



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 982/2013

Not Reportable

In the matter between

THULANI OSCAR PHIRI

Applicant

and

CITY OF JOHANNESBURG

First Respondent

THE JOHANNESBURG METROPOLITAN

POLICE DEPARTMENT

Second Respondent

Heard: 07 July 2015

Delivered: 16 October 2015

Summary: Whether the Applicant was entitled to payment of shortfall salary in terms of section 77(3) alternatively sec 77(1) of Basic Conditions of Employment Act ("BCEA"). Further whether the applicant should be paid double salaries for four months. Whether the Memorandum of Agreement properly construed applies to the dispute.

JUDGMENT

PHALA, AJ

Introduction

[1] The Applicant brought an application in terms of Section 77(3) and Section 4 of The Basic Conditions of Employment Act¹ ("the BCEA"), alternatively, Section 77(1) of the same Act read with Rule 7 of the Labour Court Rules.

]2] The Applicant seeks the following relief;

- Declaring that the Respondent paid the Applicant a shortfall in his salary from July 2008 to date or at least for a period of 56 months in the sum of at least R135 128. 00 plus interest.
- Declaring that the Respondents failed to pay the applicant double salaries for four (4) Decembers in the amount of at least R9 652.00 plus interest.
- Declaring that the Applicant is entitled to be placed on median level retrospectively from the 1 July 2008 and adjust his salary accordingly in terms of the MOA concluded by and between the City and SAMWU.
- Declaring that the Respondents to pay the Applicant the shortfall in his salary or at least R135 128.00 being the amount that the Respondents short paid the applicant for a period of 56 months.
- Directing the Respondents to pay the applicant a sum of R9 652.00 being the amount that the Respondents failed to pay the Applicant double salaries for four (4) months.

Background facts

[3] The Applicant was employed by the Respondents and in particular the Second Respondent Metropolitan Police Department with effect from the 01 July 2002. According to the Applicant, he was appointed as a permanent employee on that date.

¹Act 75 of 1997

- [4] The Applicant earned a gross monthly salary of R1 987.50 (One Thousand Nine Hundred and Eighty Seven Rand and Fifty Cents) per month.
- [5] On or about 28 June 2008, the First Respondent, City of Johannesburg Metropolitan Municipality (“the city”) and the South African Municipal Workers Union entered into a Memorandum of Agreement (“MOA”).
- [6] The First Respondent’s Metropolitan Police Department implemented the clauses of the MOA quoted herein above with effect from 1 July 2008.
- [7] Prior to the implementation of the clauses of the MOA, the Applicant was earning a gross salary of R9 489 (Nine Thousand Four Hundred and Eighty Nine Rand) per month.
- [8] There are a number of dispute of facts regarding the implementation of the MOA.
- [9] According to the Applicant, the following clauses of the MOA entered into by SAMWU and the City are relevant for the purposes of this application.
- [10] Paragraph 1.3 provides as follows:

‘Employees who have been in the service of the employer at JMPD for a period of six years to twelve years shall be placed on the median range of the salary scale.’²

- [11] Paragraph 6 provides as follows.

‘Therefore, the parties recognize that they both need to obtain mandates to conclude this agreement between them, as such this agreement will only be signed once both parties have solicited mandates from the respective constituencies and that its application will be with effect from the 01 July 2008.’³

- [12] Although the First and Second Respondents agree that the two paragraphs above are relevant, however, for the sake of completeness, clause 2 of Memorandum of Agreement (“the Agreement”) should also be included which provides that;

‘The parties agree that the provisions of clauses 1.3.1 and 1.3.2 of this agreement (the Memorandum of Agreement) shall apply once off only to permanent members of staff

²See page 25 of the paginated bundle

employed by JMPD, and shall not serve as a precedent nor can it be used against any of the parties in any future disputes, engagements and/or negotiations.'

- [13] The Applicant claimed that, as of the 1 July 2008, he had been in the service of the Johannesburg Metropolitan Police Department for six years. In support of the assertion, the applicant submitted that payslip which shows the date of engagement as the 1 July 2002.⁴
- [14] The First Respondent disputed that as of the 1 July 2008, the Applicant had been with the Second Respondent for (6) six years. The Applicant was initially engaged as a trainee Metro Police Officer, which training period endured for six months from 1 July 2002 to 31 December 2002. Therefore, the Applicant was only a trainee for the said period and not employed on the permanent staff establishment of the Second Respondent. The prospects of the Applicant's future employment with the Second respondent depended on the Applicant's successful completion of training, failing which the Second Respondent would not have appointed the Applicant as a Metro Police Officer. During that period, the Applicant was receiving a stipend from the Second Respondent. He continued on that basis up until he was employed as a permanent employee on 01 January 2003.
- [15] The Applicant submitted that after the implementation of the MOA, in August 2008, his salary was not adjusted and he was also not placed on the median level with the rest of his colleagues (whom had been employed on the same day/time as he was). The First Respondent now sought to amend his date of employment unilaterally to indicate that he was employed only on the 01 January 2003 instead of July 2002.³
- [16] The First and Second Respondents admitted that the Applicant's salary was not adjusted in terms of the Agreement and none of the two Respondents had a duty to do so. The First Respondent also denied that the date of employment was amended unilaterally. The Applicant was initially appointed as a trainee and not as a permanent employee.
- [17] In reply, the Applicant stated that it may be correct that he was engaged as a trainee on the 01 July 2002 and was only appointed as a permanent employee on 01 January

⁴See page 26 of the paginated bundle

2003, however, the other employees employed at the same time as the Applicant received the bonus/increase despite the fact that they were on the same training.

- [18] The Applicant also attached the results of a number of employees that he apparently trained with and who were receiving the bonus/ salary in terms of the agreement. These were T.E Ledwaba, S Lwana, M Malefane, H R Mogotsi and S.T Mphela.⁴
- [19] The Applicant also attached the a copy of the payslip of S Lwana which shows that this employee has received the bonus/increase in terms of the Agreement and is now receiving R11 902. 00, as basic salary. The figure was used in the founding papers to calculate what is owed to him.

Applicable Law

- [20] Section 4 of the BCEA Inclusion of provisions in contracts of employment;

‘A basic condition of employment constitutes a term of any contract of employment except to the extent that-

- (a) any other law provides a term that is more favourable to the employee;
- (b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act;
- (c) a term of the contract of employment is more favourable to the employee than the basic condition of employment.’

- [21] Section 77(3) reads as follows

‘The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.’

- [22] Section 77(1) state:

‘Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.’

⁶See page 61 of the paginated bundle

[23] Although it is not readily apparent from the papers, the application was couched primarily in terms of prayers based on section 77(3) of the BCEA and in that way, they have been repositioned as contractual rather than statutory claim pursuant to section 4 read with section 77(3) of the BCEA.

[24] In *Fourie v Stanford Driving School and Others*,⁵ Van Niekerk J stated:

‘That issue aside for the moment, the question that arises in each of the applications before me is whether the BCEA entitles an aggrieved party to enforce the provisions of the Act as contractual terms, and to rely on the concurrent jurisdiction that this court enjoys under s 77 of the BCEA to enforce them. The starting point is s 4 of the Act which provides with some exceptions, that a basic condition of employment constitutes a term of any contract of employment. A ‘basic condition of employment’ is defined in s 1 to mean a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment. In *Baartman and Another t/a Khayalebhuhesi v De Lange and Another* (2009) 30 ILJ 2701 (LC) Todd, AJ expressed his reservations about whether it could be said that an obligation under the BCEA to furnish certificates, information regarding remuneration and the like could be said to constitute basic conditions of employment (at paragraph 38 of the judgment). For the purposes of these proceedings, I am prepared to accept that they may be enforced as contractual terms. I deal with these issues below in the context of the prayers for costs on a punitive scale that accompanies virtually every application.’

Submissions

[25] The Applicant argued that the application was seeking either compliance with the Memorandum of Agreement and/or payment of unpaid moneys/salaries in terms of the same or equal treatment of the Applicant in respect of his salary with that of his colleagues who were employed at the same time he was.

[26] The Memorandum of Agreement was implemented on the 01 July 2008 and it was submitted on behalf of the Applicant that at the time he had been in the service/employment of the Respondent for 6 years and it should be common cause.

[27] It is disputed that as to whether or not the Applicant was a permanent employee at such stage 1 July 2002-01 January 2003.

⁵(2011) 32 ILJ 914 (LC) at para 7

- [28] The Applicant is contending that he was a permanent employee at such stage (1 July 2002) whereas the Respondents are contending that he was a trainee at such stage and had to undergo training for a period of six (6) months.
- [29] The Applicant contended that it really does not matter whether or not the Applicant was only a trainee as at 1 July 2002, the point is that his colleagues who were employed at the exact same time as him as being on 1 July 2002 were also put on the median level and their and their salaries, accordingly, put on the relevant salary scale.
- [30] It was argued strenuously that while two (2) clauses contains the word “permanent member”- this relates to the date of the MOA only. That the Applicant must be a permanent member as at the date of the MOA coming into operation. When the MOA came into operation the Applicant was a permanent employee.
- [31] To argue that, as the Respondents do, that the Applicant must be prejudiced in that he only became a permanent member in January 2003 and, therefore, the MOA is not applicable to him is nonsensical.
- [32] Clause 1.3.1 sets out that any ‘employee who have been in the service of the employer at JMPD for a period of six years to twelve years shall be placed on the median range of the salary scale’.
- [33] It was further argued that the Courts have repeatedly set out that where there is a dispute over the meaning of a word/phrase/clause in a document that the simple /plain /literal/ clear or ordinary meaning of the word/ phrase/ clause be used.
- [34] According to the Applicant, the clauses set out above are easily interpretable to mean that the employee is meant to be six (6) years in employ of the Second Respondent and that the MOA is only applicable to permanent employee, that is employees that are permanent employees as at the time it comes into effect. To repeat, there is no mention that the employee must have six (6) years of service as a permanent employee but that he be an employee for six(6) years.
- [35] In support of the assertion above, the Applicant referred to the case of *National Credit Regulator v Opperman and Others*⁶ Where the Constitutional Court set out that the Court must look to the simple and/or plausible meaning of the words to give effect to

the clause and avoid interpretations which make the legislation unworkable or unconstitutional when interpreting a clause of legislation. The Applicant argued that the same principles are applicable in this case.

- [36] There was no mention that the term or word “service” as set out in clause 1.3.1 is restricted to only that period that the employee was a permanent employee/member.
- [37] The Applicant supplied documentation proving his case to the Court. The Respondents have supplied no documentation in support of their case. It has no proof of its case and merely relies on the MOA.
- [38] The Respondents fail to explain the change in the date of employment in the pay slips and it failed to explain why the Applicant’s colleagues who were similarly employed to have been placed on the median salary level.
- [39] The Respondents submitted that the Applicant alleged in his founding affidavit that he was permanently employed from the 01 July 2002 and in support of the allegation, he attached a salary slip.
- [40] However, in his replying affidavit the Applicant conceded that he was only employed on a permanent basis on the 01 January 2003. The two statements given under oath were contradictory in a material sense. There was no attempt by the Applicant to explain the discrepancy.
- [41] The Respondents argued that the Applicant asserted that the requirement of permanency was irrelevant because others who were also not permanent during 2002 benefited from the Memorandum of Agreement. The Applicant failed to adduce sufficient evidence to support the baseless assertion.
- [42] However, paragraph 7 of the founding affidavit the Applicant emphasised permanency. Upon realizing that the argument was unlikely to succeed, the Applicant changed the argument in his replying affidavit.
- [43] The applicant does not seem to know what his case is. Initially, it was that there was no compliance with the provisions of Memorandum of Agreement signed on the 28 June 2008.

- [44] It appears that his case is now premised on unfair discrimination based on the fact that some of his colleagues who were employed at the same time were treated better than him because they received the benefit of the MOA.
- [45] Even if the Applicant sought to rely on unfair discrimination, he still had to make out a case in that regard but he has failed to do so. The Applicant tried to make out a new case of his colleagues in the replying affidavit
- [46] The Respondents implored the Honourable Court to strike out all the irrelevant provisions in the replying affidavit or alternatively to afford the Respondents the opportunity to respond properly to the allegations made in the replying affidavit by granting them the opportunity to do so.

Analysis

- [47] In *Poseidon Ships Agencies (Pty) v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another*,⁷the Court upheld the principle that the Applicant in motion proceedings has to make out his case in the founding affidavit and was not permitted to supplement it in the replying affidavit unless done due to special circumstances.
- [48] In *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*,⁸after confirming the general rule applicable in motion proceedings, held that the rule was not absolute and that the Court has a discretion to permit new material in the replying affidavit.
- [49] The Applicant further argued that the Second Respondent treated his colleagues differently in that to the extent that they were all employed around the same time and under the same circumstances, they were placed on the median level and paid accordingly.
- [50] The founding affidavit did not give comprehensive details of the so-called differential treatment. However, the Applicant's replying affidavit introduced new evidence and also described the payments as salaries/ bonus.

⁷1980 (1) SA 313 D at 315H-316A.

⁸ 2003 (5) SA 1 (C) at 6D-F

- [51] The Respondents argued that the Honourable Court should strike out new submissions in the replying affidavit or alternatively grant them the opportunity to respond properly to the new submissions.
- [52] Although the rule against raising new material for the first time in the replying affidavit was not rigid and inflexible, I was not presented with special circumstances such as whether the Applicant was aware of these issues at the time of deposing to the founding affidavit.
- [53] In the present instance, I am not persuaded that there is a basis upon which I should exercise my discretion in favour of allowing the new evidence introduced by the Applicant in the replying affidavit. I, therefore, decided the matter without the new evidence in the replying affidavit.
- [54] The claim of the Applicant is based on the Memorandum of Agreement entered into by the South African Municipal Workers Union and The City of Johannesburg Metropolitan Municipality ("The First Respondent")
- [55] Although the parties did not present any evidence or make submissions on the background and what led to the conclusion of the agreement, the preamble is instructive.
- [56] The preamble reads:

;-Whereas the City of Johannesburg Metropolitan Municipality is an employer, and whereas the members of SAMWU raised a number of concerns on behalf of their members employed at the Johannesburg Metro Police Department (JMPD), in order to resolve the current impasse, parties record their agreement herein.

- [57] Para 1 state;

In relation to the payment of minimum salaries to Metro Police Officers (MPOs), the parties agree that:

'57.1 Newly appointed Trainees will attend a course at the Academy for the period of 6 months in order to conclude theoretical aspects and will receive a stipend of R2000 per month.

- 57.2 Upon completion of the 6 months theoretical training, a Trainee MPO will be placed as a trainee for further period of 6 months, during which period he/she will be paid an amount of R4 200 per month.
- 57.3 upon successful completion of both theoretical and practical training, the MPO will be appointed on the permanent structure of JMPD and be paid the applicable minimum salary.
- 57.4 in principle, the employer commits that none of its employees will be paid below the minimum salary of the grade applicable to the position
- 57.5 Employees who have been in the service of the employer at JMPD for a period of six years to twelve years shall be placed on the median range of the salary scale.
- 57.6 Employees who have been in the service of the employer at JMPD for more than twelve years shall be paid at the maximum salary of the salary scale.
- 57.7 The parties agree that the provisions of clauses 1.3.1 and 1.3.2 of this agreement shall apply once off only to permanent members of staff employed by JMPD, and shall not serve as a precedent nor can it be used against any of the parties in any future disputes, engagements and or negotiations.
- 57.8 The parties agree that this Agreement shall supersede any other agreements relating to the issues contained herein.
- 57.9 Members of SAMWU shall return to work with immediate effect and failure to adhere to this provision will render this agreement null and void.
- 57.10 The parties recognize that Council operates within a legislated environment and that SAMWU operates within its constitution.
- 57.11 Therefore the parties recognise that they both need to obtain mandates to conclude this agreement between them, as such this agreement will only be signed once the parties have solicited mandates from their respective constituencies and that its application will be with effect from 01 July 2008.
- 57.12 No party may embark on an industrial action or lockout resulting from a dispute relating to the application and interpretation of this agreement.

57.13 Any party may make this agreement an order of court.’⁹

- [58] I specifically asked the attorney for the Applicant Mr Goldberg whether his client was a member of SAMWU and after taking instructions, he confirmed that indeed the client was a member of SAMWU.
- [59] The Memorandum of Agreement was concluded after members of SAMWU embarked on industrial action and this is apparent from paragraph 4 which reads ‘members of SAMWU shall return to work with immediate effect and failure to adhere to this provision will render this agreement null and void.’
- [60] According to paragraph 2, the provisions of clauses 1.3.1 and 1.3.2 shall apply once off to permanent members of staff employed by JMPD, and shall not serve as a precedent nor can it be used against any of the parties in any future disputes, engagements and or negotiations.
- [61] The MOA is not a classical case of good drafting. Although the first part of paragraph 2 refers to permanent member of the JMPD, the second part states the agreement could not be used against any of the parties in “any future disputes”.
- [62] It is common cause that there were only two parties to the agreement, The City of Johannesburg Metropolitan Municipality and the South African Municipal Workers Union. If none of the parties were allowed to use the agreement as a precedent nor in any future disputes, was the Applicant, a member of SAMWU precluded from doing the same?
- [63] In terms of paragraph 8 of the Agreement ‘any party may make this agreement an order of court’.
- [64] There was no indication in the papers the Applicant enlisted the assistance of SAMWU when it became clear that he will not be included the when MOA was implemented in 2008.
- [65] There was clearly one avenue available to the Applicant as a member of SAMWU as envisaged by paragraph 8 of the Agreement. By invoking the latter paragraph, through

⁹ See pp 22-24 of the paginated bundle.

his representatives (SAMWU) Applicant would have acted within the parameters of the MOA.

- [66] The merit in making an agreement an order of the Court was to cut out the necessity for instituting action and to enable the Applicant to proceed direct to execution. Moreover, it is questionable whether the Applicant had the right to act on the Agreement without the involvement of SAMWU. However, if I am wrong I go on to deal with the merits of the application.
- [67] The Applicant argued that he was entitled to be placed on the median level retrospectively to the 1 July 2008 and have his salary adjusted accordingly, because at the time of the conclusion of the agreement he had been in the service of the Second Respondent for six years.
- [68] Furthermore any reference to permanent staff relates to the date of the MOA only. That is; one be a permanent member as at the date of the MOA coming into operation.
- [69] The Applicant relied on paragraph 1.3.1 of the MOA but whether in error or by design ignored paragraph 2 which states that para 1.3.1 will apply only to permanent members of staff employed by the JMPD. Paragraph 1.3.1 cannot be read in isolation and must be read and interpreted with other clauses of the Agreement in particular paragraph 2.
- [70] The submission that permanent employee only relates to the date of the signing of the MOA is inaccurate. For an employee to fall within the ambit of the Agreement, one had to be permanent and be six years with the company.
- [71] The Applicant was alive to this fact as a result he specifically made the following submission in the founding affidavit;
- “I was employed by the Respondents and in particular as a Metropolitan Police Officer with effect from 01 July 2002. As proof of this I attach a salary slip which sets out this as my date of employment marked as ANNEXURE “A”. I was appointed as a permanent employee on such date (my emphasis)
- [72] The MOA makes a deliberate distinction between a Trainee Metro Police Officer and Metro Police Officer. Upon completion of the both the theoretical and practical training

the MPO “will be appointed on the permanent structure of JMPD and be paid the applicable minimum salary”.

- [73] Although the MOA was only concluded in July 2008, there was no evidence led that the situation was different in July 2002. The applicant alleged that upon his employment, he was earning a gross salary of R1 987.50 (One Thousand Nine Hundred and Eighty Seven Rand and Fifty Cents) per month.
- [74] It is clear from the language of the MOA the trainees were not paid a salary but a stipend. The Applicant’s legal representative conceded that indeed the R1987.50 was not the minimum salary of Metro Police Officer in July 2002. Therefore, it is safe to conclude that the amount was a stipend which is consistent with the MOA albeit the amounts have since changed over the years.
- [75] The Applicant, however, effectively abandoned the initial submission and argued that permanence was inconsequential. It was sufficient that the he had been in the service of the Second Respondent for six years. I have already pointed out the limitations of this argument.
- [76] It is therefore my finding that the Applicant failed to make out a case that he was indeed entitled to payment as envisaged by section 77(3) of the Basic Conditions of Employment Act 75 of 1997 as amended.
- [77] It is an established principle that costs should follow the result but I exercise my discretion against ordering the Applicant to pay costs because he had a *bona fide* belief that there was a legal basis for approaching the Court and seeking a remedy.
- [78] In the circumstances, I make the following order
1. The application is dismissed.
 2. There is no order as to costs.

Phala, A J

Appearances

Applicant:	Mr A L Goldberg (Attorney)
First and Second Respondents:	Advocate Mashabane
Instructed by:	Mncedisi Ndlovu & Sedumedi Attorneys