



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable
Case No: C534/23

In the matter between:

JOHANNA LETLHOGONOLO BABOLAENG

Applicant

and

SOL PLAATJIE LOCAL MUNICIPALITY

First Respondent

DR TL MABUSELA

Second Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL

NORTHERN CAPE REGIONAL OFFICE

Third Respondent

Heard: 10 October 2025

Delivered: 27 October 2025

JUDGMENT

KAHANOVITZ, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award handed down on 18 September 2023 under case number NCD 062204 WECT 2107-23 by the second respondent (hereafter "the commissioner"), acting under the auspices of the third respondent, which found that the first respondent had not committed an unfair labour practice.

The evidence at arbitration

The applicant's case at arbitration

- [2] The applicant testified that she was employed by the first respondent as an intern who joined the municipality in September 2018 through the ISDG Mentorship program as a candidate Civil Engineering Technician. Her employment ended in November 2022. She signed a written employment contract with the municipality.
- [3] She holds a BTECH degree and has had eight years' professional experience in construction project management.
- [4] She was expected to register with the Engineering Council as a professional civil engineering technician.
- [5] This application was unsuccessful as her application had failed to meet some of the council's requirements. In consequence, her contract with the municipality had to be extended in 2021.
- [6] The written contract of employment provides that mentorship is a process of transferring knowledge and experience from an experienced individual to an inexperienced mentee by providing guidance and advice that will help to develop their career. It also provides that the agreement shall not be interpreted to create any expectations of permanent appointment.
- [7] The applicant had three different supervisors. The last of which was Ms Jele, the PMU manager. After Ms Jele left, there was a staffing gap in the section of the

municipality in which the applicant was employed, and she was asked to fill it. The then municipal manager, Mr Akharawaray, had verbally instructed her to perform Jele's functions.

- [8] Although she had done this, the applicant had never been paid an acting allowance. According to her, she had performed most of the functions of the PMU manager. She described the function she had performed and testified that these functions were not similar to those she had performed as a mentee.
- [9] She said that at some point, she had dropped out of the mentorship program due to the fact that she was not receiving the exposure that she needed, and not because she was found to be incompetent.
- [10] In the absence of Ms Jele, she did not have a supervisor but reported directly to the municipal manager.
- [11] She was aware that, in terms of clause 7.1 of the collective agreement, it was provided that appointment into any acting position must be in writing. She had, however, felt it was not necessary to ask for the appointment in writing. She thought there was no need for such a letter, as the municipal manager knew that she must be compensated.
- [12] She confirmed that she was aware that for someone to validly act, there must be on record a memo addressed to the municipal manager asking for (formal) approval and that in her case, there had been no such memo.

The municipality's case at the arbitration

- [13] Candy Jenneke, employed as a financial officer, was called by the municipality. She confirmed that there was no document on record from the municipal manager stating that the applicant was required to act as the Project Unit Manager.¹

¹ Referred to by the abbreviation "PMU" in in the award. I will accordingly also use this abbreviation in what follows.

- [14] Pierre De Villiers, the Employee Relations Manager, testified that his understanding of the applicant's case was that she was claiming compensation for her acting role as the PMU manager.
- [15] He said interns were employed for the purposes of gaining exposure and experience. There had never been a situation where an intern had acted in a permanent position.
- [16] The evidence of the further witnesses called by the municipality did not, in my view, take the matter further, and their evidence is accordingly not canvassed in this judgment.

The arbitrator's findings

- [17] The arbitrator found that he was convinced and satisfied that the applicant executed at least 70% of the duties and functions of the PMU manager. He rejected the employer's argument that interns cannot act in higher positions as "*lame and baseless*".
- [18] This notwithstanding, he held that there was no evidence that the applicant was instructed to act in this position. There was no witness or any document proving that she was indeed acting, and the collective agreement was clear that no one could act unless they were doing so in accordance with clause 7.1 of the Collective Agreement on Conditions of Service for the Northern Cape Division of the SALGBC.²
- [19] Accordingly, while she may have indeed executed some of the duties of the PMU manager, she was not doing so while 'acting' in the true sense of that word as regulated by the collective agreement. In the circumstances, he found that there was no proof by the applicant of an unfair labour practice, and the applicant's referral had to be dismissed.

² Quoted below.

The grounds of review

- [20] The applicant contends that the finding by the arbitrator that the appointment had to be in writing cannot stand, as allowing it to stand *'would be extremely unreasonable and unfair'*, as this would allow the municipality to escape its liability *'through an overly technical approach'*.
- [21] She argues that although the municipality had received its side of the bargain and the services performed by an acting PMU manager, the applicant had not received the remuneration to which she was entitled.
- [22] In the notice of motion, review with substitution is the principal relief sought, with an order prayed for in the following terms:
- 22.1 That the first respondent had committed an unfair labour practice by failing to pay an acting allowance to the applicant for the period 1 November 2021 until the middle of May 2022, during which she acted in the position of Manager: Project Management Unit.
- 22.2 That the first respondent should be ordered to compensate the applicant in an amount of R467 707,45 as the due acting allowance, *'calculated at 70% of annual rate equal to the difference between the applicant salary and the commencing notch of the salary scale of the post in which she acted'*.
- 22.3 In the alternative, she sought remission of the matter to the Bargaining Council for arbitration by a different arbitrator.
- [23] The applicant contends that the arbitrator misconstrued the nature of the referral and the issues that stood for determination. In oral argument, counsel for the applicant submitted that the arbitrator had ignored material evidence and failed to apply correct legal principles. If, as the evidence showed, the applicant had indeed performed the functions of an acting PMU, then he contended that she was, in fairness, entitled to be paid an acting allowance for performing these functions. This figure of 70%, the commencing notch of the salary scale of the post in which

she acted, is based on the arbitrator's finding that the applicant executed at least 70% of the duties and functions of the PMU.³

- [24] The first respondent, however, submitted that the whole of the applicant's case 'is mounted on a slippery slope'. All three witnesses called by the employer had confirmed at the arbitration that the applicant had not been appointed as the acting PMU manager or had acted in this position as alleged. The applicant was just one of several interns requiring supervision by a qualified engineering professional.
- [25] It would create administrative havoc in municipalities, submitted the first respondent, if employees are able to claim acting allowances for work done in so-called acting capacities for which no written record was available. The relevant provisions of the collective agreement applied. The fact that the applicant had conceded that the purported appointment was not in writing was in itself dispositive of the application.

Acting allowances and the ULP regime - relevant legal principles

- [26] Although (as a local authority employee), the applicant was not a public servant in the sense contemplated under the Public Service Act⁴ (PSA), the concept and definition of an acting allowance, as provided under the PSA, provides a useful analogous explanation and starting point for our discussion. In *HOSPERSA & another v Northern Cape Provincial Administration*⁵, the court said the following about acting allowances:

'The provisions of the PSA

- [14] The second appellant is a public servant. In order to ascertain whether or not she is entitled to an acting allowance the first areas to look at are the Act and the staff code which govern the terms and conditions of

³ This argument appears to assume that if applicant was entitled to an acting allowance, then that acting allowance would be calculated by reference to the salary of the PMU. If, so the argument ran, she was performing 70% of the work previously done by the incumbent, then her allowance should be equal to 70% of the salary at the commencing notch the PMU manager.

⁴ Proclamation 103 of 1994.

⁵ (2000) 21 ILJ 1066 (LAC)

employment of a public servant, as well as her contract of employment. It is therefore imperative that the relevant statutory provisions be examined with a view to ascertaining what a public servant's obligations are vis-a-vis a direction from a person in authority that she or he perform additional work, and to which reward, if any, the assumption of such additional duties would entitle such a public servant.

(i) An acting appointment

- [15] The duties and obligations of a public servant in respect of an acting appointment are set out in s 32 of the PSA as follows:

"Assignment of other functions to officers and employees. - An executing authority or the head of a department, branch, office or institution may direct any officer or employee under his or her control temporarily to perform duties other than those ordinarily assigned to such an officer or employee or appropriate to the grade, designation or classification of his or her post, and he or she shall comply with such a direction."

It follows that a public servant has no choice but to comply when called upon to act in a post which is higher than the one to which he or she was permanently appointed. I turn now to address the question whether such obligatory compliance is a ticket to the payment of an acting allowance.

(ii) The payment of an acting allowance

- [16] For the purpose of this case, there are two sections of the PSA which go a long way towards shedding some light on the question whether the assumption of duties on a grade higher than a public servant's own grade, entitles such a public servant to a higher scale of salary applicable to that higher post or at least to some additional compensation or monetary recognition for the higher and presumably more demanding post. ..

- [19] A proper reading of both ss 14(3)(c) and 30(c) reveals that an acting appointment does not per se entitle a person who was appointed to act to

an acting allowance. There are, therefore, no statutory provisions which give rise to or create a right to an additional remuneration which the second appellant contends for. However, these sections are not inimical to the payment of an acting allowance. None of them states that an acting allowance will not be paid under any circumstances. Therefore the legislature has left open the possibility for the employer and the employee to enter into a contract of employment or to conclude a collective agreement which stipulates, as one of the conditions of employment, that additional remuneration would be paid should employees be called upon to act in a higher post. This leads me to the discussion relating to whether or not the second appellant's contract of employment or a collective agreement which applies to her, if any, deals with this question.

(iii) The contract of employment and the collective agreement

[20] Having decided that the relevant statute does not entitle the second appellant to the acting allowance she contends for, there remain two other avenues to be explored to find out if they perhaps make provision for an acting allowance.

[21] The introductory part of s 30 of the PSA states that 'unless it is otherwise provided for in his or her conditions of employment' no employee may claim any additional remuneration in respect of any official duty (s 30(c)). The conditions of employment envisaged by this section, which may or may not provide for the payment of an acting allowance, can be found either in the relevant collective agreement, if any, or her contract of employment."

[27] Direct reliance was not placed on the statutory regime applicable to local authorities, but Clause 7.1 of the operative and binding collective agreement (quoted below) provides that in appropriate circumstances an employee of a local authority called upon or instructed to act in a higher position may lay claim to the difference between his or her normal salary and the salary applicable to the higher post in which he or she is acting. Furthermore, in the light of the decision in *Independent Municipal & Allied Workers Union on behalf of Verster v Umhlathuze*

*Municipality & others*⁶, it is possible to make out a claim where the cause of action relies on the unfair labour practice jurisdiction. There, the court reviewed the judicial and academic authorities on what constitutes a 'benefit' in terms of s 186(2)(a) and the shift in the conceptualisation of the ambit of the unfair labour practice claim, at least in relation to the notion that a prerequisite for bringing such a claim is proof of a pre-existing right. The view that initially prevailed was that there had to be an existing entitlement in a contract, collective agreement or statute, but more nuanced interpretations of the scope of an unfair labour practice concerning a benefit were subsequently advanced, the most plausible interpretation being that the term 'benefit' is intended to refer to advantages conferred on employees which do not originate from contractual or statutory entitlements, but which have been granted at the employer's discretion.

[28] The court, per Lagrange J, continued to find that, once this conceptual hurdle is overcome, it stands to reason that an unfair labour practice dispute over an acting allowance, in which an employee is making the claim on the basis that it was granted to him or others in similar circumstances on other occasions, is a claim that the employer has unfairly refused to confer the benefit on the occasion in question. This does not amount to a demand to make the benefit obligatory in the future. It is true that, if the employee is successful in his unfair labour practice claim, that may clarify the factors the employer ought to consider in granting or refusing to grant the benefit in the future and may mean that it will be easier to predict when the benefit is likely to be granted, but that does not, in principle, make the dispute one about the creation of new rights.

[29] The instant case, however, turned on a different point. This was not a case where it was not in dispute that the employee was occupying an acting position, and a limited question arose as to the exercise of a discretion as to whether, in the light

⁶ (2011) 32 ILJ 2144 (LC).

thereof, the employee should, as a matter of fairness, be given an acting allowance.⁷

- [30] The relevant legal framework under clause 7.1 of the collective agreement on conditions of service provides as follows:

'When an employee is required to act in a more senior post for a period of not less than 10 (ten) days consecutive working days, an acting allowance at an annual rate equal to the difference between an employee's salary and the commencing notch of the salary scale of the post in which he acts, shall be paid to such employee in addition to his salary and respect of the period in which she acts, provided that:

7.1.1 the employee has been duly appointed in writing by the municipal manager or his assignee to act in a higher post.'

- [31] Accordingly, it was contended, unless the employee had been duly appointed in writing by the municipal manager or his assignee to act in the higher post, they were not acting in that post.

- [32] Direct authority on the point was to be found in the decision of *Henry v General Public Service Sectoral Bargaining Council and Others*⁸, which held as follows:

[6] The arbitrator held that the applicant was not entitled to payment of acting allowance after November 2004, since he was not appointed in writing by a duly authorised person to act after November 2004. There was no extension (sic) of the period in writing either.

[7] The applicant has not put before me any grounds or any concrete facts to persuade me to interfere with the arbitrator's reasoning. An acting appointment must be recorded in writing. Its existence cannot be inferred

⁷ The claim was curiously pleaded. Although an employee would, as a matter of right, be entitled to an acting allowance under the provisions of the collective agreement where the jurisdictional facts are satisfied, this is not the basis on which this claim was brought. This was no doubt because the applicant was aware that the necessary formalities for a laying claim to an acting allowance had not been satisfied, as the alleged appointment was not made in writing. Accordingly, she based her claim on fairness alone.

⁸ (C314/2005) [2006] ZALC 85 (5 September 2006).

from perceptions and invitations to meetings. Not only ARC's attended the meetings in January 2005. Such facts were not properly aired before the arbitrator. They may have been in the unsuccessful variation application before a different commissioner.

- [8] The Department was quite clear about the dates until which the applicant had to act.
- [9] The e-mail relied upon by the applicant in support of his case, takes the matter no further. It is written by the new Regional Co-ordinator: Communication Services (the position in which the applicant had acted). He states on 4 May 2005:

"Mr Johnson (the applicant) who was acting before will remain in the communication component but will revert to his post as SCC external communication services, but will still assist with the greater section of the workload".

- [10] One could infer that the applicant had been doing at least some of Mr Solomon's work up to the point the latter had sent the e-mail. However, Mr Solomon had been appointed in December 2004. There is also no formal written extension (sic) of the acting period by an authorised person. The aforesaid requirements in the collective agreement are pre-emptory. One can understand why. There has to be certainty and proof of the exact duration of the acting period. That can only be achieved by formal appointments in writing, in which the time period is unequivocally stipulated. In large governmental departments such a requirement is of great importance, precisely because there are often instances where employees would do the work of other employees, for various reasons and due to certain circumstances. It would create administrative havoc if employees were able to claim allowances for work done in acting capacities of which no record is available. (Emphasis added)

- [33] Further authority was also relied on where it was found that, absent written authorisation, no acting appointment took place.⁹
- [34] The applicant's case however rested on a simple proposition: the fact that the instruction was never given in writing did not detract from the fact that the applicant indeed acted in that position (in the sense that she had performed the relevant duties) and this being so it would be grossly unfair for the employer to escape its liability premised on its own failure to provide her with the relevant written instruction.¹⁰
- [35] The municipality's case was, however, that there was no negligent failure on its part to provide her with written instructions to act. She was not provided with written instructions simply because she had never been required to act in the position in which she claimed to be acting. Even if it was true that she had fulfilled some or many of the functions previously performed by the departed Jele, it did not follow that she had assumed an acting position.¹¹
- [36] The employers' witnesses testified that there had been no fundamental change in her functions. The contract of employment provided that she had been hired to perform at a junior level as a mentee. Within the structures of the municipality, she could hardly have evolved from being a candidate Civil Engineering Technician - an internship - employed at a salary of R21 840 a month to Manager: Project Management Unit at a commencing salary of R1 407 385 per annum.¹²

⁹ See *MEC: Department of Health: Eastern Cape v Saville Kops and 16 others*, unreported judgment case no: PA5/2014 (LAC); See also *South African Police Services v Du Preez and Others in Re: Du Preez v South African Police Services* (PR157/17;P226/17) [2019] ZALCPE 3 (8 March 2019)

¹⁰ The applicant claimed that she had been verbally instructed to do the work of the departed PMU by the municipal manager (who had also departed by the time the arbitration was heard). It was also argued that, as this version had not been disputed with her in cross-examination, it had to be accepted that what she had said on this score was true.

¹¹ The arbitrator found that although in his view it could not be disputed that the applicant had in the relevant period done most of the work previously done by Jele, even if this was so, she had done it in her capacity as an intern.

¹² Clause 5 of the pre-arbitration minute provides that the difference between the applicant's monthly salary of R21 840 and that of the post in which she claimed to be acting was R95 450. In other words, if she had been given this acting appointment, her monthly salary would have increased by several multiples.

- [37] To create certainty, the legal framework under which the municipality operated made it compulsory for elevations to acting appointment to be made in writing.¹³ As the arbitrator correctly found, in the absence of such written authority, she was not acting in the post in which she subsequently claimed to act. His decision was accordingly not reviewable. It could, therefore, hardly be unfair for her not to be paid an acting allowance. (It would make little sense to have a requirement that all acting appointments must be confirmed in writing if, notwithstanding non-compliance with this requirement, a municipality could still be obliged to pay an acting allowance because one of its officials, acting outside of the scope of his lawful authority, made an "oral acting appointment".)
- [38] Even if I am wrong and it was possible to find that she was lawfully occupying an acting position for unfairness to arise, she would need to show that when compared to other similarly situated people, she was treated unfairly. There was no evidence that there were others who had been occupying *de facto* acting posts through an unlawful appointment's process who were remunerated by the provision of acting allowance at a different level to her, and, therefore, to pay her less than them was comparatively unfair. She contended that the failure to pay her at the level of remuneration of an acting manager PMU was unfair. The measure she, however, used to calculate what she was owed was based on a provision in the same collective agreement, which required written authorisation before any obligation to pay an allowance would arise.¹⁴

¹³ The public law character of a municipality and its obligation to adhere to all relevant checks and balances when acting as an employer is well established. See generally *Bitou Municipality v Minister for Local Government, Environmental Affairs & Development Planning, Western Cape Provincial Government & others* (2021) 42 ILJ 993 (LAC). Alleged unfairness towards an employee should, in general terms, not found a good claim it is based on requiring a court to overlook restrictions imposed by law to protect the public purse or ratepayers from abuse of public resources. *Hendricks v Overstrand Municipality & another* (2015) 36 ILJ 163 (LAC).

¹⁴ While it may be that under the unfair labour practice jurisdiction it is not a requirement that the entitlement must be sourced in a contractual or statutory right, it does not follow that if contract or statute makes it clear that in particular circumstances there would be no such right, such rule can hardly be simply sidestepped or trumped or ignored by the expedient of basing the claim of unfairness only. There may well be rare cases where a court may be required to do that to mitigate considerable unfairness. This is, however, not such a case.

[39] In the circumstances, the application to review the arbitrator's finding is dismissed. Neither party argued that in the event of the review being dismissed, a costs order should be made against the applicant.

[40] In the premises, the following order is made:

Order

1. The review application is dismissed;
2. There is no order as to costs.


C.S. Kahanovitz

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv LA Roux
Instructed by: Peypers Attorneys, Bloemfontein
For the first respondent: Adv D Babuseng
Instructed by: T. Kouter Attorneys, Kimberley