



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR2016/14

In the matter between:

SIBANYE GOLD LIMITED

Applicant

and

SOLIDARITY obo BEZUIDENHOUT, WG.

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

KHUMALO, B N.O.

Third Respondent

Heard: 25 May 2017

Delivered: 12 October 2017

JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review an Arbitration Award under case number GAJB 25885-13-14. The third respondent (the Commissioner) found that the

applicant had committed an unfair labour practice in relation to demotion and ordered the applicant to 'reinstate' the first respondent into the position of boilermaker foreman as from 1 August 2014. He further awarded the first respondent twelve months compensation. The compensation was calculated as R2986.63 per month constituting what was considered to be the average difference in remuneration the first respondent would have earned as a boilermaker foreman during the material period.

- [2] The first respondent was employed in the position of an underground acting boilermaker foreman (supervising engineering boilermaker) for 22 years. From the 13 August 2012 he was appointed to the position of boilermaker foreman. The dispute before the Commissioner pertained to whether this appointment was or became a permanent appointment or not. On 22 July 2013 the first respondent was told that he would revert back to the position of boilermaker and lodged a grievance.
- [3] On 1 September 2012, the first respondent signed a letter dated 13 August 2012 which set out *inter alia* "...in terms of section 7(4) of the Mine Health and Safety Act no. 29 of 1996¹ (MHSA) read with Regulation 29.2., you are hereby appointed as Vertical Boilerman foreman at Driefontein Consolidated, Business Unit 3, for Bambisani, Rethabile, Khomanane and North Shaft with effect from the 1 September 2012".
- [4] The letter did not specify working hours or remuneration nor did it refer to a promotion. Monthly 'Employee Movement Forms' in respect of the first respondent were issued by the applicant on a monthly basis which stipulated that the 'temporary movement' was an 'acting' movement from the position of "UG Plater" to Supervisor Engineering Boilermaker UG" (boilermaker foreman) and would be accompanied with a salary adjustment from grade "C1" to grade "C4".

¹ This section records that "...an employer may appoint any person with qualifications as may be prescribed to perform any function of the employer in terms of this Act."

- [5] On 9 July 2013 the first respondent applied for a position being internally advertised for “Supervisor Engineering Boilermaker” at the “C-Upper” job grading. He was interviewed for the position on 18 July 2013 and was not recommended for the said position.
- [6] During the period in question the first respondent had received pay slips which recorded his designation as that of “underground platter” at the “C1” grade and that his remuneration method was that of “Miner Artisan” The pay slips also reflected that he received an “acting non pensionable allowance.”
- [7] The Commissioner found that a policy entitled “Conditions of Employment Booklet Officials Employed at Sibanye Gold Limited’ (the Policy), applied to the first respondent. As the sole witness for the applicant at the arbitration Wagner, the Manager of the first respondent, was asked under cross-examination whether he appointed the first respondent as an acting official and whether that was ‘similar’ to what is stipulated in 2.1 of the Booklet. Wagner read out the definition and said he was just trying to understand what it means. He was then asked:
- “MR VILJOEN: Is that a position to which you have appointed him, an acting official?
- MR WAGNER: That is correct.
- [8] In terms of the Policy definition clause an: “2.1 ‘Acting Official’ means an Employee who is functioning in an Official’s post where a vacancy exists but no incumbent has been appointed or who is doing the work of an Official of higher rank who is temporarily absent from work.”
- [9] It is submitted on behalf of the applicant that the Commissioner did not apply his mind to its contention throughout the arbitration that the Policy did not find application to the first respondent. This, it submits, was because specifically because the first respondent was not “remunerated in terms of the Gross Remuneration Package (GRP) remuneration method”.

Evaluation

[10] The Policy defines 'employee' as follows:

"Employee' for the purpose of this document, unless the context clearly indicates otherwise, means a person employed by an Employer as an Employee in paid permanent service, whose job falls within the Officials' recognition unit and who is paid according to the GRP remuneration method.

[11] Reading Clause 2.1 with the definition of 'employee' it is evident to the Court that for the first respondent to be considered 'an acting official' he would have had to fall within the recognition unit for Officials and to have been remunerated in accordance with the annual package applicable to them. The evidence before the Commissioner as far as pay slips were concerned showed that the first respondent was remunerated on the 'Miner Artisan' remuneration method and not the GRP package whether annual or monthly.

[12] The Commissioner failed to properly apply his mind to the content of the Policy relying instead on the interpretation of Wagner as referred to above.

[13] A further issue taken up by the applicant in its review grounds is the fact that it was common cause that the first respondent during July 2013 applied for a permanent position similar to that in which he was acting. The record reflects the following:

"MR BOTES:If you have been promoted to boilermaker foreman, why did you respond to this advert?

MR BEZUIDENHOUT: My engineer told me to apply and as I have already said I was taken out of my positions without my knowledge.

MR BOTES: But Mr Bezuidenhout, did you ask your engineer, "Why must I attend an interview for a foreman position if I am already appointed as a foreman?"

MR BEZUIDENHOUT: No, no, I did not.

MR BOTES: Why not?

MR BEZUIDENHOUT: No reason.”

[14] As stated above, Bezuidenhout was told that he would revert to his normal position on 23 July 2013, after he applied for the said similar permanent position on 9 July 2013.

[15] The submissions on behalf of the first respondent that the Commissioner could only rely on *viva voce* evidence and not submissions in deciding the applicability of the Policy to the first respondent, is misguided. The Policy was central to the first respondent's case at arbitration and was documentary evidence before the Commissioner. The interpretation of the Policy was something the Commissioner was enjoined to apply his mind to. It was not reasonable for a decision-maker to accept Wagner's understanding of one clause without applying his mind to the legal submissions before him, and the clause itself read in context.

[16] The case for the first respondent made by his union was that his acting stints amounted to a promotion and that the Policy applied to him. The Commissioner's finding that this was indeed so, and that he had been demoted from that position, is a decision a reasonable decision-maker could not have made. On all the material before the Commissioner, no unfair labour practice relating to demotion occurred. The result of the Award, one of 'reinstatement' and an erroneous computation of back-pay, is in addition outside the bounds of reasonableness.

Order

[17] I therefore make the following order:

1. The Award under GAJB 25885-13-14 is reviewed and set aside and substituted as follows:

1.1 “The application is dismissed”.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

Applicant: Advocate Mpumi Nkanyeza

Instructed by: Solomon Holmes Attorneys

First Respondent: G.J Visser of SOLIDARITY

LABOUR COURT