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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 63/15

In the matter between:

PSA obo SEHLOHO & 2 OTHERS

Applicant

and

CEO: NCEDA

Respondent

Heard: 16 February 2017

Delivered: 4 May 2017

Summary: Contractual claim for payment of benefits in terms of BCEA s 77(3). Contracts of employment converted from temporary to permanent positions. Dispute whether benefits included in “total cost to company” remuneration.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant is a trade union, the Public Servants Association of South Africa. It represents three of its members, Mr Bernard Mabele, Ms Yoliswa Sehloho and Mr Denzil Kruger. All three are employed by the Northern Cape Economic, Trade and Investment Promotion Agency (NCEDA). It is a provincial public entity. The respondent is the Chief Executive Officer of NCEDA, cited in her representative capacity.
- [2] The applicants claim certain benefits arising from their contracts of employment in terms of ss 77(3) and 77A(e) of the Basic Conditions of Employment Act.¹ They initially did so by way of application. The dispute was referred to oral evidence.

Background facts

- [3] The three employees were initially employed on fixed term contracts by NCEDA. They accepted permanent employment at the end of 2012. Mabele and Sehloho were given letters of appointment, signed by the Acting CEO (Ms T Masilo) dated 24 October 2012 and effective from 1 November 2012. Kruger was given a letter dated 1 November 2012 and effective from 1 January 2013.
- [4] The contracts of employment contain seemingly contradictory clauses. On the one hand, they provide for the following benefits: medical aid assistance, home owner's allowance, pension fund contributions and a service bonus. On the other hand, the appointment letters sent to Mabele and Kruger refer to an "all inclusive" salary. NCEDA argues that it means that all three were employed on "total cost to company" basis, including all benefits; the three employees argue that the benefits are payable over and above their salaries.

¹ Act 75 of 1997 (BCEA).

The evidence

[5] Ms Yoliswa Lekhoathi (née Sehloho)² received an appointment letter, signed by the Acting CEO (Ms Masilo) on 24 October 2012. She was to be appointed as a Project Manager : Tourism in Kimberley with effect from 1 November 2012. It refers to a “salary range” and continues to state: “Kindly take into cognizance that your appointment is subject to the terms and conditions indicated in Annexure A.” (The same clause appears in the letters sent to Kruger and Mabele). And Annexure A contains the following clauses:

“7. **Medical Aid Assistance**

7.1 An employee not belonging to a medical scheme shall be eligible for the employer’s subsidy, which is 75% of the employer’s membership fees, limited to the maximum employer’s subsidy of R1 014 per month.

8. **Assistance with the payment of a housing allowance**

8.1 **Home owners [sic] allowance:**

According to the collective agreement signed in the PSCBC, i.e. PSCBC Resolution 2 of 2004, the Home Owners Allowance Scheme has been repealed and replaced with the Housing Allowance.

The Housing Allowance is a sum of money that the Employer pays every month in addition to an employee’s salary³ in order to assist him/her to pay for the rent or an instalment on his / her home.

To qualify for the Housing Allowance a few simple rules (requirements) must be met.

9. **Pension Contributions**

Your compulsory contribution from your pensionable salary to the Employees [sic] Pension Fund amounts to 7,5% from your date of appointment. The Administration contributes at the rate of 13%.

10. **Service Bonus**

² For the sake of consistency I will refer to this applicant as Ms Sehloho – that is the surname under which she brought the application, although she had adopted a married name at the time of the hearing.

³ My underlining.

A service bonus equal to one month's salary is payable on the salary payment day of the month of his/her birthday."

- [6] NCEDA has paid none of these benefits, other than pension contributions, to Ms Sehloho or the other two applicants.
- [7] Although they initially instructed the PSA to withdraw their dispute when they were under the impression that they would receive the listed benefits, they have reinstated it and the case is properly before court.
- [8] Under cross examination Mr *Majenge* put it to the witness that the benefits were included in their salaries on a "total cost to company" basis. She disagreed, saying that they were not informed accordingly and that was not what her contract stated.
- [9] Tebogo Luse, the human resources manager, testified for NCEDA. He reiterated that the intention was to pay the applicants, who are senior employees, on a "total cost to company" basis and that they had to structure their own benefits, such as pension and housing.
- [10] Under cross examination Mr *Venter* pointed out to Luse that, contrary to his opinion, the Public Service Act was not applicable to the applicants. The letters of appointment stated that they were appointed "in terms of the Northern Cape Economic, Trade and Investment Promotion Agency Act, No 4 of 2008".

Evaluation / Analysis

- [11] The first question is whether two of the employees – Sehloho and Mabele -- had withdrawn the dispute, as submitted by NCEDA. But they made it clear that they had instructed the PSA to reinstate it. And our courts accept that litigants may reinstate a matter that they had withdrawn.⁴ For example, in *Kgobokoe v CCMA*⁵ the Court held "that both the commissioner and the applicant laboured under the mistaken belief that the matter was resolved in principle and thereby causing the

⁴ *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others* [2005] 3 All SA 389 (E); 2005 (6) SA 123 (E).

⁵ (2012) 33 ILJ 235 (LC).

commissioner to inadvertently making undue pressure to bear on the applicant to sign. It is therefore my finding that the applicant did not sign the said notice of withdrawal voluntarily.”

- [12] And in *Ncaphayi v CCMA*⁶ Lagrange J held that the withdrawal of a matter at a stage when it is ripe for hearing does not prevent the instruction of fresh proceedings.
- [13] In any event, the PSA – that is, the applicant, acting on behalf of its three members – has not withdrawn the dispute before this Court. I am satisfied that it is properly before court.
- [14] Turning to the merits, it seems to me on a plain reading of the appointment letters that it is “subject to the terms and conditions indicated in Annexure A”. And that annexure, in turn, spells out the benefits relating to medical aid, housing, pension contributions and a service bonus. In the case of the housing allowance, it further specifically adds that it is a sum that the employer pays “in addition to an employee’s salary”.
- [15] The employees say they were not told that these benefits would be included in their salaries and that they needed to structure their own packages. The employer’s witness could not seriously dispute it. And the employer’s version is incompatible with its own offer of employment, signed off by the Acting CEO.
- [16] In conclusion, I am satisfied that the three employees are entitled to the benefits contained in clauses 7, 8, 9 and 10 in Annexure A of their contracts of employment; and that NCEDA is obliged to pay them those benefits over and above their salaries.
- [17] Both parties asked for costs to follow the result. I see no need in law or fairness to order otherwise.

Order

- [18] I therefore make the following order:

⁶ (2011) 32 ILJ 402 (LC),

18.1 The respondent is in breach of the terms and conditions of employment of the applicant's members, Mr Bernard Mabele, Ms Yoliswa Sehloho and Mr Denzil Kruger.

18.2 The respondent is ordered to pay to each of these employees the medical aid contributions, housing allowances, pension contributions and service bonuses stipulated in clauses 7, 8, 9 and 10 of Annexure A to their contracts of employment for the following periods:

18.2.1 Bernard Mabale : 1 November 2012 until the employment relationship terminates;

18.2.2 Yoliswa Sehloho : 1 November 2012 until the employment relationship terminates;

18.2.3 Denzil Kruger : 1 January 2013 to 20 June 2014.

18.3 The respondent is ordered to pay the applicant's costs.

Steenkamp J

APPEARANCES

APPLICANT:

P M Venter

Instructed by Adrie Hechter.

RESPONDENT:

Zenzile Q Majenge

Instructed by the State Attorney, Kimberley.