



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 868/10

In the matter between:

PSA obo MP TLOWANA

Applicant

and

DEPARTMENT OF AGRICULTURE LIMPOPO

First Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Second Respondent

Heard: 19 April 2017 to 21 April 2017

Delivered: 27 October 2017

JUDGMENT

MAHOSI AJ

- [1] There are a number of applications before this Court. The applicant initially brought an application on behalf of its member (Mr. Tlowana) for an order to declare the first respondent's deduction of Pension amounts from Mr Tlowana's salary declared unlawful and ordering the first respondent to repay the unlawful pension Fund deductions. However, at the hearing, the applicant's counsel submitted that he did not wish to pursue arguments in relation to this issue as it was resolved.

[2] The applicant further seeks an order to clarify an order granted by Cele J on the 24th of February 2012 so as to give effect to its true intention. The said order states as follow:

- '1. Condonation for late filing of the answering affidavit is granted but the first respondent is to pay costs thereof.
2. The arbitration award dated 01 March 2010, issued by the second respondent in this matter is reviewed and set aside.
3. The first respondent is ordered to compensate Mr M.P. Tlowana an amount equal to the difference between what he would have earned as from the date on which the fourth respondent was appointed against the contested Sekhukhune post, and the salary he continued to earn.
4. Such payment is to be made within 30 days from today.
5. No cost order is made.'

[3] Furthermore, the applicant seeks the court to order the first respondent to correct Mr. Tlowana's salary notch from his current salary level 12 notch 8 to salary level 12 notch 9 with an annual salary of R710 613.00. At the hearing, the first respondent conceded that Mr. Tlowana was not on the correct notch. The parties were, therefore, in agreement on Mr. Tlowana's salary level.

[4] The first respondent seeks an order to set aside the applicant's writ of execution issued by this Court on the 31 October 2013 under case number JR 868/10.

Background

[5] The applicant filed a review application wherein he sought an arbitration award in respect of his unfair labour practice dispute to be reviewed and set aside. The review application was heard on the 24th of February 2012 before

the Honourable Cele J. The background facts of this case were outlined by Cele J in his judgment as follows:¹

- [3] On 22 July 2005, the first respondent advertised the position of a Manager Cooperate Services: Sekhukhune. It was one of the posts advertised for five areas. The employee applied for the Sekhukhune post together with a number of other people including the fourth respondent. In the list of recommendations, he was no. 1 while the fourth respondent was no. 2. There was a differential margin of about 2% between the two of them. The interviewing panel recommended his appointment.
- [4] The first respondent appointed the fourth respondent instead. The employee was aggrieved by his non-appointment and assisted by his union, he referred an unfair labour practice dispute relating to promotion. The matter was arbitrated upon and the award was issued in favour of the first respondent. The employee successfully applied for the review and setting aside of that arbitration award and the order of this Court remitted the matter to the second respondent for a *de novo* arbitration hearing before a different Commissioner or Arbitrator. It so happened that I was the Judge seized with the matter at the time.
- [5] In the meantime, the fourth respondent successfully applied for a horizontal transfer from the contested post to another. The first respondent re-advertised the contested post which then had become vacant. Again the employee applied for the post. **He was recommended for and finally appointed at that post. He sought compensation for the delayed appointment.** He referred an unfair labour practice dispute relating to promotion for conciliation. Conciliation failed to resolve it. He referred it to arbitration and he then came before the third respondent in this case. The third respondent in the arbitration award issued, found no fault on the part of the first respondent and dismissed the referral.'

¹ *PSA obo Tlowana v MEC of Agriculture* (2012) 33 ILJ 2675 (LC).

- [6] The applicant further sought compensation for the delayed appointment of its member, Mr Tlowana. Having considered the parties' submission, Cele J issued the order mentioned in paragraph 1 above and delivered a judgment in which he found as follows²:

'The arbitration award in this case therefore cannot stand. I am entitled to intervene by reviewing it and by setting it aside and in so doing I am called upon to substitute and say that the member of the applicant, in this case **Mr Tlowana, deserved to have been promoted from the date on which the fourth respondent was appointed. The amount of compensation to which he is entitled is the same as was testified to during the arbitration hearing.** I believe there is no issue about that because this was never raised as an issue. The applicant has been successful. I do not want to dissuade people from coming to this Court. I have no reasons to award a costs order against the first respondent, and therefore:

1. I order the first respondent to compensate Mr Tlowana to the extent claimed by him.
2. The respondent has to pay interest but that interest must be paid from today. So to the extent that the payment will remain outstanding it must be calculated from today's date.
3. The payment is to be made within 30 days from the date of this order.

No costs order is made.'

- [7] The fourth respondent referred to in the abovementioned judgment was Mr. Makhafola. It is common cause that Mr. Makhafola was promoted in January 2006. It is apparent from Cele J's judgment that Mr. Tlowana **deserved to have been promoted from the date on Mr. Makhafola was appointed, being January 2006.** It is further common cause that the first respondent failed to comply with the order of Cele J and further that a writ of attachment was issued out of this Court for an amount of R411 727.00 plus interest. The first respondent, after being served with a writ of execution, paid Mr. Tlowana the amount of R468 230.36 on the 28th of February 2013.

² At para 16.

- [8] Despite the payment, Mr. Tlowana claimed that the first respondent failed to upgrade his salary to level 12 and to correct his salary notch with effect from 1st of October 2008. As a result, the applicant made an application for a second writ of execution dated 24th of October 2013 “for an amount of R62 366.31 together with interest thereon at the rate of 15.5% per annum from 25th of March 2012 and the sum of R38 1965.44 for the taxed costs and charges.”³ It is common cause that Mr Tlowana was on salary level 12 from October 2008. The applicant’s contention is that when implementing the court order, the first respondent had to backdate the upgrading of his salary level to level 12 with effect from April 2008. The first respondent allegedly overlooked the fact that the post was already upgraded from salary level 11 to salary level 12 prior to October 2008.
- [9] According to the applicant, Mr. Tlowana’s salary was not adjusted to the amount paid to Mr. Makhafola and, as a result, the first respondent remained in contempt of the court order. The applicant further submitted that Mr. Tlowana has also not been paid the difference in salary from 30th of September 2008 to the date of this application. In total, to date, the applicant claims that the first respondent owes him an amount of R148 577.71. This claim is based on the applicant’s comparison with another employee, Mr. Leshokgohla who was employed by the first respondent around the same period as Mr. Makgafola.
- [10] The first respondent brought an application to stay the applicant’s second writ of execution and in the founding affidavit, the first respondent submitted that there was no provision in the court order issued by Cele J that it was ordered to upgrade Mr. Tlowana’s salary to level 12 and to pay him performance bonuses. The first respondent further submitted that in satisfying the first writ, it overpaid Mr Tlowana an amount of R232 545.19. The first respondent submitted that it was incorrect for the applicant to compare himself with Mr. Leshokgohla as each individual is assessed on his/her own merit and that notches are awarded based on individual’s assessment. In essence, the first respondent argued that there was no automatic awarding of higher notches. It

³ See writ of execution dated 31/10/2013 on page 42 of bundle A.

was the first respondent's further submission that the applicant's calculations did not take into account any of the statutory calculations. In response, the applicant brought an application to consolidate all the application flowing from judgment of Cele J.

[11] On the 3rd of June 2016, Van Niekerk J granted an order in the following terms:

- '1. The following applications are hereby consolidated and will be heard together:
 - 1.1 The applicant's first notice of motion under case number JR868/2010 dated 14 March 2014 (of the applicant).
 - 1.1.1 The following prayers in the notice of motion are abandoned: prayer 1.1, 1.2 and 2.2
 - 1.1.2 The only relief requested is in terms of prayer 2.1
 - 1.2 The Respondent's notice of motion under case number JR868/2010 dated 10 December 2013 (setting aside of the second writ of execution dated 31 October 2013).
 - 1.3 The Applicant's second notice of motion (of the applicant) under case number JR868/10 dated December 2014.
2. The parties will exchange heads of arguments dealing with all three of the abovementioned applications, on or before 10 (ten) court days prior to the hearing.
3. The costs of this application are reserved.
4. Enrolled on 1 September 2016.'

[12] On the 1st of September 2016, Tlhotlhemaje J considered the parties' submissions and issued an order in the following terms:

- '1. The matter be referred for oral evidence and set down on the trial roll;
2. The oral evidence be led to determine which party owes which party money, if any at all, specifically arising from paragraph 3 of Cele J's order of 24 February 2012.

3. The application and counter application will stand as pleadings.
4. The costs are reserved.'

[13] What follows is the summary of oral evidence that was led during the trial.

Evidence of parties

[14] Mr. Tlowana testified for himself and Mr. Khaukanani Percival Mbedzi testified for the first respondent.

Applicant's testimony

[15] Mr. Madimetja Peter Tlowana ("Mr. Tlowana") testified under oath that he was still employed by the first respondent as the Manager: Human Resource Management, Sekhukhune District. Mr. Tlowana further testified that his interpretation of Cele J's order was that, as Mr. Makhafola, he should have been promoted from salary level 9 to the salary level 11 with effect from 1 January 2006. Furthermore, he stated that as Mr. Makofola's post was upgraded from level 11 to level 12 in April 2008, the first respondent should backdate the upgrading of his salary to level 12 with effect from April 2008.

[16] Mr. Tlowana further confirmed that the first respondent's failure to comply with Cele J's order resulted in him instructing his attorneys to issue a writ of execution amounting to R411 727.00 plus interest which amount was computed by him in terms of translation key and was not disputed when submitted in court. The said writ of execution was issued on the 18th of October 2012. Upon being served with the writ, the first respondent paid him an amount of R468 230.36 on the 28th of February 2013.

[17] Subsequently, Mr. Tlowana made an application for the second writ for an amount of R62 366.31. The second writ was for the amount owing of the salary difference between salary level 11 to 12 calculated from 01 July 2009 to 30 June 2010. Mr. Tlowana stated that the problem arose in April 2008 when he was not given a salary progression. Under cross-examination, Mr Tlowana testified that he was on the correct salary level but incorrect notch. According to him, he was supposed to be on level 11 from 1 January 2006. On the

difference in calculation, Mr. Tlowana testified that he was appointed in October 2008 and that he was put on salary level 12 with the salary being R407 748. Mr. Tlowana argued that in April 2008 when all employees on level 11 were upgraded he should also have been upgraded.

- [18] On the allegation that he was overpaid, he agreed that the payment was done on BAS but denied that there were no deductions except for the pension fund payable to the Government Employment Fund. Mr. Tlowana argued that he personally completed his tax returns and further submitted that his calculations of the amount due to him date back from 01/01/2007 as his salary level was only upgraded on 01/10/2008 instead of April 2008.
- [19] Mr. Tlowana further testified that his first computation of the amount owed to him did not include the years 2009, 2010, 2011 and 2012 because he did not know the notches. He submitted that the reason his calculations include the year 2013 is because the court ordered that he be paid continuously. Mr. Tlowana conceded that on the 1st of October 2008, he was paid on the correct notch when he was appointed to the post. He further stated that although the court order does not specify the notch, it states that he should be put where he was supposed to have been. Mr. Tlowana submitted that he is 12 years in the position and he is supposed to be in notch 12, not notch 10. Under cross-examination he testified that in April 2016, he moved from notch 9 straight to notch 11 as he was assessed and was promoted. In addition, he stated that he confirmed that he did receive a pay progression. However, he denied that he was overpaid by the first respondent.

The respondent's witnesses

- [20] Mr. Khaukanani Percival Mbedzi ("Mr. Mbedzi") testified under oath that the applicant's claim that the first respondent owes Mr. Tlowane an amount of R184 702.92 is not correct and that his calculations are flawed. Mr. Mbedzi's understanding of Cele J's order is that Mr. Tlowana was to be paid the salary he was deprived of had he been appointed from January 2006 to September 2008 as he was promoted to the position in question in September 2008. He submitted that the amount of R468 230.36 that was paid to Mr. Tlowane as

per the first writ of execution, was calculated by Mr Tlowane and was not correctly done.

- [21] Mr. Mbedzi testified that the re-calculation of the amounts owed to Mr. Tlowane was necessitated by the applicant's further claim of money from the first respondent. Proper calculation revealed that Mr. Tlowane was only owed R207 250.42 plus the interest of 13.72% which brought the amount to R235 685.17. According to Mr. Mbedzi, the difference in calculations was brought by the applicant's use of the basic salary of R155 409.00, which included fringe benefits in arriving at his total amount without taking into account the deductions.
- [22] Mr. Mbedzi testified that Mr. Tlowana's pay progression, amounting to R58 237.12, was to address variances or incorrect notch against the one he should have been on from 1 October 2008 to 31 July 2016. In addition, Mr. Tlowana was entitled to an amount of R17 091.75 being performance bonus which was based on a wrong level from 2006 and wrong notch from 2008. An amount of R16 640.17 was interest on the pension that was incorrectly deducted from Mr. Tlowana. The amounts of pay progression, performance bonus and pension interest add up to R91 969.04 and if deducted from the alleged overpayment of R232 545.19, then Mr. Tlowana owes the first respondent an amount of R140 576.15. Mr. Mbetsi conceded that Mr. Tlowana is not on the correct notch as he is on R891 039 instead of R904 404.

Cele J's judgment

- [23] It is clear from Cele J's judgment that the amount of compensation to which Mr. Tlowana is entitled ***"is the same as was testified to during the arbitration hearing."*** The first respondent was further ordered to pay interest from the day of the order. The issue is what was the amount that was testified on in the arbitration hearing. According to the record, Mr. Tlowana testified as follows in the arbitration hearing:

'MR. CARRIM: And what is the amount?

WITNESS: R448 693.83

MR CARRIM: What are you saying? What is the amount?

WITNESS: This amount I want to be compensated to this amount. This amount is the difference from when Miss McArthur was appointed in this post and I was not and until when I was appointed to this post.⁴

- [24] It follows that the first respondent was ordered to pay Mr. Tlowana an amount of R448 693.83 plus interest calculated from the date of the order being 22nd February 2012 to the date of his payment being 28th of February 2013. This is the amount that was paid to Mr. Tlowana after he issued a writ of execution to the first respondent.
- [25] Therefore, Mr. Tlowana's second writ of execution dated 24 October 2013 was not for an amount that was ordered by Judge Cele. The applicant ought not to have proceeded to have the second writ issued by the Registrar of the Labour Court on the basis of an unliquidated claim. The applicant had a new claim against the first respondent and should have brought a new application. In the absence of such an application, this Court cannot make any pronouncement in this respect.
- [26] That being said, the first respondent's counsel and Mr Mbedzi both conceded in the hearing that Mr. Tlowana is not on the correct notch as he is on R891 039 instead of R904 404. The applicant should, therefore, place Mr. Tlowana on the correct notch. Regarding the claim of Mr. Tlowana's overpayment, I am of the view that if the first respondent wishes to claim overpayment from Mr. Tlowana, it would have to bring an application to that effect. It is therefore not for this Court to adjudicate whether the first respondent overpaid the applicant or whether the applicant has a further claim against the first respondent.

Costs

- [27] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs as the parties are engaged in an ongoing employment relationship.

⁴ Record page 15 line 5-11.

Order

[28] Accordingly, I make the following order:

- a) The writ of execution dated 24 October 2013 is set aside.
- b) There is no order as to costs.

Mahosi AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Adv. M.S. Schnehage

Instructed by AM Carrim Attorneys

FOR THE FIRST RESPONDENT:

Adv. F.M.M. Snyman,

Instructed by The State Attorney