



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D942/11

In the matter between:

THAMSANQA SELBI NXELE

First Applicant

SITHEMBILE HYCYNTHIA GLENROSE NXELE

Second Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL BARGAINING
COUNCIL (GPSSBC)**

Second Respondent

ARBITRATOR DR R MACCAIN

Third Respondent

Heard: 30 October 2014

Delivered: 22 May 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] This is an application to review and set aside an award in terms of which the Third Respondent (*“the Arbitrator”*) held that the demotion of the Applicants was substantively fair but procedurally unfair. The Arbitrator held further that owing to the irregularity of the Applicants’ promotion to level 6, the First Respondent was entitled to reverse the said promotions and to deduct any money overpaid

due to the said appointments. Despite having found that demotions were the procedurally unfair, the arbitrator dismissed the application without any relief to the Applicants.

Factual background

- [2] The Applicants, who are now married, joined the First Respondent's employ on 5 October 2000 probationally at salary level 3 subject to successful completion of a 6 months training programme. At the end of the six months training programme, the Applicants were permanently appointed as Correctional Officer Grade, at salary level 5, with effect from 1 November 2001.
- [3] However, it is common cause that Applicants were not eligible to be appointed to permanent positions as they did not successfully complete their training programme due to one outstanding module. The First Respondent became aware of this irregularity sometime in 2003. As a result, the Applicants were sent back to the training college and successfully completed the outstanding module. Their permanent appointments were never set aside or their salaries deducted.
- [4] On 7 November 2005, the Third Respondent internally advertised vacancies for Correctional Officer Grade 2 at salary level 6. The job requirements for that position were matriculation, 4 years' experience in the employ of the First Respondent, 3 years' experience at salary level 5 and an average performance assessment of 65 for that particular year.
- [5] Both Applicants applied for the above vacancies and were found to be eligible and promotable. In essence, the Applicants were promoted from Correctional Officer Grade 3 at salary level 5 to Correctional Officer Grade 2 at salary level 6. Even though they were notified of their appointments on 10 March 2006, their promotions were effective as of 1 February 2006.
- [6] In June 2006, the First Respondent conducted an internal audit. The context thereof is not clear, save to state that it revealed that the Applicants and 50 other Correctional Officers were incorrectly appointed to permanent positions in

2001 as they had not successfully completed the basic training as per the requirements.

- [7] It is common cause that the Applicants were not aware of the said investigation. As such, they were never afforded an opportunity to make representation during the said investigation. Notwithstanding the above, the First Respondent unilaterally concluded that the Applicants had been irregularly appointed to permanent positions on 1 November 2001.
- [8] Consequently, on 4 December 2007 the Applicants were served with identical letters notifying them of their demotion back to Correctional Officer Grade 3 at salary level 5 and that their salaries would be reduced from R75 411.00 per annum to R68 955.00 per annum with effect from 1 January 2008. In March 2008 they received another set of letters which confirmed they would be demoted, however, to a new lower notch of R70 341.00 per annum and were further notified that the overpayment in salaries would be recovered by deductions from their salaries.

Grounds of review

- [9] This application is premised mainly on the following grounds of review:
- 9.1 The Arbitrator committed a gross irregularity in failing to realise that once he makes a finding that there was procedural irregularity of the extent proven in this matter, then the legal authority compelled him to set aside the demotions;
- 9.2 The Arbitrator committed gross irregularity in holding that there was substantive fairness in the promotion where the facts prove the arbitration showed that there was no good reason for the demotions; and
- 9.3 The Arbitrator exceeded his powers and accordingly issued an arbitration which is unreasonable.

Legal principles and analysis

[10] It is trite that Section 145 of the Labour Relations Act 66 of 1995 as amended (“LRA”) provides limited grounds for review and is suffused by constitutional standard of reasonableness.¹ In *Goldfield Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*² the application of the test for review is stated as follows:

“[18] In a review conducted under s145(2)(a)(c)(ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator’s award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.”

Demotion

[11] The genesis of this dispute is the appointment of the Applicants as Correctional Officers Grade 5 in November 2006. That appointment was absolutely irregular, a fact conceded by the Applicants in these proceedings. Whether or not the deviation from the requirements when appointing the applicants had been sanctioned by powers that be remains cryptic. I say so because the appointing executives, Messrs Diedericks and Smith, were never called to take the witness stand and explain the rationale behind such appointment, especially given the number of affected officials revealed by the audit.

[12] The manner in which the Arbitrator dealt with the omission to call Messrs Diedericks and Smith is very superficial. Their evidence was critical in order to establish whether their conduct had been endorsed so as to determine the appropriateness of the First Respondent’s corrective action. It is more so in the light of the Applicants’ undisputed evidence that during that era some of the requirements for eligibility to be permanently appointed as a Correctional

¹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 28 ILJ 405 (CC) at para 108

² [2014] 1 BLLR 20 (LAC) at para 18

Officer had been relaxed. One of the examples given was the appointment of Correctional Officers who had criminal records for minor offences, a state of affairs that could not have happened, but for the indulgence that prevailed at that particular time.

- [13] The mere fact that a conduct is irregular does not necessarily mean that same is unauthorised as a room for deviation or condonation for none compliance exists in every prescript. This takes me to the main point in this regard.
- [14] The First Respondent's response when it became aware of the said irregularity in 2003 is essential. Instead of demoting the Applicants or deducting allegedly overpayments in salaries, the First Respondent allowed the Applicants to go back to the training college to complete the outstanding module. Therefore, by successfully completing the outstanding module, the Applicants' appointments were regularised without affecting their seniority.
- [15] It is my view that the above response adequately resolved the problem of irregularity of the Applicants' appointments. I agree with the Applicants' counsel that by the time the decision to promote them in 2007 was made, the underlying irregularity had fallen away. As such, the experience they had gained could not be ignored.
- [16] The Arbitrator misconstrued the issues to be determined and consequently came to a conclusion that a reasonable arbitrator could not have made. Therefore, on this ground alone the review application should succeed. However, I deem it appropriate to deal with the procedural challenge as well.

The *audi alteram partem* rule

- [17] The Applicants also had qualms with the First Respondent's failure to afford them the opportunity to be heard before the decision to demote them was made. Granted, the Arbitrator was spot on in his finding that the First Respondent did not comply with *audi alteram partem* rule ("*audi* rule"). However, he completely miscomprehended the legal import of his finding when he failed to give effect to it and dismissing the application solely on the basis of his finding on substance.

[18] In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others*,³ dealing with the issue of a transfer that offended the *audi rule*, the Labour Appeal Court stated the following:

[61] *In our law, the general rule is that, where a body or state functionary is obliged to observe the audi rule in a particular case, it is required to observe that rule before it can take the decision in issue (see Administrator of the Transvaal & others v Traub & others 1989 (4) SA 731 (A) at 750C). In Traub's case, the learned Chief Justice explained the rationale for the requirement that the audi rule should, generally speaking, be observed before an adverse decision is taken against a subject. He said at 750C:*

" . . . that is, while [the body or official or functionary who is to make such a decision] still has an open mind on the matter. In this way, one avoids the natural human inclination to adhere to a decision once taken."

[19] Accordingly, the honourable Judge President, as was then, found that a decision to transfer (demote in this instance) the employee that is not preceded by *audi rule* is unlawful, invalid and of no legal effect and can be set aside.⁴ Congruently, section 193(4) of LRA enjoins the arbitrators to determine any unfair labour practice dispute on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

[20] I agree with the Applicants' counsel that the approach adopted by the Arbitrator is fundamentally flawed in that he failed to appreciate that, pursuant to his finding that the First Respondent flouted the *audi rule*, the decision to demote the Applicants was illegal and of no legal effect and stood to be set aside. Therefore even on this ground alone the review application should succeed.

[21] In the light of the finding above, it is not necessary to deal with the legality of deductions from the Applicants' salaries in order to recover the allegedly overpaid salaries in terms of section 38 of the Public Service Act.

³ [2008] 12 BLLR 1179 (LAC).

⁴ Ibid para 69.

Conclusion

[22] I conclude that the Applicants' demotion from positions of Correctional Officer Grade 2, salary level 6, to Correctional Officer Grade 3, salary level 5 is unlawful and invalid and constitutes an unfair labour practice. The Arbitrator clearly misconceived the nature of the inquiry and as a result arrived at an unreasonable conclusion that a reasonable arbitrator could not reach on all the material that was before the arbitrator.

Relief

[23] It would serve no purpose to remit this dispute to the Second Respondent. It is patent, from my reasoning above, that the Applicants' demotion is illegal and as such constitutes an unfair labour practice.

[24] On the issue of costs, there is no reason to depart from the usual rule that costs follow the result.

Order

[25] In the circumstances, I make the following order:

1. The arbitration award dated 11 September 2011 issued under case number PSGA1216-07/08 is reviewed and set aside.
2. The award is replaced with the following award:
 - "1. The demotion of the Applicants is both procedurally and substantively unfair.
 2. The First Respondent is ordered to reinstate the Applicants to the position of Correctional Officer Grade 2 at salary level 6 with retrospective effect and without loss of remuneration and benefits.
 3. The First Respondent is ordered to reimburse the Applicants all the monies that were deducted from their salaries owing to their unlawful and invalid demotions.
 4. The First Respondent is ordered to pay costs."

3. The First Respondent is ordered to pay costs of this application.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Advocate M Pillemer SC

INSTRUCTED BY:

Jafta Incorporated

FOR THE FIRST RESPONDENT:

Advocate S Jakdud

INSTRUCTED BY :

State Attorney