



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number C188/13

In the matter between:

L.N. DLULEMNYANGO-SOPOTELA

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

JOSEPH WILSON THEE N.O.

Second Respondent

DEPARTMENT OF EDUCATION

WESTERN CAPE

Third Respondent

Date heard: 17 February 2015

Delivered: 5 August 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number GPBC 242-12. In the award, the second respondent (the arbitrator) found that the third respondent (the Department) had not committed an unfair labour practice in respect of an alleged demotion.
- [2] The applicant was previously employed in the position of Director: Operational Support Unit. The Department was involved in a restructuring process it termed "modernisation" between 2009 and 2011, with a specific focus on its head office organisation. The scrapping of certain directorates and their replacement by new directorates formed part of the modernisation plan. One of the directorates scrapped under the plan was Infrastructure, Transport, Equipment and LTSM, the post occupied by applicant.
- [3] Two new directorates were established. First that of Director: Infrastructure Planning and Management (the IPM post). In terms of the design this was not an educational post although the incumbent would provide services to the Department. The job requirements specified were an appropriate B degree or equivalent qualification in architecture, engineering or quantity surveying. The incumbent would be required to facilitate the effective planning and delivery of infrastructural capital projects.
- [4] The second post was Director: Institutional Resource Support (including Library Services). The purpose of this function was to plan and manage the delivery of learning and teaching support material, library services, learner transport schemes and equipment to schools in the Western Cape.
- [5] The applicant's case at arbitration was that the Department failed to comply with its rules, procedures and guidelines, namely the Modernisation Personnel Plan and the Human Resource Principles document when it declared her in excess of its establishment. The department, she alleged, also took incorrect information into account when it declared her in excess of the establishment. The applicant now functions as a Chief Education Specialist, a function she performed for 5 years before she joined the Department, she now reports to a Director, whereas she previously reported to a Chief Director. She no longer manages a budget, or has

an office or a secretary. Her performance assessment is conducted at post level 12 instead of level 13 which she previously enjoyed.

[6] The applicant submits that the arbitrator reached an unreasonable result having failed to take into account the following evidence:

- 6.1 That the applicant was considered in a 'matching and placing' process. This evidence was not disputed but was ignored by the arbitrator;
- 6.2 That the matching and placing committee made mistakes when it considered the applicant for the new posts. The arbitrator misconstrued the importance of this evidence and believed the applicant was putting forward a case for promotion;
- 6.3 That had the matching and placing committee taken into account the correct considerations, the applicant would have been matched and placed. This evidence was misconstrued by the arbitrator.

[7] In its answering affidavit, the Department avers inter alia the following:

- "20. The Applicant's old post was abolished.
- 21. It is apparent that the meeting of the matching and placing committee held on 29 October 2010 new posts (into which current employees could not be lawfully placed via absorption) came under the consideration of the committee who seemed to labour and the (sic) misapprehension that although these were clearly new posts it might be possible to place suitable internal candidates into these positions without the posts being opened up to competition from the public or other public servants who were under threat of being declared in excess.
- 22. As it happened no placements via absorption and the matching and placing process were made into the two posts that are under consideration in these proceedings. This resulted in the legally correct outcome namely that in each case the post needed to be advertised."

[8] The minutes in question, part of the record before the arbitrator, reflect that the decision to advertise some posts was based on a finding that certain senior

managers, including the applicant, were not considered suitable for placing in those positions. The arbitrator did not take into account whether this amounted to unfair conduct. Secondly the arbitrator did not consider was that other senior managers were placed in new posts, by decision made in the 29 October 2010 meeting.

- [9] The record of the arbitration proceedings reflects the following exchange during cross examination of the applicant:

“MR KAHANOVITZ: So what I think you are failing to understand is that there are three cardinal principles that were applicable in this process. What it essentially says is if the new post is almost the same as the old postit is classified as an unaffected post and it is only available then to the incumbent of the existing post. That person then gets absorbed into the post on the new organogram and by no stretch of the imagination was that procedure that applied in your case or could it have applied in your case. Your comment if you wish to.

LINDELWA SOPOTELA: My comment would be then that is what I was asking or maybe I should pose it this way. Then it means there were inconsistencies in the process, because the post of the new Chief Director Physical Resource was a new post and that post was not advertised but Mr Lewis was placed in that post.

MR KAHANOVITZ: Well I am not here to deal with what in respect of Mr Lewis' post...

LINDELWA SOPOTELA: Okay.

MR KAHANOVITZ: And I was not given any warning before today that we needed to come here to prepare to answer about Mr Lewis case....”

- [10] The fact that the post of Chief Directorate Physical Resources (into which Mr Lewis was placed at the meeting of 29 October 2010) was a new directorate, was confirmed by the Department's witness Ms Louise Esterhuizen in her evidence in chief. This evidence does not seem to have been considered by the arbitrator whose analysis of the case before him is contained in paragraphs 72-75 of the Award as follows:

“72. In my assessment of this case I cannot find any evidence that makes the respondent guilty of an ULP. I say this on the basis that the applicant was not the only employee affected by the restructuring. On the evidence before me I find that the respondent has followed a bona fide process that was supported by the relevant stakeholders. The applicant admitted that she was part and parcel of the restructuring process. I cannot ignore the respondent's concern of what the implications would be in the event that every single employee in the public sector challenges a displacement as a result of restructuring.

73. It appears to me that the applicant only became aggrieved once she realised that her position was at risk. More importantly in assessing the applicant's challenge during her evidence in chief it appears to me if she actually started to present a case for promotion. This became evident when the applicant argued that she was erroneously overlooked by the selection panel.

74. This clearly shows that she knew her post would be abolished and be subjected to a competitive process. She applied for the post and willingly participated in the recruitment and selection process. The applicant cannot have her cake and eat it. Even if this was the case I must point out that I do not have jurisdiction to consider whether the selection panel has erred or to make a determination in this regard.

75. Turning to the procedural fairness. The applicant contended that the applicant failed to follow fair processes. The applicant conceded under cross-examination that the respondent had followed a procedure in accordance with the modernisation principles. I therefore find that the applicant doesn't have a credible argument on her own admission. In my opinion this argument is simply a fabrication of what the real issue at hand is namely her non-appointment. This is not an issue for the arbitrator to determine as I do not have authority to do so.”

[11] The arbitrator went on to find that the applicant had failed to show she was unfairly treated during the restructuring exercise. In my judgment the award stands to be reviewed given that the process of implementing the restructuring vis a vis the applicant demonstrably involved unfair conduct. In the unreported case of **Makosana v General Public Services Bargaining Council**¹ which concerned the application of the 'modernization process' of the Department of the Premier of the Western Cape the court held as follows:

"[26] Whether a particular transfer results in a demotion will always be a factually specific question and will not necessarily be unfair. In this instance, it is evident from the difficulty encountered in deploying the applicant permanently that there seemed little prospect the transfer to a position in addition to the staff establishment was going to be of a temporary nature. Where the duration of such appointment is demonstratively temporary its nominal character as a demotion will no doubt be recognised. Where as in this case placement seems to be assuming an indefinite character, it will not be unfair if the process by which it was implemented was fair. In this instance, the fairness essentially concerns one issue: whether the applicant was afforded an opportunity to consult over the measure before it was implemented"

[12] In this instance, the unfairness concerns the fact that Applicant, unlike at least two other senior managers who were placed into new posts when such posts should have been advertised, was denied such placement on the basis that she did not merit it, as the minutes of the October 29, 2010 meeting confirm. In such circumstances, her chances of success in subsequent applications she was able to make in respect of the two posts (when advertised), along with other candidates, were prejudiced from the word go. The record reveals that members of the Matching and Placing Committee, including its chairperson, who decided that applicant was not suitable to be placed in the positions at the meeting of October 29 2010, also sat as members of the interview panel for the posts which were subsequently advertised.

¹ C597/2012 dated 19 August 2012

- [13] Is the award reviewable? As the Labour Appeal Court held², per Zondo JP as he then was, there can be no doubt under **Sidumo** that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account.
- [14] In my assessment of the award, for the reasons set out above, which the arbitrator did not rely on to support his decision, the arbitrator's decision is one that a reasonable decision-maker could not reach. This matter has been heard on two occasions under the auspices of the first respondent. After the first arbitration an award was reviewed and sent back for re-hearing. No purpose will be served in remitting it for a third time. The decision must be substituted.
- [15] In my judgment the only practical remedy in this matter is the awarding of compensation. The applicant has been the subject of an unfair labour practice. Her employer was aware that mistakes had been made in relation to the matching and placing process but only clearly conceded as much in the review papers. I find it just and equitable that the applicant be awarded a solatium in terms of section 194(4) of the LRA³. Such a solatium is capped in terms of the sub-section with reference to an amount equivalent to 12 months remuneration. In making my order of compensation I am mindful that the applicant has travelled a long road in order to obtain redress for the unfair conduct she has suffered at the hands of her employer. Her remuneration package at the time the second award was handed down in November 2012 was recorded to be an amount of R600,000 per annum. The court was not provided with any further information as to her current

² Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 964 (LAC) at paragraph 102.

³ Minister of Justice & Constitutional Development & another v Tshishonga (2009) 30 ILJ 1799 (LAC) at paragraph 15

remuneration or legal costs incurred at arbitration. However, taking into account the record of the arbitration and the papers before me in this application, I am mindful that the applicant has suffered an infringement to her dignity given the circumstances of the unfair conduct I have dealt with above. I therefore make the following order which includes the payment of compensation which the court believes to be just and equitable in all the circumstances of this case:

Order:

1. The arbitration award under case number GPBC 1242-12 dated 25 November 2012 is reviewed and set aside and substituted with the following order:
 - 1.1 The applicant has been subject to an unfair labour practice in relation to demotion;
 - 1.2 The third respondent is ordered to pay the applicant an amount of R600,000 (Six hundred thousand Rand) as compensation;
 - 1.3 Third respondent is to pay the costs of this application

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicant: Adv. Mangu-Lockwood instructed by Nongogo Nuku Attorneys

For the First Respondent: Adv Colin Kahanovitz S.C. instructed by the State Attorney

LABOUR COURT