

**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not Reportable

Case No: P 241/17

In the matter between:

**NELSON MANDELA BAY MUNICIPALITY**

**Applicant**

and

**ARBITRATOR M FOUCHE N.O**

**First Respondent**

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL**

**Second Respondent**

**SOUTH AFRICAN MUNICIPAL WORKERS**

**UNION**

**Third Respondent**

**NOKONWABA MPLATYI**

**Fourth Respondent**

**XOLISWA KARINA KHALIMANE**

**Fifth Respondent**

**Delivered: 2 December 2019**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J**

Introduction and background:

- [1] The applicant (Municipality) seeks an order reviewing and setting aside the arbitration award dated 3 July 2017 issued by the first respondent (the Arbitrator) acting under the auspices of the second respondent (SALGBC). In the award, the Arbitrator held that the Municipality had committed an unfair labour practice in not paying the fourth and fifth respondents (the Employees)

scarce skills allowances. The Municipality further seeks to review and set aside a second arbitration award issued by the Arbitrator, in terms of which the amounts due to the Employees were quantified. The Employees and the third respondent (SAMWU) filed and delivered a Notice to Abide with the Court's decision.

- [2] The dispute referred by the Employees to the SALGBC is one of numerous other similar disputes referred by other employees employed by the Municipality related to the payment of scarce skills allowances. On the date that this application was heard, a similar matter under case number PR223/17 was heard unopposed and the relief sought by the Municipality was granted. Judgment in this matter was however reserved in the light of certainty sought by the Municipality in view of the multitudes of similar other disputes.
- [3] To the extent that the application is unopposed, the brief background to this dispute as can be gleaned from the material before the Court is as follows;
- 3.1 The Employees are employed as superintendents in the Infrastructure and Engineering Directorate (the Roads and Stormwater sub-directorate) of the Municipality.
  - 3.2 The Municipality introduced a 10% scarce skills allowance in 2008 in order to retain and attract skills particularly Artisans, Technicians, Technologists in engineering, Doctors, Pharmacists and Nurses. The allowance was further introduced as an interim measure, payable until a new wage/salary structure could be implemented. The allowance was introduced following discussions held with SAMWU and IMATU from 2007, which discussions had resulted in a Council Resolution in September 2008.
  - 3.3 When the allowance was implemented, all employees employed at the time received it. In December 2013, and with a view of properly regulating the issue of the allowance, the Municipality, SAMWU and IMATU entered into a collective Agreement on the Implementation of Tuned Assessment of Skills and Knowledge (TASK) Final Outcomes Report in the Modified Model Wage Curve. The agreement was

applicable to all employees who were in service as at 1 December 2013 when the agreement took effect.

- 3.4 The Collective Agreement was meant to ensure that there was a job evaluation conducted in respect of all identified positions and that the existing employees' wages would be adjusted accordingly. It overtook all other applicable policies and procedures related to payment of the scarce skills allowance, and placed emphasis on tertiary qualifications for employees to qualify for payment of the allowance. Furthermore, other terms and conditions of the Agreement were that;

3.4.1 The Agreement would remain in place until replaced by a Collective Agreement entered into at National Level;

3.4.2 All employees would be paid in accordance with the new wage rates with effect from 1 December 2013;

3.4.3 Salary scales would thereafter be adjusted in terms of the applicable Wage and Salary Collective Agreements concluded from time to time;

3.4.4 All positions to be advertised from 1 December 2013 to be advertised utilising the appropriate TASK grade and salary;

3.4.5 That all employees negatively affected by the discontinuance of the allowance would be paid the allowance for three months until May 2014, during which period the Municipality and the Unions would assess and review the impact of the allowance on affected employees.

- 3.5 Attempts by the Municipality in June 2014 into 2015 to discontinue the payment of the allowance in accordance with the provisions of the Collective Agreement were met with resistance by employees who were affected. This had led to these employees embarking on industrial action in or around June 2014. The industrial action had forced the Council of the Municipality in August 2015 to revisit its decision and

reinstate the scarce allowance to certain employees pending consultation with the Unions. This decision was however contrary to the Collective Agreement already concluded in December 2013.

- 3.6 The Employees in this dispute were employed in March and April 2013 respectively in TASK Grade 11. It is common cause that from the commencement of their employment, they had not received the scarce skills allowance. In March 2016, some three years after the commencement of their employment, they had then lodged a grievance, contending that they were entitled to the allowance.
- 3.7 Several meetings were held between the Employees as represented by a SAMWU representative, their supervisor, and management from the Municipality between March and August 2016 with a view to resolve the grievance.
- 3.8 When the grievance could not be resolved, SAMWU then referred an unfair labour practice dispute to the SALGBC in September 2016. For some reason, two separate disputes were referred on behalf of Employees. The disputes were subsequently consolidated on 18 November 2016, and came before the Arbitrator for arbitration on 18 January 2017. The arbitration proceedings were finalised on 17 May 2017.

[4] At the arbitration proceedings, the Municipality led the evidence of its Deputy Director: Job Evaluation and Grading (Mr B L Douglas), its Senior Director: Budget and Treasury (Mr Ngcelwane), and Mr J Scheepers, a qualified artisan and Training Manager. Douglas was closely involved in the development of the scarce skills strategy, whilst Ngcelwane was involved in the preparation of budgets.

[5] In summary, the evidence before the Arbitrator was that the two Employees had responded to an advertisement of two posts of Assistant Superintendent. At the time that they responded to the advertisement, they possessed National Diplomas in Civil Engineering and were studying towards a B.Tech. Upon their appointments in March and April 2013 respectively, and as a result

of the implementation of TASK, their job titles were changed from assistant superintendent to superintendent.

- [6] The Employees' case was that upon assuming their new positions, they had discovered that many of their colleagues were being paid the scarce allowance whilst they were not. The Employees' comparators were seven other senior superintendents. Upon making enquiries with their supervisor (Mr Gaffore), they were advised that they should in fact be receiving the payment as they qualified by virtue of their tertiary qualifications.
- [7] Gaffore had also testified on behalf of the Employees in the arbitration proceedings, and confirmed that they had qualified for the scarce skills allowance as they held national diplomas and had higher qualifications than trade tested artisans. His view was further that by virtue of the Employees' qualifications, they were technicians, and the latter were receiving the allowance. He further testified that to the extent that when the posts were advertised, the Municipality had omitted to factor in the 10% allowance as contemplated in Council Resolution of September 2008 when adopting the interim scarce allowance, this was an oversight.
- [8] The Municipality's case before the Arbitrator was that
- 8.1 Only employees in its employ since 2008 who had occupied the identified occupational categories qualified for the allowance;
  - 8.2 The Employees in this dispute were appointed in 2013 and had applied for the allowance after the implementation of TASKS and did not therefore qualify. No promises were made to the Employees and they thus had no legitimate expectation that they would receive the allowance.
  - 8.3 When the posts which the Employees occupied were advertised, the 10% allowance was not included in the remuneration package, and they had accepted the offers of employment without the allowance.

8.4 The Employees did not in any event qualify for the allowance as they were not certified. In this regard, it was argued that even if the Employees had academic qualifications, they were not professionally qualified in the sense of having been certified or registered by the Engineering Council of South Africa (ECSA).

8.5 The dispute referred for arbitration was that of interest, as the Employees did not have a right to the allowance. Accordingly, what the employees sought was a new right, which was a matter that fell within the prerogative of the Municipality to deal with.

[9] In the award, the Arbitrator rejected the Municipality's arguments that the dispute pertained to disputes of right, as the scarce skills allowance was a condition of employment for certain categories of employees, and therefore an existing right.

[10] According to the Arbitrator, the dispute turned on whether the Employees had skills identified by the Municipality as scarce and if so, whether they qualified for the allowance. The Arbitrator concluded that the Municipality had committed an unfair labour practice, and that the Employees were entitled to a scarce skills allowance on the grounds that;

10.1 The Employees were scarce skills employees when employed from 2013, as they were qualified in engineering.

10.2 Engineering was identified as scarce skills as far back as 2007 with the inception of the allowance, and was one of the identified occupational categories. The work performed by the Employees fell within scarce skills category.

10.3 There was no requirement for registration with a professional body before the allowance could be paid, and all that was required were professional and/or formal qualifications.

10.4 The fact that the advertisements did not include the allowance and that the Employees had accepted the offers without the allowance did not

imply that they did not qualify for it. The scarce skills allowance remained a condition of employment.

The grounds of review and evaluation:

- [11] The Municipality sought to have the arbitration award reviewed and set aside on various grounds. The test on review is trite, and the enquiry is whether the decision arrived at by the Arbitrator is one that falls within a band of reasonableness.
- [12] Having had regard to the grounds upon which a review is sought, and the submissions advanced in that regard, I am in agreement with the Municipality that the arbitration award ought to be reviewed and set aside for the following reasons;
- 12.1 The Employees were employed in March and April 2013 respectively. At the time of their employment, the payment of the scarce skills allowance was still in place as per the 2009 Council Resolution, in terms of which four criteria were to be met for qualification.
- 12.2 It was however not in dispute that the Employees from inception of their employment, did not receive nor were they entitled to the scarce skills allowance. This was based on the fact that their posts when advertised, had specifically excluded the 10% scarce skills allowance.
- 12.3 That omission in my view could not have been by error as contended by Gaffore, as it followed a decision of the Council and the Municipality to exclude the 10% scarce skills allowances from any future advertisement of posts.
- 12.4 The Employees only raised a grievance in March 2016, some three years after their appointments, and it is inexplicable that they would only raise that entitlement after such a long period of employment. The only invariable conclusion to be reached is that they had jumped on the bandwagon after the Council Resolution to reinstate the allowances following the industrial action.

- 12.5 The Municipality is also correct in stating that the circumstances of the employment of comparators relied upon by the Employees, were materially distinguishable. The comparators were in the employ of the Municipality long before the Employees, and had benefitted from the scarce skills allowance from its inception in 2008. This was so in that at the time that the comparators were employed, their positions were designated as scarce skills, whilst the Employees' posts were not.
- 12.6 The Municipality is further correct in pointing out that the Arbitrator ignored the significance of the Collective Agreement of 1 December 2013. When the Council Resolution was replaced by the Collective Agreement entered into between the Municipality, SAMWU and IMATU in December 2013, part of the agreement was to adopt and implement a new model, TASK, which was meant to put mechanisms in place that would lead to the discontinuance of scarce skills allowance. In line with the adoption of that new model, all employees who were to be affected by the discontinuation of the scarce skills allowance were to be paid such an allowance until May 2014.
- 12.7 It was the Municipality's contention that the subsequent Council Resolution adopted in August 2015 in terms of which the scarce skills allowance was reinstated following upon the industrial action was unlawful and contrary to the provisions of the Collective Agreement entered into December 2013. In my view, the lawfulness or otherwise of this Council Resolution was not a defence that could be relied upon in the light of that Resolution not having been set aside by a Court order. In any event, as shall be made clearer in this judgment, nothing turned on that Resolution.
- 12.8 The issue of the Council Resolution was however not central to the determination of whether the Employees were entitled to the scarce skills allowance or not. To the extent that the Municipality relied on the provisions of the December 2013 Collective Agreement, which in any event supersedes the Council Resolution, the issue is whether the

Employees were indeed entitled to the scarce skills allowance after 31 May 2014.

12.9 Any entitlement to the scarce skills allowance, to the extent that it could have been argued that it formed part of the terms and conditions of employment could only have been based on the provisions the Collective Agreement. As correctly pointed out on behalf of the Municipality, the issue for consideration was whether the Arbitrator applied her mind to the provisions of that agreement and the implications of those provisions in relation to the discontinuance of the allowance with effect from 31 May 2014. Clearly with these provisions, the intention of the parties could only be understood to have been that the scarce skills allowance would be terminated with effect from May 2014, whilst further consultations over the matter took place.

12.10 The Arbitrator commented on these consultations and the fact that as at the date of the arbitration hearing, the parties had not reached or concluded any agreement in that regard. Be that as it may, the Arbitrator nonetheless appeared to have placed emphasis on the fact that the payment of the scarce skills allowance had continued after May 2014, and in that regard had considered the reasons the Employees should equally be entitled to such allowances despite the fact that the circumstances of the comparators were materially distinguishable.

12.11 It is my view that once the Arbitrator appreciated the parties intention as reflected in the December 2013 Collective Agreement as she had done, this ought to have been the end of the matter, given the sanctity of collective bargaining and the primacy given to collective agreements. As further pointed out on behalf of the Municipality, the provisions of section 71(3) of the Local Government: Municipal Systems Act<sup>1</sup> placed an obligation on the Municipality to comply with any collective agreements concluded with organised labour.

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<sup>1</sup> Act 32 of 2000 (as amended)

12.12 In line with above, the fact that the Municipality had continued to make payments of these allowances to other employees who had previously benefitted, cannot give rise to the Employees' entitlement to, or a right to such payments. In any event, the Employees never at any stage of their employment benefitted from the scarce skills allowance, and any right alleged by them in that regard cannot simply arise out of the fact that other employees, contrary to the specific provisions of the collective agreement, continued to receive the allowance.

12.13 Even if any reliance was to be placed on the subsequent Resolution of Council of 20 August 2015, which reinstated the payment of the allowances after the industrial action, that Resolution in any event refers to reinstatement of the allowance in respect of certain employees who had previously benefitted. The Employees did not fall into this category.

12.14 I am further in agreement with the submissions made on behalf of the Municipality that it constituted a material error of law on the part of the Arbitrator to order the Municipality to make the payments to the Employees, where any such order was contrary to the basic tenets of statutes governing municipalities, or where compliance with such an order would have led to material breaches of such statutes and collective agreements reached by the parties to the dispute.

12.15 In the light of the above conclusions, it is not even necessary to have regard to the other factors that the Arbitrator considered in coming to a conclusion that the Employees qualified for the scarce skills allowance. Equally so, it is not even necessary to consider other grounds of review related to the second (Supplementary) Arbitration award issued by the Arbitrator in relation to the quantum of amounts payable to the Employees. That issue fell away as soon as a decision was reached that the initial arbitration award in any event ought to be reviewed and set aside.

[13] Accordingly, the following order is made;

Order:

1. The arbitration award dated 3 July 2017 issued by the First Respondent under case number ECD091613, is reviewed, set aside and substituted with an order that the failure or refusal by the Applicant to pay to the Fourth and Fifth Respondents a scarce skills allowance, did not constitute an unfair labour practice within the meaning of section 186(2) (a) of the Labour Relations Act.
2. There is no order as to costs.

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Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: P N Kroon SC with A. Rawjee, instructed by Joubert Galpin  
Searle Inc.

For the Respondents: No Appearance