



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: **PS11/2013**

In the matter between:

Applicant

HC DODDS

and

MEC DEPT HEALTH,

Respondents

EASTERN CAPE PROVINCE

And OTHERS

Heard: 10 & 11 March 2015

Delivered: 24 March 2015

Summary: Employment contract, authority to enter into in the public service.

Collective agreement entered into in terms of section 197 of the Labour Relations Act, no. 66 of 1995. Validity and interpretation of. Principles re-stated.

JUDGMENT

EUIJEN, AJ

Introduction:

- [1] This is an application, founded in contract, in which the applicant, Mrs Dodds, claims payment of her remuneration due to her for services rendered as a 'sessional' or part-time pharmacist at the former SAWAS Memorial Hospital in Jansenville, Eastern Cape, together with associated leave pay and a travel allowance. Save for the leave pay, the period for which Mrs Dodds claims her remuneration and travel allowance is 1 April 2011 to 31 March 2012.
- [2] The claim is founded on a written fixed-term employment contract for the period in question, signed by Mrs Dodds and Dr Nyushman, who was then the clinic manager at the hospital, on 9 April 2011.
- [3] The first and second respondents ("the Department"), for its part, denies the authority of Dr Nyushman to enter into any contracts on its behalf and consequently, denies any liability to Mrs Dodds at all. After Mrs Dodds had completed her evidence in chief, Ms Laher, who appeared on behalf of the Department, moved for an amendment to the statement of defence, to include reliance, in the alternative to the denial of authority to enter into the employment contract, on a collective agreement entered into between the third respondent (SAWAS Memorial Hospital), the Department and the majority trade union NEHAWU, which regulated the transfer of employees from the employ of the hospital to the Department, with effect from 1 April 2011 ("the transfer agreement").
- [4] Mr Grobler, who appeared on behalf, of the applicant, did not oppose the amendment, which was accordingly granted. Although Mr Grobler did not seek a postponement or any consequent amendment to the applicant's pleadings, he did nevertheless made it clear that the applicant regarded the agreement as incomplete, in that no annexure 2 was provided, which is referred to in the agreement itself; it is unsigned by the trade union NEHAWU; and that the 96 hours reflected as Mrs Dodds' monthly total hours in annexure "1" to the agreement was incorrect and had been inserted for reasons which are contained in a letter dated April 2012, which was handed in as exhibit "B", the transfer agreement itself becoming exhibit "A". As I understood, Mr

Grobler contended that if I had regard to the collective agreement, annexure “1” should be rectified to reflect Mrs Dodds’ rate calculated at 48 hours per month.

- [5] The parties also reached agreement during the course of the proceedings that the total number of hours that Mrs Dodds had actually worked for the year in question at the hospital and upon which her salary claim is based, amounted to 533 25 hours. In addition, the parties were agreed that the amount received by Mrs Dodds during that period from the Department amounted to R 34 007-24.

Evidence

- [6] Mrs Dodds gave evidence in support of her case and told a simple and straight-forward story. She is a qualified pharmacist, having graduated in 1980. She joined the third respondent hospital (“the hospital”) during July 2005 as a “session” or part-time pharmacist. She was never given a written contract of employment; her terms and conditions of employment were verbally agreed with the then chief medical officer, Dr Nyushman, on behalf of the hospital’s board. At all times thereafter, until 1 April 2011, she was paid an hourly rate for her services, which were limited to 48 hours per month; together with paid leave at the rate of 1 hour of paid leave for every 17 hours worked; and a travel allowance.
- [7] It is common cause that at the beginning of April 2011, the hospital was taken over by the Department. Mrs Dodds testified that she was aware of the impending takeover, but was assured that this would be on exactly the same terms and conditions which had prevailed before.
- [8] The terms and conditions which prevailed at the time of the Department’s takeover of the hospital were that Mrs Dodds was paid a rate of R274. 76 per hour; she received a travel allowance of R4.50 per kilometre; and leave pay remained at the rate of one hour’s paid leave for every 17 hours worked. In addition she was entitled to claim 1 hour’s remuneration per trip from her home to the hospital and back again. These are the terms and conditions that are indeed recorded in the disputed employment contract signed between Dr

Nyushman and Mrs Dodds on 9 April 2011, save that remuneration for travelling time is not expressly mentioned in the employment contract.

- [9] During cross examination, it was put to Mrs Dodds that Dr Nyushman clearly had no authority to conclude any binding agreement on behalf of the Department and that the agreement remained unsigned by the hospital cluster manager in the space provided for such signature. She replied that she had nobody else to deal with at the hospital. As far as the collective agreement itself is concerned, save as stated earlier, that Mrs Dodds admitted that she was aware of the take-over and was assured that this would be on the same terms and conditions of employment, she was not otherwise involved in its negotiation or any consultative process and had no personal knowledge of its contents.
- [10] There is an instance where Mrs Dodds did raise her grievance regarding the continued non-payment of her previously paid travel allowance, during the course of her employment, with the Department directly. The event is only significant because in the course of that interaction, the Department acknowledged the obligation to compensate Mrs Dodds for her travel expenses, but attempted to negotiate an alternative means of doing so. In the event the alternative proposal was not implemented.
- [11] It was put to Mrs Dodds that she was in fact offered and accepted a rate half of that which she claims, based on the number of hours contained on annexure "1" to the transfer agreement, exhibit "A". This she denied and stated that had that been the case, she would not have renewed her contract. She explained that her hours were doubled on annexure "1" to the transfer agreement, so that the Department would be unaware that she was paid at a higher rate than other sessional pharmacists. If one however, divides her annual budgeted salary on annexure "1" by the 48 hours she actually worked, then the rate was as per her claim. This version is borne out by the memorandum signed by Dr Nyushman and addressed to the Department, dated 3 June 2011, exhibit "B".

- [12] The only witness to testify for the department was Dr Nyushman. He confirmed the existence of the employment contract and his signature upon it, but stated that it was clearly incomplete as it is not signed by the district manager hence it was not properly concluded. He also confirmed the existence of the transfer agreement and that he signed as a witness to that agreement. He further confirmed that NEHAWU had agreed to and abided by the terms of the agreement, although not signed by that trade union. He also said that NEHAWU is the majority union at the hospital. Apart from that, he contradicted himself on virtually every material respect between giving evidence in chief and cross examination.
- [13] In his evidence in chief, Dr Nyushman was adamant that he had no authority to enter into any contracts with anyone, even during his time as chief medical officer, with the hospital board. Yet, as he confirmed in cross examination, he has previously deposed to an affidavit to the exact opposite effect. He also stated in chief that Mrs Dodds' actual working hours were closer to 96 than 48, but was forced to concede that, in fact, they were always, give or take a few hours, not above 48. He vacillated about the purpose of the collective agreement. In chief he said that the purpose was to comply with section 197 of the Labour Relations Act, no. 66 of 1995, (the LRA) and preserve the status quo as far as employees' salaries are concerned. In cross-examination, after conceding that the status quo was that Mrs Dodds received a travel allowance, he stated that this did not apply to her travel allowance, since the Department had not agreed to it and it did not appear on annexure "1". He also stated that he signed exhibit "B" 'under pressure' from Mrs Dodds, although he did not state that this rendered it incorrect in any way, or that this 'pressure' was of the unlawful variety.
- [14] Overall, Dr Nyushman presents as a weak individual who is unsuited to a managerial position. He is prepared to agree with and appease whoever the protagonist is with whom he is dealing at the moment. The numerous contradictions in his evidence already referred to makes it unreliable, save where supported by documentary or other acceptable evidence.

The Employment Contract

- [15] The applicant bears the onus of proving the employment contract, including that it was entered into with someone who has actual authority to do so. There is no allegation of ostensible authority relied on in this case. On the face of it, that contract is incomplete and not authorised by the person who should do so, namely the hospital cluster manager. Dr Nyushman's evidence, insofar as it is of assistance on this point, does not establish that he had any authority to bind the Department; rather the reverse, notwithstanding the content of his earlier affidavit.
- [16] In my judgment, Dr Nyushman's authority, or lack of it, is not the real issue. It is clear on the evidence, including the transfer agreement that the Department intended to take over all the staff of the hospital on their existing terms and conditions, at least for one year. In Mrs Dodds' case, those terms are recorded in her disputed employment contract. In other words, even if one ignores the written employment contract, then there would be a tacit employment contract between the parties on exactly the same terms.
- [17] The absence of the cluster manager's signature on the contract therefor, in my judgment, is a mere formality, which does not detract from the validity of the recorded agreement between the parties. The written employment contract represents exactly what the Department committed itself to when it took over the staff of the hospital. I accordingly conclude that the written employment contract has been proved as governing the employment relationship in this matter.
- [18] This conclusion renders it necessary to consider the respondent's alternative plea based on the collective agreement.

Collective Agreement

- [19] The first issue to consider about the transfer agreement is whether the fact that it is unsigned by the majority union, NEHAWU, renders it invalid. This Court has previously held that it is not a requirement for purposes of the LRA that a collective agreement must be signed by the parties. (*Diamond and*

Others v Daimler Chrysler SA (Pty) Ltd and Another [2007] 3 BLLR 197 (LC)). It is sufficient for the enforcement of the agreement that the Court is satisfied that the parties had reached an “agreement in principle”. (*SA Post Office Ltd v CWU and Others* [2010] 1 BLLR 84 (LC)).

- [20] Mr Grobler submitted that these decisions were recently over-ruled by the Labour Appeal Court, although he could not refer me to the citation. It appears that the case which Mr Grobler had in mind is *SA Local Government Association v Independent Municipal & Allied Trade Union and Others* (2014) 35 ILJ 2811 (LAC). That case did not consider, let alone over-rule, the cases in this Court to which I have already referred to. It decided, on the facts of that case that the practice of the parties to the collective agreement concluded at the Local Government Bargaining Council was not to consider collective agreements concluded in that forum as binding unless signed, although, in line with the LRA, this is not a requirement of the bargaining council’s constitution. (paras 38 – 39 & 41).
- [21] In the present matter, there is no such evidence. On the contrary the evidence is that despite not signing the agreement, NEHAWU has not challenged, but rather abided by and respected its terms, as have all the other parties, save it would appear, in the present case of Mrs Dodds. I accordingly conclude that the transfer agreement, on the evidence before me, is a valid and binding collective agreement.
- [22] The next issue is whether the agreement, properly construed or rectified, maintains the status quo, at least for a year, or whether it contains new terms and conditions, reflected in annexure “1”, which regulate the period of Mrs Dodds’ claim and in particular her rate of pay for the agreed hours worked.
- [23] It is well established that in interpreting any written document, the primary source is the language contained in the document itself, read in its entirety. If on that reading, the meaning is clear and unambiguous, no extrinsic evidence is permissible to contradict such meaning. In cases of uncertainty or ambiguity, one attempts to ascertain the intention of the author(s) of the instrument, taking account of the purpose of the agreement as a whole. In

undertaking this task, one may have regard for the nature of the problem that was sought to be addressed. In so doing, one may also examine the surrounding circumstances leading up to and surrounding the conclusion of the agreement. (*Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304 D-H; *Administrator Cape v Ntshwagela and Others* 1990 (1) SA 705 (A) at 715 F-I; *ABSA Bank Ltd t/a Volkskas Bank v Page and Another* 2002 (1) SA 617 (SCA) at para 7; *Engelbrecht and Another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) at 32-33).

- [24] Respondent's counsel contended that the agreement should be interpreted at face value and that because Mrs Dodds' monthly hours were reflected in annexure "1" as being 96, that her rate of pay was effectively halved from that based on a 48 hour month, her annual salary being common cause between the parties. This, she submitted, was the clear import of clause 4.2, which reads as follows:

'On the effective date, the employees who are listed in annexure "1" hereto which reflects also each employee's salary and salary scale and rank, notch, allowances, bonuses, hourly tariffs and rates will be transferred to the Province on the terms and conditions as agreed between the Province and the parties to this agreement'.

- [25] In my judgement, read as a whole, the clear import of the transfer agreement was that the Department would comply fully with its obligations in terms of section 197 of the LRA. This is stated in terms in clause 2 of the transfer agreement, as well as in clause 8.2, which reads as follows:

"A transitional period of 12 months from 1 April 2011 to 31 March 2012 the salary levels and notches, housing allowance, medical aid and uniform allowance which were applicable to the employees of the SAWAS Memorial hospital shall continue to be in force after the effective date."

- [26] Read in context, annexure "1" which clause 4.2 incorporates, is intended to do no more than provide the actual facts and figures applicable to each transferred employee. It is a mechanical exercise. It is not intended to

constitute any form of adjustment to existing terms and conditions; indeed the clause which I have cited above makes this plain.

- [27] In the circumstances, the transfer agreement stands to be rectified as contended by Mr Grobler, in that Mrs Dodds' monthly hours as reflected on annexure "1" to the transfer agreement should be corrected from 96 to 48. That this follows from what I have said above, which appears from paragraph 42 of the Labour Appeal Court's judgement in the *SALGA v IMATU* case cited earlier:

'A party is entitled to rectification of a written agreement which, through common mistake or mistake in transcription which the other party deliberately caused or knew about, incorrectly records the agreement which they intended to express in the written agreement...'

- [28] This is exactly what happened in this case. As Mrs Dodds testified and Dr Nyushman finally conceded, and as is borne out by the terms of exhibit "B", Mrs Dodds' rate was always intended to remain at R274.76. The doubling of her monthly hours from 48 to 96 on annexure "1" was an attempt to disguise this, without changing the annual budgeted amount.

- [29] Hence, Mrs Dodds is entitled to claim her salary, travelling allowance and leave pay, from April 2011 to March 2012, both in terms of her employment contract and the transfer agreement. The only difference between the two relates to Mrs Dodds's claim for arrear leave pay, prior to April 2011. This cannot be sustained on the pleaded case contained in the statement case, since the only cause of action relied on there is the fixed term contract, which only commences on 1 April 2011. It can conceivably be sustained in terms of clause 8.3 read with clause 10.1 of the transfer agreement, which envisages a 9 month transitional period, during which the leave records of the third respondent hospital would be updated by the hospital, presumably so that these amounts would be paid by the Department by 1 January 2012.

- [30] Since there was no formal amendment of the applicant's pleadings by Mr Grobler, I cannot consider the claim for arrear leave, as it has not been properly raised in these proceedings. In the light of my findings about the

transfer agreement set out above, however, I urge the Department nonetheless to pay this claim, if this is indeed how clauses 8.3 read with 10.1 were applied to the other transferred employees listed on annexure “1”.

Conclusion

[31] It follows from all the reasons which I have set out above, that Mrs Dodds is entitled to be paid for the 533, 25 agreed hours which she worked between April 2011 March 2012 at her previous rate of R274.76 per hour = R146 515-77, less the R34 007-24 agreed payments received which leaves an amount of R112 508-53. In addition, she is entitled to leave pay for the same period of $533,25 / 17 \times R\ 274,76 = R8618-58$; and travel expenses calculated at a rate of R4,50 per kilometre which total R64583-37. She is not entitled, in these proceedings, to be paid for her travelling time as this is not mentioned in the employment contract; nor her arrear leave since this also does not arise out of the pleaded employment contract.

[32] As stated earlier, Mrs Dodds is entitled to all of these amounts, both in terms of her employment contract and the transfer agreement. Indeed, in terms of the transfer agreement, she may well be entitled to the arrear leave pay too. Why the Department has seen fit to oppose this action instead of settling what it clearly owes Mrs Dodds and has done for over three years, is difficult to comprehend. The Department's defence has been entirely opportunistic in seizing on the unsigned employment contract (in part) and the 96 hours in annexure “1” to the transfer agreement and at odds with what is clearly stated in both agreements and exhibit “B”. Not only is this unconscionable and unprincipled, it is also not conducive to attracting professional services to provincial hospitals, particularly in the rural areas. No-one's interests are served with this approach, including those of the Department. In these circumstances, I am disposed to award costs against the Department on an attorney and client scale. However, as only party and party costs were sought on Mrs Dodds' behalf, I shall refrain from doing so.

Order

[33] I make the following order:

[34] The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the applicant the following amounts:

- a. R112 508-53 being her outstanding salary due in terms of her employment contract.
- b. Leave pay in the amount of R8 618-58.
- c. Travel allowance in the amount of R64 583-37.
- d. Interest on the aforesaid amounts at the rate of 15,5% per annum from 1 April 2012 until 31 July 2014 inclusive; and at the rate of 9% per annum from 1 August 2014 to date of payment.
- e. The applicant's costs of this application.

Euijen AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr M Grobler

Instructed by: Kirchmanns Inc

For the Respondent: Ms Laher

Instructed by: State Attorney

LABOUR COURT