IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 642/14

In the matter between:

PUBLIC SERVANTS ASSOCIATION obo ND TLOANA **Applicant**

and

THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL **First Respondent**

MOHUBEDU SIMON RANTHO *N. O* **Second Respondent**

DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, LIMPOPO **Third Respondent**

Heard: **30 January 2019**

Delivered: **13 August 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] With this application, the Public Servants Association (PSA) acting on behalf of its member, (Tloana) seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Arbitrator), acting under the auspices of the first respondent (PHSDSBC).

[2] The review application is opposed by the third respondent (The Department), which has also filed a supplementary affidavit in which it raised a point of unreasonable delay in the prosecution of that application.

[3] The Department further opposed the review application on the basis that that whilst the arbitration award was issued on 26 December 2013, the review application was only delivered on 15 April 2014, making it some two months outside of the time periods contemplated in section 145(1)(a) of the Labour Relations Act (LRA).[1] It was also pointed out that no condonation was sought for the non-compliance with the time periods, even after the concerns were raised in the answering affidavit.

[4] The applicants had in the replying affidavit, simply averred that a copy of the arbitration award was served on them on 28 February 2014 by the PHSDSBC, and that to the extent that the Notice of Motion was filed on 15 April 2014, the application was within the six weeks' period.

[5] The provisions of section 145(1)(a) of the LRA are peremptory. An application for a review of an arbitration award must be delivered within six weeks of a copy of the award having been served on the applicant. Non-compliance with these provisions would require an applicant to show good cause prior to the Court assuming jurisdiction over the matter.

[6] Since the applicants made no attempt to explain the reasons the application was only delivered on 15 April 2014 when the award was issued on 26 December 2013, and had merely averred that a copy of the award was served on them on 28 February 2014, from the records, it appears that copies of the award were served on the parties on 13 January 2013, and also on 27

[1] Act 66 of 1995 (as amended)

and 28 February 2014. A simple averment therefore that the copies of the award were only served on 28 February 2014 is not sufficient. At the most, and to the extent that the Department had raised the issue of jurisdiction, it was incumbent upon the applicants to explain the delay, and if there was no delay as they had contended, to equally state why that was the case. In the light of the record demonstrating that the copies of the award were initially served on 13 January 2014, at the most, the application is outside of the statutory period by some six weeks. Clearly under those circumstances, the applicants were obliged to seek condonation. To the extent that they had failed to do so, it follows that this application ought to be dismissed for want of jurisdiction, and it is not even necessary to address the issues surrounding the lack of timeous prosecution of the application.

[7] Even if I may be incorrect in my conclusions as above, the applicants' review application lacks merit as demonstrated below.

The background and the arbitration award:

[8] The arbitration award sought to be reviewed and set aside was issued in circumstances where an alleged unfair labour practice dispute was referred to the PHSDSBC on 14 October 2013. The dispute related to the refusal by the Department to award Tloana a performance bonus on the basis that his performance score was below (at 3). Tloana however contended that his original overall performance rating of 4 was improperly changed by the Moderating Committee.

[9] The following material is not seriously contested;

9.1 The Department had in 2007, introduced a Performance Management and Development Policy (The Policy). The policy was complemented by a Circular issued by the Head of the Department in November 2010, which *inter alia* provided that employees performing satisfactorily at a rating of 3 would no longer be awarded the bonus in the financial year 2010/2011, but were to only qualify for a pay progression.

9.2 In 2010, the Premier of Limpopo introduced a Provincial Performance Management System Policy Guideline which *inter alia* required an employee and his supervisor to ensure that a performance instrument or agreement was put in place yearly by the 1st of April, and to thereafter submit a rating to the overseer, who would in turn submit it for approval by the Moderating Committee.

9.3 The performance assessment and ratings of Tloana for April 2010 – March 2011 were compiled and signed by him, his supervisor and overseer in June 2011. Scores of 4 were allocated for Key Result Areas (KRA's 2 and 3) by the supervisor.

9.4 The role of the Moderating Committee in accordance with Clause 5.1.4[2] of the 2010 Provincial Policy is to identify deviations or discrepancies in documents and annual assessment reports, to ensure correlation between documents and consistency, and to ensure that ratings obtained are confirmed. If the Committee however identifies deviations, it must then refer those deviations back to the supervisor with a request for reconsideration of the rating.

9.5 Under the provisions of clause 6.3.1.3 of the Provincial Guidelines as issued through Circular 155 of 2007, reiterate that it is not for the Moderating Committee to change the supervisor's score, but that it must advise the PMDC or the line managers who must account for the ratings which are not consistent with the targets of the annual performance management plans. The Committee must further ensure that the ratings given are supported by verifiable evidence and that

[2] Clause 5.1.4 **Moderating Committees**
The Head of Department must constitute Moderating Committees in Branches
The Role of the Moderating Committee is to: -
5.1.4.1 Identify deviations or discrepancies in the PMDS documents namely, Pls, PRDs and annual assessment reports.
5.1.4.2 Ensure the correlation between Pls, PRDs and annual assessment reports that informs consistency with regard to the ratings.
5.1.4.3 Ensure that ratings obtained are confirmed.

If the Moderating Committees identify deviations or discrepancies with regard to the above listed roles, then such deviations should be referred back to the supervisors. This should be accompanied by a request for reconsideration of the rating.

there is a correlation between the ratings on the quarterly review, annual evaluation reports, performance instruments/agreements and annual departmental performance plan.

9.6 When the Moderating Committee was appointed, its attention was drawn to the Circular of 2007, and it was advised that its function is to moderate without changing the scores, to advise the Accounting Officer on employees who might have been rated too high when performance reports indicated that targets were not met, or where there were no supporting documents to justify the rating, and to recommend the appropriate ratings for approval by the Head of Department.

4.1 On 12 September 2012, the Moderating Committee had convened and recommended that Tloana be given a final satisfactory rating of 3 instead of 4. The Committee's reasoning was that it concurred with the ratings in KRAs 1, 4 and 5 as agreed with the supervisor, but not those in KRAs 2 and 3 because Tloana did not achieve on targets set for the Key Results areas.

4.2 Similar recommendations were made with respect to other employees. The record further demonstrates that the Committee had recommended a rating of 3 even in cases where other employees had obtained a rating of 5. In this regard, of the 30 individual employees scores moderated, 13, inclusive of Tloana, were similarly affected.

The arbitration proceedings:

[10] A dispute having been referred for conciliation and a certificate of outcome having been issued, it came before the Arbitrator. Tloana's case at those proceedings was essentially that;

10.1 A score of 4, which refers to commendable performance, was agreed to between him and his supervisor, after having obtained an overall score of 540.

10.2 The source of the score of 480 as allocated by the Moderating Committee was unknown to him and the supervisor.

10.3 The Moderating Committee was *obliged to confirm* the score allocated by the supervisor, and any deviations identified by the Committee ought to have been referred back to the supervisor with a request for a reconsideration of the rating. In his case however, this was not done, as the Committee had merely indicated that it did not agree with the scores as he did not overachieve on targets, and had accordingly changed the initial scores.

[11] The Department's case before the Arbitrator was that;

11.1 Any rating agreed to between the employee and the supervisor was not final, as it was subject to a further recommendation of the Moderating Committee upon a consideration of the scores allocated as against verifiable evidence submitted by the supervisor and the employee, and the targets to be met. The recommendations, including the appropriate score, would then be assessed and approved by the Head of Department.

11.2 Thus, the role of the Moderating Committee is not to rubber-stamp the scores agreed to between the employee and the supervisor. In this case, the Committee had agreed with some of the scores allocated in the KRA's, and not all, because targets were not achieved in certain respects, hence a final satisfactory rating of 3 was recommended. Tloana's case was not the only one where the Committee had made its own assessment and made different recommendations to the HOD.

11.3 In the light of the above, it was argued that the Committee did not change Tloana's scores as agreed between him and his supervisor, and that it had only made recommendations to the HOD with reasons as stated in its minutes. Flowing from those recommendations, and in the light of the confirmed score of 3, Tloana was then entitled a performance based salary increase by way of pay progression, which was duly paid to him.

[12] The Arbitrator concluded that having had regard to the Policy and the role of the Moderating Committee, it was not for the Committee to change the supervisor's scores, but to advise the PMDC or the line manager, who must account for the ratings which were inconsistent with the targets and management plans. The Committee only made recommendations inclusive of the appropriate rating, which were in turn approved by the HOD. Accordingly, the Moderating Committee had not acted *ultra vires* by recommending a score of 3, and consequently, Tloana was not subjected to any unfair labour practice.

The grounds of review and evaluation:

[13] Central to any review application is whether the Arbitrator's decision can be said to fall within the band of reasonableness. The applicants attacked the Arbitrator's findings based on their insistence that the Moderating Committee had changed the scores.

[14] The first ground of review is that the Arbitrator committed misconduct by finding that the Committee had no authority to change the scores as agreed to between an employee and supervisor, and yet in the same vein, concluding that the Committee had the authority to recommend a change of any score, and as such, did not act *ultra vires*.

[15] A second ground of review is that the Arbitrator committed a gross irregularity in the proceedings by over-emphasising the purposive doctrine in interpreting statutes, whilst not placing any emphasis that the agreement and the score agreed to between the employee and the supervisor was binding.

[16] The third ground of review is that the Arbitrator should have found that the Committee ought to have referred the matter back to the supervisor and the employee to revisit the score, and further that he ought to have found that the Committee had no right to amend the supervisor's score, and that to the extent that this was not done, the Department had committed an unfair labour practice.

[17] As it was correctly pointed out on behalf of the Department, the applicants' premise in attacking the award is purely based on the power exercised by the Committee rather than the reasons given by that Committee in regards to its recommendations.

[18] The mandate[3] of the Committee was to moderate quarterly reviews and annual evaluation without changing the scores, and to advise the Accounting Authority on employees who were rated too high whereas according to the division's annual performance report, some of the targets were not achieved or where there were no supporting documents to justify the ratings. The Committee was further mandated to recommend appropriate ratings for the targets achieved for approval by the HOD[4].

[19] The Arbitrator's reasoning that the Committee had no power to change the score but to recommend any changes cannot be faulted, as it was premised on the above mandate of the Committee. The ultimate decision and approval lay with the HOD and I fail to appreciate the difficulty in acknowledging this basic premise, which is grounded in letter of appointment.

[20] The applicants do not even attack that letter of appointment and the mandate set out therein. Their contention that the Arbitrator should have found that the Committee should have reverted the matter back to Tloana and his supervisor is based on the provisions clause 5.1.4 of the policy insofar as the Committee had identified deviations and discrepancies. Even if this was the case, these discrepancies ought to be referred back to the supervisor for his consideration, and nothing is said in the policy that the matter should be reverted back to the employee.

[21] The difficulty with the applicants' case is that they do not contest the reasoning of the Committee insofar as it had found that Tloana had not over-achieved in respect of certain targets set out in the KRA's, hence the recommendation of a score of 3. Their approach is simply that since Tloana and his supervisor had agreed on the rating, that rating should stand

[3] The appointment of the Committee dated 26 July 2012
[4] In line with clause 6.3.1.3 of the Policy read together with Circular 21 of 2004 at para 3.1

regardless of the process of moderation. The fundamental flaw with this approach is that it renders the role of the Committee redundant. The rating agreed to between Tloana and his supervisor cannot be final and binding on the Department, nor was the Committee obliged to simply confirm it.

[22] Thus to the extent that the Committee had found that certain targets were not met, it was obliged to point these out and to make appropriate recommendations to the HOD. There was thus no obligation to refer the matter back to the supervisor in terms of the Committee's mandate. To this end, the approach of the Committee in this regard cannot be equated with a mere changing of the scores, as the final decision to approve or not approve the recommendations was that of the HOD. Effectively, it is the decision of the HOD that ought to be the subject of the attack, rather than the recommendations of the Committee. Any suggestion that the matter ought to be have been referred back to the supervisor would only have merit if a case was made out against the decision of the HOD. In this regard, no case has been made as to the reason the HOD ought not to have approved the recommendations of the Committee without referring the matter back to the supervisor.

[23] In the light of the above conclusions, it follows that the grounds upon which a review of the arbitration award is sought are not sustainable. The reasoning of the Arbitrator cannot be faulted and consequently, the decision of the Arbitrator in the light of the material before him falls within a range of reasonableness.

[24] I have had regard to the issue of costs, and it is my view that the requirements of law and fairness militates against any costs order.

[25] In the premises, the following order is made;

Order:

1. The Applicants' application to review and set aside the arbitration award issued by the Second Respondent under case number PSHS 13/14 dated 26 December 2013 is dismissed.

2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	MS. Schnehage, instructed by AM Carrim Attorneys
For the Third Respondent:	T Skosana, instructed by The State Attorney