



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: JR1940/12

In the matter between:

JACKSON SITHOLE AND 12 OTHERS

Applicants

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

MMAMAHLOLA GLORIA RABYANYANA N.O

Second Respondent

CITY OF JOHANNESBURG

Third Respondent

Heard: 05 November 2014

Delivered: 12 June 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] In this application the Applicants seek to review and set aside an award in terms of which the Second Respondent (*“Arbitrator”*) held that they were never demoted. The Third Respondent is opposing the application.

Condonation

- [2] The applicants served and filed their Notice of Motion late by almost five months despite having filed their founding affidavit on time. In their application for condonation, which is unopposed, the Applicants furnished an adequately reasonable explanation for the delay. The need to consider the prospects of success at this stage is accordingly obviated.
- [3] Therefore, I deem it fair and just to grant the indulgence.

Factual background

- [4] The Applicants were employed as security guards in the then Security Department of the Third Respondent. In 2001, at the dawn of Johannesburg Metro Police ("JMPD"), the Security Department assimilated into JMPD. Consequently, the Applicants were transferred to the By-law Management Unit ("BMU") of the JMPD.
- [5] According to the Applicants, the migration process to JMPD meant that they were automatically placed as Law Enforcement Officers ("LEOs"). In essence, since there was no position called security guard in the JMPD organogram, they became LEO's, so they assert.
- [6] Whilst in transition, the Applicants were requested by Mr Maila, their supervisor and sole witness during the arbitration proceedings, to assist JMPD breakdown section on voluntary basis. The volunteers were assured that they would return to their positions as LEO's once the vacancies at the breakdown section had been filled. The Applicants agreed to the transfer to breakdown section as transients solely to assist the JMPD.
- [7] It would seem that nothing changed in terms of the Applicants' titles and benefits they were transferred with from the old structure. To this end, their pay slips still reflect their designations as "guards" despite the reality that those positions no longer exist. The said state of affairs persisted without any challenge up until June 2008.
- [8] In June 2008, the Third Respondent entered into a collective agreement with South African Municipal Workers Union ("SAMWU") pursuant to employees'

salaries were adjusted, subject to the years of service. Accordingly, employees who had 6 to 12 years' experience were moved to median range of the Third Respondent's salary scale. Whilst those employees who were in the employ of the Third Respondent for more than 12 years were moved to the maximum salary scale.

- [9] The Applicants, still "assisting" at the breakdown section at that time, were treated as breakdown drivers who were placed at the lower salary scale of junior operators and their salaries were adjusted as such. The Applicant, however, asserts that they ought to have been treated as LEO's for purpose of salary adjustments. To bolster that assertion, the Applicants referred to one colleague, Mr Muthaphuli, who is also in the breakdown section as a volunteer but correctly paid as an LEO.
- [10] Accordingly, the Applicants avowed that the Third Respondent demoted them by designating them as breakdown drivers as oppose to LEO's.

Grounds of review

- [11] This application is premised mainly on the following grounds of review:
- 11.1 The Arbitrator committed a reviewable irregularity by finding that Muthaphuli was not confronted with allegation that he volunteered alongside with the Applicants and is correctly paid as a LEO;
 - 11.2 The Arbitrator committed a reviewable irregularity in rejecting Maila's evidence in relation to chief of police under the circumstances where the chief of police was called not to testify; and
 - 11.3 The Arbitrator committed a reviewable irregularity in accepting that the applicants are still designated as guards whilst the Third Respondent's organogram does not provide for guards, yet not finding that the Applicants were LEO's.

Legal principles and analysis

[12] In *Herholdt v Nedbank Ltd*¹ the SCA stated that it would be justifiable in terms of the *Sidumo*² test to 'set aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner'. Whilst in *Goldfield Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*³ 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."

[13] In this instance, it is common cause that Applicants were transferred to the breakdown section and are paid salaries which are less than what LEO's are paid. In fact, the record of arbitration clearly shows that the transfer was consensual between the Applicants and the Third Respondent. Therefore, the issue that the Arbitrator was seized with is whether or not the Applicants' transfer to the breakdown section resulted in material reduction of the remuneration, responsibilities and status, which, if proven, constitutes demotion.⁴

[14] The commissioner started her inquiry on a correct footing by seeking to establish the Applicants' *status quo ante*. To this end, she states that:

¹ *Herholdt v Nedbank Ltd* [2013] 34 ILJ 2795 (SCA) at para 13.

² *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 28 ILJ 405 (CC) at para 108.

³ [2014] 1 BLLR 20 (LAC) at para 18

⁴ *Gorgan Work Place law* 9th Ed, at 256; and *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others* [2008] 12 BLLR 1179 (LAC) at paras 81 to 82.

"In determining whether the applicants were demoted I must establish and be convinced that they were LEO's. The onus is on the applicants to prove that they were LEO's and later demoted to a lower grade of breakdown."

[15] As stated above, it would seem that the Applicants took no issue with their transfer to the breakdown section prior to June 2008 when the collective agreement on salary adjustments was concluded. Their status remained as was with the erstwhile department and it would seem that their salaries were never adjusted to be in line with those of LEO's. In essence, for 9 years of their transfer to JMPD they blissfully worked at the breakdown unit despite their adamant assertion that they were transients.

[16] The Third Respondent disavowed that the Applicants were ever appointed as LEO's. In that regard Ms Maribe gave the following detailed explanation on eligibility and job responsibilities of a LEO position:

"Law enforcement officers do exactly what their designations say. They enforce the law. They enforce bylaws of the city, they work jointly with the Metro Police Officers because Metro Police officers are also law enforcement officers it is just that their ranks are different in terms of levels. So, they are jointly responsible for crime prevention, bylaw enforcement and traffic law enforcement..."

LEO's like Metro Police Officers must be trained in all the bylaws of the city. That includes the writing of files, the citation that goes with relevant infringement because if somebody contravenes a bylaw of the city an LEO must give that person a fine...They also get trained on basic law, like criminal law so that they understand various crimes..."

*[T]hey also get trained on police ethics because they are also dealing with the community, customer care and what we call point duty, just to be able to control traffic...And after that they get certificate to the effect that they completed the law enforcement course."*⁵

[17] On the contrary, the Applicants failed to submit any proof that indeed they had been appointed and trained as LEO's. Mr Maila gave equivocal answers when

⁵ See page 103 of the transcribed record lines 15 to 25; and page 105 lines 1 to 25.

challenged on this issue. To make matters worse, the Applicants could even not explain the source of their appointments as LEO's. Mr Maila fudged this issue. He gave glaringly contradictory evidence to the effect that the transfers and appointment of the Applicants as LEO's was pursuant to the agreement between the Third Respondent and unions. But under cross-examination he changed tune and testified that the transfers were done in accordance with the Council resolution which he failed to produce in any event. In my view, that was the demise of the Applicants' case.

- [18] Furthermore, the Applicants never led any evidence to prove that they did assumed responsibilities as LEO's in 2001. It is clear from the record of the arbitration proceedings that they were greeted by breakdown driver positions when they transferred to JMPD. Even though as transients initially, so they asserted, they are still in that section to date. For that reason, it does not avail the Applicants to now argue that the Arbitrator ought to have found that they are LEO's simply because the job titled security guard no longer exists.
- [19] It follows that the Arbitrator was spot on in her finding that the Applicants failed to prove that they were ever appointed as LEO's. There is nothing unreasonable in that conclusion.
- [20] What, in essence, triggered the whole dispute is the salary adjustment that took place in 2008. Hence, it is obvious from the way the Applicants crafted their case and the relief sought that they are only interested in being remunerated as LEO's even if they remain in the breakdown section. Much was made in argument of Mr Muthaphuli's pay slip and the fact that the Third Respondent was, in any event, arbitrarily paying him as the LEO whereas he was also a breakdown driver. That argument cannot be sustained since nothing turns on that evidence in light of my finding above. However, if it is anything to go by, then the Applicants' dispute is all about salary adjustment which can only be promotional since they were never appointed as LEO's.
- [21] In view of the above, this is an ill-starred application, but the Applicants can still avail themselves to other recourses at their disposal.

Conclusion

[22] In the circumstances, the Arbitrator's arbitration award constitutes a reasonable finding and I find no reason to set it aside.

[23] On the issue of costs, on account of a continuing relationship between the parties, I am of the view that the requirements of law and fairness dictate that no order as to costs should be made in this matter.

Order

[24] In the circumstances, the application is dismissed with no order as to costs.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Advocate L Segeels

Briefed by Hogan Lovells Attorneys

FOR THE FIRST RESPONDENT:

Advocate H Viljoen

Briefed by Mcedisi Ndlovu &
Sedumedi Attorneys

LABOUR COURT