



IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Not Reportable
CASE NO: D977/12

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES

Applicant

and

E T MHLONGO

1st Respondent

**GENERAL PUBLIC SERVICE SECTORAL BARGAINING
COUNCIL**

2nd Respondent

ERIC MUZIWEMBEKO KETSEKILE

3rd Respondent

Heard: 25 July 2014

Delivered: 15 October 2015

Summary judgment:

JUDGMENT

FARRELL AJ

BACKGROUND

- a) This is an Application for the Reviewing and Setting Aside of an Arbitration Award of the General Public Service Sectoral Bargaining Council ("The Bargaining Council");
- b) An Arbitration Award of the Arbitrator E T Mhlongo ("The Arbitrator");
- c) The Review Application was argued on 25 July 2014 in the Labour Court, Durban;
- d) The Review Application was dismissed and the Applicant was ordered to pay the Third Respondent ("The Employee") costs on a party and party scale.
- e) The reasons for the Judgment are as follows:-

1. The Employee applied for the post of Deputy Director Area Co-ordinator Development and Care, KwaZulu Natal Region of the Department of Correctional Services ("The Applicant").
2. He was shortlisted, interviewed and recommended for the appointment. He was never appointed to the position.
3. The Employee then referred a dispute to the Bargaining Council alleging that the failure to appoint him by the Department of Correctional Services was an unfair labour practice as described in the Labour Relations Act¹.
4. The dispute relating to the alleged unfair labour practice was arbitrated before E T Mhlongo who found that the failure to appoint the Employee to the post of Deputy Director: Area Co-ordinator Development and Care for Kwazulu Natal Region was an unfair labour practice and directed the Employer to appoint the Employee retrospectively from 1 December 2010 as Deputy Director: Area Co-ordinator Development and Care for Kwazulu Natal Region or in an alternative post.
5. The appointment was to be made within sixty (60) days of the Arbitration Award.
6. The Employer applied for the Reviewing and setting aside of the Arbitration Award.

¹ Act Number 66 of 1995.

COMMON CAUSE

7. The Employee applied for the post of Deputy Director: Area Co-ordinator Development and Care for KwaZulu Natal Region.
8. The Employee was shortlisted for the areas in Empangeni and Ngcome.
9. The Applicant was invited to attend an interview which was held in Pietermaritzburg on 23 September 2010.
10. The Applicant was the recommended candidate for the post in Empangeni.
11. The Applicant's appointment to the post was approved in principle.
12. During on or about 30 November 2010, the Applicant was requested to:-
 - 12.1 certify whether he had a criminal record, departmental charge pending against him or not; and
 - 12.2 complete a criminal clearance form and forward it to the office of the Regional Commissioner by no later than 8:00 on 1 November 2010 with the Corporate Services Department alternatively, Human Resource Manager.
13. The Employee complied with the requirements timeously.

14. During on or about 1 February 2011, the Employee sent a memorandum to the Regional Commissioner: Kwazulu Natal, wherein he requested to know the reasons for his not having been appointed to the post.
15. The Regional Commissioner responded to the Area Commissioner in an memorandum on or about 9 April 2011.
16. The Area Commissioner was requested to inform the Employee that:-
 - 16.1 The post to which the Employee was referred was indeed advertised by the National office with the intention of the post being financed and created on the PERSAL system before the appointment process could be initiated;
 - 16.2 Communications had been forwarded to the office of the CDC Corporate Services to speed up the finalization of the creation of the post on the PERSAL system;
 - 16.3 The office was anticipating the financing and creation of the post on the PERSAL system;
 - 16.4 The Employee would be advised and provided feedback once the National Office attended to the process.
17. It is also common cause that the Employee was not appointed to the position.

18. This was the evidence before the Arbitrator.
19. The Employer's evidence was that "the Applicant had not been appointed to the post because the post was not financed and it is also not created on the PERSAL system".
20. The Employer presented no evidence as to why the post was advertised and the process followed as set out above why the post had not been "financed".
21. The Employer presented no evidence as to why the post could not be "financed" and or created on the PERSAL system.
22. The Employer, the Applicant in the Review Application presented extensive affidavits and Heads of Argument but no way in the affidavits or in the Heads of Argument is there any basis for Review and Set Aside the Bargaining Council Award.
23. The Arbitrator found on the common cause of facts that the Employee had been treated unfairly and ordered his appointment.
24. There is nothing whatsoever to suggest that the Award should be reviewed and set aside.

25. In the circumstances, the Application for the Review and Setting aside of the Arbitration Award is dismissed and it is ordered that the Applicant, the Employer pays the Third Respondent, the Employee's costs of this Application on a party and party scale.

COSTS

26. This Court finds no reason why costs should not follow the result in the matter.
27. The Applicant has made out no case whatsoever for the review of the Arbitration Award.
28. The Review Application had no prospects whatsoever.

ORDER

29. In the circumstances, the Application for the Review and Setting aside of the Arbitration Award is dismissed and it is ordered that the Applicant, the Employer pays the Third Respondent, the Employee costs of this Application on a party and party scale.
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D M FARRELL

Acting Judge

Appearances :

For the Applicant : Adv M MOODLEY instructed by State Attorney KZN

For the Respondent: Adv M NGCOBO instructed by Molede Inc

LABOUR COURT