



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 157/17 & P226/17

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

T DU PREEZ

First Respondent

SSSBC

Second Respondent

JOHN ROBERTSON N.O

Third Respondent

In re:

T DU PREEZ

Applicant

And

SOUTH AFRICAN POLICE SERVICES

Respondent

Heard: 06 March 2019

Delivered: 08 March 2019

Summary: An application to review and set aside an arbitration award issued without the necessary jurisdiction is a nullity thus cannot be made an order of court. An incorrect award is reviewable in law. Held (1): The award is reviewed and set aside and is replaced with an order that the claim of Captain Du Preez is dismissed. (2): The application in terms of section 158(1)(c) is dismissed. (3): There is no order as to costs.

JUDGMENT

MOSHOANA, J

- [1] There are two applications before me. On the one hand, the SAPS is seeking a review and setting aside of an award issued by the arbitrator. On the other hand, Captain Du Preez seeks an order making the same impugned award an order of this court in terms of section 158(1)(c) of the LRA. Both applications are opposed. This judgment shall deal with both applications.
- [2] Briefly, Captain Du Preez (Du Preez) is a member of the SAPS in the capacity of a Captain in the Forensic Services Division. Around April 2013, one Lieutenant Colonel Meyer retired from the force. Following that, one Brigadier Botha, in writing and on 5 April 2013, appointed Du Preez as an Acting Commander: Provincial Human Resource Development: Eastern Cape. The Brigadier was purportedly acting in terms of an instruction issued by the Head Office in circular 14/6/23 dated 2002-03-08. This acting appointment was to run for a period of 6 months. Du Preez accepted the temporary appointment on 10 April 2013.
- [3] On 12 April 2013, the Brigadier prepared a recommendation for the acting appointment of Du Preez. On 18 April 2013, Major General Khunou refused to accept the recommendation and recorded thus:

“The post for Commander HRD does not exist, therefore, the grievance request cannot be entertained by this office”

- [4] Later on, the Major General addressed a letter to the Provincial Head and recorded that *the application for acting appointment of Number 0454254-1 Captain TA Du Preez was not recommended due to the fact that the post is not on the approved structure*. He further recorded that *in accordance to Agreement 2/2002 an employee must be appointed in writing by the Divisional Commissioner*. Despite all that, apparently, Du Preez continued to perform the duties attached to the post departed by LT Col Meyer.
- [5] Later in 2015, Du Preez lodged a grievance seeking to be paid an acting allowance owing to the fact that he was performing the tasks of a vacant post. After following various stages, at stage 4 an agreement was reached that Du Preez be compensated. Allegedly, the agreement was informed by a policy in respect of Acting Allowance. For reasons not necessary to be traversed in this judgment, the agreement was not honoured.
- [6] Aggrieved thereby, Du Preez referred a dispute in terms of section 24 of the LRA to the Bargaining Council. Apparently, the dispute was not conciliated upon. The third respondent was appointed to arbitrate the dispute. On 6 April 2017, the third respondent issued the impugned award. Aggrieved by the award, the applicant launched the present application. A counter application was lodged to make the award an order of this court.

The issue of jurisdiction

- [7] The applicant raised two points relevant to the jurisdiction assumed by the third respondent. The first one was belatedly raised. A point of law can be raised at any time before judgment. The point being that since the third respondent failed to issue a certificate on non-resolution in terms of section 135(2) of the LRA, he lacked jurisdiction to arbitrate the dispute. Reliance was placed on the Constitutional Court judgments of

September and *Intervale*. I do not agree with Advocate Thys, appearing for the applicant, on this point.

- [8] His reliance on the Constitutional Court judgments is misplaced. In *casu*, it is common cause that on 18 April 2016, Du Preez referred the dispute for conciliation to the second respondent. The jurisdictional requirements for arbitration are set out in section 191(5)(a) of the LRA. Those are (a) if the council or commissioner has certified that the dispute remains unresolved or (b) if 30 days or any further period as agreed between the parties have expired since the council or the commission received the referral and the dispute remains unresolved. It is clear from these requirements that what found jurisdiction is the referral as opposed to the actual conciliation itself. Issuing a certificate is an administrative function and does not found jurisdiction. Therefore, this point is not upheld.
- [9] The second point is that of *locus standi*. The applicant contends that Du Preez does not have the right to refer a dispute in terms of section 24 of the LRA in that he is not a party to the collective agreement in question. There is some legal force in this submission. Advocate Lamprecht, appearing for Du Preez, submitted that in line with section 23(1)(d) of the LRA, Du Preez as an identified employee is entitled to refer the dispute. In the alternative, he submitted that clause 11 of Agreement 2/2002 provides that the provisions apply to Du Preez. I have this to say with regard to the submissions. Section 23(1)(d) specifically deal with the binding effect of a collective agreement. In other words, Du Preez cannot escape the binding effects of Agreement 2/2002 on him on the basis that he is not a party to the agreement. Section 23(1)(d) is there to bring into the fold, non-parties to an agreement in so far as its binding effects are concerned. Clause 11 buttresses the provisions of the section. It identifies Du Preez as a person to whom the agreement applies. By virtue of being an employee of the SAPS, Du Preez is bound and the agreement applies to him, despite being a party to the agreement.
- [10] The issue of *locus standi* does affect the issue of jurisdiction. It is a jurisdictional fact that must exist before a power can be exercised. The

dispute referred to the Bargaining Council is one of application and interpretation of a collective agreement. On the facts of this case it is undisputed that the collective agreement does apply to Du Preez. His complaint was more centred on the interpretation of the collective agreement. However, I venture to say, the true dispute of Du Preez is that of breach of an agreement to be paid acting compensation. According to him, at stage 4 an agreement was reached that he shall be compensated for acting. By not paying him, the applicant was in breach of the agreement achieved in stage 4. The agreement in stage 4 is not a collective agreement. Therefore, in my view, the dispute is not about interpretation of a collective agreement. In the matter of *Arends v SALGBC and others*¹, I had an occasion to say the following:

[16] It must follow axiomatically that an individual employee cannot be a party to a collective agreement. A party can either be a registered trade union or an employer or employer's organisation...The issue of who a party is, is distinct from the binding nature of the agreement. Alive to the concept of *stipulatio alteri*, the legislature introduced section 23(1)(c)-(d). Employees can derive benefits from a collective agreement even if not parties. To my mind employees only derive benefits from a collective agreement and are not parties to the agreement...

[17] ...I conclude by saying that a non-party cannot refer a dispute in terms of section 24 of the Act. Since employees are generally non-parties but beneficiaries, they cannot in my view refer a dispute in terms of section 24.

[11] The matter of *Arends* was taken on appeal. On appeal, the LAC did not upset the above finding. By necessary implication, the findings were approved by the LAC. It must therefore follow that Du Preez had no *locus standi* to refer a dispute to the Bargaining Council. Also, the third respondent had no jurisdiction to entertain the dispute. An award issued without the necessary jurisdiction is a nullity. On this basis alone, the award is susceptible to review.

¹ Case number P107/12 dated 1 March 2013.

The correctness of the award

[12] Assuming that the third respondent possessed the necessary jurisdiction, I now consider the correctness of the award. In my mind, the applicable test in this regard is one of correctness as opposed to reasonableness. Nonetheless a legally incorrect award does not pass the muster of reasonableness. In order for Du Preez to have a claim arising from the collective agreement, all the requirements of the agreement must be met. The appointment must be made by a person with authority. Clause 1 of the agreement stipulates that the appointing person must be an assistant commissioner, a higher ranking official or area commissioner. Brigadier Botha is none of those. The post must be vacant and funded. Major General Khunou indicated few days after the Brigadier appointment that the position does not exist. There was no evidence from Du Preez, who bore the overall onus, that the position was funded. The acting may not be for a period in excess of 12 months. Based on the claim, upheld by the third respondent, Du Preez acted for a period of about 2 years.

[13] In the light of the above, it must follow that the interpretation by the third respondent that the collective agreement entitles Du Preez to be paid an acting allowance is wrong and cannot be upheld. The LAC in *MEC: Department of Health: Eastern Cape v Saville Kops and 16 others*² made it absolutely clear that if the requirements of the instrument relied upon have not been met, a claim to be paid an acting allowance is non-existent in law. I am bound by this decision. Besides being bound by the decision, I fully agree with its reasoning and find it to be on all fours with the matter before me.

Enforcement application

[14] The discretionary powers approbated to this court can only be exercised where a valid and binding award exists. An award issued without jurisdiction is a *brutum fulmen*. Equally an incorrect award is invalid in

² Case number PA5/2014

law and cannot be made an order of this court. The enforcement application is doomed to fail.

Conclusions

[15] In summary, it is my considered view that Du Preez lacked the necessary *locus standi* to refer the dispute, thus, the third respondent lacked the necessary jurisdiction. If he did have jurisdiction, his award is wrong in law and ought to be reviewed and set aside. Axiomatically, the section 158(1)(c) application is bound to fail.

[16] For all the above reasons, I accordingly make the following order:

Order

1. The award issued by the third respondent under the auspices of the second respondent is hereby reviewed and set aside.
2. It is replaced with an order that Captain Du Preez's claim is dismissed.
3. The application in terms of section 158(1)(c) is dismissed.
4. There is no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M Thys

Instructed by: State Attorney, Port Elizabeth.

For the First Respondent: Advocate J Lamprecht.

Instructed by Brown Braude & Vlok Inc, Port Elizabeth.

LABOUR COURT