees in the same position, his remedy does not lie in section 77(3) of the BCEA.

[10] The company argues that the schedule created by the applicant cannot be admitted in evidence and certainly not in motion proceedings when there is an express denial of the alleged "policy and/or schedule". It questions why the applicant did not seek to compel discovery of such a document and that it is simply improbable that the company would have a document such as that created by the applicant that prescribes fixed rates of pay for all employees employed in a particular position without any room for differentiation based on any ground recognized as valid by law.

Evaluation

[11] The applicant describes the schedule in his affidavit as "a summary of the relevant schedule of the Respondent in respect of the post of supervisor: sales and its corresponding salary levels for the period 2004 to 2012." The company denies that the relevant schedule as summarised in the founding affidavit exists as a company policy or schedule. Given the job evaluation exercise that the company undertook on its own version, it is simply not credible that there is no company document that links remuneration (i.e. salary bands and increment notches) with graded posts. In such circumstances, I consider that there exists a material dispute of the fact on the papers. If the acceptability or cogency of evidence stands to be influenced by the manner in which the evidence is given or, more generally, by what may eventuate if the evidence is tested by cross-examination, the truth cannot be satisfactorily established on a written exposition of the evidence[1].

[12] This court has the discretion to decide in such a situation that a dispute between parties should be heard by means of an action.[2] Where an applicant should have foreseen that such disputes of fact would arise (as in this matter),

[1] *Standard Bank of SA Ltd V Neugarten and Others* 1987 (3) SA 695 (W) 699A
[2] *Room Hire Co (Pty) Ltd V Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)

the court may simply dismiss the application. However, I am of the view that it is in the interests of justice that the matter not be dismissed on this basis. I therefore make the following order:

Order:

1. The application under case number J2790/13 is to be adjudicated as an action.
2. The parties are to draft a pre-trial minute using the affidavits filed in this matter in the stead of a statement of claim and defence.
3. The pre-trial minute is to be filed within 20 day of this order.
4. The costs of this application are to stand over for determination by the trial court.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Phungo Attorneys

Respondent: Edward Nathan Sonnenbergs