



DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

25/02/17
DATE


SIGNATURE

THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case no: J 1038/16

PHELISA MANGCU

Applicant

and

CITY OF JOHANNESBURG

Respondent

Heard: 8 February 2017

Delivered: 22 February 2017

Summary: Application to declare reduction of salary unlawful. Salary was reduced as a result of an arbitration award that ordered the demotion of the Applicant. No merit in the application.

JUDGMENT

PRINSLOO. J

Background facts

- [1] In May 2006 the Applicant was employed by the Johannesburg Tourism Company (JTC) as a general manager: tourism development. The JTC was a company owned and controlled by Respondent, which entity later merged into the Respondent's department of public liaison, and the JTC no longer exists.

- [2] On 11 January 2012 the Applicant was appointed as the acting chief executive officer (CEO) of the JTC and the acting stint was to subsist until the aforesaid merger took place. On 1 August 2013 the Applicant was placed as director of tourism in the Respondent's department of group communication and tourism.
- [3] On 13 September 2013 the Applicant was charged with various acts of misconduct, which charges relate to contravention of the supply chain management policy during her acting stint as CEO of the JTC. The Respondent proceeded with a pre-dismissal arbitration process and on 11 December 2015 the arbitrator rendered his award wherein he found the Applicant guilty on all the charges and recommended a sanction of demotion to the position of deputy director with effect from 1 January 2016.
- [4] The Respondent subsequently implemented the arbitrator's recommendation and without the Applicant's consent reduced her salary to the salary of a deputy director.
- [5] The Applicant filed a review application that is pending under case number JR 119/16.

Jurisdiction

- [6] In addition to the pending review application, the Applicant approached this Court under case number J1038/16. The relief sought by the Applicant *in casu* is an order declaring the conduct of the Respondent in reducing her salary from that of director to deputy director to be unlawful and that the Respondent be ordered to restore her salary to the level of director and to pay her the difference between the remuneration she received as from February 2016 and the remuneration she was lawfully entitled to receive, that is the difference between what she would have been paid as a director and what she was indeed paid as a deputy director.
- [7] In her founding affidavit the Applicant stated that this Court has jurisdiction to adjudicate this matter by virtue of sections 77(3) and 77A of the Basic

Conditions of Employment Act¹ (BCEA) read with section 158(1) of the Labour Relations Act² (LRA).

[8] The Labour Court derives its jurisdiction from section 157(1) and (2) of the LRA and its powers from section 158.

[9] In *Moropane v Gilbeys Distillers and Vinters (Pty) Ltd*³ the Court held that:

“I must accordingly turn to the question whether this court has jurisdiction to entertain the present application. This question is intimately intertwined with the question whether the applicant has a right to have the court intervene and come to his assistance at this stage. I might, at the outset state that if the court has the jurisdiction it would have the power to grant an appropriate remedy. But because it has a power does not mean that it has jurisdiction. This proposition is sometimes overlooked.

[10] In *Natal Sharks Board v SA Commercial Catering and Allied Workers Union*⁴ the Court held that powers and jurisdiction are separate concepts that should not be confused.

[11] Section 158(1) does not give this Court jurisdiction, but gives it powers insofar as the Court has jurisdiction arising from the provisions of section 157 of the LRA. Section 157(1) gives the Labour Court exclusive jurisdiction in respect of all matters that are to be determined by this Court in terms of the LRA or any other law. Section 157(2) gives the Labour Court jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from employment and labour relations and any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct by the State in its capacity as an employer.

[12] *In casu* the Applicant approached this Court in terms of the provisions of section 77(3) and 77A of the BCEA read with section 158(1) of the LRA.

¹ Act 75 of 1997.

² Act 66 of 1995.

³ 1998 19 ILJ 635 (LC).

⁴ 1997 18 ILJ 1324 (LC).

- [13] Jurisdiction to adjudicate this application is vested by virtue of the provisions of section 77(3) of the BCEA. This Court has jurisdiction to determine any matter concerning a contract of employment and to make any order it has the power to make in terms of section 77A(e) of the BCEA or in terms of section 158(1) of the LRA.
- [14] This application is thus premised on a contract of employment and the Applicant has to make out a case that would be sustainable in terms of section 77(3) of the BCEA.

The merits of this application

- [15] The Respondent levelled six charges of misconduct against the Applicant and as already alluded to, an arbitrator conducted an enquiry into the allegations against the Applicant as provided for in section 188A of the LRA.
- [16] On 9 December 2015 an arbitration award was issued wherein the arbitrator found that the Applicant was indeed guilty of all six charges and that her conduct constituted gross negligence which was akin to a gross dereliction of her duties as the acting CEO of the JTC. The arbitrator considered the factors he was enjoined to consider in determining an appropriate sanction and after considering the relevant circumstances, the arbitrator imposed demotion as an appropriate sanction in terms of Clause 14A of the Code of Conduct for Municipal Staff Members. The Applicant was to be demoted to the position of deputy director with effect from 1 January 2016.
- [17] The Respondent implemented the recommendation and demoted the Applicant accordingly.
- [18] *In casu* the Applicant seeks for the demotion to be declared unlawful and for the Respondent to be ordered to restore her salary on the level of director. The Applicant's case is that the demotion is unlawful as it is in contravention of section 34 of the BCEA.
- [19] The Applicant however has to make out a case as provided for in section 77(3) of the BCEA for a matter concerning a contract of employment. Notwithstanding

the fact that the Applicant elected to approach this Court in terms of section 77(3) of the BCEA, she failed to make a single allegation to lay the foundation for a case in terms of section 77(3) of the BCEA. One would look in vain for any averment setting out a case concerning the Applicant's contract of employment.

- [20] It is trite that an applicant must set out its case in the founding affidavit and must stand or fall by his or her founding affidavit. In my view the Applicant must fall by her founding affidavit as she dismally failed to make the necessary averments to sustain her case in terms of section 77(3) of the BCEA.
- [21] That should be the end of the matter and the Applicant's failure to make out a case, justifies the dismissal of her application.
- [22] In her replying affidavit the Applicant however describes the 'gist of the dispute' between her and the Respondent as the interpretation of Clause 14A of the Code of Conduct for Municipal Staff Members and Clause 12 of the Disciplinary Regulations for Senior Managers. This description of the 'gist' of the dispute is indicative of the fact that the Applicant has no hesitation to make statements without any consideration of the case that she referred to this Court. Her case is based on section 77(3) of the BCEA and nowhere does section 77(3) of the BCEA provide for the interpretation of clauses in a code of conduct or disciplinary regulations. The Applicant makes statements that are all over the place and certainly not supporting the case she elected to refer to Court. In any event this Court does not have jurisdiction to deal with the interpretation dispute, as set out by the Applicant on the papers before Court.
- [23] Although not specifically pleaded and insofar as this Court has jurisdiction to deal with all matters in terms of the BCEA, I will consider the Applicant's case that the reduction in her salary is unlawful as it does not comply with section 34 of the BCEA.
- [24] Section 34(1) of the BCEA provides that an employer may not make any deduction from an employee's remuneration unless the employee agreed in writing to the deduction or if the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

- [25] In the arbitration award issued on 09 December 2015 the arbitrator recommended the Applicant's demotion to the level of deputy director in terms of Clause 14A of the Code of Conduct for Municipal Staff Members as a sanction short of dismissal.
- [26] In her founding affidavit the Applicant stated that although the arbitration award recommended a demotion to the level of deputy director it did not mention anything about the reduction of salary. Her view is that the wording of the award is not open to any other interpretation except that the arbitrator considered Clause 14A of the Code of Conduct for Municipal Staff Members and found demotion to the position of deputy director as appropriate and nothing was said about the reduction of salary therefore the deduction is unlawful.
- [27] The Applicant's case is that the demotion is in contravention of section 34 of the BCEA, more specifically because the deduction is not permitted by an arbitration award. This is so because the arbitrator did not specifically state that the Applicant's demotion to the position of deputy director will be with reduction of her salary. The reduction of salary is a distinct disciplinary step in terms of Clause 14A of the Code of Conduct for Municipal Staff Members and Clause 12 of the Disciplinary Regulations for Senior Managers, which step the arbitration award did not permit.
- [28] The Applicant seeks an order restoring her salary level to that of director, the position she held prior to the demotion.
- [29] The Applicant is effectively suggesting that the arbitrator's recommendation that she be demoted to the level of deputy director excluded the consequence that her remuneration would be adjusted to the position of deputy director. This is absurd in the view of the reality that she was demoted as a sanction short of dismissal and the Applicant now occupies a lower position with reduced responsibilities and functions, yet the Applicant maintains that her salary should have remained that of a director because the arbitrator did not specifically state that her salary should be reduced. The Applicant submitted that a demotion does not automatically entail a reduction in salary.

- [30] The Applicant's view is illogical and misdirected if not opportunistic.
- [31] The Industrial Court has held as far back as 1992 that demotion is not a word which has some special meaning in labour law. It bears its ordinary meaning, namely to 'reduce to a lower rank or category'⁵. The converse of demotion is promotion. Demotion in the ordinary sense means a reduction or diminution of importance, responsibility, status and salary.
- [32] *In casu* the arbitrator recommended that the Applicant be demoted to the rank of deputy director. Having its ordinary meaning it cannot mean anything else but that the Applicant's rank of director should be reduced to a lower rank of deputy director. The reduction of her salary to the lower rank of deputy director follows. A reduction in her remuneration is a direct and natural consequence of the Applicant's demotion.
- [33] Demotion to the rank of deputy director means that the Applicant will perform the duties associated with the said rank and will be remunerated according to the salary band applicable to deputy directors.
- [34] The Applicant was demoted as a result of an arbitration award and the reduction of her salary followed from that. The Applicant failed to show that the reduction of her salary is unlawful and in contravention of section 34 of the BCEA.

Costs

- [35] Costs should be considered against the requirements of the law and fairness.
- [36] The requirement of law has been interpreted to mean that the costs would follow the result.
- [37] In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

⁵ *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC).

[38] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*⁶ it was emphasized that:

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

[39] In her founding affidavit the Applicant sought punitive costs and in argument before Court, Mr Sithole for the Applicant argued that each party should pay its own costs.

[40] Mr Beckenstrater for the Respondent argued that cost should follow the result. I can see no reason to disagree.

[41] The Respondent was compelled to engage in litigation and oppose an application that had no merit from the onset. The Applicant came to Court without merit and with no consideration of the fact that she approached the Court in terms of section 77(3) of the BCEA but made averments that did not support the case she referred, causing the Respondent to incur legal costs and for that the Respondent is entitled to costs.

[42] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

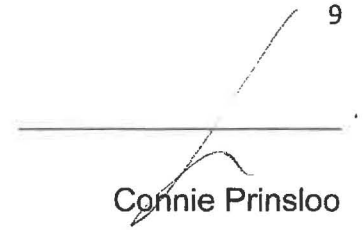
[43] I see no reason to deviate from the ordinary rule that costs should follow the result.

[44] In the premises I make the following order:

Order:

1. The application is dismissed with costs.

⁶ 2012 33 ILJ 2117 (LC).



Connie Prinsloo

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Advocate E Sithole

Instructed by: Mafanya Attorneys

For the Respondent: Mr C Beckenstrater of Moodie & Robertson Attorneys

LABOUR COURT